**IN THE EMPLOYMENT COURT**
**CHRISTCHURCH**

**[2018] NZEmpC 106**
**EMPC 197/2017**

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| IN THE MATTER OF | a challenge to a determination of the Employment Relations Authority |
| BETWEEN | X<br>Plaintiff |
| AND | THE CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS<br>Defendant |

Hearing: 12 – 15 March 2018
(Heard at Dunedin)

Appearances: M-J Thomas and R Donnelly, counsel for the plaintiff
P Chemis and E McLean, counsel for the defendant

Judgment: 17 September 2018

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**JUDGMENT OF JUDGE K G SMITH**

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[1] On 13 July 2015, a male employee of the Chief Executive of the Department of Corrections was dismissed summarily for his behaviour towards two female employees. The offending behaviour occurred between October and December 2014 and involved telephone calls, text messages, emails, "face-to-face contact", the content of a Facebook post, being issued with a trespass notice and harassment warning letter in respect of one female employee, a police safety order in respect of the other female employee and being arrested for breaching that order. The Department concluded that its Code of Conduct for its employees had been breached.

[2] The dismissal took effect from 17 July 2015.

[3] The dismissed employee issued proceedings in the Employment Relations Authority for unjustified dismissal but was unsuccessful.[1] The Authority made orders permanently prohibiting from publication any information identifying the plaintiff or the two female employees concerned.[2]

[4] The circumstances giving rise to that order continue to exist in this Court. An interim non-publication order was made at trial. Pursuant to cl 12 of sch 3 of the Employment Relations Act 2000 (the Act) there is now a permanent order prohibiting from publication the names of the plaintiff and the two female employees concerned together with any information that may tend to identify them. In this judgment, they will be known as Mr X, Ms Y and Ms Z.

## What happened?

[5] Mr X had been in a domestic relationship with Ms Y from 2006. At all material times they were both employed by the Department. In early 2009, Mr X met Ms Z not long after she began working for the Department. Sometime in October or November 2009 their friendship transformed into an intimate relationship not disclosed to either of their partners. Ms Y discovered the affair in December 2013. In early 2014, Mr X's relationship with Ms Y ended and he moved out of the rented property they shared.

[6] The relationship between Mr X and Ms Z continued until Labour Day, 27 October 2014, when he returned the key to her home. That happened because Ms Z was uncomfortable in continuing the relationship and had told him she needed to take a break from it.

[7] That news was not well received. He began a series of unwelcome telephone calls and text messages attempting to speak to her. This attempted communication began in the early morning of 28 October 2014 with one text. He discovered she was away on business in another city and did not respond maturely to a text message from her that she wanted "time out". His response was to inform her, by text, that he would travel to the city she was in. He was not dissuaded from trying to contact her by a text

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1 *X v The Chief Executive of the Department of Corrections* [2017] NZERA Christchurch 110.
2 At [2] and [4].

message telling him travelling would not help anything. She said it would scare her. She asked him not to travel but he did anyway. She would not meet him. He continued trying to contact her. Mr X sent Ms Z 28 text messages, some overnight, and tried to telephone 18 times. Not surprisingly she was upset and angry at these persistent attempts to communicate with her. His attempts to contact her were so unwelcome she had her hotel change the name she was using as a guest. She asked that calls not be put through to her room.

[8] Attempts by Mr X to talk to Ms Z continued the next day when he telephoned again. This time she answered the call because not answering had been ineffective as a deterrent. They had a brief conversation and agreed to meet to discuss their relationship. However, Ms Z decided to end the relationship because Mr X's behaviour scared her.

[9] The frequency of this ongoing contact, or attempted contact, and what was said, prompted Ms Z to make temporary changes in her private life. Between 31 October and 10 November 2014, she stayed with friends. She did that because Mr X continued to ignore requests to give her "space".

[10] Mr X and Ms Z met on 3 November 2014, and she confirmed the relationship was over. She sent him an email later that day with the same message. He did not stop. The next day he telephoned her while she was driving out of the city on business and the resulting call left her in tears.

[11] Nine days later, on 13 November 2014, he went to Ms Z's house uninvited. He had previously promised he would not turn up uninvited. He was allowed inside but the conversation quickly deteriorated. During this visit he was angry and behaving erratically. He blamed her for what had happened. He was asked to leave but remained standing on her doorstep. He told her that he would destroy her emotionally and destroy her reputation. Understandably these comments made her concerned for her safety. He eventually left and Ms Z telephoned the police. The result of this encounter was a trespass notice. She blocked his calls and texts. These attempts to stop communication were unsuccessful, because he sent emails to both her work and personal email accounts. The police served Ms Z's trespass notice on Mr X on 13 November 2014.

[12] On 21 November 2014, Mr X sent Ms Z a long email the content of which was upsetting. She was also concerned because he had previously promised to stop contacting her. The email included a statement that he knew the relationship was over but struggled with the "coldness" she was treating him with. The same email contained a statement, ostensibly attributed to unnamed other people, commenting adversely on her sexual health and fidelity to him. The email went on to say he found everything she did "very narcissistic". Other passages professed love and affection and made emotional statements about their time together.

[13] In late 2014, Mr X continued to have social contact with Ms Y even though she was uncomfortable in his company. On 29 November 2014, they were having a meal together when he told her that he would call at their former home the next day to collect some property. When he arrived the next day another man was present. Mr X asked him to leave. The other man refused to go saying he was Ms Y's friend. At that point Mr X realised this other man and Ms Y were in a relationship.

[14] Mr X's response to this news was to call the police to have the other man removed. He also telephoned the Department senior manager, Mr Jack Harrison, and asked him to come to the property to provide support. Mr X called Ms Y who told him the other man had a right to be there because she had allowed him to be. While several things were said during this conversation one of them was that he was going to "get" her, although what was meant may not have been very clear.

[15] While Ms Y did not feel physically threatened she did not want him to turn up at her home uninvited or unsupervised. When contacted by the police, who had responded to the call to the property, she told them that. A police safety order was suggested to her which would mean Mr X had to stay away for five days as a cooling off period. She agreed and one was issued.

[16] The unravelling of these relationships came to a head on the evening of 30 November 2014 with a Facebook post.

## The Facebook post

[17] Late in the evening of 30 November 2014, Mr X made a post on his Facebook page of photographs of Ms Z and Ms Y and commented about them. The post contained pictures of both women side by side. They were clearly visible and named. A comment was made in the accompanying text that Mr X had continued to contribute towards the rent for the property he had lived in with Ms Y. He questioned her integrity, and honesty, because another man was living there. His comment about Ms Z was that she had a sexually transmitted disease, which he had probably contracted from her and would have to tell Ms Y about.

[18] Ms Z was informed of the post on 1 December 2014 when she got to work that morning. She described feeling violated and scared by it. Several of her colleagues saw the post and she was embarrassed because of it. She broke down and went home. Ms Y's attention was drawn to the post by a manager at work and a copy of it was given to her by Ms Z.

[19] The post was removed on the morning of 1 December 2014. The next day Ms Y sent an email to Mr Harrison advising him she had sought a police safety order because she did not feel safe.

## Hospitalisation and treatment

[20] The Facebook post was a significant feature of the conduct investigated by the Department and it happened while Mr X was in hospital over concerns about his health. Initially he was a voluntary patient before being compulsorily detained for assessment and treatment.

