IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2022] NZERA 684
3154743
3145901

	BETWEEN	DENISE HENIGAN Applicant
	AND	WAKA KOTAHI NEW ZEALAND TRANSPORT AGENCY Respondent

Member of Authority:	Sarah Blick
Representatives:	Denise Henigan, in person Ruvin Pattiaratchi, counsel for the respondent
Investigation Meeting:	13 September 2022 at Auckland
Submissions received:	13 September 2022 and 3 October 2022 from the Applicant 27 September 2022 from the Respondent
Determination:	20 December 2022

DETERMINATION OF THE AUTHORITY

What is the employment relationship problem?

[1] The applicant Denise Henigan works for the respondent Waka Kotahi New Zealand Transport Agency (WK). Ms Henigan says she has been unjustifiably disadvantaged by a "not performing" rating given to her in a 2019 annual performance review by her managers. Although WK overturned the rating to "successful" a few weeks later because its performance review had not been followed, Ms Henigan says the action contributed to a breakdown in her relationships with her managers, resulted in her moving to another team, and left her stressed and feeling undervalued.

[2] Ms Henigan initially sought an apology from her managers and/or an acknowledgement by them to others in WK leadership positions that the rating was unjustified. An apology was given to her approximately a year later, following a formal investigation into various allegations Ms Henigan made in relation to her managers. No acknowledgement has been given to other WK leaders about the rating being unjustified.

[3] Ms Henigan later sought monetary compensation which WK declined to pay because the parties intended to stay in the employment relationship. She says WK's refusal to pay any compensation to her constitutes a breach of good faith and an implied duty to act fairly and reasonably under her employment agreement. She says WK's refusal of compensation is unlawful and she seeks penalties for the alleged breaches.

[4] The parties were unable to resolve Ms Henigan's personal grievance about the "not performing" rating, and Ms Henigan now asks the Authority for an award of compensation for loss of dignity and injury to feelings in relation to her alleged unjustified disadvantage grievance.

[5] WK says Ms Henigan's personal grievance about the "not performing" performance rating was not raised within 90 days. In the alternative, it says she has not been unjustifiably disadvantaged by WK's actions.

[6] WK says it is not for the Authority to determine whether its practice of not paying compensation to employees intending to stay in an ongoing relationship is lawful or not.

[7] WK further says Ms Henigan's claims for penalties have been brought outside the relevant statutory timeframes. In the alternative it denies it has breached the duty of good faith or treated Ms Henigan unfairly and unreasonably and as such no penalties should be imposed on it.

What has the Authority's process been?

[8] Ms Henigan lodged two statements of problem with the Authority for largely the same employment relationship problem. The matters were heard together.

[9] Ms Henigan filed a witness statement and WK filed witness statements for its General Manager Transport Services, Brett Gliddon and Group General Manager People Culture and Safety, Christina Lokum.

[10] At the investigation meeting the witnesses answered questions under affirmation from the Authority, Ms Henigan and counsel for WK.

[11] Following oral evidence, Ms Henigan handed up written submissions. In addition to her claim of unjustified disadvantage, in her submissions Ms Henigan sought the penalties for breaches of good faith and of her employment agreement. These aspects of her claim were not included in the statements of problem lodged. Given WK did not have notice of those claims, I gave it the opportunity to address the penalty claims in writing. After the investigation meeting WK filed written submissions and Ms Henigan responded to those. I thank both parties for their helpful submissions.

[12] As permitted by s 174E of the Employment Relations Act 2000 (the Act), this determination does not record all the evidence and submissions received and fully considered during my investigation, but states findings of fact and law, expresses conclusions on issues necessary to dispose of the matters, and specifies orders made as a result.

What are the issues?

[13] The following are the issues for investigation and determination:

a. Did Ms Henigan raise her personal grievance within 90 days?
b. If so, was Ms Henigan unjustifiably disadvantaged in her employment?
c. If so, should compensation be awarded and are there any issues of contribution?
d. Have Ms Henigan's claims for penalties been brought within time and if so, should penalties be imposed?
e. Should either party contribute to the costs of representation of the other party?

What happened?

