

NOTE: This determination contains an order prohibiting publication of certain information

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2023] NZERA 421
3189859

BETWEEN

JACKIE HARTE
Applicant

AND

TE WHATU ORA - HEALTH NEW
ZEALAND
Respondent

Member of Authority: Helen Doyle

Representatives: Luke Acland, counsel for the Applicant
Stephen Galbreath, counsel for the Respondent

Investigation Meeting: 1 and 2 June 2023 at Nelson

Submissions Received: 16 and 30 June 2023 from the Applicant
23 June 2023 submissions from the Respondent
4 July 2023 memorandum of counsel from the Respondent

Date of Determination: 8 August 2023

DETERMINATION OF THE AUTHORITY

Prohibition from Publication

[1] Te Whatu Ora Te Tau Ihu Health New Zealand Nelson/Marlborough (Te Whatu Ora) wants the names of its seven witnesses to be prohibited from publication. All its witnesses are members of either management or the people and capability team.

[2] Te Whatu Ora is currently proposing restructuring its people and capability and management teams following the transition from individual District Health Boards to a single

national health entity. Mr Galbreath submits the restructuring could result in a significant detrimental impact on the witnesses if their positions are affected by the restructuring and they must look for employment outside of Te Whatu Ora. He refers to a risk that publication may impact future employment prospects of the witnesses compounded by the media scrutiny that Te Whatu Ora has come under in recent years for its handling of bullying complaints.¹

[3] Mr Acland opposes the application for non-publication orders. He submits that there is no evidence of any material risk of specific adverse consequences for the seven witnesses. Further, that none of those seven witnesses say anything about what restructuring process they face, if any, and the potential repercussions of giving evidence of behalf of Te Whatu Ora.

[4] The Authority's discretion to grant non-publication orders is contained in clause 10 of the second schedule of the Act. The discretion must be exercised in a principled way and the onus is on Te Whatu Ora to show that a non-publication order for its witnesses should be made.

[5] The general principle is that justice should be administered openly and a party seeking to depart from that fundamental principle of open justice is required to provide evidence that identifies specific adverse consequences if a non-publication order is not made.²

[6] The Chief Judge of the Employment Court has commented on the growing awareness of the impact of publication on future employment prospects of individuals named in employment litigation. There is reference to these impacts whether publication is in respect to witnesses, parties or someone named in the relevant sequence of events. There is also reference to the potential for perverse results in terms of access to justice and reputational ruin for future job prospects flowing from the not uncommon practice of online searches for names when recruiting from employment litigation.³

[7] Mr Acland submits specific adverse consequences have not been provided to displace the usual principle of open justice.

[8] There is a nationwide restructuring proposed that could impact potentially on the witnesses' positions. It could result in the witnesses facing the prospect of a job search outside of Te Whatu Ora as a result. Adverse consequence could flow from on-line screening that

¹ Referred to by two witnesses in their evidence.

² *Crimson Consulting Ltd v Berry* [2017] NZEmpC 94.

³ *Elisara v Allianz New Zealand Ltd* [2019] NZEmpC 123 at [63].

could show their names in relation to this litigation. The witnesses as Mr Galbreath describes them, are players in the factual matrix and not parties. There is public interest in knowing the positions that these witnesses held but I am not satisfied that there is significant public interest in knowing their names.

[9] Te Whatu Ora is not seeking non-publication and can be held accountable for any findings made by the Authority.

[10] Standing back and taking all factors into account, I am satisfied that it is in the interests of justice to grant the non-publication orders sought for the names of the seven witnesses. These witnesses will be identified by their position. That will mean that they will likely be identifiable to those who work within Te Whatu Ora. If their future employment prospects require them to look outside of the organisation, their names will not be available when screening them for future employment.

[11] I order that the names of the seven witnesses not be published under clause 10(1) of schedule 2 of the Act.

Employment Relationship Problem

[12] Jackie Harte was employed by Te Whatu Ora as a midwife and co-ordinator at Nelson Hospital until 31 January 2022. Her employment of about nine years in duration transferred to Te Whatu Ora from its predecessor Nelson Marlborough District Health Board on 1 July 2022 on the same terms and conditions of employment.

[13] The matter initially came before the Authority on 15 September 2022 by way of an application for an interim injunction to restrain Te Whatu Ora from proceeding with an investigation until the substantive grievance of unjustified disadvantage could be determined. After receiving the application Te Whatu Ora undertook to pause the independent investigation and mediation occurred. On 14 October 2022 Te Whatu Ora advised the Authority and Mr Acland that it would end the investigation with no finding of bullying.

[14] The Authority made some preliminary observations in a notice of direction dated 7 October 2022 as discussed with the parties about the interim injunction application. One of the observations was to suggest that there be a reorientation of the independent investigation to examine general team dynamics. The Member noted that the independent investigator

appeared to concur with that from an earlier email they had sent. It was further recorded that if the Authority investigation proceeded then the matter would be allocated to another Authority member to avoid any perception of preconception. A different Member has therefore dealt with this matter.

[15] In January 2023 Ms Harte advised her intention to resign and an unjustified constructive dismissal grievance was raised, although no corresponding amendment of the statement of problem lodged in support of the application for an interim injunction was made until shortly before the investigation meeting.

[16] Ms Harte asks the Authority to resolve grievances for unjustified disadvantage in respect of the commencement of an investigation into bullying. She says that she was then unjustifiably constructively dismissed because Te Whatu Ora failed to implement steps to address the unsafe workplace conditions and managers conduct and behaviour towards her during the investigation process. It is additionally claimed that the actions of Te Whatu Ora breached the obligations of good faith.

[17] Ms Harte seeks compensation of not less than \$30,000 and penalties for breaches of good faith.

[18] Te Whatu Ora says that it acknowledged its shortcomings in the bullying investigation process and made an open offer to resolve the unjustified disadvantage grievance of \$15,000 under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) on 14 October 2022. The offer was not accepted. It does not accept that any further award should be made in respect of disadvantage related to the investigation process. Te Whatu Ora does not accept that Ms Harte was unjustifiably constructively dismissed and says that penalties for breaches of good faith are not appropriate as the failings were not deliberate, serious, and sustained, nor intended to undermine the employment relationship.

