

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2020] NZERA 219  
3051312 and 3051372

BETWEEN	ANGELA NEIL Applicant in 3051312
AND	TINA WEST Applicant in 3051372
AND	NEW ZEALAND NURSES ORGANISATION Respondent

Member of Authority:	Robin Arthur
Representatives:	Allan Halse, advocate for the Applicants Susan Hornsby-Geluk, counsel for the Respondent
Investigation meeting:	19, 20 and 21 June and 19 September 2019 in Tauranga
Submissions:	4 October 2019 and 25 October from the Applicants 18 October and 29 October 2019 from the Respondent
Determination:	4 June 2020

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**DETERMINATION OF THE AUTHORITY**

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**The employment relationship problem**

[1] The New Zealand Nurses Organisation (NZNO) dismissed Angela Neil and Tina West on 20 February 2019. Ms Neil worked as an organiser for almost 12 years. She initially worked at NZNO's Hamilton office but from February 2012 was based in Tauranga. Ms West worked as an administrator from 2004, also initially in the Hamilton office. In June 2016 Ms West moved to Tauranga to join an expanded NZNO office there.

[2] NZNO's Assistant Industrial Services Manager Glenda Alexander made the decision to dismiss Ms Neil. The union's Corporate Services Manager David Woltman

made the decision to dismiss Ms West. Similarly-worded letters from both decision makers said they had concluded the working relationships of Ms West and Ms Neil with three colleagues in the union's Tauranga office were irreconcilably broken. They told Ms Neil and Ms West that NZNO's trust and confidence in them was irreparably broken and no alternative working arrangements could address that fundamental breakdown. Ms Neil and Ms West were dismissed with four weeks' notice.

[3] Ms West had been, from early July 2018, away from the office on special leave and then, from late July onwards, was on sick leave. From September 2018 Ms Neil was also away from work on sick leave. Both provided medical certificates for the periods of sick leave taken.

[4] In late July 2018 NZNO organised a two-day meeting, described as a facilitation, for its Tauranga-based staff. The meeting was intended to help resolve long-running conflict between the five employees who worked there. NZNO arranged for Erina Papp to run the meeting. Ms Papp is a Wellington based-consultant who helps organisations improve how people work together. Present at the meeting were Ms West, Ms Neil, lead organiser Paul Mathews and two other organisers, Gail Ridgway and Selina Robinson.

[5] In her later written report on the meeting Ms Papp said the five staff had discussed behaviours and expectations of one another but, from what she observed, she doubted "agreements made by the team are able to be sustained".

[6] In late August Ms West and Ms Neil engaged their advocate, Allan Halse, to raise their concerns about their working situation with NZNO. In a letter to Ms Alexander in early September Mr Halse expressed their view that Ms Papp had been unable to accurately assess the situation, that Mr Mathews had contributed to the breakdown in working relations with Ms West and Ms Neil and that the other two organisers were "sycophants". On 8 October 2018 Mr Halse formally raised personal grievances of unjustified disadvantage for Ms West and Ms Neil. Those grievances were said to result from workplace bullying and failures by NZNO to provide a safe work environment and to respond to grievances "raised throughout the duration of employment".

[7] Both grievance letters described NZNO's Tauranga office as "increasingly divided into two factions of workers, creating an 'us and them' type mentality and

operation”. They described Mr Mathews, Ms Ridgway and Ms Robinson as comprising as “one team” and Ms West and Ms Neil as “another” team.

[8] Ms West’s grievance letter said she had been affected by an unsafe working environment since 2016. In September 2016 Mr Woltman had issued her with a written warning for inappropriate behaviour. It followed an investigation of a complaint Mr Mathews made about Ms West being aggressive and confrontational during a meeting with him and another NZNO staff member. Ms West’s grievance letter referred to ongoing poor communication with Mr Mathews over the subsequent years and said this “came to a head” in an altercation on 24 April 2018 during which she said his manner was “aggressive and intimidating”.

[9] Ms Neil’s personal grievance letter referred to a complaint about her conduct made by Ms Robinson in 2017 and another raised with her in May 2018. The latter complaint was about her conduct during a team meeting with Mr Mathews, Ms Ridgway and Ms Robinson on 23 April 2018. The letter said Ms Neil told those three colleagues she had not got enough help from them in organising a rally recently held as part of the union’s collective bargaining campaign. She said the conversation had deteriorated as they “all made excuses”.

[10] In their responses to the complaints about events on 23 and 24 April Ms Neil and Ms West each made allegations of their own about the behaviour of the other employees. In her role as Assistant Industrial Services Manager Ms Alexander carried out inquiries about those complaints and allegations during May 2018. Her report on those inquiries, completed in June, referred to “a culture of complaint and counter complaint and the absence of appropriate communication” between staff in the Tauranga office. She recommended a “conflict resolution process” be arranged, with all members of the Tauranga office required to take part. This recommendation led to the facilitation meeting being held in July 2018.

[11] Ms Alexander’s report had also described “the options” for the outcome from that process quite starkly: “People behave as adults, resolve the conflicts and work together professionally and harmoniously or they find somewhere else to work”.

[12] The October 2018 grievance letters of Ms West and Ms Neil sought mediation as a first step addressing their employment relationship issues. Mediation was arranged and held in early December 2018 without reaching any resolution.

[13] Following mediation Mr Halse sent the NZNO representatives two further separate letters on behalf of Ms West and Ms Neil on 12 December 2018. Each letter was headed “Formal Bullying Complaint”. Each recapped the account set out in the earlier personal grievance letters, up to the respective events of 23 and 24 April 2018, and then outlined their concerns about how subsequent complaints about those events were dealt with, including the arrangements for and conduct of the July facilitation. They asked for their concerns to be the subject of a further inquiry to be conducted by an independent, external investigator.

[14] In early December Mr Halse also provided the NZNO managers with reports from two clinical psychologists, one about Ms West and the other about Ms Neil. Both opinions were dated September 2018. Each recounted what Ms West and Ms Neil had told their respective psychologists about their work situation. Ms Neil’s psychologist said Ms Neil was beginning to have extreme stress responses to discussions about her workplace and was on the border of experiencing a generalised anxiety condition and possibly a mood disorder. Ms West’s psychologist said Ms West described a pattern of her manager “picking at her”. Her psychologist said Ms West had developed a generalised anxiety disorder, resulting from prolonged exposure to harassment in her workplace.

[15] On 20 December 2018 Mr Woltman and Ms Alexander wrote to Ms West and Ms Neil respectively, both to the same effect, about their 12 December complaint and the recently-received psychologists’ opinions. Both letters noted the length of their absences from work – for Ms West since July and Ms Neil from mid-September. Both letters expressed disappointment that the psychologists’ reports, dated September 2018, were not provided to NZNO until early December 2018. Both letters also noted that the key event said to have most recently triggered or caused the health effects for each woman was reported to have occurred in April 2018 – on 23 April for Ms Neil and on 24 April for Ms West. The letters referred to Ms Alexander’s investigation of those April incidents and the July facilitation held to address the issues identified by her inquiries. They declined the request for a further investigation “as that would be relitigating matters previously dealt with” and made the following comment:

Further, it is of concern to us that you continue to be so significantly affected by this particular event that occurred some eight months ago, and do not appear able to move on. I note in this regard that the incident in question was at the

lower end of the spectrum in terms of seriousness and did not, in my view, amount to bullying.

[16] The letters from Mr Woltman and Ms Alexander each said they believed they had done everything possible to address the workplace conflict that existed but Ms Neil and Ms West continued to maintain the workplace was not safe for them. They asked Ms Neil and Ms West to advise, by 14 January 2019, what steps they believed NZNO could reasonably take to restore the workplace to one that they and their health advisors considered to be healthy and safe for them. Each letter ended by advising that NZNO would consider its legal options if no reasonable solutions were identified and if Ms West and Ms Neil could not confirm they were fit to return to work within the reasonably foreseeable future. Those legal options were described as including possible termination of the employment due to medical incapacity or on the grounds of incompatibility.

[17] The following day Mr Halse responded to those letters with emails advising that Ms Neil and Ms West would each return to work on 14 January 2019 “with a full medical clearance” on the basis of assurances sought from NZNO. For Ms Neil those assurances were that there would be “no inappropriate behaviours” towards her when she had to meet with Mr Mathews, Ms Ridgway and Ms Robinson and she would “not be subjected to retaliating behaviours, physical or verbal intimidation or mobbing or unreasonable expectations”. For Ms West the assurance sought was that NZNO would “provide a safe workplace with no workplace bullying going forward”. Both were said to be looking forward to returning to work “in a safe and transparent environment”.

[18] By return email on 24 December NZNO’s lawyer said the suggestion Ms West and Ms Neil both now felt able to return to work was “an extreme turn around” from what was claimed in Mr Halse’s letter sent only a week earlier, particularly in light of what the recently-disclosed psychologists’ reports said about the health of each woman. The email said NZNO had taken steps to provide a safe workplace but could not control how Ms West and Ms Neil each perceived that environment and the actions of their workmates. It said the information now provided by the two women, and their views on the working environment, meant NZNO was not satisfied letting them return to that same environment would be safe or healthy for them. The email ended by advising that NZNO would need to address the broader issue of the relationships of Ms West and Ms

Neil with their colleagues, and their perception of those relationships, before they could return.