Parties

[14] WK has responsibility for the land transport system in Aotearoa New Zealand. Ms Henigan has been employed by WK and its predecessor since 29 September 2008. By 2019 Ms Henigan was employed as a Principal Investment Advisor in the Strategy Policy and Planning Team (SPP) of Transport Services. She reported directly to a practice manager (manager) who in turn reported to a senior manager (senior manager).

2018/2019 performance review

[15] WK's end of year performance review and remuneration process involved people leaders meeting to discuss the proposed performance ratings of people in their teams. The purpose of the meetings was for moderation purposes to achieve consistency around how leaders applied performance ratings. Ms Henigan's managers attended such a meeting in around July 2019. It is not clear what other people leaders were present or to what extent Ms Henigan's performance rating was discussed.

[16] Ms Locum gave evidence that after the moderation meeting the names of staff members and their ratings would then be provided to the relevant general manager in a type of spreadsheet for approval and sign off. Mr Gliddon was responsible for approval and sign off of Ms Henigan's 2018/2019 performance rating.

Ms Henigan's performance review meeting

[17] During a meeting on 25 September 2019 Ms Henigan's managers told her she had received a "not performing" rating for her 2018/2019 performance and remuneration review. It is common ground that the manager did not have any previous Performance and Development Plan ('PDP') discussions with Ms Henigan. The rating was unexpected for this reason.

Rating review

[18] Ms Henigan did not agree with the rating and a few days later asked her manager for a review. Mr Gliddon was responsible for the review of performance ratings within Transport Services. He reviewed the rating and concluded it was not supported or justified due to the managers' failure to follow and apply annual Performance and Development Plan ('PDP') and remuneration processes. He says had there been

concerns about Ms Henigan's performance, they should have been raised with her throughout the performance year and a plan should have been in place to improve her performance. Instead, the "not performing" rating was given without any forewarning to her. Mr Gliddon says the failure to follow this process concerned him and he found the "not performing" rating unjustified on that basis.

[19] Mr Gliddon says given the obvious process issues, he did not make his own assessment of Ms Henigan's performance. He therefore adjusted Ms Henigan's rating to "successful" with Ms Lokum's approval. On 18 October 2019 Mr Gliddon wrote to Ms Henigan by letter confirming his findings, advising the "not performing" rating had been changed to "successful" and she would be given a remuneration increase of 3.5% backdated to 1 July 2019. The letter thanked Ms Henigan for bringing the matter to WK's attention and for her patience while it addressed her concerns, and stated a copy of it would be placed on Ms Henigan's file as a record of her 2018-2019 rating.

[20] Ms Henigan received a pay increase to reflect the revised rating. Had the "not performing" rating remained, Ms Henigan would not have received a pay increase.

[21] Despite the letter's indication a copy of the letter would be placed on file, at the investigation meeting Ms Lokum says there is no record of Ms Henigan's initial "not performing" rating on WK's electronic system or in her hard copy personnel file.

[22] Ms Lokum says once Ms Henigan's rating had been formally changed, her understanding was that the issue had been resolved, with no further action required.

Mr Gliddon's meeting with manager

[23] Following his review of the PDP rating, Mr Gliddon met with the manager to discuss the PDP process the manager followed. Mr Gliddon says the manager was very remorseful and the manager acknowledged he did not do a good job. Mr Gliddon says it appeared the manager lacked understanding about how the PDP process worked. They discussed how training on managing performance processes would be useful for the manager.

Meeting and dealings with HR

[24] On 31 October 2019 Ms Henigan met with a Lead HR Advisor and an HR Business Partner (together "HR") to discuss her concerns with the PDP process and other issues with her role and managers. Ms Henigan expressed feeling hurt and humiliated by the "not performing" rating and said she felt bullied by her managers.

[25] Between 1 and 5 November 2019 Ms Henigan and HR exchanged emails. In a 1 November 2019 email, she asked about a different role which had been advertised, and also said she wondered whether HR could pursue an apology from her managers and an acknowledgment "*to the Group leadership team that the process was unjustified*". She said it was important that if any apology is issued, it is done as quickly as possible, saying the longer the delay the weaker it seemed.

