

NOTE: This determination contains an order prohibiting publication of certain information at paragraphs [92] and [93]

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2023] NZERA 378
3174982

BETWEEN	MEGAN MCLEAY Applicant
AND	TE WHATU ORA TE PAE HAUORA O RUAHINE O TARARUA MIDCENTRAL (formerly MIDCENTRAL DISTRICT HEALTH BOARD) Respondent

Member of Authority:	Claire English
Representatives:	Kelly Anne Coley, advocate for the Applicant Louise Robertson and Nicola Cuervo, counsel for the Respondent
Investigation Meeting:	21 February and 10 March 2023 at Palmerston North
Submissions received:	31 March 2023 and 3 May 2023 from Applicant 19 April 2023 from Respondent
Determination:	18 July 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Megan McLeay was employed on 24 February 2020 as a District Nurse by the Midcentral District Health Board, as it then was (Te Whatu Ora). In October 2021, Te Whatu Ora met with Ms McLeay about allegations that she had provided anti-

vaccination advice to two of her patients. Ms McLeay was stood down on pay to allow time for an investigation to occur.

[2] At around the same time, Te Whatu Ora was implementing the Covid-19 Public Health Response (Vaccination) Order 2021 (Order). In November 2021, Ms McLeay met with Te Whatu Ora on this matter. She advises that she was not vaccinated, and she did not intend to be vaccinated. Ms McLeay's employment agreement was then terminated as the Order required her role to be performed by a vaccinated person.

[3] Ms McLeay raises claims of unjustified dismissal, unjustified disadvantage over what she says is a lack of consultation over the implantation of the Order, and unjustified disadvantage regarding the way Te Whatu Ora dealt with the allegations she had provided anti-vaccination advice to patients.

[4] She seeks remedies of compensation for hurt and humiliation; lost wages; penalties for breach of good faith, and a contribution to costs.

The Authority's investigation

[5] For the Authority's investigation written witness statements were lodged from Ms McLeay, and Ms Kat Steeneken in support; on behalf of Te Whatu Ora by Ms Mandy Bevan; Ms Lesley Batten; and Mr Keyur Anjaria; All witnesses answered questions under affirmation from me and the parties' representatives. The representatives also gave closing submissions.

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

The issues

[7] The issues requiring investigation and determination were:

- (a) Was Ms McLeay unjustifiably dismissed?
- (b) Did Ms McLeay suffer an unjustifiable disadvantage, in relation to the way Te Whatu Ora consulted with her over the implementation of the Order, and/or over how Te Whatu Ora dealt with the complaints against Ms McLeay?

- (c) If Te Whatu Ora’s actions were not justified (in respect of disadvantage and/or dismissal), what remedies should be awarded, considering:
- Lost wages (subject to evidence of reasonable endeavours to mitigate loss); and
 - Compensation under s123(1)(c)(i) of the Act
- (d) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Ms McLeay that contributed to the situation giving rise to her grievance?
- (e) Did Te Whatu Ora act in breach of good faith by giving Ms McLeay copies of the complaints at a meeting on 8 November, rather than earlier?
- (f) Should either party contribute to the costs of representation of the other party.

Background – the Order

[8] Ms McLeay was a District Nurse employed by what was then the Midcentral District Health Board.

[9] As a registered nurse, she was covered by the provisions of the Order, which required that, after a certain date, she was not to work unless she had received both the vaccine and a booster dose¹.

[10] Te Whatu Ora was required to confirm that all nursing staff had been vaccinated against Covid-19². It had sent all staff, including Ms McLeay, emails inquiring about vaccination status, on 25 August 2021, 21 September 2021, and 13 October 2021.

[11] Ms McLeay responded to the 21 September 2021 email to advise she was not willing to share her health information, eg she was not willing to confirm whether or not she was vaccinated. She also responded to the 13 October 2021 email asking whether “the mandate had been legislated”.

Complaints

[12] On 20 October 2020, Ms McLeay’s manager (Ms Bevan) informed her that she would like to meet to discuss a patient complaint. Ms McLeay was concerned by this and sought the advice and support of her union. She asked for the issues to be set out

¹ Section 7 and Schedule 2 of the Covid-19 Public Health Response (Vaccination) Order 2021.

² Sections 11, 11A, and 11B of the Covid-19 Public Health Response (Vaccination) Order 2021.

in writing, and for the meeting to be held after she had had the opportunity to review the letter and seek advice.