The Investigation Process

[19] A substantive investigation meeting took place on 1 and 2 June 2023 at Nelson. The investigation time was enlarged to include a further day when advice was received that an unjustified constructive dismissal grievance had been raised. An amended statement of problem and statement in reply were timetabled and duly received on 12 May 2023 and 26 May 2023 respectively.

[20] The Authority heard sworn and affirmed evidence from Ms Harte and from seven witnesses for Te Whatu Ora over the two days of investigation. It was agreed with counsel that submissions would be timetabled as it was likely that evidence would occupy the time assigned to the investigation meeting. Those submissions were received in accordance with that timetable.

[21] As permitted by s 174E of the Act, this determination has stated findings of fact and law and conclusions on issues necessary to dispose of the matter and specify any orders made. The determination does not record all the evidence and submissions received.

The issues

[22] The issues the Authority needs to determine are as follows:

Unjustified disadvantage claims

- (a) Did Te Whatu Ora make an open offer in respect of the personal grievance of unjustified disadvantage?
- (b) If so when and on what basis?
- (c) What are the material provisions in the Bullying and Harassment Prevention Policy (the policy)?
- (d) What is the legal framework for claims of unjustified disadvantage?
- (e) Was Ms Harte unjustifiably disadvantaged assessing the matters set out below:
 - (i) Te Whatu Ora did not take sufficient steps to ensure Ms Harte was not disadvantaged because of the process.
 - (ii) Policy refers to involvement of GM human resources.
 - (iii) There was a failure to provide Ms Harte written notice setting out what the complaint is to be investigated.
 - (iv) The complaints were coached or encouraged, anonymous, not raised promptly, historic and stale and did not refer to bullying and harassment.
 - (v) There was a change without good reason from the view that there was no basis to investigate the complaints to the commencement of a formal investigation.

- (vi) No consultation on the three-person team.
 - (vii) The terms of reference for the external investigator's investigation issued without consultation with Ms Harte.
 - (viii) Te Whatu Ora misled Ms Harte on several occasions that an investigation team had met and decided to commence a formal investigation when no such meetings or decisions had taken place.
 - (ix) A manager had responsibility for decision making for the investigation and any subsequent actions against Ms Harte whilst at the same time being a complainant.
 - (x) When the external investigator recommended Te Whatu Ora stop its investigation Te Whatu Ora did not do so within a reasonable time.
- (f) If found that there were unjustified actions causing disadvantage should Ms Harte be awarded compensation more than \$15,000 offered by Te Whatu Ora?

Unjustified constructive dismissal claim

- (g) What were the reasons for Ms Harte's resignation?
- (h) Was the resignation caused by breaches of duty by Te Whatu Ora?
- (i) If there were breaches were they of a serious nature that would mean it was reasonably foreseeable that Ms Harte would not be prepared to continue to work for Te Whatu Ora?
- (j) If there was a constructive dismissal, then was it justified?
- (k) If the dismissal was unjustified, then what remedies should flow as a result.

Penalties

- (l) Should the Authority award penalties under s 4A of the Act if Te Whatu Ora failed to comply with the duty of good faith in s 4(1) of the Act.

Did Te Whatu Ora make an open offer in respect of the personal grievance of unjustified disadvantage?

[23] Te Whatu Ora made an open offer to Ms Harte for the unjustified disadvantage grievance of \$15,000 under s 123(1)(c)(i) of the Act.

When, and on what basis, was the open offer made?

[24] Mr Acland submits that the offer was made as part of a “without prejudice” chain of correspondence on 14 October 2022 and not made openly until the amended statement in reply when it was made with a denial of liability.

[25] Whilst not necessarily determinative of whether it was part of a chain of privileged communications the letter dated 14 October 2022 was not marked “without prejudice.” Its intention can also be ascertained from an email dated 14 October 2022 from Mr Galbreath to the Authority and copying in Mr Acland. The email advised the Authority that Te Whatu Ora had made an open offer to resolve the substantive grievance, would end the current investigation and commence an independent review of the team dynamic.

[26] The letter of 14 October 2022 acknowledged that there were failings in the process and that Te Whatu Ora did not adhere completely to the policy. Further that more could have been done at the outset to clarify the complaints before deciding to proceed with an investigation. It acknowledged that the panel did not consider the complaints before the independent investigator was appointed and as a result, specific bullying allegations were not identified. This was stated as “learnings which Te Whatu Ora is taking on board.”

[27] The General Manager People & Capability (GM) sent Ms Harte a letter dated 28 October 2022 at her home address headed private and confidential. It confirmed that the investigation into the allegations of bullying and harassment has been ended. The GM apologised in the letter for the failure to comply with all aspects of the policy and set out aspects that could have been done better. There is general reference to the offer to resolve the grievance. Although the letter is headed private and confidential it does not impact on the status of the earlier letter and convert an otherwise open offer to one that is privileged. Furthermore, the letter from the GM does not refer to the details of the offer.

[28] An open offer was made in the letter dated 14 October 2022. The offer was not accepted.

What do the material aspects of the Bullying and Harassment Prevention Policy provide?

[29] The policy is a substantial document of nine pages. As the GM said in their evidence the policy is process heavy, somewhat confusing and needs to be read carefully. It was developed as a joint initiative between unions and the then DHB. In March 2023 it was replaced with a new policy.

[30] The policy contains a broad definition of bullying and harassment. There is a section about the rights of the complainants and those accused of bullying. There is also reference to the manager's responsibilities. The policy provides that the primary mechanism to directly address bullying and harassment is the bullying and harassment team (the Team) which comprises three representatives. One is from the unions, one from management and one from human resources. Te Whatu Ora referred to the Team in its correspondence as the Panel.

[31] Some focus in this matter is on the parts of the policy that refer to informal and formal resolution.

[32] If the decision is to proceed formally with a complaint, then the Team will consider whether the investigation should proceed based on the information that it has. If there is a decision to proceed then the Team will engage an outside person who is an expert to carry out the investigation.

What is the legal framework for claims of unjustified disadvantage?

[33] Section 103(1)(b) of the Act defines a personal grievance arising from unjustified disadvantage as one that includes a claim that at least one of the employee's conditions of employment has been affected to the employee's disadvantage by some unjustifiable action on the part the employer.