[21] On 4 November 2014, Mr X took a day's sick leave. He spent the time driving around in a distressed state. He had spoken to Ms Y and to his counsellor by telephone. For reasons which were not immediately clear to him someone spoke to the police out of concern. He received a text message from them asking for his location. Eventually he was found and agreed to have an emergency psychiatric assessment at a hospital.

After the assessment he was sent home with medication. He took a day's annual leave on 5 November 2014 and returned to work on 6 November 2014.

[22] Subsequently he decided, on 17 November 2014, to be admitted to hospital as a voluntary patient. He did so because he considered his life was "spiralling out of control" and everything important to him he had destroyed. He was prescribed an anti-depressant and sleep medication.

[23] Mr Harrison knew about this voluntary admission and visited Mr X in hospital on 22 November 2014. During their conversation, they discussed the breakdown of Mr X's relationship with Ms Z.

[24] While away from hospital on 2 December 2014, Mr X made an attempt on his life by overdosing. He was located by the police and taken to hospital. The next day he left the hospital. He was located and arrested for breaching the police safety order by naming Ms Y in the Facebook post. Later that day a Judge declined to grant a protection order but increased the police safety order for a further three days.

[25] On 3 December 2014, he was given a letter from the police stating that Ms Z had made a complaint of harassment about him. The complaint arose from events over several occasions between 13 November 2014 and 21 November 2014 when he had sent emails to her. The complaint relied on the Facebook post as well. This letter was a warning that an ongoing pattern of harassment had occurred that might constitute criminal harassment. Copies of sections from the Harassment Act 1997 were attached to the letter.

[26] Mr X returned to hospital. He was examined under s 9 of the Mental Health (Compulsory Assessment and Treatment) Act 1992. One of the purposes of the examination was to determine whether he was mentally disordered and, if so, whether further assessment and treatment were required. A preliminary assessment was conducted and a certificate was issued stating there were reasonable grounds for believing he was mentally disordered and it was desirable he be required to undergo further assessment and treatment. The nature of the disorder was not stated. Mr X was detained for a further period for further assessment and treatment. The compulsory

order was discharged on 15 December 2014 and he remained as a voluntary patient until 17 December 2014.

## Complaint and investigation

[27] Ms Z was aware that Mr X had sent an email to a workmate on 2 December 2014 threatening self-harm. The email was sent to a colleague who sat next to her at work and was known to be her friend. Ms Z was left with the impression that this email was a calculated move knowing the email would be passed on to her. She had been planning a trip, to visit family, but the email and the attention it got meant she cancelled those plans.

[28] The next day, 3 December 2014, she received a call from the police advising her that Mr X had left hospital and there were concerns for her safety. She was advised to stay inside the building where she worked. Later that day she received a copy of the harassment letter served on Mr X, which she sent on to a senior human resources advisor in the Department.

[29] On 4 December 2014, Ms Z made a written complaint in which she alleged being bullied, emotionally blackmailed, harassed, stalked and verbally threatened by Mr X. Her letter was frank. She described their affair and the pressure placed on her by him to make a commitment to the relationship. She described Mr X's behaviour as "very controlling".

[30] She described the frequent texts and telephone calls and her decision to end the relationship. She complained that Mr X forced her into a meeting to listen to him for over two hours where he did the bulk of the talking. She described how he continued to email her from hospital even though the police, and his manager, had told him not to contact her. She described blocking his phone calls and text messages. The complaint ended by referring to the Facebook post and how, as a result, she felt "…sick and scared again".

[31] The Department decided a formal investigation was needed. This decision was communicated by letter to Mr X in early December 2014, while he was in hospital. He

was given an overview of the complaint and told the investigation would be delayed until his health improved. He was told not to enter any Department premises until a comprehensive medical assessment had been received indicating his health was such that he could return to work.

[32] Mr X was cleared to work from mid-December 2014 but he had not, at that stage, been assessed. On 16 January 2015, the Department gave Mr X a letter confirming what it would investigate. It read:

> Specifically it is alleged that:
>
> - You harassed [Ms Z] during the period October to December 2014 by means of phone calls, texts, e-mails, face to face contact and a Facebook posting
> - Had the following issued against you by the police:
>   - Trespass notice in respect of [Ms Z] home address
>   - Harassment notice in respect of [Ms Z]
>   - Police safety order in respect of [Ms Y]
> - And were arrested and found to have breached the safety order

[33] Mr X was informed that if the allegations were proved they were likely to amount to serious misconduct under the Department's Code of Conduct. Three aspects of the Code of Conduct were referred to although the investigation was not limited to them. They were:

> **Inappropriate behaviour or relationships (internal or external).** *Failing to maintain professional boundaries with prisoners or offenders. Failing to respect the rights, privacy and dignity of any person.*
>
> **Careless or unsafe behaviour.** *Any behaviour resulting in a potential or actual threat to the health and safety of any individual or to security or professional/performance standards.*
>
> **Reputational issues.** *Actions that bring Corrections into disrepute or negatively affect the public perception of Corrections or the Government*

[34] As well as telling Mr X that serious misconduct could result in a penalty up to and including dismissal, this letter advised him that if the complaint was upheld it had the potential to undermine the trust and confidence necessary between him and the Chief Executive of the Department as his employer. Finally, Mr X's possible suspension from work was raised, but a decision about that was left in abeyance until the medical

assessment was received. Not surprisingly, he was advised of a right to have support from his union at all times.

## Medical Assessment

[35] Mr X was referred to a registered clinical psychologist by the Department. On 22 January 2015, the Department wrote to the psychologist asking for her professional opinion on two matters. The first of them was if Mr X was medically incapacitated, being defined by the Department as meaning an "inability due to illness or injury to safely fulfil the normal requirements of the position". The second matter was the extent to which any incapacity was permanent meaning a full recovery could not be expected within a foreseeable timeframe.

[36] This letter briefly described Mr X's employment with the Department and his length of service. In bullet point format it described, in a circumspect way, what had happened from late October to early December 2014 prompting this request. Mr X had to consent to the psychologist examining him which he did.

[37] The psychologist provided her confidential report on 19 February 2015. Her opinion was that Mr X was suffering from Acute Adjustment Disorder which she described as being short in time frame, occurs as a response to a specific stressor, and typically resolves naturally once the person suffering from it can adapt to the situation. She concluded that he was fit to return to work and that keeping him from work may have a detrimental effect on his mental health. Recommendations about his return to work were made.

## The investigator's report

[38] The investigation into the complaint was concluded by a report dated 9 April 2015. The matters investigated were stated at length as was the procedure used. Both Ms Z and Ms Y were interviewed as were other employees. Mr X was interviewed as were two medical practitioners nominated by him. The investigator also interviewed a police constable about the trespass notice, harassment warning letter and the police safety order.

[39] The report summarised the evidence gathered and made findings about the complaint. It acknowledged Mr X's claim that many of his actions were the result of his mental health at the time before concluding:

> …medical experts have confirmed that the condition is unlikely to be responsible for many of his daily decisions. In fact, at times he demonstrated logical thought processes at the times he has suggested he was anything but logical. Witnesses have also commented on the rational nature of his thinking. I conclude that whilst his medical condition cannot be discounted, I do not believe that it is the reason for his behaviour.