[13] Ms Bevan agreed. She gives evidence that, later that same day, she received a second complaint relating to Ms McLeay. She asked both complainants to put their concerns in writing. Ms Bevan then wrote to Ms McLeay summarising the complaints.

[14] Both complaints raised concerns that Ms McLeay had advised 2 different patients not to receive the Covid-19 vaccination. Suspension was proposed.

[15] The letter was delivered to Ms McLeay on 22 October 2021. Ms McLeay found this very stressful, and on the advice of her union, took a week's sick leave.

[16] The meeting was held on 8 November 2021. Ms McLeay was represented. Ms Bevan and Ms Batten (Ms McLeay's one up manager) attended for Te Whatu Ora. At this meeting, Ms McLeay was given copies of the two complaints made. She explained her position, that in respect of one patient, she had told that patient and his family that she herself would not be having the vaccine, but that they should "do their own research". Ms McLeay could not recall the other patient.

[17] The meeting ended with Ms McLeay being placed on paid suspension while Te Whatu Ora investigated further. At the conclusion of the meeting, Ms Batten informed Ms McLeay that a complaint would be laid with the nursing council. Ms McLeay asked that this be deferred, but in the end Ms Batten took the view that she was obliged to make a report.

[18] Ms McLeay claims that this amounts to an unjustified disadvantage in her employment, as Te Whatu Ora had not completed its own investigation into the two complaints at the time the referral to the nursing council was made.

The Covid-19 Public Health Response (Vaccination) Order 2021

[19] At the same time, Te Whatu Ora was continuing to consult with staff about their vaccination status.

[20] On 1 November 2021, Te Whatu Ora wrote again to Ms McLeay about her vaccination status, advising that all affected workers would need to have their first Covid-19 vaccination by 15 November 2021. The letter stated that Ms McLeay could expect to have a meeting with her manager "as soon as possible" but that this process

would need to be completed by 15 November, and “any affected employee who does not comply with the Order will be given notice of termination of their employment in accordance with their employment agreement, if no suitable alternative arrangements have been agreed.

[21] On 9 November 2020, Ms Bevan contacted Ms McLeay, and asked to meet with her to discuss her vaccination status. Ms McLeay declined to meet, on the grounds that this was irrelevant until the other matter was resolved.

[22] At the time on 9 November 2020, Ms McLeay had come to Wellington with a friend. She advises that they did some shopping, and then attended a protest at parliament³.

[23] Ms Bevan wrote again on 11 November to attempt to set up a meeting. She wrote again on 12 November advising Ms McLeay that unless Ms McLeay was able to confirm she had been vaccinated, she would be stood down as of 15 November 2021.

[24] Ms McLeay explains that she was aware that Te Whatu Ora were consulting with staff as to individual staff’s vaccination status, and that if she was not vaccinated, this could lead to the ending of her employment.

[25] Ms McLeay further states that she had “informed management on several occasions that I intended to apply for an exemption⁴”, and that she understood that if “the process” was not completed by 15 November 2020, she would be placed on special paid leave, and she anticipated this would occur⁵.

[26] On 13 November 2021, Ms McLeay sent Te Whatu Ora a signed document “Mandated Non-Consent Form”. This form concluded with the statement:

In accordance with my Bill of Rights Freedoms I do not consent to participation in any of your workplace processes associated with your decision to implement the provisions of the Covid Public Order (the Ministerial Decree) contrary to superior laws....

I will not accept any further communication from you or any workplace representative except by my prior agreement and in a form that I decide to accept such as in writing.

³ Paragraph 23 of the Reply Witness Brief of Megan McLeay dated 10 February 2023.

⁴ Paragraph 40 of the Witness Brief of Megan McLeay dated 30 November 2020.

⁵ Paragraph 42 of the Witness Brief of Megan McLeay dated 30 November 2020.

[27] In the end, Ms McLeay agreed to attend a meeting to discuss her vaccination status, and the impact this might have on her on-going employment, on 15 November 2020. This was originally supposed to have been with her manager Ms Bevan, but due to the delays in Ms McLean agreeing to meet, Ms Bevan had gone on pre-arranged leave. Ms McLeay met with Ms Batten instead.

[28] Ms McLeay explained that she understood, going into this meeting, that if she refused to be vaccinated, her job would come to an end.