[26] On 5 November 2019 HR responded saying it would be good to understand Ms Henigan's "*thoughts in full so that we can work together to find what a solution to this could look like*". Ms Henigan responded the same day listing some suggestions, saying "*first and foremost*" she wanted to continue working for WK. She asked for:

> 1. An apology as discussed, sooner rather than later or not at all & for this failure to be acknowledged as non-performance and to peers for both Managers;
> …
> 5. Depending on whatever future role/work I am given develop an appropriate development plan with human resources and Manager;
> 7. Support from People to ensure that future PDP processes with Managers in the SPP team.
>
> As discussed I feel hurt and humiliated by the unjustified classification. I keep second guessing who knows and who contributed to the rating. I feel I have been bullied [by] SPP management. I am afraid this process has disadvantaged me and will continue to do so into the future. I will need support from People to address this if the best option is to move to somewhere else within the organisation. I look forward to discussing with you soon.

[27] Ms Henigan's suggestions also included appointment to a role on a par with the one advertised and assured re-employment to a commensurate role should there be restructuring. At the investigation meeting Ms Henigan acknowledged some of her suggestions were a bit "*cheeky*".

[28] Ms Henigan says she subsequently emailed HR advising she still had not had a PDP conversation with her manager or any update on their proposed meeting. Ms Henigan and HR exchanged further emails, but between 2 and 21 December 2019 she

went on sick leave as a result of the stress she was experiencing. She says she found the failure of her managers to apologise or open up dialogue extremely distressing, and although she is a resilient person, her mental health deteriorated. HR telephoned her during the period of sick leave and she was advised the senior manager could give an apology.

Formal complaint on 24 December 2019

[29] On the afternoon of 24 December 2019 Ms Henigan submitted a formal written complaint to Ms Lokum. The complaint alleged her managers had engaged in repeated unreasonable behaviour amounting to bullying and was in breach of WK's Code of Conduct. Ms Henigan raised issues stemming from a restructuring in 2017 and alleged bullying by her managers. Ms Henigan asked for a formal and independent review into her complaint.

[30] Being Christmas Eve, Ms Lokum says there was very little WK could do with the complaint that day. She says by the time WK's offices re-opened in the new year and the appropriate people had been assigned to manage the complaint, the situation had escalated and Ms Henigan's complaint turned into a personal grievance.

First personal grievance letter

[31] On 15 January 2020 Ms Henigan raised a personal grievance by letter for unjustified disadvantage suffered as a result of the 2018/2019 PDP process. The letter claimed the "unjustified" remuneration process resulted in actions that disadvantaged her and caused her hurt and humiliation. In particular, the letter expressed concern about suffering career stagnation as a result of the initial "not performing" rating - her view was she was not getting enough work and she was concerned about the "taint" the "not performing" rating might have on her future opportunities. Ms Henigan also alleged management neglect from her manager following the PDP process, due to a lack of PDP meetings with him. She noted she had set up weekly meeting invites for this purpose, but the manager declined them all.

[32] Ms Lokum says after considering possible resolution options, a decision was made to conduct a formal independent employment investigation into Ms Henigan's complaint. On 14 February 2020, draft Terms of Reference for the investigation were provided to Ms Henigan for her feedback.

Second personal grievance letter

[33] By 18 February 2020 Ms Henigan had engaged counsel who sent WK a letter raising a personal grievance on Ms Henigan's behalf. It alleged she had been unjustifiably disadvantaged by WK grossly mismanaging her. Counsel also raised issues with the draft TOR. The letter alleged Ms Henigan's first personal grievance letter and formal complaint both demonstrate breaches by WK of its obligations under the Act and the Health and Safety at Work Act 2015. The letter again raised concerns about the 2017 restructuring, the management of Ms Henigan, and the "not performing" rating (including on-going detrimental effects of the "not performing" rating). The letter further stated Ms Henigan had lost all trust and confidence in her employer and felt it wanted to get rid of her. The letter sought urgent mediation to resolve the matter, which WK agreed to attend.