[40] These comments were based on interviews with the psychologist and a psychiatrist interviewed at Mr X's request. Both doctors were interviewed in March 2015, well after the events which gave rise to the complaints and his hospitalisation. The psychologist diagnosed his condition but could not comment on how it affected him for the period between October and December 2014. However, she noted that during those months he had some insight into his behaviour because he had made some rational decisions such as admitting himself to hospital. She was recorded as saying this insight did not equate with being able to control his behaviour.

[41] Separately, Mr X had been a patient of a psychiatrist in January and February 2015. She was also unable to comment about his mental state the previous October, November or December from first-hand experience of treating him at the time. However, she had his medical records from his time in hospital and had spoken to him at length. She participated in the Department's interview relying on these records and discussions.

[42] The psychiatrist told the investigator Mr X's condition would result in low moods and may lead him to make decisions he did not feel positive about. Some potential examples of this behaviour were given, such as where a low mood may make a person want to self-harm or not be able to face work. The sufferer might, therefore, resign from a job that he or she would normally be satisfied with. However, and importantly, she said the condition was not one that would affect day-to-day decision making. Her opinion was that Mr X was not psychotic and "…therefore he would know right from wrong and would be able to make most normal daily decisions in a rational, logical way". This observation was rounded out with a comparison that, if he had done something that brought him before a court, it was unlikely his condition would amount

to a defence. Her opinion was that his daily decision making would not have been affected during the inquiry period.

[43] A copy of the investigator's report was sent by Mr Harrison to Mr X and to his union, the PSA. In his accompanying letter Mr Harrison responded to the invitation that he be interviewed as part of the inquiry. Mr Harrison was nominated because he had been at the property, rented by Mr X and Ms Y, shortly after the police safety order was issued. He had not been interviewed because, he explained, he had arrived after a decision had been made about the order and there was nothing he could add. His letter also drew attention to the fact that he had supported Mr X, Ms Y and Ms Z as their senior manager. In this letter he proposed to remain the decision-maker but volunteered to step aside if he was thought not to be impartial. The PSA accepted that Mr Harrison should remain the decision-maker and no further issue was taken with him discharging that responsibility.

[44] Detailed submissions about the investigation were made by the PSA. The frequent attempts at communication in the early stages of the disintegration of Mr X's relationship with Ms Z were described as "not out of normal" during a break-up. Some of the emails were explained by attempting to put them into context. The union pointed out that the harassment letter was only a warning. It was a statement by a police constable coupled with advice that, if certain proscribed behaviour continued, a charge for criminal harassment might be possible. The union said the behaviour had not been repeated, meaning the warning had been heeded.

[45] As to the Facebook post, the union said it happened late at night, when Mr X was distraught, was removed the following morning and the Facebook account was closed. The union went on to submit that what was posted were personal opinions, believed by Mr X to be factual, and only available to friends because of the privacy settings used. The union contended the post was not accessible to the public at large and it was not Mr X's intention to embarrass Ms Z or Ms Y.

[46] To illustrate the poor state of Mr X's health, and its relevance to the inquiry, the proximity between the time the Facebook post occurred and his attempted self-harm was emphasized. Summarising its submissions about the Facebook post, the union said

it was from a distraught person who felt his life was imploding and he should not be held responsible for the collection and dissemination of it by management in the Department. What was being referred to were the notes of Ms Z's interview with the investigator where she explained how the Facebook post came to her attention. The existence of the post was drawn to a manager's attention and another employee was sent home to obtain a screenshot of it.

[47] Criticisms were also made of the way in which the interview notes recorded the doctors' opinions of Mr X's condition and its effect on him. The interview with the psychiatrist was said to contain an unexplained contradiction about how moods and other behaviour may lead him to make unwise decisions but his day-to-day decision-making was unaffected. The Department was criticised for not seeking further information from the psychiatrist and for not obtaining information from the doctors who cared for Mr X while he was in hospital.

## Preliminary decision

[48] The union's response was not accepted. Mr Harrison's preliminary decision was conveyed to Mr X on 5 June 2015. His letter recorded each of the allegations, the investigator's findings about them, and largely repeated each point made for Mr X. He noted Mr X did not deny making, or attempting to make, contact with Ms Z in the extensive way she alleged and after he was asked to stop contacting her. This summary recorded Mr X's explanation about the Facebook post and repeated his statement that it was not work-related, even though Ms Z and Ms Y worked for the Department. This part of the complaint was held to be substantiated.

[49] The remaining aspects of the complaint dealt with in the preliminary decision were about the trespass notice, harassment letter and police safety order. Mr Harrison's opinion was that the trespass notice was a direct result of Mr X's behaviour in the preceding weeks which lead Ms Z to feel distressed and unsafe in her own home. As to the harassment letter, Mr X's submission that it was only a warning was accepted. Mr Harrison concluded that, while the behaviour was not repeated, the fact remained that what happened was considered by the police to be sufficiently serious to justify one being issued.

[50] The police safety order was dealt with in much the same way. It was acknowledged as an "on-the-spot" order issued by a qualified constable who had reasonable grounds to believe the order was necessary to ensure a person's safety. Mr Harrison noted Mr X's subsequent arrest for breaching the order. That arrest was sufficient for him to be satisfied that this part of the complaint was substantiated.

[51] In relation to the medical condition the preliminary decision was:

> …Whilst the medical professionals agree upon the fact that you were suffering from Acute Adjustment Disorder, there is less agreement between them as to the extent to which this would have affected your judgement from October to December 2014. Therefore whilst the fact that you were suffering from Acute Adjustment Disorder may provide a partial explanation for your actions, it does not in my view completely excuse or justify them.

[52] The letter said Mr X had deliberately made remarks to Ms Z, about her personal life, intended to be hurtful. That information was interpreted as an admission of a conscious decision to comment and an awareness of its impact. Mr Harrison's letter said:

> …I am also concerned that you frequently refer to the fact that comments which you have made either directly to [Ms Z] or made in the Facebook posting or made to others are "because she is like that" or because they are in your opinion true as if this somehow either excuses or justifies having made them. I also note that when it comes to these comments you do not attempt to explain them away as having been the product of Acute Adjustment Disorder either which leads me to speculate as to what your true intentions were in making or posting such comments and the extent to which you knew that your behaviour would achieve this aim. Moreover, I believe that the various actions taken by the Police are a clear indication of how they viewed your actions in this respect i.e. that it was deliberate & calculated with the aim of causing distress or feelings of unsafety.

[53] That paragraph was followed by this remark:

> …Fundamentally, even allowing for the influence of your Acute Adjustment Disorder at the time, I am not convinced that you are truly taking accountability for your actions even now despite the senior role which you hold within Corrections.

[54] The preliminary decision was that the complaint was substantiated, the Department's Code of Conduct had been breached and it no longer held the required trust and confidence in Mr X. Consequently he was to be dismissed summarily.

## Final decision

[55] The union made submissions about this preliminary decision at a meeting on 12 June 2015 which were later confirmed in writing. While maintaining its position on Mr X's behalf the union also sought a lesser sanction than dismissal. In doing so it drew comparisons with other situations where, it said, comparable conduct did not result in dismissal.

[56] The Department was not persuaded. By letter dated 13 July 2015, Mr X was dismissed summarily for serious misconduct.

## The challenge

[57] Mr X raised a personal grievance for unjustified dismissal. He was unsuccessful in the Employment Relations Authority and has challenged that determination.[3] He is seeking reinstatement, reimbursement of lost wages from 17 July 2015 until the date of his reinstatement and $40,000 as compensation for humiliation, loss of dignity and injury to his feelings under s 123(1)(c)(i) of the Act.