[19] Ms West and Ms Neil provided no further feedback to NZNO about their proposal to return to work or the basis on which that might successfully occur. Rather, on 14 January 2019, their advocate lodged applications to the Authority seeking orders that NZNO pay them for “the time taken off work due to the unsafe working conditions until such time that the workplace is deemed safe to return to”. The applications said Ms West and Ms Neil were “effectively locked out” of work with no pay because NZNO had refused to investigate their bullying complaints, had refused to pay them special leave for their absences and had refused to agree to their request to return to work on 14 January. They also sought orders for NZNO to pay penalties for breach of good faith and to pay them compensation for distress.

[20] On 29 January 2019 Mr Woltman and Ms Alexander sent further letters for Ms West and Ms Neil to their advocate. Those letters said Ms Alexander and Mr Woltman were concerned that the relationships of Ms West and Ms Neil with the other three Tauranga staff, and with NZNO as their employer, had become irreconcilable. Each letter provided an extensive outline of events to that date and summarised the respective manager’s concerns. These included the length of time Ms West and Ms Neil had been away from work, the health consequences each had reported as arising from workplace conflict, the view that each took on who was responsible for the situation, their request made on 21 December 2018 to return to work in January 2019 and their view, expressed through their advocate’s correspondence, that their trust in NZNO as their employer was “seriously eroded”.

[21] Those letters also expressed concern about “the disparaging nature” of statements that Mr Halse had recently posted about NZNO and their employment on a public Facebook page widely read by nurses. Given he was acting as the representative of Ms West and Ms Neil, the letters said what Mr Halse publicly posted about their employment was deemed to be made on their behalf and was “further suggestive of a breakdown in the employment relationship”.

[22] Although not set out in the letters, Mr Halse’s Facebook post included the following comments:

NZNO members will no doubt be horrified to learn that not only does their union leadership not support individual members in legal action against DHBs in workplace bullying cases, they actually enable/condone bullying of their own NZNO employees.

... [L]ast week we lodged statements of problem with the Employment Relations Authority on behalf of two bullied NZNO employees who have suffered serious emotional and psychological harm by being bullied at work, NZNO has refused to investigate their bullying complaints.

You will witness over coming months how much your union will pay high priced Wellington lawyers to defend bullying.

It is probably time NZNO members asked some serious questions of their union because it seems they may not be acting in the best interests of their members and/or their own employees.

[23] The letters said Ms West and Ms Neil appeared to hold such entrenched views of their relationship with the other employees in the Tauranga office, and with NZNO as their employer, that Mr Woltman and Ms Alexander were considering whether the employment relationship should be terminated on the basis of incompatibility. The letters said alternative options had been considered, referring to the prospects of further mediation or relocating Ms West and Ms Neil to another workplace, but Ms Alexander and Mr Woltman doubted such measures would address the concerns identified. They asked Ms West and Ms Neil to meet to respond to the letters and to give their views about the identified issues and options. The letters ended by emphasising “one possible outcome” was termination of the employment of Ms West and Ms Neil if Mr Woltman and Ms Alexander decided the breakdown in the employment relationship was irreconcilable.

[24] Although the 14 January applications by Ms West and Ms Neil had not sought any urgent or interim intervention by the Authority, subsequent correspondence from Mr Halse appeared to suggest he believed those applications would operate as a curb on NZNO proceeding with its inquiry into whether the employment relationship was irreconcilable and could be terminated for incompatibility. In emails sent to Authority Officers on 4 and 5 February he referred to wanting “immediate intervention” by the Authority directing NZNO to “withdraw” the letters of 29 January letters sent to Ms West and Ms Neil.

[25] The references made in those emails fell well short of being an adequate application for an injunction or for an urgent investigation by the Authority. I had an Authority Officer send an email message to the parties’ representatives on 5 February

drawing their attention to recent case law that contained guidance on the relevant principles if an application was formally made in such circumstances. In *Ports of Auckland v Findlay* the Employment Court had explained the principle in this way:<sup>1</sup>

... [O]rders restraining an employer from proceeding with an investigative/disciplinary process into concerns about employee conduct will be rare. ... The reasons for this are clear. The first point is that such an approach runs the risk of putting the cart before the horse, and pre-judging the end-point that an employer might (but might not) get to. It also runs the risk of cutting across an employer's obligation to investigate concerns, including health and safety concerns impacting on other employees. Also relevant is the interest, both to the individuals concerned and more generally, in allowing such processes to run their course without undue interruption and delay. A stop-start approach to an investigative and disciplinary process which invites intervention along the way from the Authority; the Employment Court on a challenge; and potentially the Court of Appeal and Supreme Court by way of further appeal; is plainly undesirable for public policy reasons.

[26] NZNO's legal representative then wrote again to Mr Halse about meeting with Ms West and Ms Neil but he replied that they would not attend a meeting with NZNO representatives because to do so would cause them further emotional and psychological harm. NZNO responded by sending Mr Halse further letters for Ms West and Ms Neil on 11 February 2018 advising them Mr Woltman and Ms Alexander had reached the preliminary view that the employment relationship should be terminated due to incompatibility. The letters noted further Facebook postings by Mr Halse which, among other comments, described NZNO as "New Zealand's 2<sup>nd</sup> worst bullying employer" and "actively condoning" bullying of Ms West and Ms Neil. The letters also said further correspondence from Mr Halse appeared to confirm the views he expressed were genuinely held by Ms West and Ms Neil. He described NZNO's Tauranga office environment as "toxic" and Ms Alexander as "believ[ing] in sweeping workplace abuse under the carpet". The letters said the views of Ms West and Ms Neil, conveyed through Mr Halse's correspondence, demonstrated "a lack of insight as to the sensitivities of the situation in terms of your relationships with your colleagues and NZNO and the need to rebuild relationships, not further destroy them". Ms West and Ms Neil were again asked to provide their responses, either by submissions in writing or by attending a meeting.

[27] On 15 February Mr Halse confirmed Ms West and Ms Neil would not attend a meeting to discuss the concerns raised, said NZNO was ignoring its "toxic culture" and again called for an investigation of their earlier bullying complaints. He also made a

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<sup>1</sup> [2017] NZEmpC 45 at [23].

further Facebook posting that said “NZNO condones bullying and bullies their own staff”.

[28] Ms Alexander and Mr Woltman sent letters of dismissal for Ms Neil and Ms West to their advocate on 20 February 2019. The letters rejected their request for further investigation of the April 2018 events, noting Ms Neil and Ms West had not provided any new information in support of alleged bullying that would warrant re-opening any inquiries.

[29] The letters noted Ms West and Ms Neil had continued to assert Mr Mathews and, to a lesser extent, Ms Robinson and Ms Ridgway bullied them although NZNO’s inquiry into the April incidents found no bullying had occurred. They said that airing those assertions through a public forum that identified those colleagues made “it virtually impossible for relationships of trust and confidence to be restored”.

[30] Both letters gave this explanation of the decision to dismiss Ms West and Ms Neil:

Given that NZNO can find no evidence of bullying having occurred in the workplace, and that it has taken all reasonably practicable steps to seek to restore relationships, but has been unsuccessful, it simply cannot agree to the path you have proposed or provide the undertakings sought. In this respect, it is NZNO’s view that it is your own misguided perception of the workplace, rather than the reality, that has led to your profound dissatisfaction with it and any psychological or physiological impacts. The reality is that we simply cannot ensure that you will not continue to experience the serious consequences that you say you have suffered, given your own view of the world.

... The three colleagues with whom you have an employment relationship issue, and Mr Mathews in particular, have been publicly identified as bullies or contributing to a bullying environment ...

In my view it would simply not be reasonable to require those three employees to work with you again in the same office ... I now also believe that the relationship of trust and confidence between you and NZNO as your employer has broken down to the point that it is irreparable such that alternative working arrangements would not address this fundamental breakdown.

[31] Following their dismissal Ms West and Ms Neil, through their advocate, lodged amended applications to the Authority on 25 March 2019. These repeated their earlier claims and added claims that they were both unjustifiably disadvantaged and dismissed because NZNO had failed “to follow process and justly and correctly investigate allegations of bullying”. They said their dismissals on 20 February 2019 were unjustified because, by that time, they were already involved in a dispute with their

employer and were “awaiting acknowledgement and action to be taken in response to a formal bullying complaint”. They also said their dismissals was “based largely” on the actions of their advocate and were not the decision of a fair and reasonable employer.

[32] They applied to the Authority for findings that NZNO had failed to meet good faith obligations owed to them, had failed to provide them with a safe workplace and failed to provide them with special leave from work while their issues were addressed. They sought orders requiring NZNO to conduct an independent investigation of the concerns they had raised, to pay them special leave, to pay compensation for hurt and humiliation they had suffered and to pay penalties for breach of good faith obligations.

[33] NZNO’s statement in reply denied Ms West and Ms Neil were unjustifiably disadvantaged or unjustifiably dismissed. Rather, NZNO said it acted fairly and reasonably in terminating its employment of Ms Neil and Ms West because their relationship with their colleagues and with NZNO was irreconcilably broken.

#### **The Authority’s investigation**

[34] Evidence considered in the Authority’s investigation included written witness statements and oral evidence from Ms Neil, Ms West, Ms Alexander, Mr Woltman, Mr Mathews, Ms Ridgway and Ms Robinson and NZNO’s Northern Team Lead Donna Simpson. Ms Simpson, who worked in NZNO’s Auckland office, was Ms West’s supervisor and, in turn, reported to Mr Woltman.