[34] Ms Henigan later withdrew her request for mediation. She says this was as a result of receiving legal advice that WK would not move from its position about not paying compensation to an employee who wished to continue in employment. She did not wish to leave WK and says mediation would just be about negotiating money for an exit package.

Secondment

[35] WK says upon receiving Ms Henigan's bullying complaint steps were taken to remove her from the work environment she complained about. Ms Henigan was offered a secondment role as Principal Investment Advisor, Corporate Services Group. She began working in that role on about 16 March 2020. Ms Lokum understands this role was offered due to the relationship issues with Ms Henigan's managers and because the investigation into her bullying complaint was about to commence.

Investigation

[36] Ms Locum says WK delayed commissioning the investigation into Ms Henigan's complaint in anticipation of mediation taking place. After receiving advice Ms Henigan did not wish to attend mediation, in March 2020 Ms Lokum formally commissioned an investigation into the complaint and an independent investigator was engaged. Ms Henigan signed a TOR for the investigation.

[37] Delays followed due to the COVID-19 pandemic and subsequent lockdowns from late March 2020 to May 2020. Further, the investigator who was engaged passed away in early May 2020. A firm was engaged later in May 2020 to complete the investigation, which involved reinterviewing Ms Henigan and other witnesses.

Report

[38] On 24 August 2020, the firm provided its final investigation report to WK. The report found Ms Henigan's managers had not bullied her. The investigation found, however, that the managers' behaviour toward Ms Henigan amounted to a breach of the Code of Conduct in:

a. not properly following the PDP process and giving her a 'not performing' rating; and
b. failing to acknowledge or apologise for the distress this had caused her.

[39] In making that finding, the investigation report cited relevant extracts from Code of Conduct:

> We are accountable for the decisions and judgements made by us personally and those reporting to us.
>
> We own up when we make mistakes so we can correct and learn from them...

[40] The investigator outlined their belief a reasonable manager would have taken steps to either ensure Ms Henigan received an acknowledgement (if not an apology) from one of her managers regarding the failure to follow due process.

[41] The investigator did not find the manager intentionally deleted Ms Henigan's meeting requests following the issues arising from 2018-2019 PDP review.

WK's actions after the report was received

[42] After considering the investigation report, Mr Gliddon met with the manager and discussed the investigation findings with him. Mr Gliddon says they discussed lessons to be learned from the findings and further leadership training that could be undertaken. They also discussed how the manager's induction may not have been as thorough as it should have been - particularly around managing PDP processes. Mr Gliddon did not address the investigation findings in a disciplinary context.

[43] In October 2020, shortly after the investigation concluded, the senior manager left WK. Mr Gliddon says because of that he did not have the opportunity to make the same progress with the senior manager.

[44] Mr Gliddon met with Ms Henigan to discuss the findings of the investigation report, although the date the meeting took place is unclear. Following the meeting, Mr Gliddon sent a letter on 25 November 2020 to Ms Henigan summarising what he understood was her feedback on the report and responding to it. Mr Gliddon accepted the report's finding that bullying had not occurred. He further relevantly stated:

> As you are aware, the report makes a finding that misconduct has occurred with the handling of your PDP rating. I accept that this was the case. The report acknowledges that the rating was found to be unjustified on appeal and this was confirmed to you in writing on 18 October 2019.
>
> As Waka Kotahi was aware of this some time ago, we do not think it is open to Waka Kotahi to now revisit this in a disciplinary context. However, I have addressed this behaviour with the remaining staff member.
>
> I would however like to take this opportunity to apologise for that error and express my regret that it has ultimately led us to where we are now….

[45] Ms Henigan remained unsatisfied with the findings of the investigation. She believes Mr Gliddon's apology was perfunctory in that it did not apologise for the effects the handling of PDP had on her. Mr Gliddon says his apology was genuine and sincere.

[46] Without prejudice discussions subsequently took place in an attempt to resolve the outstanding personal grievance but those attempts were not successful.

Email correspondence between Ms Henigan and Ms Locum

[47] On 4 February 2021 Ms Henigan emailed Ms Lokum highlighting issues she had with the investigation into her bullying complaint. They included that more should have been done to address the misconduct, that her managers had not apologised for the PDP process followed, and the "not performing" rating and formal complaint had impacted on her job prospects in WK.