[58] The following issues have emerged:

(a) Was the conduct complained about outside the workplace?

(b) Was the investigation flawed?

(c) Was there disparity of treatment when Mr X's case was compared to other employees investigated by the Department?

(d) Has the Department satisfied the test in s 103A of the Act? and;

(e) If Mr X's challenge is successful what remedies should be ordered?

[59] Each of those issues is to be addressed below.

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3 *X,* above n 1.

***a: Conduct outside the workplace?***

[60] A significant part of Mr X's case was that the conduct investigated by the Department was a private matter stemming from a relationship break-down. He acknowledged, with the benefit of hindsight, that his conduct did not show him in the best possible light. But he did not concede the Department was able to investigate to the extent that it did or to dismiss him.

[61] Ms Thomas' submissions acknowledged the ability of an employer to consider conduct by an employee, outside of work, but argued that there were limits which were exceeded in this case. She did not suggest the matters investigated were unable to be raised with Mr X, but said the key is that action is only warranted to the extent the behaviour impacts or potentially impacts on the workplace. The fact that the investigated events occurred outside the workplace, she submitted, should be taken into account in favour of a "lesser sanction", which the Department was said not to have properly considered. Instead it behaved as if it was prosecuting Mr X for causing stress to its other employees.

[62] The cases relied on by Ms Thomas do not support all of her submission. In *Smith v Christchurch Press Co Ltd* the Court of Appeal considered for the first time the connection between conduct ostensibly outside of the workplace and an employer's ability to dismiss for it.[4] The circumstances in *Smith* were serious. A Christchurch Press employee was harassed and sexually assaulted by another employee while they were at lunch away from the workplace. The nub of the decision is captured in the following paragraph:[5]

> …there must be a clear relationship between the conduct and the employment. It is not so much a question of where the conduct occurs but rather its impact or potential impact on the employer's business, whether that is because the business may be damaged in some way; because the conduct is incompatible with the proper discharge of the employee's duties; because it impacts upon the employer's obligations to other employees or for any other reason it undermines the trust and confidence necessary between employer and employee.

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4 *Smith v Christchurch Press Co Ltd* [2001] 1 NZLR 403 (CA).
5 At [25].

[63] In *Smith*, the Court of Appeal was satisfied there was a sufficient nexus between what happened and the workplace for the employer to take action. The case involved two employees and had the potential to adversely affect the working environment. The place and time where the offending conduct occurred were irrelevant.

[64] The Court's decision in *Booth v Big Kahuna Holdings Ltd* was also relied on by Ms Thomas, for the proposition that personal relationships which arise out of the workplace did not enable the employer to short circuit the usual requirements of an investigation or to unnecessarily intervene in an employee's private life.[6] It is possible that reliance on this decision was designed to invite careful reflection about the quality of the decision-making by the Department, to be satisfied that it had not taken any shortcut in the way in which it investigated the complaints because of the complex private life Mr X had been leading. If that is what was contended for, the way in which the Department investigated the complaint was sophisticated, considered and provided several opportunities for the union to represent Mr X's interests. The circumstances in *Booth*, which prompted the remark referred to in submissions, were not replicated in this case.

[65] The last case referred to by Ms Thomas was *Hallwright v Forsyth Barr Ltd*.[7] Mr Hallwright had been involved in a driving incident.[8] He and another motorist got into an altercation. Mr Hallwright ran over the other motorist while departing the scene, causing significant long-term injuries.[9] What occurred happened while he was driving a family member to an appointment and was not part of his work or during work time. He was charged with an offence. Subsequent media coverage repeatedly drew attention to his employment at Forsyth Barr. Much of the circumstances surrounding the offence were described in the media as "road rage" and a "hit and run". [10] In *Hallwright* the Court referred to *Smith* before stating:[11]

> It is not necessary that the conduct itself be directly linked to the employment but rather that it have the potential to impact negatively on it. That is why an employee can be held to account for what might otherwise be regarded as a

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6 *Booth v Big Kahuna Holdings Ltd* [2014] NZEmpC 134, [2014] ERNZ 295.
7 *Hallwright v Forsyth Barr Ltd* [2013] NZEmpC 202, [2013] ERNZ 553.
8 At [2].
9 At [2].
10 At [10].
11 At [49].

> private activity, carried out away from the workplace and with no ostensible connection to the employment or other employees.

[66] The Court rejected a submission that *Smith* required the out of work conduct to reach a higher standard of seriousness before it will impact on the employee's suitability for ongoing employment.[12] The possibility that the Court of Appeal had intended to introduce a graduated scale of seriousness, depending on the type of conduct, or where it occurred, was also rejected.[13] In doing so the Court in *Hallwright* observed that the focus of the inquiry was on the impact of the conduct on the employer's business. That impact may, but need not, correlate with seriousness.[14] In *Hallwright* the impugned conduct was the negative publicity which the driving charge created by the repeated link to the employer.

[67] *Hallwright* also addressed an argument now put forward for Mr X, that a different sanction ought to have been considered. In *Hallwright* the plaintiff submitted that there had been inadequate consideration to a possible alternative to dismissal.[15] The Court found that the employer had turned its mind to options identified for the plaintiff before also noting that the full Court in *Angus v Ports of Auckland Ltd*[16] (in applying s 103A(5) of the Act) precluded conclusions based on minor or inconsequential defects in process. *Hallwright* went on to hold that the emphasis is on substantial fairness and reasonableness as opposed to minute and pedantic scrutiny to identify any failing however minor. That observation led the Court to conclude that the process followed by the employer was fair overall.

[68] Mr Chemis, for the Department, submitted that *Smith* was determinative of this issue. I agree. The harassing behaviour, and the Facebook post, had a direct impact on Mr X's fellow employees and the Department. There was an impact on the workplace as a result of the harassment. There was an attempt to downplay the significance of this behaviour by characterising it as an understandable, if overly emotional, response to the break-up of a relationship. Such a description does not adequately capture the persistent way in which Mr X pursued Ms Z, interacted with Ms Y, and attacked both of them on

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12 At [50].
13 At [50].
14 At [50].
15 At [97].
16 *Angus v Ports of Auckland Ltd* [2011] NZEmpC 160, [2011] ERNZ 466.

Facebook. That behaviour was incompatible with Mr X discharging his duties for the Department.

[69] All of those activities were sufficient to entitle the employer to take action. Obviously, there is an issue about the extent to which an employer can intrude on the private life of an employee. In this case, however, the employer did not go beyond what was appropriate. The Department was drawn into the maelstrom of Mr X's private life because of how he behaved. An obvious example is that Mr Harrison was called on to provide pastoral care to Mr X and Ms Y when Mr X was upset at discovering another man in the house formerly occupied by him and Ms Y.

[70] The way in which *Smith*, *Booth* and *Hallwright* addressed behaviour outside the workplace was to ask if there was an adequate nexus to justify the employer investigating and taking action. None of those cases support Ms Thomas' submission that some lesser sanction, short of dismissal, should have been considered. *Smith* and *Hallwright* recognised that the employee's behaviour could lead to a justified dismissal by the employer. *Booth* did lead to a finding of unjustified dismissal but, aside from the Court's observations about the care that needs to be taken when domestic relationships may be involved, it applied *Smith*.