[34] To determine the justification of any action by the employer complained of under s 103(1)(b) of the Act the Authority applies the test in s 103A of the Act on an objective basis. The test in s 103A subs 2 provides:

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

[35] In applying the test in subs 2 the Authority must consider the procedural fairness factors set out in s 103A (3) of the Act. These are whether having regard to the resources available to Te Whatu Ora the allegations against Ms Harte were sufficiently investigated, whether concerns were raised with her, whether she had a reasonable opportunity to respond and whether such response was genuinely considered before the taking of action. The Authority may in addition to the factors in subs 3 consider other factors as it thinks appropriate. The Authority must not determine an action to be unjustified under s 103A solely because of defects in the process followed if they were minor and did not result in Ms Harte being treated unfairly.

[36] In this situation where an investigation into bullying was commenced but not concluded the procedural factors as set out in subs 3 cannot be easily applied. Consideration of these factors is mandatory and to the extent that it is difficult the Employment Court has concluded that the Authority should try to give the considerations in subs 3 a sensible interpretation.⁴

Was Ms Harte unjustifiably disadvantaged?

Insufficient steps taken to ensure that Ms Harte was not disadvantaged during the process.

[37] On 22 July 2022 Ms Harte had completed a night shift and stayed on to chair a perinatal mortality meeting. She was asked to stay behind by her manager. The Authority did not hear evidence from that manager. Ms Harte said that she was told that the human resources business partner (HR business partner) was coming to see her with a complaint and that this was said within the hearing of other staff present. She said she then waited for a period of some ten to twenty minutes before the HR business partner arrived and other staff were asked to leave. One of the midwives offered to remain with Ms Harte as a support person and did so.

[38] Ms Harte was advised of the complaints and was provided with a letter dated 22 July 2022. Attached to the letter was copies of the complaints, information about the investigator who had been appointed, advice about who was on the investigation panel, a copy of the bullying and harassment prevention policy and an employee assistance programme brochure. Although the letter stated the terms of reference were attached, they were not, but were

⁴ *Angus v Ports of Auckland* [2011] NZEmpC 160 with reference to the *Northland Milk Vendors Association Inc v Northern Milk Ltd* [1988] 1 NZLR 530 (HC).

provided at a later point. The letter advised Ms Harte that she was entitled to have a representative or support person at the meeting with the investigator.

[39] Ms Harte was concerned she was not given advance notice of the meeting and the opportunity to arrange support and prepare. She described the meeting as shocking and embarrassing for her. There is a level of discomfort in being advised of complaints but Ms Harte was not expected to respond to them at that time. She had someone arranged at short notice to provide support. Ms Harte needed the complaints to be able to respond to them. The fact that others may have heard Ms Harte was to receive a complaint before the HR business partner arrived was not ideal and I accept resulted in some embarrassment for Ms Harte.

[40] The policy provides under the heading formal complaint that the person accused of bullying/harassment should not be disadvantaged and this may involve negotiation by the general manager human resources to ensure both parties are not disadvantaged.

[41] Ms Harte says that she was not consulted about how she could be supported while the investigation took place. After the meeting on 22 July 2022 Ms Harte went on sick leave. The evidence from Te Whatu Ora was that special leave was offered at that meeting. I conclude that less likely otherwise sick leave would not have initially been taken. On 26 July 2022 Te Whatu Ora was contacted by a co-leader from the Midwifery Employee Representation and Advisory Service (MERAS) asking that Te Whatu Ora consider placing Ms Harte on special leave. Five days special leave was granted at that time. Participation in the employee assistance programme (EAP) was offered at the outset which is the action of a fair and reasonable employer.

[42] Mr Acland was then instructed. In a letter, dated 5 August 2022 he asked amongst other matters for special leave to “mitigate disadvantage”. Te Whatu Ora advised that Ms Harte would be granted special leave for the duration of the investigation process and any sick leave used since notification of the complaint will be recorded as paid special leave. Ms Harte remained away from the workplace until November 2022.

[43] The initial disadvantage about a lack of consultation regarding support for Ms Harte during the investigation was reduced by the granting of paid special leave for the duration of the investigation which enabled Ms Harte to remain away from the workplace without impact on her financially.

Policy refers to the General Manager of Human Resources being involved

[44] There is no longer a specific general manager human resource position but in the main the new GM role covers the old general manager human resource function but is a larger role.

[45] The GM is responsible for leading human resources, payroll, learning and organisational development, workforce planning and health safety and well being teams. The teams have about 50 employees and service a workforce of about 3000 in Nelson, Tasman and Marlborough. On occasion tasks are delegated to HR business partners as they were in this matter. The HR business partner in this matter had considerable experience in the HR area. Before the investigation commenced the HR business partner discussed the issues with the GM. The GM became more involved when matters took a legal turn in September 2022.

[46] I do not conclude unjustified disadvantage is established because of the delegation to the HR business partner. The HR business partner communicated about important aspects with the GM who had an overview.

Failure to provide Ms Harte with written notice setting out the complaint to be investigated to proceed formally under the policy

[47] It was a requirement of the policy that the person accused of bullying be told of the complaint in the form of a formal written notice from the GM.

[48] I accept that requirement was likely met by the letter provided to Ms Harte on 22 July 2002 advising that there had been complaints. I do not conclude a failing in that regard.

Coaching or encouragement about the complaints?

[49] The first indication that a complaint could be expected from P was in an email to the HR business partner from P dated 6 December 2021. The subject in the email was “complaint 26/08/20” and the email asked that the HR business partner reopen the complaint. There had been an earlier complaint made by P that she had withdrawn. P was unavailable over the Christmas period and could not meet with the HR business partner until 9 February 2022. On 9 February 2022 P provided the HR business partner who had also been involved at the earlier time with details of the complaint. P refers to issues after 26 August 2020. It was not simply a reopening of the earlier complaint.

[50] The HR business partner explored with P informal ways to resolve her complaint both at that time and in an email dated 15 February 2022. P sent an email dated 16 February 2022 and wanted it to be an “official complaint” against Ms Harte rather than a more informal approach.