[35] Some former NZNO staff, active members of the union and family members of Ms West and Ms Neil also provided written witness statements and answered questions at the Authority’s investigation meeting. Those witnesses were Sonya Church, a former Tauranga organiser; Valerie Scott and Gwen Ahuriri, Gisborne-based delegates who attended various NZNO meetings at the Tauranga office; Ken Jones, a nurse and union delegate at Tauranga Hospital; Robyn Schwass, an administrator who had worked at the Tauranga office on a temporary basis on some occasions Ms West was on leave; Ms Neil’s husband Keith Neil and her daughters Heather Atutahi and Lyla Atutahi; and Ms West’s husband John West and her son Allister West.

[36] Ms Papp was called to give evidence by a witness summons the Authority had issued on its own motion. She gave her evidence by audio visual link from Wellington.

[37] Mr Owens also attended under a witness summons. It was issued at the request of Ms Neil and Ms West.

[38] Heather Atutahi, Ms Scott and Ms Ahuriri each attended the meeting by telephone conference.

[39] As noted in a Minute issued to the parties on 15 April 2019 I declined to extend the investigation of Ms West and Ms Neil's matters to include witnesses about another Authority matter determined on 11 June 2015, including evidence from the applicant in that earlier matter.<sup>2</sup>

[40] It concerned a nurse dismissed by the Bay of Plenty District Health Board in 2014. At the time Mr Mathews was an associate nurse manager in a DHB hospital. The events that had led to the eventual dismissal of that nurse included a complaint Mr Mathews made in 2013 about the nurse's performance and the nurse complaining he had harassed her.

[41] The Authority's determination found the harassment complaint in that case was made because Mr Mathews regularly spoke to the nurse about minor performance issues. It concluded his behaviour was within the appropriate scope of managerial functions, not harassment.<sup>3</sup>

[42] For the following reasons I declined to hear from witnesses about that earlier determined matter because:

- (i) It did not involve employment relationships between NZNO and Ms West and Ms Neil or between NZNO and Mr Mathews; and
- (ii) The Authority had already made a determination on allegations about Mr Mathews' working relationship with the nurse in that case; and
- (iii) Ms Neil had been involved as a union representative in the Board's investigation of that matter in 2013-14. To the extent information about what occurred then was relevant to Ms Neil's view of, or relationship with, Mr Mathews after he began working for NZNO, Ms Neil was able to give her own direct evidence about it.

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<sup>2</sup> *Cliff v Bay of Plenty District Health Board* [2015] NZERA Auckland 168.

<sup>3</sup> *Cliff*, above n 2, at [108].

[43] This determination has been issued outside the usual statutory period as the Chief of the Authority decided exceptional circumstances existed for the delay.<sup>4</sup>

[44] The evidence considered in relation to the applications from Ms Neil and Ms West comprised written witness statements from 18 witnesses, answers given to extensive questioning through the four-day investigation meeting and more than 600 pages of background documents provided by the parties. The representatives provided lengthy closing submissions in writing.

[45] As permitted under s 174E of the Employment Relations Act 2000 (the Act) this determination does not set out all the evidence and submissions given in the Authority investigation. It is important in this case to emphasise all the evidence has nevertheless been considered closely in reaching the findings and conclusions made in this determination. Those findings and conclusions are reached on the civil standard of proof – that is what is more likely than not to have occurred. In considering whether that standard of proof has been reached, the credibility of what witnesses say is assessed against what documentary and other evidence may or may not corroborate allegations made or answers given to questions asked of those witnesses.

[46] No firm findings of fact could reasonably be reached favouring one or other of the differing accounts and recall of Ms Neil, Ms West and the other three Tauranga office staff about many of their workplace interactions, which later become such matters of controversy. They had all formed strong impressions about what they recalled was said or done or, included, in some instances, what a glance, an expression or a tone of voice was intended to mean. Their conflicting accounts of those impressions were often simply not sufficient to determine one or other was, on the civil probability standard, more likely than not to have accurately described what happened and why. Their accounts, as a whole, did however establish a pattern of ongoing discord between them which created the foundation or context in which NZNO managers took various actions that became the subject of the personal grievances Ms West and Ms Neil raised.

[47] In reaching decisions about those managers' actions, and the grievances raised by Ms Neil and Ms West, firm views could reasonably be reached about conflicts of accounts and reliability of evidence given by them, on the one hand, and by Ms

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<sup>4</sup> Employment Relations Act 2000, s 174C(4).

Alexander and Mr Woltman on the other hand. All the written evidence, the background documents (including notes and correspondence written at the relevant times) and the answers given during extensive questioning of all the key witnesses has been carefully considered. On the basis of that review Ms Alexander and Mr Woltman clearly gave the more credible and reliable accounts of what they had done and said in seeking to deal fairly with the fractious workplace dynamics between NZNO's Tauranga office employees. On points of conflict in the evidence, this determination has generally preferred and relied on what Ms Alexander and Mr Woltman said.

### **No ongoing order prohibiting publication of certain evidence**

[48] Early in these proceedings, by Minute issued on 14 February 2019, an Authority order prohibited publication of the names, work position and location of the three other Tauranga office staff who Ms Neil and Ms West said had bullied or otherwise treated them unfairly in their working relationship. The order was made for the period up until the Authority issued its determination or otherwise directed. Put simply the order was made as a matter of fairness to those three individuals and to protect the integrity of the Authority investigation process until the allegations about them, and particularly about Mr Mathews, could be properly tested through questioning at the investigation meeting by the Authority Member and both parties' representatives. At the case management conference held to discuss making this order and other procedural issues, the advocate for Ms Neil and Ms West emphatically rejected the prospect that such an order could also be appropriately made to protect their identity for a similar period.

[49] Despite the clear terms of the order made, Mr Halse repeatedly breached the order in the following days, resulting in NZNO seeking and being granted a compliance order.<sup>5</sup> The determination issued making that compliance order described his behaviour as vigilante-like and exhibiting a disturbing and incorrect view of the law and procedures developed for the fair treatment of parties and witnesses in proceedings in the courts and in tribunals like the Authority.<sup>6</sup>

[50] The terms of the order made provided for its expiry on the issue of this determination. There was no application for its continuation. Having completed the Authority's process to examine the allegations made and to make determinations about them, there appeared to be no grounds in this case to make further orders prohibiting

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<sup>5</sup> *Neil & West v New Zealand Nurses Organisation* [2019] NZERA 98.

<sup>6</sup> *Neil*, above n 5, at [16] and [18].

publication of the evidence considered or the identities of the NZNO staff or any other witnesses who attended the investigation meeting. They each had the opportunity to respond to allegations made and to comment about evidence given.

[51] There were, however, other current or former NZNO staff members referred to throughout the written and oral evidence who did not have the opportunity to comment on or respond to any negative or critical comments made about them, sometimes in relation to events now many years old. No order is made prohibiting publication of their names but there was no need to use their names in this determination which is permanently available on the public record. Rather, those people have been referred solely by roles held or some other details have been used, such as dates or events mentioned, that is sufficient for the parties, representatives and witnesses to know their identity for the purpose of reading and understanding this determination.

### **The issues for determination**

[52] The following issues arose for investigation and determination from the amended statement of problem and amended statement in reply:

- (i) Did NZNO act justifiably in what it did to investigate the complaints by Ms Neil and Ms West about bullying by co-workers?
- (ii) Did NZNO act justifiably in its response to the request of Ms Neil and Ms West for paid special leave?
- (iii) Did NZNO act justifiably in its decision to dismiss Ms Neil and Ms West on the grounds of incompatibility and in how it reached that decision?
- (iv) If NZNO acted unjustifiably (so Ms Neil and Ms West were thereby unjustifiably disadvantaged or unjustifiably dismissed) what remedies should be awarded to them, considering:
  - (a) Lost wages (subject to their evidence about endeavours to mitigate that loss); and
  - (b) Compensation under s123(1)(c)(i) of the Employment Relations Act 2000?
- (v) If any remedies were granted under s 123 of the Act, should any part of their individual remedies be reduced (under s 124 of the Act) due to actions of Ms Neil and/or Ms West that contributed to the situation giving rise to their grievance?

- (vi) Should NZNO be ordered to pay Ms Neil and Ms West special leave for any period?
- (vii) Does NZNO have any liability to a penalty for a breach of good faith under Schedule 1B of the Act in respect of its dealings with Ms West and/or Ms Neil or for orders under Part 6AA of the Act (flexible working) in respect of their request for special leave?
- (viii) Should either party contribute to the costs of representation of the other party?

### **The test of justification**

[53] As with any personal grievance claim brought under the Act, the obligation rested with the respondent employer to establish that what it did, and how it did so, were what a fair and reasonable employer could have done in all the circumstances of the action or actions that the worker says amounted to her or his unjustifiable dismissal or disadvantage.<sup>7</sup> In applying this statutory test of justification the Authority must consider whether the employer made sufficient inquiries before taking whatever actions have been questioned, what was done to raise concerns with the worker, whether the worker was given a reasonable opportunity to respond to those concerns and whether any explanations given were genuinely considered before the employer acted.<sup>8</sup> If any defects found in that process were more than minor and resulted in the worker being treated unfairly, the Authority may find the employer's actions failed to meet the test of justification.<sup>9</sup>

[54] The obligations of the employer, including the requirement to act fairly and reasonably in what it does and how it does it, include those written or implied by law into their employment agreement with the worker. This includes complying with both the provisions of relevant policies the employer has in place to deal with particular circumstances and with the provisions of relevant statutes. Of particular importance in this context is the good faith duty set by s 4 of the Act.