[71] The issue for consideration is whether or not the Department has satisfied the test in s 103A of the Act. It is not an assessment of a sanction which Mr X, or the Court, would prefer to have had imposed. A comment by the full Court in *Angus* illustrates the point; the Act contemplates there may be more than one fair and reasonable response or other outcome that might justifiably be open to a fair and reasonable employer in the circumstances. If the employer's decision to dismiss the employee is one of those responses the dismissal must be found to be justified.[17] It follows that, if dismissal was one option open to the Department after conducting a proper investigation into the circumstances of the complaint, its decision ought not to be interfered with merely because the Court might, possibly, think some lesser penalty could have been imposed.

[72] For completeness, it is necessary to address Ms Thomas' submissions about the application of the Department's Code of Conduct and policies. Relevant parts of the

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[17] At [23].

Department's Code of Conduct were referred to in the investigation letter. Additionally its policy on social media was discussed in submissions for Mr X and, therefore, was considered by Mr Harrison.

[73] This part of Mr X's case concentrated on inviting a conclusion that the Department could not have been brought into disrepute. *Wikaira v The Chief Executive of the Department of Corrections* was the basis for this submission.[18] A corrections officer was dismissed after pleading guilty to a charge of wilfully damaging a car. She was discharged without conviction. An attempt was made to justify her subsequent dismissal because of her guilty plea to the charge. It was said to amount to an admission of unlawful behaviour prohibited by the Department's Code of Conduct. That was because the charge, and the court appearance, risked bringing the Department into disrepute. The Court did not accept those propositions, and said the disrepute referred to in the policy is not the same as any personal disrepute the employee invited by her conduct.[19] The Court concluded that, just because an employee does something he or she should not have done, especially outside of work, did not necessarily mean his or her employer would be brought into the same disrepute as the employee.

[74] This analysis in *Wikaira* led the Court to say that a fair and reasonable employer, considering whether an employee's conduct brought, or risked bringing, the employer into disrepute must objectively consider several factors. Those factors including whether a neutral, objective fair-minded and independent observer apprised appropriately of the relevant circumstances could have considered the actions to have brought, or risk bringing, the employer into disrepute.[20] The Court concluded the circumstances in which the corrections officer had damaged the vehicle could not reasonably be said to damage the reputation of the Department.

[75] What happened in *Wikaira* is qualitatively different from what happened here. In *Wikaira* the Court found the corrections officer had been engaged in a relatively minor and private disagreement and the circumstances in which the vehicle was damaged did not involve its driver being entirely blameless. In this case, Mr X's behaviour brought

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18 *Wikaira v The Chief Executive of the Department of Corrections* [2016] NZEmpC 175, (2016) 15 NZELR 638.
19 At [146].
20 At [158].

his private life firmly into the workplace. It was not necessary for the disrepute referred to in the Code to apply only where there is, in fact, adverse publicity. The purpose of the Code was to attempt to make sure that the Department did not face the risk of being brought into disrepute. A neutral, objective fair-minded and independent observer would conclude, I consider, Mr X's behaviour did risk bringing it into disrepute.

[76] The Department was also entitled to investigate and reach a conclusion about Mr X's behaviour because of its concerns about compliance with its social media policy that warned of disciplinary action if any material that was harassing or could create a hostile work environment was published online. There is no substance in the claim that Mr X intended private correspondence with his Facebook post and was merely relaying to his friends what he understood to be facts. That was a disingenuous description of the Facebook post. What was written in it went beyond explaining to friends that his relationship with Ms Z had ended. It unnecessarily linked together Ms Z and Ms Y and made gratuitous personal comments about both of them. While the Facebook post was not published to the world, Mr X must have known the identity of his Facebook friends and that they were, largely, other employees of the Department. He must also have known that his post was capable of being distributed more widely than just to them. His comments were inconsistent with the policy.

[77] The Department was entitled to investigate the complaint about Mr X even though it related to events which occurred outside the workplace.

***b. Flawed investigation?***

[78] Mr X maintained the investigation was flawed, giving rise to several subsidiary issues as follows:

(a) Was Mr Harrison the only decision-maker?

(b) Was the decision pre-determined?

(c) Was the investigation into his medical condition adequate?

(d) Was the investigation into the circumstances relating to the trespass notice, harassment letter and police safety order adequate?

[79] Ms Thomas prefaced argument about the flaws said to have arisen in the investigation by referring to the test in s 103A of the Act as the "minimum mandatory standards of procedural fairness".[21]

*Only decision-maker?*

[80] As to the first subsidiary issue, the claim was that the decision-maker was not only Mr Harrison but others in the Department Mr X could not address about his possible dismissal. Since he could not address the other decision-makers his dismissal was unjustified.[22]

[81] This part of Mr X's challenge begins with a comment by Mr Harrison in the letter dismissing him:

> I have also taken advice at both regional and national office level and have given serious consideration to alternatives to dismissal.

[82] On 2 July 2015, Mr Harrison arranged for notes of his meeting with Mr X, and his union, to be sent to the Department's Principal Employment Advisor, Brett Russell. Mr Russell was asked "…to give us an interim view as to the effect/impact of the PSA's latest submissions on the prelim view of dismissal by [close of business] tomorrow…".

[83] Mr Russell obliged, pointing out that what had been put forward by the union was more conciliatory than had been offered previously, but its main submission was still to do with Mr X's stress and mental illness. This response went on to refer to the new points raised about the large amounts of overtime Mr X worked in 2014 and his expressions of understanding and regret.[23] Mr Russell's response was that the overtime may be excessive, and a stressor contributing to mental health issues, although he was not sure this link had been made by the medical professionals. Mr X's reconciliation

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21 Relying on *Angus*, above n 18.

22 *Irvine Freightlines Ltd v Cross* [1993] 1 ERNZ 424 (EmpC).

23 While Mr X's case originally relied on claims that the inquiry did not take into account (or adequately take into account) what he considered to be excessive overtime, that part of it was withdrawn from consideration by counsel during closing submissions.

with Ms Y was noted as was the possibility she may now have a different view than before.

[84] Mr Russell went on to say Mr X's mental health was concerning but the key issue was whether the Department could have trust and confidence in his ability to do his job. Mr Russell's email contained a comment about needing to satisfy the test in s 103A of the Act and said:

> …In particular, given the PSA's invitation to consider a lessor penalty I would also suggest strong consideration needs to be given to alternatives to dismissal and you may wish to take up this invitation.

[85] After Mr Russell's email had been received the next person consulted by Mr Harrison was the Regional Commissioner who was sent an email containing the following comment:

> I am feeling less and less confident about getting this across the line with this sort of softening position from National office.

[86] The Commissioner's response was that he had not seen the emails or submissions in question, but recommended speaking with human resources, and Mr Russell, to "help reach a decision".

[87] These emails do not show the decision-making extending beyond Mr Harrison to others. His correspondence with Mr Russell showed only that he sought advice. His employment agreement required him to seek advice. Nothing in Mr Russell's email goes beyond explaining the legal test and recommending careful deliberation. There is nothing in the communication with the Commissioner going beyond seeking and receiving some reassurance and support. This evidence falls short of establishing that anyone other than Mr Harrison made the decision.