[29] Ms Batten inquired about her vaccination status, and her intentions. In response, Ms McLeay advised Ms Batten:

- a. That she was not vaccinated;
- b. That she did not intend to be vaccinated.
- c. That she had previously mentioned the prospect of getting a medical exemption to her doctor (a GP), but that apart from this, had taken no steps to arrange an appointment with her doctor to progress towards an exemption, and had not applied for an exemption.

[30] On this basis, Ms Batten says that there was nothing further to discuss, and the meeting came to an end.

[31] Ms McLeay was issued with a notice of termination of her employment on 16 November 2021. The letter explained that Ms McLeay had advised she was not vaccinated and did not intend to be vaccinated, and that “the Order explicitly mandates that the DHB is prohibited from allowing you to perform your role while you remain unvaccinated.” The letter went on to explain why alternative arrangements and redeployment were not feasible. Ms McLeay was stood down on pay until the ending of her employment on 14 December 2021.

[32] The letter ended by indicating that if Ms McLeay received a vaccination or a medical exemption during her notice period, the notice of termination could be withdrawn.

[33] Ms McLeay did not communicate further with Te Whatu Ora. On 10 December 2021, Te Whatu Ora wrote again to confirm the ending of Ms McLeay’s employment as of 14 December, in the absence of any new information.

[34] On 15 December, Ms McLeay’s representative wrote to Te Whatu Ora inquiring about an investigation into the two patient complaints that had been referred to the Nursing Council and onwards to the Health and Disability Commissioner. Te Whatu Ora responded to say that it believed this process was sufficient, and it had decided not to carry out its own investigation.

[35] On 21 December 2021, Ms McLeay’s representative wrote on her behalf raising a personal grievance of unjustified disadvantage, claiming that by not carrying out its own investigation, Te Whatu Ora had committed a breach of good faith.

[36] On 19 January 2022, Te Whatu Ora replied, explaining its position, and offering an apology to Ms McLeay for not advising of its decision earlier. It resisted other remedies. Ms Bevan notes in her brief of evidence that: “I recognise that the DHB should have made it clear to [Ms McLeay] sooner that, when the Vaccinations Order process came into play, the DHB decided not to progress the investigation into the concerns and I am sorry that I did not think about this at the time.”⁶

[37] It was not until 9 February 2022 that Ms McLeay wrote to Te Whatu Ora raising a personal grievance claim of unjustified dismissal.

[38] Ms McLeay states that she “cannot get a job as I am currently being investigated by Nursing Council”⁷. She then further explains that she did not renew her practicing certificate “due to the cost involved and the knowledge that mandates were in place”⁸. At the time of the investigation meeting, Ms McLeay advised that she had not taken up her practicing certificate, as she remained unvaccinated, and this affected her ability to meet the requirements for many nursing jobs.

[39] As at the time of the investigation meeting, I was advised that the Nursing Council had passed the matter to the Health and Disabilities Commissioner for investigation, but that neither party was aware of any further progress on the matter.

Analysis

[40] I will first consider if Ms McLeay was unjustifiably dismissed. Then I will consider her claims of unjustifiable disadvantage, in relation to what Ms McLeay says

⁶ Paragraph 58 of Ms Bevan’s Brief of Evidence dated 3 February 2023.

⁷ Paragraph 52 of the Witness Brief of Megan McLeay dated 30 November 2020.

⁸ Paragraph 28 of the Reply Witness Brief of Megan McLeay dated 10 February 2023.

is a lack of consultation in good faith over the implementation of the Order, and stemming from Te Whatu Ora's decision not to undertake its own investigation into the two complaints received.

Unjustified Dismissal

[41] Ms McLeay claims she was unjustifiably dismissed because it was "unnecessary" to terminate her employment as of 14 December 2021, because Te Whatu Ora had already agreed to her being placed on paid leave.

[42] In contrast, Te Whatu Ora's position is that as a District Nurse, Ms McLeay's work was covered by the Order, and therefore Ms McLeay (being unvaccinated) could not lawfully carry out work in her role as a District Nurse from 16 November 2021 without being vaccinated or exempt. Te Whatu Ora points out that to do otherwise would have placed both Te Whatu Ora and Ms McLeay in a position where they would have been committing criminal offences, and describes this as a "no fault" termination arising from a change to the law that was outside both parties' control⁹.