[55] Ms West, Ms Neil, their office colleagues and NZNO managers were each bound by an express term in the NZNO staff collective agreement mutually committing them to “a positive and constructive working relationship”. This included upholding

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<sup>7</sup> Employment Relations Act 2000, s 103A.

<sup>8</sup> Section 103A(3).

<sup>9</sup> Section 103A(5).

and maintaining values set out in an appendix to that agreement. Values listed in that appendix included providing support to each other, treating others with courtesy, testing their actions by asking “what would members think”, taking responsibility for their actions and decisions and treating each other with respect, sensitivity and fairness.

[56] A complaints policy provided guidance on steps to promote what was called a “common sense resolution of complaints” within NZNO, including steps for the appropriate manager to gather information and seek responses from employees about the complaint.

[57] The collective agreement included an express commitment to providing a healthy workplace. Achieving this was described as requiring, among other things, a workplace culture that balanced “a safe quality work environment and organisational efficiency” and an “appreciation that good outcomes rely on the whole team”.

[58] NZNO’s policy about bullying is published on its website. Ms Alexander accepted in her evidence that this policy applied to considering issues raised by its own staff as NZNO’s employees. The policy gives this definition:

Bullying is a persistent misuse of power, whether formal or informal. It is ongoing offensive, abusive, intimidating, malicious or insulting behaviour. It may make the recipient or target feel upset, threatened, humiliated or vulnerable and undermine self-confidence. It may have a detrimental effect upon a person’s dignity, safety and wellbeing and may cause them to suffer stress. Bullying can be overt or covert, and can be perpetrated by anyone in any position in an organisation.

[59] Sixteen categories of overt or covert bullying are described, including:

- threats, intimidation, stand over tactics and coercion
- verbally abusive or degrading language or gestures
- unjustified criticism and insults, nit-picking and fault-finding without justification
- constant humiliation, ridicule and belittling remarks
- isolating or ignoring someone on a consistent basis
- malicious teasing, practical jokes, gossiping
- excessive criticism on a regular and systematic basis
- malicious freezing out, excluding and/or not speaking to someone.

[60] The policy also describes what is not considered to be harassment or workplace bullying. Examples given include:

- issuing reasonable instructions and expecting them to be carried out
- warning or disciplining someone in line with organisational policy and procedures

- insisting on high standards of performance in terms of quality, safety and team cooperation
- legitimate criticisms about work performance (not expressed in a hostile, harassing manner)
- giving critical feedback, including in a performance appraisal, and requiring justified performance improvement
- assertively expressing opinions that are different from others
- free and frank discussion about issues or concerns in the workplace, without personal insults

### **Relevant legal principles**

[61] Through their decisions on various cases the courts have developed principles that assist in determining whether an employer has acted justifiably in dealing with allegations of bullying and in circumstances where an employer has terminated an employment relationship on the grounds of incompatibility.

#### *Bullying*

[62] In *Emmerson v Northland District Health Board*, referring to an employer's policy on bullying broadly similar to the one used by NZNO, the Employment Court identified the following behaviour as unlikely to cross the threshold of what was defined as bullying: appropriately expressed criticism of work performance, justified discussion of conflict in the workplace and relatively insignificant incidents of miscommunication or misunderstanding. Such interactions might be unwanted or even humiliating in the eyes of an employee, but were not necessarily unwarranted. The issue was one of fact and degree.<sup>10</sup>

[63] In *Emmerson* the Court also referred to the obligation to take reasonable steps to maintain a safe workplace, as set out in health and safety legislation. It noted those obligations were now recognised as a term implied by common law into all employment agreements. It pointed to this explanation given in a Court of Appeal decision on the importance of context in assessing the extent of the employer's obligation to protect against unacceptable employment practices:<sup>11</sup>

An employer does not guarantee to cocoon employees from stress and upset, nor is the employer a guarantor of the safety or health of the employee. Whether workplace stress is unreasonable is a matter of judgment on the facts. It may turn upon the nature of the job being performed as well as the workplace conditions. The employer's obligation will vary according to the particular circumstances. The contractual obligation requires reasonable steps which are proportionate to known and avoidable risks.

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<sup>10</sup> [2019] NZEmpC 34 at [157].

<sup>11</sup> *Attorney-General v Gilbert* [2002] 1 ERNZ 31 (CA) at [92].

[64] On the particular facts of what happened between the key people involved in the *Emmerson* case the Court found the many alleged instances of continuous bullying and intimidation, of a junior colleague by a senior colleague, had occurred in the context of a high-pressure work environment. Some communication between those colleagues was not completely professional but some of what had happened in those interactions were exaggerated by the complainant. The Court said “multifactorial complexities” in such difficult and sometimes challenging “dynamics” had to be evaluated dispassionately and did not, in that case, amount to bullying. In that case the allegations that those interactions had imperilled the plaintiff’s safety were not made out, so the employer had not breached its safety obligations to her.<sup>12</sup>

### *Incompatibility*

[65] The courts have long recognised that, albeit relatively rarely, an employer may appropriately terminate an employment relationship on the grounds of incompatibility, if trust and confidence in that relationship has irreconcilably broken down. Such action can be held to be justified where three broad grounds are satisfied – firstly, the employer has met the onus on it to establish irreconcilable incompatibility existed; secondly, the irreconcilable breakdown must be attributable wholly or substantially to the employee; and, thirdly, the employer must have carried out the dismissal in a procedurally fair manner.<sup>13</sup>

[66] The reference to the responsibility of the employee for the breakdown is because the employer could not be justified in terminating the employment if it was itself substantially responsible for the breakdown.<sup>14</sup> The focus of inquiry for the Authority in such circumstances is not on every individual instance of conflict and every individual procedural step but a more holistic view of the whole relationship to assess whether the employer had established the necessary elements justifying the dismissal to the standard set in s 103A of the Act.<sup>15</sup>

[67] A further and final point of principle relates to the nature of a dismissal for incompatibility compared to one made for serious misconduct. While cases of

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<sup>12</sup> *Emmerson*, above n 10, at [162]-[175].

<sup>13</sup> *Walker v Procare Health* [2012] NZEmpC 90 at [77] and *Mabry v West Auckland Living Skills Homes Trust Board* (2002) 6 NZELC 96,573.

<sup>14</sup> *Reid v New Zealand Fire Service Commission* [1999] 1 ERNZ 104 (CA) at 107.

<sup>15</sup> *Walker*, above n 13, at [82].

incompatibility may include incidents of misconduct alleged or established during the course of the employment, the basis for termination of the employment is not a disciplinary outcome for serious misconduct but is for the different concept of irreconcilable breakdown in trust and confidence.<sup>16</sup> In those circumstances the employment agreement is so fundamentally broken the relationship cannot continue.

### **Investigation of complaints – what was done and was it enough?**

[68] The first major issue for determination was whether NZNO acted justifiably in how it dealt with the complaints of Ms Neil and Ms West of being bullied by co-workers. It concerned the period up to 20 December 2018 when Mr Woltman and Ms Alexander declined to appoint an independent investigator. They said to do so would be “relitigating” concerns already investigated in May and June 2018 by Ms Alexander who had concluded the interactions complained about did not amount to bullying.

[69] The NZNO actions for consideration comprise what was done about the 23 and 24 April incidents, Ms Alexander’s subsequent inquiries resulting in her June report, the arrangements for and conduct of the July 2018 facilitation meeting, how NZNO dealt with Ms West and Ms Neil being absent from work in the following months and, lastly, whether the 20 December response to the 12 December Bullying Complaint letters met the standard set by the statutory test of justification.

#### *An extensive background of difficulty in staff dynamics*

[70] Before evaluating those specific actions, some further background information needed to be considered as part of “all the circumstances” to be taken into account under the statutory test of justification. The evidence and submissions from all parties ended up canvassing the interactions of Ms Neil, Ms West and Mr Mathews with other NZNO staff over many years, as well as their more recent interactions with one another. Attention to such an extensive history was relevant in this case because of the wide scope of the allegations made and what it suggested about patterns of behaviour, to be taken into account as part of a holistic assessment of what happened and what was done about it.

[71] The general tenor of what Ms West and Ms Neil alleged was to the effect that they were recipients of poor behaviour by others that NZNO managers had ignored or

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<sup>16</sup> *Reid*, above n 14, at 107 and *Snowdon v Radio New Zealand* [2014] NZEmpC 45 at [85].

failed to deal adequately with over many years.

[72] Ms Alexander's evidence traversed a quite different perspective on what she called Ms Neil's "turbulent history" in maintaining functioning professional relationships with her NZNO colleagues. Examples she listed included a warning given to Ms Neil in 2009 for yelling at a colleague over who should be doing work referred to Ms Neil and a similar incident later in 2009 about which both Ms Neil and NZNO's regional Lead Organiser at that time had complained to their manager. Ms Neil's account of the latter incident included saying she had spoken firmly in a raised voice and was intimidated when the Lead Organiser had stiffened in her chair, clenched her fists and looked sideways at Ms Neil. Part of NZNO's resolution of that incident included offering paid professional supervision to Ms Neil as a means of providing "personal debrief time and support" in her role as an organiser. Ms Neil did not take up the offer.