[51] Ms Harte considered that emails she saw from the HR business partner indicated P was coached or encouraged in complaints. I could not be satisfied that the requests in those emails for more information amounted to coaching or encouragement of the complaints. I think it more likely that the HR business partner was trying to get a better understanding of what was being complained about which a fair and reasonable employer could be expected to do. In the email of 17 February 2022, the HR business partner asked P to advise the nature of things that she was complaining about such as the type of behaviour. There was a request for more specific examples of the behaviour that P considered bullying with questions such as what happened, when, by whom and where.

Delay in providing Ms Harte with a copy of the complaints.

[52] On 13 April 2022 before P’s complaint was progressed a MERAS official wrote a letter to Ms Harte’s then manager and copied in the acting director of midwifery on 13 April 2022. It was stated that the letter was written to bring to their attention concerns that had been raised by MERAS members about Ms Harte. Concerns were set out in the letter under headings of bullying and unsupportive behaviours, insults and put downs and poor role modelling. It was stated that midwives had more specific examples to support points in the letter but were concerned to have them listed for fear of being identified. Further that they perceived a lack of action in the past to address the behaviour and that they feared some form of reaction if identified.

[53] This letter was provided to the HR business partner who responded that as part of the requirements of natural justice Ms Harte needed to know who the people were making the allegations and some specifics. He suggested staff could talk to him or his manager to have explained what is required. He mentioned the complaint he had received already from P.

[54] On 11 May a midwife employed by Te Whatu Ora who was also a MERAS union delegate sent a letter dated 27 April to Ms Harte’s then manager. It provided it was written in support of the concerns in the letter written by the MERAS official. It set out broad descriptions

of reported concerns. The union delegate wrote they had witnessed some of these. The letter was forwarded to the HR business partner on 11 May 2022.

[55] There was an unfortunate delay in raising the complaints with Ms Harte until 22 July 2022. This was due in part to the HR business partner requesting further details from P after the statement she had provided on 9 February 2022. There were then the other two letters. Ms Harte was largely absent for personal reasons from 9 May to 4 July 2022. There were some justifiable reasons for the delay in provision of the complaints as more specific detail had been requested and may have been forthcoming. As it transpired no further specifics were provided. I do not conclude the delay to the extent it was unjustified.

Anonymity

[56] The policy provides in the first instance that an employee has the right to lodge a written signed complaint about the behaviour. The presentation of a written complaint to the GM (or the GM's delegate) becomes mandatory if the step of treating the complaint as a formal complaint is to be taken as it was in this matter. This requirement of the policy for a formal complaint is not met when complaints are made on behalf of unnamed persons. It requires a complainant and a written complaint. There was a failing in this regard to comply with the policy. A fair and reasonable employer could be expected to comply with the policy.

Historical and stale - not doing more to clarify the complaints before moving to a formal investigation.

[57] As best the Authority can ascertain from the very general concerns, they ranged from about June 2021 (referred to as six months before December 2021) and perhaps even earlier through to January 2022. Some concerns, even historical may inform more recent matters. The nature of the complaints and when they arose goes hand in hand with the failure to do more at the outset to clarify them.

[58] Ms Harte was concerned that the three complaints were not capable of response because they lacked specifics and were "anonymous gripes about her personality and performance." It would have been difficult for Ms Harte to have responded to many of the concerns because the specifics were not available. The policy requires discussion with complainants and exploration of complaints so that there can be a full understanding of the situation. The HR business partner had some discussion with the complainants and asked for further information but this did not

result in further clarification. A fair and reasonable employer could have been expected to have identified more clearly the concerns to enable proper response and to enable proper consideration about how to proceed and whether to take a formal or informal approach.

No bullying/harassment alleged

[59] I do not conclude that it could be discounted out of hand that the complaints did not refer to behaviours that could fall within the definitions of bullying in the policy. The definitions are quite broad. There is the use the word bullying in relation to some conduct complained about. The union official and delegate referred to fear preventing some of the members to come forward.

[60] Te Whatu Ora had to do something with the complaints. There was a need to balance obligations to those who had complained with obligations to Ms Harte. The failing in this regard is that Te Whatu did not do more at the outset to clarify the nature of the complaints before proceeding to formal investigation.

Change in view by HR business partner about no basis to investigate to a formal investigation (no consideration of informal resolution)

[61] Ms Harte came into possession of “hundreds of pages of emails” from Te Whatu Ora in or about November 2022 after she asked for her personal information by way of a privacy request.

[62] The Authority was directed to some of the emails for the material period between 6 December 2021 and 13 September 2022. One of them was the email from the HR business partner dated 13 April 2022 that Ms Harte needed to know who was making the allegations and some more specifics about the events rather than an impression. The email also indicated that P had also been asked for more information.

[63] Ms Harte was concerned that the HR business partner had, notwithstanding they had identified the concerns about lack of specifics, confirmed that the complaints would go forward to be investigated under the policy even though they did not change at all.

[64] The HR business partner said that they had a Teams meeting with the GM to discuss the two complaints received on 14 April 2022. Whilst the HR business partner initially considered the MERAS compliant was not sufficient to take forward, they came to a view that

it was very likely to be corroboration of P's complaint and could be expanded on if witnesses came forward during an investigation. They found dealings with the MERAS official to show that they had integrity. There was agreement to commence an investigation under the policy and it was agreed that the MERAS official should be contacted again to discuss the concerns further. When the MERAS official was eventually contacted there was advice that staff were too scared to come forward but they were hopeful that more may come forward if there was an investigation.

[65] Mr Acland submits that Te Whatu Ora decided to commence an investigation for the sake of its own reputation. This is with reference to evidence the Authority heard that there had been some scrutiny of Te Whatu Ora by the media and reporting of a culture of bullying and a lack of action to address it. I accept this likely meant the threshold for complaints going to investigation was quite low and that Te Whatu Ora took bullying complaints very seriously. The HR business partner stated in evidence to illustrate this that there had been about fifty complaints since the policy was put in place in 2011/2012. They understood that all had been investigated.

[66] When Ms Harte complained of bullying by those who had been involved in this matter from HR and management in or about October/November 2022 her complaints were investigated formally. The Authority understands from evidence that there was no finding of bullying.⁵

[67] The HR business partner felt that P's complaint was sufficient as a standalone complaint. It was considered that an independent investigation could be the fairest way to determine if there was any wrongdoing and that the unnamed complainants may have been more likely to come forward to an independent investigator.