[43] Section 103A of the Act sets out the test of justification. In reaching the decision to terminate Ms McLeay's employment, I must be satisfied that Te Whatu Ora:

- a. Investigated matters;
- b. Raised its concerns with Ms McLeay;
- c. Gave Ms McLeay a reasonable opportunity to respond before reaching the decision to dismiss;
- d. Genuinely considered any explanations provided by Ms McLeay before deciding to dismiss.

[44] I may also take into account any other matters that I think appropriate.

[45] The reasons for dismissal are clear. Ms McLeay was dismissed because, as at the relevant time, she was not vaccinated, nor was she exempt from vaccination, and legislation (the Order) required her to be either vaccinated or exempt from vaccination to carry out work in her role as a District Nurse.

[46] Te Whatu Ora investigated Ms McLeay's situation adequately before deciding to dismiss. It advised Ms McLeay that she would need to be either vaccinated or an

⁹ Paragraph 101 of the Submissions for the Respondent dated 19 April 2023.

exempt person by a certain date for her employment to continue. Ms McLeay understood this. Although Ms McLeay originally resisted meeting with Te Whatu Ora to discuss, as shown by her sending of the Mandated Non-Consent Form on 13 November 2021, in the end she did so, on 15 November.

[47] At that meeting, Te Whatu Ora confirmed with Ms McLeay that she was not vaccinated, did not intend to be vaccinated, and had taken no steps to progress towards an exemption. As Ms Batten stated, once Ms McLeay had made her position clear, the meeting naturally came to an end, as there was little else to discuss.

[48] Ms McLeay says that Te Whatu Ora “were aware I would be seeking an exemption, as this was raised by me on 15 November”, and that Te Whatu Ora terminated her employment “without waiting until the medical exemption had been determined”¹⁰. I do not accept this is an accurate statement of the evidence given by Ms McLeay, or by Ms Batten, as to what occurred.

[49] At the investigation meeting, it became clear from evidence given by both Ms McLeay and Ms Batten, that Ms McLeay had not in fact told Ms Batten that she would be or was seeking a medical exemption from the requirement to be vaccinated. Instead, Ms McLeay told Ms Batten that she had at some unspecified prior point, mentioned the prospect of applying for an exemption to her GP, and Ms McLeay then explained she had not taken any further steps, and had not even arranged a subsequent doctor’s appointment, to follow up on this.

[50] Ms McLeay did not apply for a medical exemption during her notice period either. It is therefore, on the basis of her own evidence, not accurate for Ms McLeay to say that Te Whatu Ora terminated her employment without waiting until “the” medical exemption had been determined. There was no medical exemption to be determined. Ms McLeay had not applied for one, and she made it clear to Te Whatu Ora that she had not applied for one. There was nothing for Te Whatu Ora to wait for. In addition, it was open to Ms McLeay to have commenced the process of applying for an exemption after 16 November, and to have advised Te Whatu Ora of this. Ms McLeay took no such steps. This complaint is not made out.

¹⁰ Paragraph 47 of the Witness Brief of Megan McLeay dated 30 November 2020.

[51] There are various further suggestions advanced on behalf of Ms McLeay which I will deal with in turn. First is the suggestion that Te Whatu Ora did not properly take into account that Ms McLeay did not want to have the vaccine because she had previously experienced allergic reactions¹¹. However, there is no indication that she provided evidence to this effect to Ms Bevan, Ms Batten or to Te Whatu Ora. The letter of 16 November 2021 also makes no reference to this concern being raised by Ms McLeay. As there is no evidence that this matter was raised with Te Whatu Ora at the time I find there is no failure on the part of Te Whatu Ora to consider it.

[52] I further note that the Order applied to Ms McLeay regardless of this matter, and required her to be either vaccinated, or an exempt person without exception. While any medical concerns she had might have been something for Ms McLeay to raise with her GP as part of her application for an exemption, it was not a matter for Te Whatu Ora to consider. Accordingly, nothing flows from this.

[53] It is also submitted for Ms McLeay that she was waiting for Te Whatu Ora to assist her in applying for an exemption. However, the letter of 16 November sets out the process that Ms McLeay, not Te Whatu Ora, needed to follow to obtain an exemption. This was a matter within Ms McLeay's control, and was not a matter for Te Whatu Ora. There is no breach by Te Whatu Ora in this respect.