[73] In November 2010 Ms Neil was issued a further formal warning for an incident with a colleague in which she was described as breaching NZNO values by communicating in a way that was reactive, emotive and lacking common courtesy. She was again asked to work with an external supervisor of her choice to manage her communication with colleagues.

[74] In March 2013 Ms Alexander investigated complaints over how Ms Neil had communicated with Ms Church and NZNO's regional Lead Organiser in separate incidents. Ms Neil responded by saying she was being bullied by the lead organiser. Ms Alexander wrote to Ms Neil expressing concern about her "personality conflict [with the Lead Organiser] which presents as frequent unacceptable displays of anger ... along with resistance to following legitimate instruction or direction related to communication about your whereabouts or work". Ms Alexander wrote that a review of Ms Neil's personnel file over the eight years of her employment, as it was at that time, showed those issues had been raised repeatedly with her and the behaviour continued to be a problem. After an investigation was carried out on that occasion NZNO's chief executive found Ms Neil had breached NZNO's code of conduct and its values. The eventual outcome, in that instance, included Ms Neil and the lead organiser attending a facilitation in November 2013. They then both signed a "conduct agreement" about how they would work together in the future.

[75] In August 2014 Ms Neil and Ms West, along with Ms Church and Ms Robinson, were part of a group of seven NZNO staff who requested an external investigation of what they described as “unreasonable and unprofessional behaviour” by the Lead Organiser. The resulting investigation, conducted by human resources consultant David Munro, included interviews of 19 NZNO staff.

[76] Mr Munro’s report was issued in February 2015. By that time the Lead Organiser had resigned from the role. Mr Munro criticised both NZNO’s senior managers and its staff in the Tauranga and Hamilton offices. He said the Lead Organiser had an inconsistent management approach and “a significant group of senior organisers” had actively undermined her leadership.

[77] He gave withering descriptions of the behaviour of NZNO’s Hamilton and Tauranga staff, who included the seven complainants. Mr Munro identified the following as “symptoms” of “a leadership crisis”:

- An engrained sense of entitlement amongst staff ... leading to a sense of impregnability by organisers and an attitude that they are not accountable to the organisation.
- Ongoing bad behaviour by staff that has become endemic and habitual. Examples include:
  - ...
  - Staff refusing to be reasonable about vehicle use ...
  - Levels of sick leave that exceed reasonable and justifiable levels. It is hard to accept that all such leave is genuine ... and with some staff reveals a shocking sense of entitlement.

[78] His findings said staff accountability and productivity was “severely sub-optimal” and a change in the regional leadership structure and personnel was needed to deal with it. Mr Munro’s report recommended, among other things, increasing the size of NZNO’s Tauranga office. Adoption of that recommendation included creating a Lead Organiser role based there, a position to which Mr Mathews was appointed later in 2015.

[79] In February 2017 Ms Neil sent Ms Alexander an email raising various concerns about a “lack of leadership and communication” by Mr Mathews. Ms Neil said Mr Mathews favoured one organiser, had arranged a Christmas get together that required too much travel and she had seen him “pulling faces” if he did not like what someone else said. After getting a response from Mr Mathews to those concerns Ms Alexander,

along with another NZNO senior manager, organised a meeting of all Tauranga staff in May 2017 to discuss working relationships in the office. One outcome of that session was a separate facilitated session for Ms Neil and Ms Robinson to improve their communication with one another.

[80] Ms West had a less troubled history with other staff in the Hamilton office. In 2011 Ms West complained she was bullied by an NZNO staff member who yelled at her about a message not including a telephone number. Ms West had thought the staff member already had that number, which was of a family member. She took what she described as extended sick leave following that incident in which she said she was being “targeted”. In 2014 another regional administrator, who worked with Ms West, complained about what she called an aggressive and confrontational outburst from Ms West but later decided not to proceed with that complaint.

[81] In 2016 Mr Woltman issued Ms West with the written warning referred to earlier in this determination. It followed a complaint by Mr Mathews about Ms West’s behaviour in a meeting with a new staff member. Mr Woltman said part of Ms West’s response during his investigation of that complaint was to claim Mr Mathews was a bully. However Mr Woltman said it was clear to him that it was Ms West and not Mr Mathews who had behaved badly on that day.

[82] As the later evidence of both Ms West and Mr Mathews showed, the 2016 incident and its outcome was the catalyst for ongoing deterioration in their working relationship. Mr Mathews subsequently said Ms West frequently ignored him and did not return greetings while Ms West said it was Mr Mathews who did not respond to her greetings or acknowledge her as he came and went from the office.

[83] Two particular instances concerning Mr Mathews’ interactions with others were also canvassed in the extensive evidence on the background to the later incidents in April 2018 involving Ms Neil and Ms West.

[84] Firstly, Ms Neil and Ms West alleged Mr Mathews, before his appointment as NZNO’s lead organiser in Tauranga, had engaged in bullying behaviour towards a nurse while he was working as an associate nurse manager and had not fully disclosed his involvement in subsequent litigation about the dismissal of that nurse.

[85] As referred to earlier in this determination, the Authority's determination on that matter in 2015 firmly concluded Mr Mathews' behaviour in raising concerns about the nurse's time keeping and other conduct were within the appropriate scope of managerial functions he was exercising at the time. Ms Neil, in her role as an organiser, had been involved in the earlier stages of the DHB's investigation of the nurse and was aware it followed a complaint made by Mr Mathews. At the time of Mr Mathew's appointment to the NZNO Lead Organiser role in Tauranga Ms Neil did not raise any concerns that information she had become aware of through that nurse's case made him unsuitable for the role. Also, accepting Ms Alexander's evidence on this point, Mr Mathews had disclosed his involvement in that nurse's case to NZNO managers making decisions about his appointment to his NZNO role in 2015.

[86] Secondly, Ms Neil and Ms West alleged Ms Church's employment by NZNO ended as a result of Mr Mathews bullying her. Ms Church had been on the NZNO panel that interviewed Mr Mathews for the Lead Organiser role in 2015 and said, in her oral evidence, she had supported his appointment. She resigned in March 2017 after signing a settlement agreement with NZNO after discussions about some work matters. The evidence of various witnesses, including directly from Ms Church, provided some firmly expressed opinions but very little by way of substantiation for what they said were the reasons for Ms Church ending her employment with NZNO. This was not sufficient to either confirm or negate the allegations Ms Neil and Ms West made that this was caused by Mr Mathews' behaviour rather than concerns about Ms Church's work.

#### *The 23 April incident*

[87] At a meeting of the four Tauranga organising staff on 23 April 2018 Ms Neil told Mr Mathews, Ms Robinson and Ms Ridgway that they had not provided her with any support in organising recent rallies held as part of NZNO's collective bargaining campaign for its members working for District Health Boards. In the ensuing discussion Ms Neil considered the other organisers made excuses while they described her as having yelled at them and interrupting when they tried to speak. Ms Neil said Mr Mathews had flung his arms up in the air and ended the meeting. Mr Mathews said Ms Neil had described Ms Ridgway as "always being horrible" to her and he had interrupted Ms Neil to say "that is enough".

[88] Soon after the meeting Ms Neil and Mr Mathews each separately telephoned Ms Alexander. She asked them to send her written accounts on what had happened. On 22 May a representative acting for Ms Robinson, Ms Ridgway and Mr Mathews lodged a formal complaint with NZNO about Ms Neil's conduct on 23 April.

*The 24 April incident*

[89] On 24 April Mr Mathews spoke to Ms West as he was leaving the office in the afternoon. Ms West was standing at the office photocopier and had her back to Mr Mathews when he first spoke. Both gave quite different accounts of what then occurred.

[90] Mr Mathews said he told Ms West he was leaving for the day and asked her to set the office alarm when she left. He said she had turned and said: "What, are you talking to me? I didn't hear my name. You want to talk to me, come here". He described Ms West as gesturing with her hands in a 'bring it on' stance and using an aggressive tone. He said he repeated his request and, when Ms West did not respond, asked if she had heard what he said and she replied "yes".

[91] Ms West's account was that she was busy photocopying and had thought Mr Mathews was talking to someone else. When she turned to look at him, she asked "were you talking to me" and he replied "who the hell do you think I was talking to". She said she had not heard him and asked him to come closer. She said Mr Mathews responded, in a raised voice, that he was sick of her attitude.

[92] Ms Ridgway was in her office nearby and overheard what was said. In a note she said she wrote that day Ms Ridgway recorded the exchange as follows:

Mr Mathews: I am going out and I won't be coming back Tina, could you please lock up?

Ms West: Are you talking to me, you didn't say my name, how would I know if you were talking to me. Come and talk to me if you want to talk. You were looking at the door.

Mr Mathews: Please stop with the attitude. I was looking at you directly but you were looking at the photocopier. I said I am going now Tina and won't be back. Tina could you lock up please?

Ms West: [no response]

Mr Mathews: Well, can you?

Ms West [no response]

[93] Soon after that exchange Ms West telephoned Mr Woltman in Wellington. According to handwritten notes Mr Woltman said he made during the telephone call Ms West told him Mr Mathews had said: “I’m sick of your attitude, who do you think you are talking to”. She said she spoke to him pleasantly but he yelled at her and “went off in a rage”.