[68] There was a very quick change to decide to proceed to investigation under the policy. Ms Harte when she read the material emails would have understandably considered this somewhat inexplicable. Objectively assessed I am not satisfied that there was some ulterior motive in the decision to proceed to an investigation and that Ms Harte was singled out.

[69] The evidence supported that the view of the GM and the HR business partner was that an independent investigator would be better placed to make an assessment. The decision to

⁵ The Authority did not see the investigator's report into alleged bullying by management and HR as part of its investigation. It was not relevant to resolution of the employment relationship problems.

proceed to investigation under the policy did not mean with proper application of the policy there was no alternative pathway to resolution other than formal investigation. There were safeguards in the policy that could have overcome some of the difficulties and could still have identified informal resolution. Unfortunately, there were some failings in its application.

The terms of reference for the external investigator's investigation were issued without consultation with Ms Harte

[70] The initial letter given to Ms Harte on 22 July 2022 indicated that the terms of reference for the independent investigation were attached but they were not. Mr Acland in a letter of 5 August 2022 asked for the terms of reference and these were subsequently provided with a letter dated 9 August 2022 from the HR business partner. There was an opportunity to comment on them if considered necessary however it would appear no comment was made.

[71] I am not satisfied that the policy required consultation about the terms of reference and accordingly there was no unjustified action on the part of Te Whatu Ora in not consulting.

No consultation on the three-person team

[72] Mr Acland also raised in his letter of 5 August that Ms Harte was not given the opportunity to comment on the composition of the Team as the policy required. In a letter of 9 August 2022, the HR business partner advised that Ms Harte was welcome to make any suggestions on the composition of the panel and if appropriate the member(s) could be replaced.

[73] There was initial non-compliance which was unjustified but there was then an opportunity to comment on the makeup of the Team and an indication that what was said would be considered. It did not appear that further comment was received and the investigation was stopped. If there was disadvantage it was minimal.

Te Whatu Ora misled Ms Harte on several occasions that an investigation team had met and decided to commence a formal investigation when no such meetings or decisions had taken place.

[74] The policy requires that if a decision is made to proceed formally with complaints the GM will bring together the Team. It states as below at the top of page six:

The Team will consider whether an investigation should proceed based on the information provided to it. This may involve an initial interview with the complainant or person who alleges that bullying/harassment has occurred to clarify detail in their written complaint. If the Team decides to proceed with the investigation, it shall follow the investigation procedure below.

[75] Ms Harte was misled that the Team had met and considered whether to proceed formally with the complaints on three occasions. Te Whatu Ora accept that the Team had not met and reviewed whether to proceed formally with the complaints. It says that the representations made had resulted from regrettable mistakes and led in part to the open offer in which it was acknowledged that the independent investigator was appointed before the Team had met.

[76] The HR business partner had asked a senior HR adviser to prepare the work for the bullying and harassment investigation. This was the first time the senior HR adviser had been involved in such an investigation and said that they did not read the policy and were unaware that the Team decided whether to proceed with the investigation under the policy.

[77] The investigation team did not meet until 16 August 2022 by which time the decision to proceed to a formal investigation had already been made and the independent investigator had been appointed and had commenced investigation.

[78] The first occasion that Ms Harte was misled was in the letter handed to her on 22 July 2022. That provided amongst other matters, that the Team had received the complaint and decided to proceed with an investigation to be run by an external investigator. The senior HR adviser said she had mistakenly left in that paragraph which was in a template letter and she should have clarified that the Team had been set up only at that time. I could not be satisfied this was other than an unfortunate mistake.

[79] The second occasion was when Mr Acland in a letter dated 5 August 2022 to Te Whatu Ora asked for a copy of the decision that the Team made to have an external investigation. The response was by letter dated 9 August in the name of the HR business partner but signed by the senior HR adviser. The HR business partner was away on 9 August 2022 on leave. The letter provided there was no copy of a written decision made by the Team for a formal investigation. It stated that the decision to proceed with an independent investigation was made at a meeting of the Team on 20 July following a review of the letters of complaint. It is common ground

that all that had happened on 20 July 2022 was that the Team members had been confirmed. There had been no meeting at which there had been discussion and review of the complaints.

[80] The senior HR adviser said in evidence that they were very busy and felt under pressure to respond to Mr Acland's letter.

[81] On the same day as the letter was responded to, the senior HR adviser sent an email to the Team members attaching complaints, information about the investigator and suggesting a meeting that ultimately took place on 16 August 2022 by Zoom. It is less likely in these circumstances that the incorrect advice was a mistake.

[82] The third occasion was when the HR business partner swore an affidavit in opposition to the application for interim orders in which they deposed to the Team meeting on 20 July 2022 to consider the complaints and decision that an independent investigator should be appointed to investigate them.⁶ It is more likely I conclude that they relied in so deposing on earlier advice from the senior HR adviser.

[83] It was an unjustifiable action to advise Ms Harte that the Team had met and reviewed the complaints before deciding to appoint an external investigator when that had not occurred. Te Whatu Ora acknowledged this in its letter containing its open offer of 14 October 2022. It was not an action in accordance with good faith obligations.

Manager responsibility for decision making for the investigation and any subsequent actions against Ms Harte whilst at the same time being a complainant?

[84] The associate Director of Midwifery – Operations Manager (operations manager) has the role of professional lead for midwifery and overall operation manager for maternity services across Nelson, Tasman and Wairau. From 8 August to 22 August 2022, they were the direct line manager for core midwives and clinical co-ordinator midwives at the Nelson maternity unit due to the vacancy of the charge midwife manager. Ordinarily clinical midwives report directly to their charge midwife manager and the charge midwife manager reports to the operation manager.

⁶ Affidavit of HR business partner sworn at Nelson on 4 October 2022 at paragraph 11.

[85] Ms Harte was concerned that the operations manager was responsible for the investigation, a complainant and witness.

[86] This concern arose from a response to the letter from Mr Acland dated 5 August 2022. That letter was addressed to the charge midwife manager who was no longer in that role. The operations manager was acting in that role. The response from the operations manager in an email dated 5 August 2022 was that they “will be assuming responsibility from now on.” They also wrote that “HR will be responding to your letter.” That clearly resulted in some confusion that the operations manager was assuming responsibility for the investigation and decision making. An email from the HR business partner to Mr Acland on 8 September 2022 confirmed that the operations manager would not be involved as decision maker and had not had any role in the decision making or investigation given the involvement of the panel and the independent investigator. This email did not allay concerns.