[48] On 10 February 2021 Ms Lokum responded to Ms Henigan saying she had revisited the investigation report and the original complaint and was satisfied a fair process had been followed and appropriate steps taken to address the conduct issues

identified from the investigation. Ms Lokum set out WK's position on compensation payments in circumstances – that it does not make payments to employees in an ongoing employment relationship on a compensatory, compassionate or goodwill basis as it was accountable for public funds and needs to justify money changing hands. Ms Lokum concluded by offering Ms Henigan support from EAP Services.

[49] On 11 February 2021 Ms Henigan sent a further email response expressing her dissatisfaction with Ms Locum's response. On 12 February 2021, Ms Lokum sent Ms Henigan a further email response, reassuring her they took her complaint very seriously, the investigation was conducted with an open mind and in good faith, and the conduct was appropriately addressed. She also stated a hope there could be a positive working relationship going forward.

Third personal grievance letter

[50] On 6 April 2021 Ms Henigan sent a further personal grievance letter for unjustified disadvantage through new counsel. The letter set out the issues Ms Henigan had previously raised concerning her initial "not performing" rating, the impact the rating had on her and her employment prospects, and failure to address misconduct by her managers and the relationship breakdown with her managers.

[51] Ms Lokum says because Ms Henigan's complaint went back to a 2017 restructure, WK initially thought she wanted redundancy. It thought her comments that she had lost trust and confidence in WK was an indication of this. Ms Lokum asked Ms Henigan whether she would like to speak with an external consultant about career possibilities. Ms Lokum says Ms Henigan later made verbal comments to her that she wanted to stay with WK. Ms Lokum says WK has since endeavoured to maintain a positive working relationship with Ms Henigan. The parties had further discussions about resolving the personal grievance and attended mediation in September 2021. However, attempts at resolution were clearly unsuccessful.

Subsequent roles

[52] As noted earlier, Ms Henigan was offered a secondment to the Corporate Services Group in March 2020, and was later offered a permanent role. Ms Henigan has received "successful" performance ratings in her role and received a "merit" rating in her most recent performance review. Ms Henigan was an acting manager in her team

from June 2022 to September 2022. Just prior to the investigation meeting, Ms Henigan was offered and accepted a permanent managerial role which came with a salary increase. Ms Henigan says she was very lucky a person in Corporate Services she has known for some time realised something had gone in wrong during her time in the SPP team, and she was lucky the person had faith in her in offering the role.

Did Ms Henigan raise her personal grievance(s) within 90 days?

[53] WK says Ms Henigan did not raise her personal grievance about the "not performing" rating within 90 days of being informed of it at the 25 September 2019 meeting. Further, Ms Henigan's first personal grievance letter of 15 January 2020 was received more than 90 days after the meeting. WK says it did not impliedly consent and does not now consent to the claim being raised out of time. WK points to a comment in the 15 January letter which states "*This grievance is within the ninety days of the suggestions for next step [sic] and the formal result from the appeal*".

[54] When considering whether a personal grievance claim has been raised, the applicable principles include:[1]

a. A personal grievance may be raised orally or in writing with no particular formula of words required.
b. Where there have been a series of communications, each must be examined as to whether it might constitute raising the grievance. The totality of such communications might also constitute raising the grievance.
c. It does not matter what an employee intended their complaint to be, or their preferred process for dealing with it in the first instance.
d. It does not matter whether the employer recognised the complaint as a personal grievance.
e. The issues are whether the nature of the complaint was a personal grievance within the meaning of s 103 of the Act and, if so, whether the employee's communications conveyed the substance of the complaint to the employer.
f. The employer must know what it is responding to - it must be given sufficient information to address the grievance to respond to it on its merits with a view to resolving it soon and informally, at least in the first instance.

[1] *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2019] NZEmpC 132, at [36]-[38].