[94] Mr Woltman’s notes record that Ms West also used the phrase “got him” when she described Mr Mathews’ actions. Ms West, in her oral evidence, denied using that phrase but Mr Woltman, in his oral evidence, insisted his note was correct. He said he had the impression Ms West meant she now had the basis for a complaint about Mr Mathews. Mr Woltman said, at the time, he thought this was a *quid pro quo* for Mr Mathews’ 2016 complaint about her behaviour that had resulted in Mr Woltman issuing Ms West with a written warning.

[95] During this telephone call Ms West also said Mr Mathews did not respond to morning greetings from her and “sat on his butt” in the office. She said there were “only two of us” in the Tauranga office who worked hard.

[96] Before he received Ms West’s telephone call that day Mr Woltman had also seen an email she sent her supervisor Ms Simpson in Auckland earlier that day. Ms West sent that email before her exchange with Mr Mathews. Ms West’s email had the subject heading: “DRAFT – Toxic Work Environment”. It said she felt vulnerable if left in the office by herself with Mr Mathews and said her health was under threat because of a toxic environment he had created in the Tauranga office. She asked for “formal written advice” from Ms Simpson about how she should protect herself in any potentially confrontational situation. Ms Simpson spoke by telephone to Ms West after getting her email and suggested she talk to Mr Woltman about it. Ms Simpson also contacted Mr Woltman about the email and forwarded it to him.

[97] That evening Mr Mathews sent Ms Alexander a file note setting out his account of his exchange with Ms West.

[98] Three days later he also wrote a formal letter of complaint to Mr Woltman. He wrote about difficulties in his working relationship with Ms West since she got a formal written warning for the 2016 incident. Mr Mathews wrote that he had tried to raise

those concerns with Ms Simpson but felt she did not want to deal with them. He gave his account of what happened on 24 April and said he had “now had enough of Tina West’s infantile and passive aggressive behaviour”. He said Ms West had contributed to “an uncomfortable and toxic situation” for him “and several other members of my team”.

[99] Attached to Mr Mathews’ written complaint were 11 pages of diary notes he described as documenting Ms West’s behaviour in the period 11 June 2017 through to 24 April 2018. He listed more than 100 instances where he said Ms West had not acknowledged greetings from him when coming or going from the office along with other examples of what he considered was unsatisfactory communication from her.

#### *May inquiries and June report*

[100] Ms West was on leave for several weeks from 25 April. After her return in mid-May Mr Woltman sent her Mr Mathews’ 27 April complaint for her response. Soon after Mr Woltman himself left for a period of leave. Ms Alexander then undertook the task of inquiring into both Mr Mathews’ complaint about Ms West and the 22 May complaint about Ms Neil from Ms Robinson, Ms Ridgway and Mr Mathews.

[101] While her inquiries were underway Ms Alexander put in place some alternative arrangements for work in the Tauranga office. Ms Simpson and Mr Woltman both spent two weeks each working there rather than their usual base offices of Auckland and Wellington respectively. One-on-one work meetings between Ms Neil and Mr Mathews were also suspended.

[102] Ms Neil and Ms West alleged Ms Alexander failed to adequately investigate the situation at the time, including the two specific incidents on 23 and 24 April, and to fairly canvas their responses. That allegation is at odds with the evidence.

[103] Ms West’s own notes of what happened around that period record contact from Ms Alexander about responding to Mr Mathews’ complaint and offering her some additional special leave. And as Mr Halse’s letter of 12 December 2018 noted Ms West had been advised of the complaint, given the opportunity to respond and “wrote a lengthy and comprehensive response”. Her response was dated 30 May 2018. It included a letter describing Mr Mathews as “a narcissistic bully with sociopathic tendencies” and “an overgrown immature bully”. She said his behaviour had affected

her psychological health, requiring medication and contributing to her high use of sick days. She attached more than 20 pages of her own diary notes in response to Mr Mathews' notes for the period from 11 July 2017 to 24 April 2018. A further eight pages set out further instances from April 2016 to 24 May 2018 criticising Mr Mathew's behaviour and communication with her. It described Mr Mathews as influencing Ms Ridgway to be part of a "triangulation" to join in "targeting" Ms West. In a further seven pages Ms West set out her concerns about the tone of voice and body language of Ms Robinson and Ms Ridgway in their interactions with her and criticised their work ethic and time they spent out of the office at cafes. She also sent Ms Alexander further emails detailing concerns she had about more recent day-to-day interactions with Ms Robinson and Ms Ridgway.

[104] Ms Neil also provided a detailed written response to the complaint of Ms Robinson, Ms Ridgway and Mr Mathews about her behaviour. She described the complaint as an example of bullying of her and other colleagues under Mr Mathews' leadership, saying he had colluded with Ms Robinson and Ms Ridgway to write a fabricated and fanciful complaint. She said Mr Mathews had reacted to her asking how workloads could be shared in the future. She also criticised the complainants' work ethic, referring to discussions about going to town for coffee for long periods and taking time off.

[105] In addition to considering their written responses Ms Alexander also spoke by telephone to Ms Neil and Ms West as part of her inquiries. Her evidence adequately established that she had sufficiently investigated the concerns raised by all five employees and genuinely considered their responses before reaching conclusions on what to do. No unjustified disadvantage arose from what she did and how she did it.

[106] The overall fairness of the consideration she gave was apparent from the robust report she wrote as the outcome of her inquiry. As she said in her evidence she did not side with either party over the complaints made. Her report made trenchant observations about all participants. She described a lack of respect and trust between the employees involved and a culture of complaint and counter complaint and the absence of appropriate communication.

[107] Ms Alexander expressly criticised Mr Mathews for contributing to that culture. She was unimpressed by the extent of written detail Mr Mathews and Ms West both

gave about their daily interactions over a long period, finding that both had contributed to the communication issues.

[108] Ms Alexander also concluded that the complaints about and from Ms Neil were part of a history of similar behaviour from all involved. She said there was no trust and respect between all five people involved and “no ability to self-manage the behaviour in an adult way”.

[109] She decided disciplinary action against any or all of the employees involved would not resolve the situation. She proposed a two-phased facilitation process and, as noted earlier in this determination, set out the options as being for those NZNO staff to “behave as adults” or “find somewhere else to work”.

[110] In all the circumstances, based on the evidence about the information available to Ms Alexander at the time, those conclusions were within the range of what a fair and reasonable employer could have done and decided.

#### *The July facilitation*

[111] All five employees agreed to Ms Alexander’s proposal for a facilitation although Ms Robinson, Ms Ridgway and Mr Mathews were more reluctant and she had to press them to do so.

[112] She arranged for Ms Papp to first interview each of the five separately and then organise a joint session.

[113] The closing submissions for Ms Neil and Ms West suggested the facilitation was “flawed and biased” from its outset because Ms Papp was a “close social friend” of Mr Woltman and his wife. Such a description did not accurately reflect the evidence. Ms Papp had met Mr Woltman some ten years earlier when she did some work for his employer at that time. She had also later done some organisational consultancy work for his wife’s employer, a health standards body. Because he had heard about that latter work, through his wife, Mr Woltman had suggested to Ms Alexander that Ms Papp might be a suitable person to conduct the planned facilitation process. His connection was not sufficiently close to make Ms Papp’s subsequent engagement as the facilitator improper or to support a conclusion she had failed to carry out her work impartially.

[114] In fact, after her initial one-on-one interviews with all five employees on 16 July 2018, Ms Papp expressed considerable doubt about the utility of attempting a group facilitation session at all. She told Ms Alexander that, for the first time in 25 years of working with teams with similar degrees of difficulty, she was not confident she could facilitate any sustained or significant improvement. She asked whether it was worth the expense of going ahead with a joint meeting.

[115] The gloomy prognosis Ms Papp gave at that time raised the question of whether Ms Alexander acted reasonably, on NZNO's behalf, in making arrangements for the group facilitation to go ahead anyway. Pressed on that point during the Authority investigation meeting, Ms Alexander said she still hoped it would work and felt she had simply run out of other options. The background already canvassed showed measures such as individual communication courses, access to professional supervision, in-office team meetings and disciplinary action had not resolved the long-standing problems. In that context, Ms Alexander's decision to continue with the two-phased process she had set up was within the range of responses open to a fair and reasonable employer in those circumstances at the time.

[116] The evidence did not support another allegation Ms Neil and Ms West made about what Ms Alexander said about arrangements for the two-day facilitation. They said she told them that if the event was not successful, "two people would have to go". Given the two-three split between the office staff, they said the reference to two people could only mean them. Ms Alexander, compellingly, denied she made that comment. As Ms Alexander said in her written statement Ms West and Ms Neil were being co-operative about making arrangements for the facilitation and it was Mr Mathews, Ms Ridgway and Ms Robinson who were being difficult. At that time she had no cause to be more critical of Ms Neil and Ms West than the other three employees. Such a comment would also have been inconsistent with the even-handed criticism of the office dynamics she had expressed in her June report.

[117] However Ms Alexander admitted she had said there would have to be decisions about who would stay and who would not stay if they could not resolve the situation and the group of people could not work together. It was an observation regarding the organisational reality for NZNO, not favouring one or other of the office 'factions'. In the full context of what had happened to that point, that particular comment was not unreasonable.