[54] Ms McLeay submits that Te Whatu Ora had previously placed her on paid leave as a result of the complaints, and that Te Whatu Ora could have chosen not to terminate her employment as of 14 December 2021, but could have instead kept her on paid leave for some indeterminate period of time. Ms McLeay variously suggests her paid leave could or should have continued until either her medical exemption had been determined, or until Te Whatu Ora had completed an investigation into the complaints against her.

[55] There is no indication that Ms McLeay specifically asked Te Whatu Ora to keep her on paid leave as an alternative to termination.

[56] My view is that this suggestion – which was never raised with Te Whatu Ora at the time – mis-understands the application of the Order, and the constraints that Te Whatu Ora was operating under. Clause 7 of the Order required that Ms McLeay could

¹¹ Paragraph 40 of the Witness Brief of Megan McLeay dated 30 November 2020.

not be employed to carry out certain work (eg, her work as a district nurse) unless she was vaccinated or exempt. Ms McLeay was neither vaccinated, nor exempt, so Te Whatu Ora could not continue to employ her as a district nurse. Continuing to employ her as a district nurse but keeping her on paid leave would not satisfy Te Whatu Ora's obligations under the Order.

[57] I note that Te Whatu Ora did consider it could in theory, have lawfully employed Ms McLeay in another role, and the letter dated 16 November 2016 shows that Te Whatu Ora did consider other options¹². However, Te Whatu Ora considered that the discussed options of PPE and social distancing would not meet the terms of the Order, which required Ms McLeay as a nurse to be vaccinated or exempt. And in terms of redeployment, it considered there were no other roles available. Ms McLeay to perform that were not also covered by the Order, given the scope of the Order and the roles available at Te Whatu Ora as a health services provider.

[58] The evidence shows that Te Whatu Ora did consider other options to the termination of Ms McLeay's employment, but that these were not viable in the circumstances. Ms McLeay's suggestion that Te Whatu Ora should have placed her on paid leave as an alternative to termination was never put to Te Whatu Ora, and would not have complied with the order in any case. This claim is not made out.

[59] Ms McLeay also attempted to advance the argument that Te Whatu Ora had reached a specific and binding agreement with her at the meeting of 8 November 2021 that Ms McLeay would remain on paid leave until Te Whatu Ora had completed its anticipated investigation into the complaints against Ms McLeay, and that it was not therefore open to Te Whatu Ora to terminate Ms McLeay's employment until after that investigation had occurred.

[60] Again, this contention was not put to Te Whatu Ora at the time. Ms McLeay is not able to point to any particular reason why she expected this. She also accepted that by 15 November or earlier, she understood (to the contrary) that as a nurse, vaccination was required by the Order, and that if she remained unvaccinated, her job would come to an end.

¹² As set out at pages 2 and 3 of the 16 November 2021 letter.

[61] The same comment applies to this suggestion as to the previous suggestion. Ms McLeay was dismissed because the Order required that this, in the absence of Ms McLeay becoming vaccinated or becoming an exempt person. Even if Te Whatu Ora had entered into a binding agreement with Ms McLeay not to terminate her employment for any reason until after the conclusion of an investigation (which Te Whatu Ora does not accept occurred, and there is no evidence that this occurred), this process was overtaken by the promulgation of the Order, which required Te Whatu Ora to take action by a given date.

[62] I find that in dismissing Ms McLeay, Te Whatu Ora was substantively and procedurally justified. Ms McLeay's claim of unjustified dismissal is not made out, and no orders are made.

Unjustifiable disadvantage resulting from a lack of consultation in good faith over the implementation of the Order

[63] Ms McLeay claims that she was unjustifiably disadvantaged, as “the consultation process self-prescribed by the Respondent was not followed and the Respondent failed to act in good faith relating to the process¹³”. The document attached to the Statement of Problem referred to the Co-operation, Consultation and Management of Change process set out in the collective agreement.

[64] Te Whatu Ora's position is that these particular provisions did not apply, because they are to be used in a staff surplus situation, and this was not a staff surplus situation.

[65] The quoted clauses refer to a “staff surplus” situation, where there is “substantial restructuring of the whole or any parts, of the employer's operations. This is not the case here. There was no restructure, and no surplus of staff or reorganisation of staff or work. Plainly, the management of change process does not apply.