[88] The second part of this submission arises because Mr Harrison canvassed opinions from some senior managers between stating his preliminary decision and telling Mr X of the final decision. On 7 July 2015, he sent an email to Mr Russell expressing the sentiment that he was not moved to change his preliminary decision, but would rather have the support of the Department in making that decision than not having it. He went on to say that he had a visit from an unnamed employee concerned for that

person's safety and wellbeing should Mr X return to work. This unnamed staff member was the one in a relationship with Ms Y, the discovery of which resulted in the police safety order. As part of this email Mr Harrison commented that none of the principal case officers, or managers, he had canvassed:

> …either want [Mr X] back on site or could see how he could actually come back as they too have lost trust and confidence in him as have I.

[89] The disclosure of this email prompted further inquiries for Mr X about the people spoken to by Mr Harrison. In correspondence from its counsel the Department confirmed he had spoken to three other named managers; Mr X's manager, the security manager, and a principal corrections officer. The security manager was spoken to because a sanction other than dismissal had been proposed by the union; that Mr X spend time on the permanent night watch for a set period. Had that happened the security manager would have been responsible for managing him. The principal corrections officer spoken to had provided Mr X with some support at the time these difficulties began.

[90] Mr Harrison did not recall these conversations in any detail, but described them as looking for reasons to dissuade him from his decision to dismiss and none of the people spoken to said anything to make him reconsider his decision.

[91] There was no flaw in this process. The evidence falls short of establishing that other managers took part in the decision-making in the sense that they were invited to evaluate the investigation report and the response to it or to express any opinion about whether Mr X should be dismissed. For example, Mr X's manager said she had no input into Mr Harrison's decision and did not advocate for or against dismissal.

[92] Even if that conclusion is wrong, any departure from an adequate process in the circumstances disclosed in this case is minor or inconsequential and, therefore, must be put aside because of the requirements of s 103A(5) of the Act. Arguments advanced for Mr X to persuade the Department not to dismiss him did not dispute what had happened but sought to colour or influence the decision-making by inviting Mr Harrison to look at things as being less serious than he ultimately concluded they were. Once Mr Harrison reached conclusions about the harassment, breaches of the Department's Code

and policy and that the medical condition did not provide an explanation, a different decision was unlikely.

*Pre-determination?*

[93] There is a claim Mr Harrison's decision was predetermined, based on two emails the first of which was sent when he was informed about the Facebook post. He emailed other managers and commented, without knowing the content of the Facebook page, "…this has to be a Code of Conduct issue now…". The same email contained a comment that Mr Harrison was sure Mr X had "crossed the line with his Facebook post" before observing someone would have to confirm what was in it. This email ended with a statement that Mr X was not fit to return to work and no doubt Ms Z and Ms Y needed to be looked after.

[94] The decision to dismiss was made several months later. All the communication shows, at this initial stage and while Mr Harrison was providing pastoral care to at least Mr X and Ms Y, is that he was concerned about whether a breach had occurred and to ensure proper steps were taken in the interests of all potentially affected employees. The comment about returning to work was about Mr X's state of health and hospitalization at that time. The other comments may disclose frustration or even annoyance but nothing more.

[95] The second email said to support this submission was accidentally copied to Mr X in December 2014. In an email intended for another manager, about Mr X's leave status, Mr Harrison included a sentence reading:

> I note his response shows a continuation of the poor me and entitled attitude that he has been displaying.

[96] Mr Harrison explained he was frustrated at the time because he considered Mr X had cast himself as the victim in a relationship breakdown and seemed unaware of the impact his actions were having on others. He acknowledged his remark was unhelpful. Ms Thomas characterised this email as creating an impression he was not able to put out of his mind. The remark does not go as far as Ms Thomas submitted. Such a conclusion is inconsistent with the subsequent detailed inquiry and the careful way Mr Harrison

provided more than one opportunity to Mr X, and his union, to address the complaint and proposed decision.

[97] Importantly, Mr Harrison raised with the union whether it had any objection to him being the decision-maker and said he would defer to someone else if it did. When this invitation was extended Mr X had the email because it had been misdirected to him. With that knowledge the union agreed to Mr Harrison continuing to be the decision-maker. It is not realistic to now challenge Mr Harrison's ability to make his decision based on alleged partiality where, with knowledge of the previous correspondence, the issue of his appointment was raised and not challenged.

*Medical condition*

[98] Mr X's medical condition is important to his challenge. He considers the Department paid inadequate attention to whether it affected his behaviour. He maintains the Department was obliged to consider its effect on his decision-making, because that is a matter relevant to the trust and confidence it could have in him in the future. Another way of describing this submission is that, in the course of dismissing him, the Department gave inadequate weight to his medical condition and overreacted by punishing him for what happened.

[99] During his interview with the investigator Mr X mentioned his mental state adversely affecting his decision-making and judgment during late 2014. He asked that the clinical psychologist's report be taken into account and that she be interviewed. He suggested his psychiatrist be interviewed to determine his state of mind at the relevant time. Initially he invited the Department to interview his in-patient psychiatrist from the time when he was detained for assessment. Subsequently, the union listed the psychiatrist and psychologist as people Mr X wished to have interviewed but did not repeat the request to interview the in-patient psychiatrist.

[100] The psychologist and psychiatrist were interviewed by telephone. Notes were taken but no recordings of the interviews were kept. This aspect of the investigation was criticised as inadequate because the doctors were not asked to sign those notes to

confirm the accuracy of them.[24] Despite this criticism there is no reason to conclude that the interview notes do not record the medical advice provided to the investigator. That point aside, submissions concentrated on comments attributed to the psychiatrist as having been relied on, inappropriately, to conclude the medical condition did not explain Mr X's behaviour. The notes of her interview were said to contain an inconsistency between a statement that his daily decision-making would not be affected and another statement describing what he might do during a low mood.

[101] The investigation was criticised because it appeared the psychiatrist may have been saying that, while a criminal defence of insanity would be unavailable, Mr X's condition meant his decisions were out-of-character and not those he would have made when well. The proposition was that this opinion meant the wrong legal test was used as a guide to the Department's decision-making and that, in any event, it was inconsistent with earlier remarks suggesting he may not have been able to control his behaviour.

[102] A remark attributed to the psychologist in her interview, that the condition would have affected his judgment at times, was preferred by Mr X. The comment was:

> [The clinical psychologist] advised that every individual affected by Acute Adjustment Disorder will be affected differently, thus someone may have their judgement affected 100% of the time they have this condition whilst the judgment of others may only be affected at certain times, meaning some of their decision making is rational even though they have the condition. In [Mr X's] case she can't comment having not seen him over the October, November period but he clearly had some insight into his condition because he made some decisions, such as checking himself into [hospital], that support that. This doesn't equate to being able to control behaviour though, just that he had insight into his needs.

[103] Mr X's point was that the extent of the inquiries into his medical condition was inadequate. Further clarification, or more information, was needed but not obtained.

[104] The medical condition was taken into account. Mr Harrison gave more weight to the psychiatrist's opinion than the psychologist's one but that is not surprising. The psychiatrist had access to Mr X's hospital notes and had interviewed him. From those

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[24] *Harris v The Warehouse Ltd* [2014] NZEmpC 188, was used to say signing notes is a standard practice.

notes, and her experience, she was well placed to comment about his behaviour and awareness of right and wrong. Furthermore, from the interviews, it is not apparent that the doctors disagreed in any material way. The psychiatrist said Mr X knew right from wrong. The psychologist said patients suffering from the condition can make rational decisions and Mr X had insight into some of his actions.