[87] One of the disclosed emails with the privacy request stated that the operations manager was invited to a meeting by the senior HR advisor to decide if there was to be mediation or progression of the investigation. The operation manager’s evidence was that they did not attend the meeting and that is supported by evidence from those who did attend. I am not satisfied that the operations manager was involved in the decision making that followed the pausing of the investigation process or attended the meeting in question.

[88] The operations manager did talk to the investigator as part of the investigation and whilst she did not regard herself as a complainant some of the emails disclosed subsequently with the privacy request caused Ms Harte to form that view. The emails were disclosed without context and could have been seen as complaints. The operations manager put them in a different context when they gave their evidence.

[89] Having carefully considered the evidence I am not satisfied that the operations manager was responsible for the investigation and decision making in respect of the investigation I do not conclude the unjustified disadvantage claim about a conflict of interest on the part of the operations manager is made out.

When the external investigator recommended Te Whatu Ora stop its investigation it did not do so.

[90] On 6 September 2022 Ms Harte raised a personal grievance on the basis that there had been procedural failings and unfairness and that the investigator had not identified “a single complaint that could justify the bullying and harassment investigation.” There was a request that the investigation end and a claim for compensation and costs.

[91] The raising of the personal grievance was acknowledged by the HR business partner in an email of 8 September 2022 to Mr Acland. They advised in the email that there was to be an interview with P and the independent investigator shortly and that the investigation should continue.

[92] The independent investigator in an email sent on 8 September 2022 to the senior HR advisor expressed some concerns with the scope of the investigation and what appeared to be wider issues. They noted a risk that it may look as if they has been appointed to “look for problems against Ms Harte.” It was clear from the email that it was unlikely there was going to be a conclusion reached that there was bullying or harassment. The independent investigator suggested three alternative approaches. The first was to review the terms of reference. The second was to stop the investigation and the third was a cultural review to identify issues rather than focus “on one person’s alleged behaviour towards others.”

[93] There was a Zoom call between the HR business partner, senior HR adviser and the independent investigator on 12 September 2022. The independent investigator advised that some of those interviewed had been distressed. One of the witnesses was described as “very distressed” and asked to withdraw from the process. It was accepted at that meeting the investigation should be paused whilst legal advice was obtained. The evidence supports that the independent investigator was advised that the investigation was paused after the meeting. Mediation was proposed.

[94] The matter was then escalated to the interim general manager clinical services (GM clinical services) who was responsible for delivery of service from Nelson and Wairau hospital. That was the level at which mediation decisions needed to be made. Before the meeting took place with HR, the GM clinical services and legal counsel on 19 September 2022 the interim injunction application had been lodged.

[95] On 20 September Mr Galbreath suggested urgent mediation and that in the interim the investigation be paused pending substantive determination of the disadvantage claim, or an agreement being reached between the parties.

[96] On 27 September 2022 there was advice to the Authority that Te Whatu Ora agreed to pause the investigation pending the resolution of the substantive disadvantage claim or agreement between the parties.

[97] On 29 September there was mediation. Mediation was not successful, and Te Whatu Ora lodged affidavits in opposition.

[98] The investigator's email was disclosed when the affidavits were lodged on 4 October 2022.

[99] On 6 October 2022 based on an undertaking to pause the investigation Ms Harte agreed the interim injunction application would not proceed.

[100] On 7 October 2022 the Authority member as set out earlier suggested a change in the orientation of the investigation to examine "general team dynamics." He observed that this was in line with what the independent investigator had stated in her email.⁷

[101] On 14 October 2022 there was advice from Mr Galbreath on behalf of Te Whatu Ora that the investigation would be ended with no finding of bullying and there was an open offer.

[102] Mr Acland submits in addition to saying it was unjustified not to stop the investigation earlier that Te Whatu Ora did not disclose the independent investigator's suggestions and views but used it as "tactical leverage" in response to the personal grievance.

[103] There was some delay in disclosure of the investigator's views and in stopping the investigation. There was a need to involve management to approve next steps. Both Ms Harte's situation and that of the complainants had to be considered and there was a decision to obtain legal advice. There was an intervening event with the lodging of an interim injunction to stop the investigation.

⁷ Notice of direction dated 7 October 2022 – the investigator's email of 8 September had been attached to the affidavit of the HR business partner.

[104] The investigation was paused promptly although there was some delay in advising Mr Acland and Ms Harte of this, there was mediation and then agreement to stop the investigation on 14 October 2022. Te Whatu Ora accepted that it had made mistakes and offered to pay some compensation. I am not satisfied that the level of delay in the circumstances was such to conclude it was unjustified or that it was for tactical reasons. Rather this was a large organisation and that delayed the speed of decision making and response.

Conclusion about unjustified action causing disadvantage.

[105] It is appropriate for Te Whatu Ora to treat bullying complaints seriously. Te Whatu Ora was not responsible for how the complaints were initially received. The difficulties in this matter arose because of the nature of the complaints, the lack of specifics and the anonymity of most of the complainants. Once the complaints were received Te Whatu Ora properly accepted that more at the outset to clarify them could have been done before it decided to proceed with an investigation. There could also have been a decision to investigate them informally.

[106] Under s 103A(3)(b) and (c) of the Act Ms Harte did not have a proper opportunity to respond to the concerns because they were not specific enough. It was necessary that she have this opportunity because if a complaint of bullying or harassment is substantiated under the policy a disciplinary action including dismissal may result.

[107] Issues could have been resolved by proper application of the policy. For reasons set out above this did not occur. A fair and reasonable employer could have been expected to comply with its own policy. Its failure to do so in the respects identified above was unjustified and not in a minor way that did not cause unfairness. There were breaches of good faith in respect of the advice that the investigation team had met and reviewed the evidence before a formal investigation was decided as appropriate. Ms Harte was misled in this respect.