[66] I also note that the quoted extract did contain a clause that stated: “From time to time directives will be received from government and other external bodies, or through legislative change. On such occasions, the consultation will be related to the implementation process of those directives.¹⁴”

¹³ Paragraph 2.18 of the Statement of Problem.

¹⁴ Page 67 of the Statement of Problem, appearing to be clause number 25.6.6 of the underlying document from which it had been copied.

[67] This was not a change management process, as defined by the relevant provision which required a staff surplus situation where there is substantial restructuring. Te Whatu Ora was not under any obligation to follow the change management process where no such situation existed. In addition, I have already found that Ms McLeay was consulted with about how the Order would impact her. This claim is not made out.

Unjustified Disadvantage resulting from Te Whatu Ora’s decision not to undertake its own investigation into the two complaints received

[68] Ms McLeay says that Te Whatu Ora should not have made a complaint to the Nursing Council based on allegations which were no more than hearsay, and that Te Whatu Ora was obliged to investigate these allegations itself, as it had agreed with her to do.

Decision to make a report to the Nursing Council

[69] Ms Batten explains that she felt it was her professional duty to make a “concerned about a nurse” report to the Nursing Council, based on what Ms McLeay had said at the meeting to discuss the complaints held on 8 November 2021, including because this raised issues of public safety¹⁵. The Nursing Council of New Zealand states that: there is an obligation to make a complaint if the nurse’s alleged conduct involves public safety¹⁶.

[70] I note that the Nursing Council guidance clearly refers “alleged conduct”, rather than any requirement for a certain type or standard of proof. The Nursing Council refers to its own process for investigation and consideration, as well as a range of potential outcomes that might result. There is no assumption that concerns must be made out to a certain standard.

[71] Ms Batten’s evidence was that she made the decision to make a report to the Nursing Council only after speaking with Ms McLeay, and based on what Ms McLeay told her. In addition, she was obliged as a nursing practitioner to make a timely report once she believed issues of public safety had arisen. Accordingly, my view is that it is not correct to say that the report to the Nursing Council was based entirely on hearsay,

¹⁵ Paragraphs 22, 23, and 24 of Ms Batten’s Brief of Evidence dated 3 February 2023.

¹⁶ See the publicly available information about conduct published at: https://www.nursingcouncil.org.nz/Public/concerns/Complaints_process/NCNZ/concerns-section/More_on__Fitness_to_Practice_.aspx?hkey=2e419f64-68dc-42be-827d-00dbdb6546cb

and that it was not necessarily open to Ms Batten to delay making such a report while still abiding by her own professional obligations.

[72] I note that, as at the time of the investigation meeting, this matter had not yet been resolved. The report of concern had been forwarded to the Health and Disability Commissioner, but as far as either party was aware, no further steps had been taken. This is unfortunate, and I recognise that this has caused Ms McLeay distress. However, this is not the fault of Te Whatu Ora. There has been no unjustified action by Te Whatu Ora in respect of the report made by Ms Batten (noting that the report was made by Ms Batten in accordance with s. 34(1) of the Health Practitioners Competence Act 2003, and not by Te Whatu Ora in accordance with s. 34(4) of that Act), and Ms McLeay is unable to point to any adverse impact on the terms and conditions of her employment.

[73] While Ms McLeay gave evidence that she believed having to disclose that there was an unresolved complaint against her before the Nursing Council negatively impacted her ability to obtain work, she also gave evidence that she had chosen to surrender her practicing certificate rather than become vaccinated, and this loss of her practicing certificate impacted on the types of jobs she could apply for. On balance, I do not find that Ms McLeay suffered any disadvantage from the making of the report to the Nursing Council that was not outweighed or subsumed by her own decision to surrender her practicing certificate.

[74] On balance, I find that there was no disadvantage and any disadvantage that may have occurred was justified. No claim is made out.

Decision not to investigate

[75] Ms McLeay also submits that:

As at the date of making the decision not to investigate, the respondent had an obligation to communicate this to the applicant in good faith. Moreover, given there was a firm agreement between the parties to engage an independent investigator, the respondent should have consulted regarding a proposal not to investigate¹⁷.

[76] Te Whatu Ora accepts that it had initially told Ms McLeay that it would be carrying out its own investigation into the complaints. It then re-evaluated its need to do so, after Ms McLeay was given notice of termination of her employment for other reasons, and the nursing council had indicated the matter would be investigated by the

¹⁷ Paragraph 6.15 of the Submissions on Behalf of the Applicant dated 29 March 2023.