[118] Ms West and Ms Neil also criticised the conduct of the facilitation itself, suggesting Ms Papp had been briefed with only negative information about them and favoured the perspective and concerns of the other participants over them. By contrast the evidence of Ms Ridgway and Mr Mathews was that they felt Ms Papp had pressed and challenged them about their own roles in the situation and had been unduly tolerant of the views and concerns of Ms West and Ms Neil. Given those conflicting accounts about the very same event, which the evidence overall showed was typical of the two groups, it was more likely Ms Papp had acted impartially and neutrally in seeking agreement on ways they could positively improve how they worked together. This evidence, however, also supported Ms Papp's prior pessimism about the intractable nature of the conflict and its participants, despite her best efforts to seek change in it.

[119] Two further criticisms of the facilitation process also had to be addressed.

[120] Firstly, the plans made for the facilitation included Ms Alexander and Mr Woltman attending its second day. They did not. Ms Alexander was unable to do so because she was part of the NZNO team involved in bargaining of its largest national collective agreement, which were at a sensitive point that week. She and Mr Woltman spoke by telephone to the group at the end of the first day and they agreed that the second day should continue without them. In the circumstances it was not unreasonable that Ms Alexander prioritised the national interest of thousands of NZNO members over an earlier commitment over an internal staff matter involving five employees.

[121] Secondly, arrangements were made at the end of the two day facilitation for an office meeting early the following week to talk about how agreed outcomes would be implemented. That meeting did not occur. This was not the fault of NZNO's managers. In that week Ms West returned to work briefly but then began a further period of sick leave, Ms Neil took time off in lieu. Mr Mathews was absent on pre-planned annual leave. Ms Robinson was injured during the weekend in a horse riding accident and did not return to work at all for five months.

#### *The extended absences of Ms West and Ms Neil*

[122] NZNO had granted Ms West special leave in early July, in the period after Ms Alexander's June report was issued and until the late July facilitation was held. The sick leave she took after the facilitation ran until she exhausted that entitlement on 16

November 2018. NZNO then confirmed she could stay on leave by using her annual leave entitlement, which ran through until mid-January 2019. Her advocate then sought further special leave.

[123] While on planned annual leave during September 2018 Ms Neil got a medical certificate advising she was unfit for work. She remained away from work on leave thereafter. Her sick leave entitlement ran out in late November 2018. She was then advised she could use annual leave or take unpaid leave if she remained away from work after then.

[124] NZNO complied with its contractual and statutory obligations to provide leave during that period. It did not press either Ms Neil or Ms West to come back to work before they were ready to do so. It did ask Ms West in August and September for information in support of her extended sick leave. There was nothing unfair or unreasonable about how NZNO acted in that respect.

*“Formal Bullying Complaint” – 12 December 2018*

[125] Ms West and Ms Neil failed to establish NZNO had acted unjustifiably in how it responded to their formal written bullying complaint submitted on 12 December 2018. Rather, as NZNO more persuasively submitted, the 12 December complaints identified no new events or fresh information that warranted further investigation and inquiry. The most recent events Ms West and Ms Neil complained about in that letter had occurred in April 2018. Those events had been investigated in May and June 2018, with the July facilitation as an outcome attempting to address the problems identified.

[126] Contrary to the closing submissions made for Ms West and Ms Neil there is no obligation on an employer to have complaints of the type they had made investigated by an external investigator. Such an investigation may be appropriate or necessary in some circumstances, but not all. In some cases there may be no-one internally who can fairly conduct the investigation. In other cases there will be. Whoever the investigator is, or wherever they are from, the question to be asked of the employer, under the test of justification, is whether the inquiries actually carried out met the requirements of fairness.

[127] For reasons already given, NZNO had established its earlier inquiry met the statutory standard, including the steps required under s 103A(3), in what it did to deal

with the April complaints. This included considering the allegations or counter-complaints that Ms West and Ms Neil had made in their responses to the complaints of their colleagues.

[128] Ms Neil and Ms West submitted that their 12 December bullying complaint comprised new complaints made by different parties, that is by them rather than their colleagues, so required fresh investigation. The reality was that the events they complained about were the same events already investigated by Ms Alexander six months earlier and in which she concluded no bullying had occurred. This determination has already found that she reached fair conclusions in that investigation and reasonably took further action to try to resolve the underlying issues that gave rise to the complaints, by arranging for the July facilitation. The ultimate failure of that later facilitation process to have made any real difference did not warrant a new inquiry into the earlier events.

#### **Did NZNO act reasonably and fairly in declining special leave?**

[129] On 10 December 2018 Ms Neil, through her advocate, sought special leave until her workplace was “safe to return to”. NZNO declined the request. At the time Ms Neil’s sick leave was exhausted but she still had an annual leave balance of 22 days. NZNO approved Ms Neil using annual leave instead.

[130] In their statements of problem, lodged on 15 January 2019, Ms Neil and Ms West sought an order requiring NZNO to pay them for “the time they had taken off work due to the unsafe working conditions until such time that the workplace is deemed safe to return to”. It was, in effect, a request to be paid special leave for all the time they had been off work, using sick and annual leave and for any unpaid periods after that. NZNO did not accept such special leave was appropriate or reasonable.

[131] As NZNO submitted, it was not obliged to provide special leave to them in those circumstances. Its staff collective agreement included a discretionary provision for special leave which said NZNO’s Chief Executive “may” grant special leave. This could be granted on pay or without pay “or on such other conditions as the employee and employer may determine”.

[132] Accepting special leave under that provision was available only at the employer’s discretion, not as a contractual or statutory right, decisions made in exercise

of that discretion had to reasonably consider any requests made and not decline such requests for unfair reasons. The questions for answer in relation to the claims of Ms Neil and Ms West about special leave were: firstly, was the discretion reasonably exercised and, secondly, was it fairly exercised? The second question includes the alleged disparity of treatment, that is whether others had been granted special leave in circumstances that should have applied also to Ms West and Ms Neil.

[133] NZNO acted reasonably in declining Ms Neil's request on 10 December 2018 for special leave. On Ms Alexander's evidence, which is accepted, it was NZNO's usual practice to have employees use up their sick and annual leave entitlements before granting special leave. Ms Neil was not unjustifiably disadvantaged by that decision.

[134] Neither had NZNO acted unreasonably in not accepting the claim of Ms West and Ms Neil for paid special leave for the entire period they were each off work up until their dismissal.

[135] On 21 December 2018 Ms Neil and Ms West said they would return to work from 14 January if NZNO gave them certain undertakings about what would happen in the workplace. Although, through their advocate, they were said to be well enough to do so, the conditions they set for returning were entirely subjective. They relied wholly on their own view of what had happened and what would be acceptable in future. It was not unreasonable for NZNO to decline pay special leave on what, in those circumstances, would have been an open-ended basis entirely dependent on the views of Ms West and Ms Neil.

[136] Two points of comparison arose in assessing the second question regarding the fairness of the approach NZNO took on this issue of special leave.

[137] Firstly, Ms West had been paid special leave for some time in July 2018. This occurred after Ms Alexander had issued her June report and while arrangements were being made for the late July facilitation. Ms West's role required her to work in the office with organisers, rather than from home. NZNO decided, in those circumstances and for that limited period, it was reasonable to allow her to remain out of the workplace until the facilitation process was over. The situation by January 2019 was different. NZNO had completed its attempts at resolution between staff and the request of Ms West and Ms Neil for special leave was effectively open-ended, without an objectively identifiable end point.

[138] Secondly, Ms Neil and Ms West submitted there had been other NZNO staff given long periods of special leave so there was a disparity of treatment. Their evidence did not reliably establish any situations where other employees were granted special leave on what were, essentially, substantially the same or similar circumstances as theirs.

**Did NZNO act justifiably in its decision to dismiss Ms Neil and Ms West?**

[139] To be found justified, NZNO's decision to dismiss Ms Neil and Ms West on the grounds of incompatibility had to meet the three broad grounds identified in case law concerning onus, attribution and fairness.<sup>17</sup>

*Did NZNO meet its onus to show the incompatibility was irreconcilable?*

[140] Answering the question on onus required a holistic assessment of the employment relationship, and particularly the state of deterioration reached by the period from December 2018 through to the dismissal decision was made in February 2019, rather than by microscopic analysis of every individual instance of conflict Ms West and Ms Neil had with their colleagues and of every aspect of their manager's dealing with them about their complaints and their situation.

[141] For the following reasons, based on a holistic assessment of all the evidence and the parties' submissions, NZNO had met the onus of showing its employment relationship with Ms West and Ms Neil was so broken that it had become incompatible.

[142] Firstly, NZNO had reasonably concluded that the views Ms Neil and Ms West held regarding instances in which they said they were bullied by the other employees were disproportionate and held with such ongoing intensity there was no realistic prospect they could return to working productively in the office.

[143] The situation was similar to that analysed by the Employment Court in the *Emmerson* case. While some interactions between colleagues from what they called the two "factions" in NZNO's Tauranga office were not completely professional, some of what happened was exaggerated. This created an unsatisfactory office environment but Ms West and Ms Neil were active participants in those dynamics, not merely passive recipients. As they submitted, Ms West and Ms Neil could not be "condemned"

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<sup>17</sup> *Walker*, above n 13, at [77].

for occasional disputes with their colleagues, which was “a natural part of working life, particularly in a high stress environment like a union ... and often involve strong personalities having robust discussions”. However that description applied in equal measure to at least some of the interactions about which they complained. Their selective view of what was acceptable was not compatible with mending fractured working relationships.