[55] Standing back and taking all these matters into consideration, I find Ms Henigan did raise her personal grievance of unjustified disadvantage about the "not performing" rating itself within 90 days. She was advised of the rating at the 25 September 2019 meeting. Following Mr Gliddon's letter advising the rating was overturned, Ms Henigan's email correspondence with HR on 1 and 5 November 2019 amply demonstrated the overturning did not resolve all of Ms Henigan's concerns about the PDP process. While she had concerns about being bullied and other issues with her role, she was seeking an apology, and/or an acknowledgement by her managers about the "not performing" rating to other managers. She was clearly asking WK to address it further.

[56] Although Mr Gliddon and Ms Lokum may have believed the allocation of the "not performing" had been addressed, it would have been obvious to HR, with whom Ms Henigan was corresponding, that she remained aggrieved about the process and outcome and was seeking further resolution. As HR represented WK, it must be taken to have known this.

[57] I also find Ms Henigan raised her personal grievance in her formal complaint of 24 December 2019. While Ms Henigan's complaint spanned several pages and traversed older claims about 2017 restructuring and alleged bullying, it included claims about the PDP process and the "not performing" rating. The complaint asked WK to address the latter issue further. I find Ms Henigan clearly raised a personal grievance about the PDP rating itself in the formal complaint.

Was Ms Henigan unjustifiably disadvantaged in her employment?

Unjustified action causing disadvantage

[58] An employee may have a personal grievance where the employee's employment or any condition of employment is or was affected to the employee's disadvantage by some unjustified action by their employer.[2]

[59] Ms Henigan needs to establish a prima facie case that there was a relevant action affecting her employment to her disadvantage. If she is able to show this, the onus then shifts to WK to show its actions and how it acted met the test of justification under s

[2] Employment Relations Act 2000, section 103(1)(b).

103A of the Act. In determining justification of actions, the Authority does not consider what it may have done in the circumstances. It is required to consider on an objective basis whether the actions of WK and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time of the alleged unjustified actions.

Whether Ms Henigan was disadvantaged by rating

[60] I am satisfied the failure to follow the proper PDP process resulting in the "not performing" rating and WK's failure to give a timely apology or acknowledgement were actions affecting Ms Henigan's employment to her disadvantage.

[61] Ms Henigan says the allocation of the "not performing" rating contributed to the breakdown in the relationship between her and her managers. While relationship issues clearly existed prior to this, the allocation of the rating was the breaking point. The breakdown in the relationship resulted in Ms Henigan taking sick leave for most of December 2019 as result of the distress she was experiencing. It also resulted in her moving away from the SPP team and the type of policy work she undertook studies for and enjoys most. I accept these were all consequences of WK's failure to follow its PDP processes and they affected Ms Henigan's employment to her disadvantage.

[62] Ms Henigan also says she is or was disadvantaged by the "not performing" rating due to leaders viewing her through a "*lens of failure*". She perceived the rating would influence the way leaders heard and responded to her opinions, advice and performance in a way that was career and opportunity limiting. She said the same leaders still occupied positions of influence both within WK and externally. It is not clear which other WK leaders took part in the 2018-2019 moderation meeting leading to Ms Henigan's "not performing" rating. There is no evidence that leaders involved in the moderation meeting held or hold adverse views of Ms Henigan's performance or that they have made decisions based on such views. However, I accept Ms Henigan believed the rating was noted on her personnel file and that it may limit her career prospects because no acknowledgement of its overturning was ever given to other leaders involved in the moderation process. Ms Henigan held these beliefs as a consequence of WK's decision not to apologise or acknowledge the overturn of the rating. I accept Ms Henigan's health and wellbeing in the workplace was affected as a consequence, which included a loss of confidence in professional settings.

[63] By way of example of her loss of confidence following the "not performing" rating, Ms Henigan told me when she applied for the managerial role she holds now in late 2020, she was given feedback that she lacked confidence. She applied for the role again in 2022 and upon being offered it was told she was the standout candidate.

"Not performing" rating clearly unjustified

[64] It is clear the "not performing" rating was not procedurally justified due to Ms Henigan's managers' failure to follow WK's PDP process. If WK had concerns about Ms Henigan's performance, it was obliged to point out the perceived shortcomings, advise her of necessary improvement required, warn her of the likely consequences if expectations were not met and provide a reasonable period time to remedy her performance.[3] The investigation report says the manager failed to follow the process for all of his team. I am willing to accept the process failure was likely due to a lack of understanding or training of the manager and the senior manager's apparent "hands-off management style" as found in the investigation report. WK says there were a handful of other employees in 2019 dissatisfied with their rating who raised concern and their ratings were also overturned – so the situation was not unique to Ms Henigan.