Health and Disability Commission. Simply put, once circumstances had changed, Te Whatu Ora changed its mind. Te Whatu Ora apologised to Ms McLeay for not advising her of its decision more promptly (it accepts there was a delay of three weeks), in its letter to her of 19 January 2022.

[77] Te Whatu Ora points out that in making this decision, it effectively considered the matter closed, and resulted in no adverse findings against Ms McLeay, therefore (even if the employment relationship had continued, which it did not) there was no disadvantage to Ms McLeay's terms and conditions of employment.

[78] For an unjustified disadvantage claim to be made out, Ms McLeay must show that the decision not to take any further action in respect of the complaints received affected one or more conditions of her employment to her disadvantage, and that this action was unjustifiable. The decision to take no action affecting her employment is a decision that by definition has no impact on Ms McLeay's conditions of employment, and cannot be said to be to her disadvantage, as nothing changes. In addition, choosing to take no further action in circumstances where Ms McLeay's employment has come to an end for unrelated reasons and where the conduct will be investigated by an independent government body, is not a decision without justification. Ms McLeay's claim of unjustified disadvantage cannot be made out.

[79] I note that the submissions which I have quoted above re-framed this pleading as a breach of an obligation to communicate in good faith, and that there was a requirement to consult before the decision not to investigate was made.

[80] In her witness statement, Ms McLeay objects to the decision not to investigate, on the grounds that "they didn't want to clear my name and ease my pain!"¹⁸ However, this statement mis-understands the purpose of the investigation, which was to provide Te Whatu Ora with information to decide whether or not to commence disciplinary action. Once Te Whatu Ora had decided to take no further action and to consider the matter closed, there was no need for an investigation. The good faith requirement to consult in section 4 of the Act refers to circumstances where an employer is proposing to make a decision that will or is likely to have an adverse effect on the continuation of

¹⁸ Witness Brief of Megan McLeay dated 30 November 2022, at paragraph 51, exclamation mark in the original.

employment. This was not such a decision. I am not persuaded that Te Whatu Ora acted in breach of an obligation to consult. No claim is made out.

[81] Ms McLeay also claims that Te Whatu Ora should have communicated with her in a timely way that it had decided not to investigate. There was a delay of some three weeks, and Ms McLeay's representative had to ask Te Whatu Ora for information about the investigation, before Te Whatu Ora conveyed its decision to Ms McLeay. My view is that Te Whatu Ora should have advised Ms McLeay that it had decided to close the matter, particularly in circumstances where it had told Ms McLeay that it would be back in touch with her to discuss the matter. This claim is made out.

[82] This is pleaded as being either a breach of good faith, as quoted above, or a type of disadvantage¹⁹. My view is that this failure to communicate is properly viewed as disadvantage in Ms McLeay's employment, as it left her in a position of insecurity as to the position of her employment. Te Whatu Ora's response as to why this occurred was that it was a very busy time for them, and the delay was not long. That may be so, but there is no indication as to how or when Te Whatu Ora would have followed the matter up with Ms McLeay in the absence of her own inquiries, which she should not have been required to make.

[83] Ms McLeay gives evidence that she found this process and the period of insecurity distressing, and states about this in particular: "They left me in limbo, giving no thought to my personal wellbeing," I accept her evidence of the hurt that this caused her. An award of compensation is appropriate. Weighing the relatively short amount of time delay against the distress caused to Ms McLeay in circumstances where a relatively brief communication was all that was needed, I find that a compensatory award of \$10,000 to be appropriate. There is no action by Ms McLeay that have contributed to this situation, and no deductions to this award are warranted. Orders are made accordingly.

Other matters

[84] The applicant has raised other claims in addition to the ones discussed above. The applicant claims Te Whatu Ora withheld information from her, in breach of its obligation to act in good faith²⁰. I understand that this claim relates to the two complaints. Copies of the two complaints were given to Ms McLeay in the meeting on

¹⁹ See paragraph 2.2 of the Submissions on Behalf of the Applicant, dated 29 March 2023.

²⁰ Paragraph 2.8 of the Statement of Problem.

8 November 2021. Ms McLeay claims she should have received them earlier, for example when she was sent the formal meeting invite she had requested on 22 October 2022.