[108] I am satisfied that Ms Harte was disadvantaged by the unjustified actions. She experienced stress that she spoke about at the investigation meeting whilst away from the workplace. She described this period as one of the worst in her life. Ms Harte was not clear who had complained about her which caused distress and unease. Ms Harte concluded that there was the building of a case against her, that Te Whatu Ora had not told her the truth and insisted everything was done appropriately when it was not.

[109] Ms Harte has made out her personal grievance of unjustified actions causing disadvantage and is entitled to consideration of remedies.

Should the Authority award more than \$15,000 offered for the unjustified disadvantage grievance.

[110] The failings on the part of Te Whatu Ora could properly be identified as procedural in nature. There was no substantive outcome because the investigation was stopped. Te Whatu Ora then discussed a return-to-work plan and looked to implement a broader team culture review.

[111] It was clearly a stressful and difficult time for Ms Harte. I weigh for the period of investigation Ms Harte was on paid special leave, Te Whatu Ora agreed to go to mediation, paused and then stopped its investigation and apologised formally for its actions admitting its most serious failings. I weigh that the complaints themselves would have caused a measure of the distress.

[112] The Authority has considered other cases where there have been findings of unjustified disadvantage for procedural failings. Some of the awards have been at the lower end.⁸ Some awards have been assessed in a global manner which makes it more difficult to compare with this matter.

[113] Although there were several actions that the Authority has concluded to be unjustified it is appropriate that any award be assessed on a global basis. Overall, I conclude that the sum of \$15,000 for compensation is higher than many awards for unjustified disadvantage where there was no substantive failings. The Authority has focussed on the evidence about the harm caused weighed with matters set out above.

[114] I conclude that subject to any issues as to contribution an appropriate award is the sum of \$15,000 under s 123(1)(c)(i) of the Act.

Contribution

[115] Where the Authority has determined that there is a personal grievance it is required to consider under s 124 of the Act whether the actions of the employee contributed to the situation

⁸ *Spotless Facility Services NZ Limited v Anne MacKay* [2017] NZEmpC 15 – an award of \$2,000 under s 123(1)(c)(i) of the Act where consequences were stated as significant and on-going.

that gave rise to the grievance and, if so, reduce the remedies that would otherwise have been awarded.

[116] I am not satisfied that Ms Harte contributed to the grievance of unjustified disadvantage and I do not reduce the award above under s 123(1)(c)(i) of the Act.

[117] I order Te Whatu Ora pay to Ms Harte without deduction the sum of \$15,000 being compensation under s 123 (1)(c)(i) of the Act.

Constructive dismissal

[118] In some circumstances a resignation may amount to a dismissal.⁹

[119] The Court of Appeal in *Auckland Shop Employers Union v Woolworths (NZ) Limited* has listed three non-exhaustive situations where a constructive dismissal may occur.¹⁰

[120] One of these is where a breach of duty by the employer results in an employee resigning. That is the ground on which Ms Harte relies. Ms Harte says that that there was no safe plan in place for her to return to work and steps were not taken to address the harmful workplace conditions before she resigned on 31 January 20223. Further that Te Whatu Ora's actions toward her during the investigation process and "inaction to implement the Authority's suggestions and a safe reintegration process" made the situation at work so intolerable that Ms Harte was forced to resign.

[121] The correct approach the Court of Appeal has stated in constructive dismissal cases where breaches are alleged is to firstly conclude whether the resignation has been caused by a breach of duty on the part of the employer. In determining that matter all the circumstances of the resignation must be examined and not simply the communication of the resignation. The Authority needs to assess whether the breach of duty, if one is found by the employer, was of sufficient seriousness to make resignation reasonably foreseeable.¹¹

[122] Ms Harte has the burden of establishing that the resignation was a dismissal. Claims that a resignation was in fact an unjustified dismissal are not straightforward claims.

⁹ *Wellington Clerical Union v Greenwich* (Court of Appeal) [1983] ACJ 965 at 975.

¹⁰ *Auckland Shop Employees Union v Woolworths (NZ) Limited* [1985] 2 NZLR 37 (CA) at 374.

¹¹ *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 1 ERNZ 168.

What was the reasons for the resignation?

[123] After the investigation had stopped there was discussion about a return-to-work plan. Ms Harte returned to work on 29 November 2022.

[124] Mr Acland sent a letter dated 31 January 2023 advising of Ms Harte's intention to resign and raising of an unjustified constructive dismissal grievance. There was reference to earlier emails sent by him to Te Whatu Ora on 18 and 24 January 2023. Mr Acland stated that there has been "radio silence" on Ms Harte's substantive concerns and that it was clear to her that Te Whatu Ora was not demonstrating any motivation to mitigate the effects of its "failed investigation." It was stated that the relationship of trust and confidence is being undermined by the failure to provide a safe workplace.

[125] An earlier email dated 18 January 2023 from Mr Acland to Mr Galbreath set out in more detail the issues of concern for Ms Harte. Concerns are set out that there wasn't a plan to ensure positive work relationships between Ms Harte and the union delegate and P or facilitated meetings if everyone agreed as set out in the work plan. Ms Harte noted that she had not been approached about these meetings. There were concerns about limited interactions with the service manager and a late response from the service manager to a concern about two colleagues not talking to her and that she was not advised about what had occurred or whether anything had been done. She recorded that one of the colleague's behaviours was unchanged.

[126] Further that there had not been as set out in the plan the engagement of an external consultant with expertise in team building to address issues with team dynamic and ensure positive behaviours. There was reference to Ms Harte approaching her then manager on 9 January 2022 regarding some frustrations. She talked about two colleagues and that she felt excluded by them and undermined in decision making at times and there was some confusion as to who was leading the shift. The manager suggested a meeting the next day however that did not eventuate.

[127] Ms Harte states that overall she has not felt well supported by management although her colleagues have been supportive. She set out that she had become increasingly anxious and more isolated and felt as if everything had been swept under the carpet and that she had been to see her doctor on 13 January 2023 to discuss the stress she was under.

[128] The email of 24 January 2023 was in response to a letter from Mr Galbreath of 18 January 2023 suggesting a meeting with the service manager and Ms Harte's direct manager to address the concerns and agreeing to three weeks paid special leave in the interim. Mr Acland responded in the 24 January email that Ms Harte was on stress leave and the concerns were in the earlier email and would not be able to be added to in person. There were no additional matters referred to.