[105] Furthermore, there was no obvious contradiction in the notes of the interview with the psychiatrist. A lot was made of the fact she made a comparison between the condition and a defence to a criminal charge. All she was doing was using the comparison to illustrate her comments to make a point. Mr Harrison's evaluation of the medical opinion concentrated on Mr X's awareness of right and wrong not on any more complicated assessment.

[106] There was no flaw in the way the investigation gathered the available medical information or in how it was evaluated. This challenge to the adequacy of the assessment of the medical condition relies on attempting to find nuanced differences between the interview notes of medical opinions. Once the psychiatrist's opinion was stated it must have meant to any fair and reasonable decision-maker that an attempt to explain all that had happened based on the medical condition was frail and unsustainable. All of the efforts to criticise the quality of the decision-making by Mr Harrison avoided acknowledging that he was presented with uncontradicted evidence that Mr X knew the difference between right and wrong.

[107] Finally, on this subject, Ms Thomas submitted Mr Harrison did not genuinely consider the medical information. She relied on a statement by him that, even if he had given complete credit or allowance for these health issues, he suspected he would have come to the same conclusion. She submitted that meant no matter how unwell Mr X had been Mr Harrison's mind was made up to dismiss. I disagree. He was just being complete to explain how seriously he took the investigation and its consequences. He made an assessment of the totality of the situation which does not suggest a closed mind.

*Trespass notice, harassment warning letter and police safety order*

[108] The investigation was said to be flawed because little or no inquiry into the facts leading up to the trespass notice, harassment warning letter and police safety order was undertaken. These alleged shortcomings were summed up in the rhetorical submission that they were proof of what? The criticism was that the investigation and the decision to dismiss made assumptions that, because they were issued, inappropriate behaviour had occurred and Mr X was responsible for it.

[109] Two flaws were argued about the findings on the trespass notice and the resulting consequences. One of them was that a decision to issue a trespass notice is made by the owner or occupier of premises. It is not necessary for that person to establish anything improper happened or that rights have been infringed. It is an exercise of property rights. It does not follow, therefore, that a notice is proof Mr X did anything open to criticism by the Department. The second alleged flaw was that, regardless of the legitimacy of the trespass notice, it had not been breached. Mr X did not return to Ms Z's house.

[110] The same type of flaw was said to arise with the harassment letter. It was a warning based on the opinion of a police officer, not proof anything untoward had occurred justifying the Department investigating. Support for that argument came from the words of the letter being carefully couched as allegations. Again, the argument was that the police officer's decision to write the letter did not constitute proof that there had been any harassment.

[111] Finally, the police safety order was challenged because of the circumstances in which it was issued. Under s 124B of the Domestic Violence Act 1995 a qualified constable can issue an order against a person who is, or has been, in a domestic relationship with another person. The basis for one is that there are reasonable grounds to believe that it is necessary to ensure the safety of the person who will benefit from it.[25]

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[25] Domestic Violence Act 1995, s 124B(1)(b).

[112] The police safety order was, therefore, the product of an "on the spot" decision which is risk management orientated. While it is necessary for the constable to have reasonable grounds to issue an order there is no ability for the recipient to challenge it. Mr X's case was that circumstances leading to the police safety order did not warrant disciplinary action. That is because he was named on the lease of the premises and had permission to be there because Ms Y knew he intended to visit to collect his property. It follows the order was not proof of any unlawful behaviour or conduct. Mr X's case was that a fair and reasonable employer would not simply adopt the police view without further inquiry.

[113] These challenges to the adequacy of the investigation came down to criticising the work done as merely confirming that in each case a trespass notice, harassment warning letter and police safety order had been issued without an adequate inquiry about the substance of them. There is some merit in Mr X's criticism that the investigation did not establish whether there were sufficient circumstances to justify the notice, letter and order. The report can be read as the investigator being satisfied just to confirm each of them had been issued. However, that is a narrow reading of the complaint and subsequent inquiry. Ultimately what the Department was concerned about was a senior employee placing himself in a position where, in a short time, he engaged in behaviour which resulted in steps being taken by Ms Y and Ms Z to protect themselves. For example, the existence of the trespass notice was a sufficient indication that he had behaved in a way causing Ms Z to seek some protection. It served to support her claim of harassment.

[114] The same can be said about the police safety order sought by Ms Y. It was enough to be satisfied that an order had been made and, given the requirements of the statute, to accept that such a step was not taken lightly. The police safety order was extended by a Judge which is some indication it had merit. The harassment letter can be looked at in the same way.

[115] The nature of the complaint, and Mr X's response to it, did not require the level of investigation which the criticisms suggested were necessary for a fair inquiry. Throughout the inquiry Mr X was in no doubt what behaviour was being investigated and was able to respond to each of the matters raised. In his responses, he largely

accepted what had happened but either invited Mr Harrison to look at things from a different perspective or to view the behaviour as less serious than it was eventually considered to be. In the absence of a dispute about what had happened there was no need for Mr Harrison to inquire any further than what had been established by the investigator.

[116] It would be going too far, against that background, to hold that an employer should have investigated more fully the adequacy of the grounds on which each of the trespass notice, harassment letter and police safety order were issued. Even if this part of the investigation was flawed it is not, by itself, enough to overcome the difficulties this challenge faces, because of the way in which Mr X harassed Ms Z with texts, telephone calls, and the Facebook post or caused Ms Y to seek a police safety order.

***c. Disparity?***

[117] The statement of claim pleaded that the Department had failed to give weight to other instances of similar conduct dealt with by a sanction less than dismissal. No particulars of the pleading were provided.

[118] A prima face case of disparity of treatment may mean a dismissal is unjustified in the absence of an adequate explanation by an employer. In *Airline Stewards and Hostesses of New Zealand IUOW v Air New Zealand Ltd*,[26] two stewards where charged jointly with smuggling a video cassette recorder. One of them was acquitted but the other was convicted. The one who was acquitted was subsequently convicted, on his guilty plea, of being in possession of uncustomed goods.[27]

[119] While recognising the principle of parity of treatment, that case never reached the stage where the employer was required to explain, because the circumstances of each employee were different. One of the stewards was not a party to smuggling while the other was convicted of it. The Court of Appeal held that the more serious breach was committed by the steward convicted of smuggling. It followed that the employer could have laid itself open to criticism if both of them had been dealt with in the same way.

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[26] *Airline Stewards and Hostesses of New Zealand IUOW v Air New Zealand Ltd* [1985] ACJ 952 (CA).
[27] At [954].

[120] The Court of Appeal's decision in *Airline Stewards* was considered in *Samu* v *Air New Zealand Ltd*.[28] A flight attendant was dismissed because she failed the airline safety standard examinations in breach of a policy where three failures in five years would prevent her from flying.[29] A consequence of not being able to fly was that the attendant was eventually dismissed. The comparator was an example of another flight attendant who had failed the same examination four times in five years but who had not been dismissed. The reason for not dismissing that flight attendant was because of doubt about whether he had been told of the policy.[30] *Samu* considered and adopted *Airline Stewards* explaining:[31]

> Thus if there is an adequate explanation for the disparity, it becomes irrelevant. Moreover, even without an explanation disparity will not necessarily render a dismissal unjustifiable. All the circumstances must be considered. There is certainly no requirement that an employer is for ever after bound by the mistaken or overgenerous treatment of a particular employee on a particular occasion.

[121] In *Samu* the disparity was explained because the flight attendant with whom a comparison was drawn had not been informed of the policy.