[65] I accept Ms Henigan's evidence she had in the past only received "successful" ratings. I do not have compelling information before me to suggest the "not performing" rating was substantively justified.

Review and prior to the formal complaint

[66] To its credit WK overturned the "not performing" rating to a 'successful' rating relatively promptly with Mr Gliddon's letter of 18 October 2019.

[67] Ms Henigan suggested to HR as early as 1 November 2019 that her managers could give an apology and acknowledge to the Group leadership team that the performance rating was unjustified. She reiterated those suggestions a few days later on 5 November 2019.

[68] The investigation report writer considered a reasonable manager would have taken steps to either ensure Ms Henigan received an acknowledgment (if not an

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[3] *Nelson Air v NZAPLA* [1994] ERNZ 665 at [669].

apology) from either manager regarding the failure to follow due process. This apology could have been communicated by either email or letter. The report writer found the managers should have appreciated the "*significant stress and anxiety [Ms Henigan] experienced in receiving an unexpected and ultimately unjustified "not-performing rating*". While I acknowledge WK did not receive the investigation report until August 2020, it did not need to wait for that report to issue an apology or acknowledgment.

[69] WK does not deny it indicated an apology could be given by the senior manager, but was never given. Ms Henigan's manager also did not give an apology. At the investigation meeting Mr Gliddon said he did not know why an apology was not given by them and he would have supported one being given.

[70] WK's Code of Conduct outlines its expectations of its people – relevantly here, it expected its people to be accountable for the decisions and judgements they make and to own up when mistakes are made. A fair and reasonable employer in all the circumstances, which included those expectations, would have promptly addressed Ms Henigan's request for an apology or an acknowledgement. This could have spared Henigan ongoing distress and loss of dignity in relation to the rating. It would also have enabled to the parties to focus on other issues Ms Henigan raised about her role and how it was being managed.

[71] Ms Henigan's period of sick leave in December 2019, over a month after her request for an apology or acknowledgement, did not prevent an apology being given in writing. An apology from either of her managers, in a situation where she remained in the SPP team in a deteriorating or non-existent relationship with her manager, could have deescalated the situation. This was an obvious and no-cost step which could have been taken in a timely fashion. I find WK's omission to take this step was not what a fair and reasonable employer could have done in the circumstances at the relevant time.

After the formal complaint

[72] I accept WK took Ms Henigan's formal complaint on 24 December 2019 and personal grievance letters seriously. It received the complaint just before WK reduced its operations for the Christmas/New Year period, and on 15 January 2020 Ms Henigan sent a letter formally raising a personal grievance. It is understandable that it did not respond earlier given the time of year.

[73] WK thereafter engaged with Ms Henigan about the TOR and an independent investigator was engaged to investigate her bullying complaint which included the PDP process. WK did not take steps to remove Ms Henigan from the situation until it offered a secondment role to her on 13 March 2020. Although that period was not insignificant and ideally would have been shorter, I accept it would have taken time to find an alternative role for Ms Henigan.

[74] I am not satisfied the length of time it took for the investigation to be completed was due to a failure on WK's part – intervening events clearly beyond its control occurred in 2020 which delayed the investigation process. That Ms Henigan had to take part in a second interview with a new investigator was not unreasonable in the circumstances and allowed for a full and fair investigation process.

[75] Following the investigation, appropriate steps were then taken to address the conduct issues identified by the investigation. WK also apologised to Ms Henigan for the flawed PDP process on 25 November 2020, albeit more than a year after the rating was overturned. There is no evidence WK has made managers who attended the PDP moderation meeting in July 2019 aware of the flawed 2018/2019 PDP process and overturned rating in Ms Henigan's case.

[76] Overall, I am not satisfied WK's actions and how it acted in relation to the performance review rating and the process that followed in 2019 were what a fair and reasonable employer could have done in all the circumstances. Ms Henigan has therefore established a personal grievance for unjustified disadvantage.