[144] Secondly, NZNO had not reached its conclusion on incompatibility lightly or quickly.

[145] The extensive history canvassed in the evidence showed NZNO had, over a number of years, tried many different measures to address the workplace conflicts in which Ms Neil and Ms West had been involved at various times. These included counselling, professional supervision, communications courses and participation in various staff meetings held to try to improve working relationships.

[146] Ms Neil and Ms West had been involved throughout those many endeavours to address the poor state of working relations among staff in two NZNO offices. It was a state of affairs that shocked external observers, as shown in the comments of Mr Munro as far back as 2015 and in the concerns expressed by Ms Papp as late as August 2018. Ms Papp’s written report on the July 2018 facilitation said the intensity of feelings in the office team were unprecedented in her professional experience. Her conclusions expressed the view that the individual differences in perceptions of the situation were large enough to suggest incompatibility. Those views are consistent with the evidence considered and conclusions reached throughout this determination.

[147] Thirdly, and more particularly, NZNO again tried and failed in the period from late December 2018 to February 2019 to engage with Ms West and Ms Neil about the basis on which they could safely return to work. This was difficult given the inconsistent negotiating position Ms West and Ms Neil took from 20 December onwards. Having reported for some months, and as recently as 12 December, that they were too unwell to work, and providing medical reports in support of that description, they then declared they were well enough to work on certain conditions. They provided no medical reports in support of that changed position but declined to meet with NZNO managers to talk about how such arrangements might work. The reason for that refusal, given by their advocate, that they were protecting their health and safety, was not

rational. They were supposedly well enough to work and were not being asked to meet with the colleagues with whom they had deep seated difficulties. It was part of a situation where NZNO reasonably concluded that a productive ongoing employment relationship, with its organisation generally and those colleagues specifically, could not be restored. Rather it was so broken down, it had become incompatible with its needs and interests as their employer.

*Was the breakdown wholly or substantially attributable to Ms West and Ms Neil?*

[148] In their closing submissions Ms West and Ms Neil said the incompatibility NZNO had referred to in terminating their employment was “largely due to the fault of NZNO who, for years, were aware of the dysfunction within NZNO offices and who failed to deal with and prevent this”. The point of their submission was to suggest that the breakdown of the employment relationship was not substantially attributable to Ms West and Ms Neil.

[149] However, in assessing the circumstances of this case, this question does not concern simply who was mostly responsible, if that could ever be discerned, for the fractious office culture itself. It is not an attribution of fault in that sense. If it were solely that, all five employees would bear some degree of that fault but, as noted earlier in this determination, firm findings of fact could not reasonably be reached about their competing accounts of many workplace interactions. NZNO itself took such an even-handed position in Ms Alexander’s June report on the April complaints, criticising Mr Mathews for contributing to a culture of complaint in the office as well as criticising Ms West, Ms Neil and the other two employees for “no ability to self-manage the behaviour in an adult way”. What had been established was an ongoing and unsatisfactory pattern of discord between them which was disruptive of the respectful and productive working relationships that NZNO needed between its employees to help carry out the union’s role in serving its members.

[150] Rather than finding fault for the overall situation, the focus of this question concerns whether the position Ms West and Ms Neil took had become so entrenched and intractable that there was no realistic prospect they could any longer satisfactorily perform their roles, thereby being incompatible with the requirements of the employment relationship. The answer is yes and it was that position which made the breakdown substantially attributable to Ms West and Ms Neil. They sought to return to work but refused to engage with their NZNO managers about how that might be

achieved. Having declared Mr Mathews was a sociopath, as Ms West did, and deriding their other colleagues as his ‘sycophants’, as their advocate did on their behalf, there was no reasonable chance they could return to the Tauranga office and reliably work with the other three.

[151] This situation was reinforced by the stance that the advocate for Ms West and Ms Neil took in correspondence with NZNO representatives and through public forums, specifically his Facebook postings that referred to their employment issues, to their colleagues and to NZNO. This involved both the negative comments he made about the organisation and the refusal to attend meetings to discuss the basis on which they might return to work.

[152] Their closing submissions said Ms West and Ms Neil were not responsible for the actions of their advocate. They said they had followed his advice when he encouraged them “to stay away from work to prevent further harm”. In their evidence to the Authority investigation Ms West and Ms Neil confirmed they were aware at the time of postings Mr Halse made criticising NZNO and did not resile from their support of what those postings said.

[153] Ms West and Ms Neil had both formally authorised Mr Halse to act on their behalf. If the dismissal for incompatibility had relied solely on what he had said and done, the grounds would probably not be sufficient. However NZNO was required to take account of what he said as representing their views and was, equally, entitled to act on it as being their views. What he said and did on their behalf weighed as an element supporting the conclusion that the breakdown in the relationship was substantially attributable to Ms Neil and Ms West, rather than to NZNO.

*Was the decision made and carried out through a fair process?*

[154] There was no real contest on the fairness of the formal process that NZNO followed in advising Ms Neil and Ms West of the prospect that their employment could end on the grounds of incompatibility. Rather, their case was that the substantive basis for considering the proposition of incompatibility, at least in respect of them, was fundamentally flawed. For the reasons already given in this determination, NZNO was entitled to raise that question and seek the input of Ms Neil and Ms West in answering it. The position they took on who was responsible for the issues involved, and the approach that their advocate took in advancing that stance, including by open

disparagement of their employer, did not advance their cause in any fruitful way but that was not due to any failure by NZNO in the fairness of the process it followed.

[155] As noted earlier in this determination a dismissal for incompatibility is not a disciplinary outcome for serious misconduct but relies on a different concept involving irreconcilable breakdown in trust and confidence. Before taking such action an employer is bound to meet the standards set in s 103A(3) of the Act for a fair process of considering and making such a decision.

[156] The evidence of Ms Alexander and Mr Woltman established they did so. Their concerns regarding the deterioration of the employment relationship were sufficiently investigated, Ms West and Ms Neil were advised of those concerns, with a real opportunity given to address them. What explanation was given in response, through their advocate, was genuinely considered.

#### **No penalty for breach of good faith and no orders on flexible working**

[157] Two other elements of the claims set out in the amended statements of problem lodged for Ms West and Ms Neil also had to be addressed. Both involved misconceived claims in relation to statutory provisions. Both claims were in their original statements of problem. In a case management conference held before their advocate lodged amended statements of problem, some guidance was given about the apparent difficulty in respect of these two claims.<sup>18</sup> No changes to those misconceived claims was made in the amended statements of problem subsequently lodged.

[158] Ms West and Ms Neil sought a finding that NZNO breached Schedule 1B of the Act by failing to meet good faith obligations owed to them and for penalties to be awarded to them for the alleged breaches of that Schedule's provisions. Schedule 1B is the Code of good faith for the public health sector. It applies to defined parties to an employment relationship in that sector. This definition includes unions but does so in the context of a union's relationship, as an organisation, with the district health boards and the Blood Service, with employees of DHBs and the Blood Service and with other unions. This does not include the employment relationship of a union, as an employer, with its own employees. Those latter employment relationships are governed by good faith obligations under s 4 of the Act but the amended statements of problems lodged

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<sup>18</sup> Minute of the Authority issued 14 February 2019 at [10].

for Ms Neil and Ms West, specifying their formal claims, sought findings and penalties under Schedule 1B. Those claims are dismissed.

[159] Ms West and Ms Neil also sought a finding that NZNO had failed to meet obligations due to them under s 69AAE(1) of the Act. This part of the Act provides employees with a right to request variation to their working arrangements. The reference to it in the claims lodged by Ms West and Ms Neil appeared to relate to their request to be paid special leave rather than using sick leave and annual leave entitlements for the periods they were away from work after they had raised personal grievances and provided their formal bullying complaints. This request was not within the scope of the Act's provisions on flexible working. The Act defines the relevant "working arrangements" as being to do with the hours of work, days of work and place of work, such as at home or at an office.<sup>19</sup> The request of Ms Neil and Ms West made for special leave payments was not within the scope of that definition. They were seeking payments for not working rather than variations in the arrangements for working. Those claims are dismissed.

### **Outcome**

[160] The applications of Ms Neil and Ms West to the Authority are declined. They do not have personal grievances for unjustified disadvantage and unjustified dismissal.

### **Costs**

[161] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so, NZNO may lodge and serve a memorandum on costs within 28 days of the date of this determination. Ms Neil and Ms West may then lodge and serve a reply memorandum by no later than 14 days. No application for costs will be considered outside that timeframe unless prior leave to do so has been sought and granted.

[162] If an Authority determination of costs is required, this would consider those related to the application for a compliance order granted on 25 February 2019 and the application for removal to the Employment Court declined on 20 March 2019 as well as costs for the four-day long investigation meeting that has resulted in the present determination.<sup>20</sup>

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<sup>19</sup> Employment Relations Act 2000, s 69AAA definition of "working arrangements".

<sup>20</sup> *Neil*, above n 5 and *Neil & West v New Zealand Nurses Organisation* [2019] NZERA 160.

[163] Subject to any submissions made, the parties could expect the Authority to set the appropriate level of contribution to the costs of representation by applying its usual daily tariff, adjusted up or down for any relevant principles or factors that might apply.<sup>21</sup>

Robin Arthur  
Member of the Employment Relations Authority

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<sup>21</sup> *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].