[122] Subsequently, in *Chief Executive of the Department of Inland Revenue v Buchanan* the Court of Appeal drew together the themes evident from those decisions to describe the test for disparity of treatment as follows:[32]

(a) Is there disparity of treatment?

(b) If so, is there an adequate explanation for the disparity?

(c) If not, is the dismissal justified, notwithstanding the disparity for which there is no adequate explanation?

[123] The decision to dismiss Mr X was compared with the actions by the Department in dealing with another employee described by the parties only as case one. While Mr

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28 *Samu* v *Air New Zealand Ltd* [1995] 1 ERNZ 636 (CA).
29 At 637.
30 At 638.
31 At 639.
32 *Chief Executive of the Department of Inland Revenue v Buchanan* [2005] ERNZ 767 (CA) at [43].

Hodson, who is a PSA representative, referred to other cases they were not fully described in the evidence and did not form part of Ms Thomas' submissions. Consequently, those other cases do not need to be considered any further.

[124] Case one involved two Department employees who were in a relationship. A complaint was made by the female employee that her ex-partner was bullying her and acting unprofessionally towards her in the workplace. Mr Harrison explained that the complainant alleged her ex-partner continued to refer to her as his "missus" and would make noises on the work radio as a way to get her to stop talking to men at work. The complaint also involved an allegation that he addressed the complainant in an unspecified but unprofessional manner over the work radio.

[125] In case one the complainant insisted she wanted the matter to be dealt with at the "lowest level". There was a difference in the account of events by each person leaving Mr Harrison in a difficult position. Matters could not be taken much further without going through an investigation. As a result he was constrained in what could be done. He explained that the former partner about whom the complaint had been made was disciplined, placed on notice of unacceptable behaviour and advised that any further occurrences would have "serious consequences".

[126] Case one also involved a trespass notice resulting from the failed relationship but no police involvement. Mr Harrison's assessment was that the situation he was confronted with in case one did not escalate in the same way as the circumstances which lead to Mr X being complained about. He considered that it was the intensity or escalation of the behaviour which made the comparison between Mr X's circumstances and case one inappropriate.

[127] This claim of disparity of treatment is unsustainable. There is no true comparison between Mr X's behaviour and case one that requires an explanation. At a superficial level case one involved nuisance-related behaviour that could be described as harassment. The behaviour complained about was unwelcome and immature. However, Mr X's harassment of Ms Z, and his overall behaviour, is of a different order of magnitude. She was harassed in a persistent way. He took steps to circumvent efforts

to block communication. He was intimidating. Case one did not involve the police or a police safety order. Mr X not only received a police safety order but breached it.

[128] The attitude of the female complainant in case one must also have been a block to an investigation because she was insistent on a low-level response. That is some indication the behaviour had not reached the same level of intensity as the behaviour that caused Ms Z to complain.

[129] Even if these cases had been comparable, and the Department had failed to adequately explain the disparity, there was still sufficient basis on which the Department could decide to dismiss to satisfy the third limb in *Buchanan*.

***d. Section 103A satisfied?***

[130] Section 103A of the Act requires an objective assessment about whether the Department's decision to dismiss Mr X was justified. The test is captured in s 103A(2) which reads:

> (2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[131] As was described in *Angus v Ports of Auckland* in deciding whether justification exists the Court has to determine whether what the employer did and how the employer did it were what a notional fair and reasonable employer in the circumstances could have done bearing in mind that there may be more than one justifiable process and/or outcome.[33] *Angus* went on to say that the Court must undertake this exercise objectively, ensuring that its own decisions are not substituted for those of a fair and reasonable employer in all the circumstances.[34]

[132] In this case the evidence against Mr X was overwhelming and largely uncontested. The strongest point in his favour was that he had been diagnosed with a medical condition which may have had a bearing on his behaviour between October and December 2014. Mr Harrison's review of that information was robust and he reached

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33 *Angus*, above n 18, at [59].
34 At [59].

conclusions which were open to him. Relying on the medical opinions it was open to the Department, objectively, to conclude that despite his condition Mr X knew what he was doing in his behaviour towards Ms Z, and in causing Ms Y to seek a safety order and in breaching it.

[133] Viewed objectively a fair and reasonable employer in the Department's position could conclude that the complaint was justified, its Code of Conduct had been breached and that it had lost trust and confidence in Mr X. The Department has satisfied the test in s 103A of the Act.

***e. Remedies***

[134] A detailed review of Mr X's claim for remedies is not needed but a brief comment should be made about his claim for reinstatement. Reinstatement is an available remedy if it is practicable and reasonable to do so.[35] The onus of proof rests with the employer to show that reinstatement is not practical or reasonable within the meaning of s 125.[36]

[135] Part of the case for reinstatement was that Mr X had recovered his health and that the Department, as a large employer, could make arrangements to ensure that at all relevant times he and Ms Z did not come into unnecessary contact. There is no issue about his contact with Ms Y because they have reconciled and continue in a relationship. As it happens, Ms Z works for the Department but in a different office from the one that would be used by Mr X if he was reinstated.

[136] However, what illustrates that reinstatement is not practical and reasonable are two recent events; comments made by Mr X to an intelligence officer employed by the Department and his more recent behaviour towards Ms Z. In July 2016, the intelligence officer organised a taxi for a short ride from his home into the city. By coincidence the taxi driver was Mr X and they recognised each other. During the journey comments were made by Mr X about the injustice which he said had been done to him and the substantial financial impact on him arising from his dismissal. By itself that comment

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35 Employment Relations Act 2000, s 125(2).
36 See, *Angus*, above n 18, at [66].

was unremarkable and would not ordinarily be any cause for concern. It is the subsequent remark which places this conversation into a different category.

[137] The intelligence officer attributed to Mr X a statement that he really hated and despised his former manager and Mr Harrison. The intelligence officer said the conversation made him uncomfortable. Mr X denied making the statement. I prefer the evidence of the intelligence officer, because he recorded the content of this conversation in an email two days later, when he reported to senior Corrections Department managers.

[138] Mr Harrison has since left the position he held with the Department at the time Mr X was dismissed and is employed by it in another city. Mr X's former manager remains at the same facility and has been promoted. If Mr X was to be reinstated he must, inevitably, report to her. His stated animosity would make such a relationship fraught with difficulty from the outset and it would probably be dysfunctional.

[139] The second event counting against reinstatement is uncontradicted evidence of Mr X's behaviour towards Ms Z after the dismissal. Evidence was given by the Department's former industries manager of a conversation he had with Mr X in mid-2016. At the time the manager, and Ms Z, had formed a relationship. In this conversation the manager asked Mr X why he was occasionally parking his car outside Ms Z's office where it could be seen by her. The manager assumed Mr X was going to see his lawyer who had an office in the same street. Mr X's answer was that he just parked his car there to "wind (Ms Z) up". Mr X did not dispute making this remark.

[140] These events indicate there are lingering and unresolved issues between Mr X and others he formerly worked with. Had he been successful in this challenge the Department would have satisfied the onus placed on it to show it would not have been practicable or reasonable to reinstate him.

## Outcome

[141] Mr X's challenge to the Authority's determination is unsuccessful and his claim is dismissed.

[142] Costs were provisionally assessed on Category 2 Band B using the Court's Guideline Scale. That assessment is now confirmed. If the parties are unable reach agreement about costs memoranda may be filed.

K G Smith
Judge

Judgment signed at 11.40 am on Monday 17 September 2018