[85] Te Whatu Ora says that the complaints were accurately summarised in the letter before being provided to Ms McLeay at the first meeting, and that nothing was withheld. Having viewed the two complaints, the first relevantly states that:

- a. “During our conversation [the patient’s partner said] my colleague who last visited when they asked her, she advised them that she isn’t having the vaccine and advised them not to either.”
- b. The second relevantly states: “[the patient stated] RN Megan had said she was not going to get it and advised her not to get it”. “It” in this context being the Covid-19 vaccination.

[86] The letter dated 22 October 2022 summarised these complaints as follows:

- a. “the family told [the visiting nurse] that the previous District Nurse (DN) told them she would not be having the Covid-19 vaccination and advised them not to also”; and
- b. [the patient] named you as advising against the vaccination.

[87] My view is that the complaints were accurately summarised in the letter of 22 October 2021, and sufficient information was provided to allow Ms McLeay to consider and prepare for the meeting on 8 November. At that meeting, she was given copies of the actual complaints, and she and her representative were allowed time to consider them. It is also relevant that the meeting on 8 November was an exploratory meeting, not a disciplinary meeting. As stated in the letter of 22 October 2021, “We now wish to meet with you to understand your version of these allegations.” The letter indicated that a possible outcome from that meeting was that no further action would be taken, as it was possible that Ms McLeay’s responses would resolve the issue.

[88] My view is that there is nothing improper about Ms McLeay being given a copy of the complaints themselves at that initial meeting, taking into account that she had previously received an accurate written summary, and the meeting itself was not a disciplinary one, but was conducted for the express purpose of conveying the

complaints to Ms McLeay and receiving her initial responses. No claim is made out, and no orders are made.

[89] Ms McLeay states that she was deliberately misled as to the purpose and potential outcome of the meeting of 8 November 2021 at paragraph 2.16 of the statement of problem. Ms McLeay does not say how she was deliberately misled, so I am unable to take this matter any further. I also note that the letter of 22 October 2021 explained the purpose of the meeting and set out a range of potential outcomes that could result, and I do not accept that there was anything improper in this.

[90] In legal submissions filed on her behalf, Ms McLeay says she was deliberately misled “by stating that the report [to the nursing council] was standard practice”²¹. Te Whatu Ora’s position is that Ms Batten’s evidence to the Authority was that she considered it part of standard nursing practice to report matters of concern to the nursing council, even though she herself had not previously made a notification of this type.

[91] The Nursing Council is a well established body for the professional support, registration, and oversight of nurses and the nursing profession. I do not consider there to be any inconsistency in Ms Batten’s evidence when she stated that she considered making a report to the council of concerns she had about a nurse was “standard practice”, but that she did not have cause to do this often. I do not accept that there was anything misleading such statements. A matter does not need to be frequent to be part of standard practice.

Non Publication

[92] Te Whatu Ora seeks permanent non-publication orders in respect of the names and non-identifying details of the two patients in this case. This is not opposed by Ms McLeay.

[93] There is no public interest in the identities of these two patients in all the circumstances that I have set out above. Such orders are granted.

Orders

[94] Ms McLeay’s claim of unjustifiable dismissal is not made out. No orders are made.

²¹ Paragraph 2.2(f) of the Submissions on Behalf the Applicant dated 29 March 2023.

[95] Ms McLeay's claim of unjustified disadvantage in relation to lack of consultation in the implementing of the Order is not made out. No orders are made.

[96] Ms McLeay's claim of unjustified disadvantage in relation to Te Whatu Ora's decision not to investigate the complaints, and the report made by Ms Batten to the Nursing Council is not made out. No orders are made.

[97] Ms McLeay's claim of unjustified disadvantage in relation to Te Whatu Ora's failure to communicate with her when it decided to take no further action on the complaints, is made out.

[98] Te Whatu Ora is ordered to pay to Megan McLeay the sum of \$10,000 without deduction in compensation for humiliation, loss of dignity, and injury to feelings.

Costs

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

[100] If they are not able to do so and an Authority determination on costs is needed the applicant may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum the respondent 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.

[101] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.²²

Claire English
Member of the Employment Relations Authority

²² Please note the Authority's Practice Note on costs, effective from 2 May, available at <https://www.era.govt.nz/assets/Uploads/practice-note-2>