Should compensation be awarded and are there issues of contribution?

[77] As Ms Henigan has a personal grievance for unjustified disadvantage she is entitled to a consideration of remedies.

Compensation

[78] Ms Henigan seeks $10,000 in compensation under s 123(1)(c)(i) of the Act. Taking into account the elements of disadvantage identified above, the extensive evidence Ms Henigan provided about the impact the rating and subsequent process had on her and awards in other cases, I am satisfied that level of compensation is appropriate.

Contribution

[79] Section 124 of the Act states that I must consider the extent to which, if any, Ms Henigan's actions contributed to the situation giving rise to the personal grievance and then assess whether any remedy should be reduced. WK says Ms Henigan made unconstructive "cheeky" requests in November 2019 which inhibited resolution. I acknowledge the employment relationship problems Ms Henigan raised were complex and a few of the solutions she sought likely unrealistic, but I do not consider her requests contributed towards the situation giving rise to the grievance to the extent a reduction in remedies is warranted. I have already observed Ms Henigan unequivocally requested an apology or acknowledgement from one or both or her managers about the performance rating.

[80] WK further says Ms Henigan's cancellation of a scheduled mediation in February 2020 further contributed to her issues remaining unresolved and arguably amounted to a breach of a good faith obligation to be active and constructive in maintaining a productive employment relationship. I acknowledge Ms Henigan's cancellation of a scheduled mediation was unfortunate - mediation would likely have been constructive in clarifying the employment relationship problems and possible resolution in the context of the ongoing employment relationship. However, this did not contribute to the situation that gave rise to the grievance before the Authority, which was the unjustified performance rating and WK's subsequent actions in late 2019. Accordingly, no reduction in remedies is made.

Have Ms Henigan's claims for penalties been brought within time and if so should penalties be imposed?

Claim for penalties brought out of time

[81] Ms Henigan's claims for penalties have been brought outside of the relevant statutory timeframe.[4] This is because Ms Henigan first formally became aware of WK's position on refusing compensation to current employees in February 2021 at the latest. Ms Henigan sought penalties for the first time at the investigation meeting in September 2022. This was well outside the 12 month statutory timeframe under the Act.

[4] Employment Relations Act 2000, section 135(5).

Lawfulness of WK's refusal to pay compensation to Ms Henigan

[82] Ms Henigan has nevertheless asked the Authority to investigate the lawfulness of WK's refusal to pay compensation to current employees. Section 123(1) of the Act provides for statutory remedies which the Authority or the Employment Court may order if they determine an employee has a personal grievance. Those remedies, such as 123(1)(c)(i), may be awarded at the Authority or Court's discretion.

[83] I consider WK's practice of refusing to pay compensation to existing employees prevented it from taking a step that could have resolved Ms Henigan's grievance – a grievance which was caused by WK's failure to follow its PDP processes and expectations within its Code of Conduct. While I make no finding WK's practice is or was unlawful, I do find the practice was a significant factor in this personal grievance. I accordingly recommend, pursuant to s 123(1)(ca) of the Act, that WK review the practice against the standard under s 103A of the Act and in light of its duty of good faith towards its employees. I recommend WK consider each employment relationship problem in light of its individual circumstances. This would include keeping an open mind as to available options for resolution.

What are my orders?

[84] I order Waka Kotahi New Zealand Transport Agency to pay to Denise Henigan compensation of $10,000 pursuant to s 123(1)(c)(i) of the Act within 21 days of the date of this determination.

Should either party contribute to the costs of representation of the other party?

[85] Costs are reserved. The parties are encouraged to resolve issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, Ms Henigan may lodge, and then should serve, a memorandum on costs by 18 January 2023. From the date of service of that memorandum WK would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted. If the Authority is asked to determine costs, the parties can expect me to apply the usual daily rate for a one day

investigation meeting, unless either party can show particular circumstances or factors require an upward or downward adjustment of that tariff.[5]

Sarah Blick
Member of the Employment Relations Authority

[5] For further information about the factors considered in assessing costs, see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.