[129] The reasons for the resignation were related to the safety of the workplace and residual issues following the investigation. I find they were contained in the main in the email from Mr Acland dated 18 January 2023. Ms Harte's evidence supported that the emails provided after the privacy request caused concern although these were not specifically referred to as concerns before resignation.

Was the resignation caused by a breach of duty?

[130] After the investigation was stopped the matter of Ms Harte returning to work needed to be addressed. There was consultation and discussion about that and a meeting on 24 November 2022 with Ms Harte, Mr Acland and the GM. A work plan was agreed.

[131] Understandably after a period away from the workplace and having been the recipient of complaints, most anonymous, there was some nervousness for Ms Harte in returning to the workplace. She was supported by both her direct manager and the service manager for her first week. On her first day back whilst expressing that she was nervous to her service manager Ms Harte advised other employees were behaving professionally. There was some contact in different ways most days during the first week when Ms Harte was supernumerary.

[132] After the first week Ms Harte was often working night shifts and weekends and that made it more difficult for face-to-face meetings. The evidence supported continued support from the direct manager. Ms Harte agreed in her evidence that although the direct manager was very busy when they were on shifts together they would check in with her. She also agreed that the operations manager had said she could call if needed.

Concerns raised about two employees not speaking to Ms Harte

[133] Ms Harte asked the service manager to investigate concerns about two employees not talking to her in an email dated 7 December 2022. Ms Harte wrote she had endured that

behaviour for several years, but she did hope a word to both to be “kind and professional” may assist. There was a delay in the service manager responding to the email until 13 December 2022. The service manager did indicate in her email that a conversation needed to take place. They were then busy including in an acting up role and asked the operations manager to investigate it. A meeting did take place with one of the employees and Ms Harte considered her conduct appeared to improve.

[134] The operations manager said that the other employee was casual and for several reasons was unable to talk to her before she left for Australia in early February 2023.

[135] Te Whatu Ora acknowledged that Ms Harte was not updated that communication had taken place with one of the employees about her concern.

No facilitated meeting

[136] Te Whatu Ora accepts that Ms Harte was not advised that the union delegate and P did not want to attend facilitated meetings with Ms Harte and that was why they did not go ahead.

External consultant

[137] One of Ms Harte’s concerns was that no external consultant had been engaged to look at the team dynamic and ensure positive behaviour.

[138] The evidence supports that the HR business partner, operations manager and the direct manager had been involved in organising an external consultant to work with the team from in or about mid November 2022. Ms Harte’s direct manager had booked two of the workshops on 20 December 2020 for 28 February 2023. At that time there had been vacancies in the service and a critical shortage of midwives, and the manager could not be confident that the service could be safely staffed so staff could attend the workshop. This did not change until February and so staff were not invited to attend the first workshop until 14 February 2022. Normally the workshops would have been discussed at team meetings however there was no team meeting in December 2022 and the January 2023 team meeting was cancelled. The workshops were therefore not raised before Ms Harte had resigned.

[139] The evidence did not support that concerns about the management dynamic would not be considered. Initially the external consultant wanted to talk to staff without management so

that they felt safe in raising issues that could potentially have included concerns about management.

Raising of concerns about the other co-ordinators

[140] Ms Harte raised concerns about the other two co-ordinators with her direct manager on 9 January 2023. Ms Harte said that she raised concerns about being watched, undermined, and excluded. It appeared from the direct manager's evidence that she thought the concern was primarily about the roles of the employee.

[141] There was no dispute that Ms Harte did not want the direct manager to talk to the employees until after they had talked further about the concerns off site. The arranged meeting on 10 January 2023 to do that, could not take place because it would not have been safe to have left the ward. It was agreed to try again.

[142] Ms Harte was then on sick leave from 13 January 2023.

[143] The Authority needs to consider whether the breaches of duty primarily about communication were of sufficient seriousness to make resignation foreseeable.

Were the breaches sufficiently serious so that resignation was foreseeable?

[144] Mr Galbreath responded the same day to Mr Acland's email of 18 January 2023 and stated the concerns needed to be addressed. Paid special leave was agreed for three weeks and there was mention for the possibility of a review after that time. Mr Acland had asked for special leave until the unjustified disadvantage grievance could be resolved but that was not agreed to.

[145] Te Whatu Ora proposed a meeting in its 18 January email. On 24 January Mr Acland advised the concerns were in the 18 January 2023 email and Te Whatu Ora needed to address these concerns and Ms Harte could not add anything by meeting in person. Seven days later and still within the period of special leave Mr Acland advised of Ms Harte's intention to resign.

[146] Mr Galbreath responded by email to Mr Acland on 2 February 2023 and wrote that Te Whatu Ora was coming up with a plan to address the concerns and was taking them seriously. Ms Harte was given until 8 February to reconsider her position. There was no reconsideration and Te Whatu Ora treated 8 February as Ms Harte's final day.

[147] Objectively assessed there were some workplace and communication failings, but these could have been resolved. Whilst these were investigated Ms Harte was on special leave. Te Whatu Ora's response indicated that it took the matter seriously. Seven days after Mr Acland said that a meeting was not required Ms Harte advised she intended to resign. Te Whatu Ora reiterated that it was investigating the concerns and would extend time to reconsider resignation. There was no response. The resignation was premature, and the evidence does not support that Te Whatu Ora could have foreseen the resignation.

[148] For completeness Ms Harte advised her direct manager on 7 February 2023 that she was not returning to her core role and would be working as a self-employed midwife. Ms Harte was provided with an access agreement to visit Nelson hospital to attend births and assess and visit clients. Ms Harte also worked on call for two February shifts. Given my conclusions set out above I do not need to comment on this further. I do accept that without access to the hospital it would be difficult for Ms Harte to carry out her work as a midwife in Nelson.

[149] I do not find in the circumstances that the breaches were sufficiently serious to make resignation foreseeable.

[150] I do not find that the resignation is a constructive dismissal. That claim is not made out.

Good faith

[151] I have concluded a breach of good faith. Where there is a failure to comply with the duty of good faith in s 4(1A) of the Act a part can be liable to a penalty if the failure was deliberate, serious and sustained or the failure was intended to undermine the employment relationship.

[152] The breaches relied on in the claim for penalties are wide and encompass the procedural failings generally. I have considered the procedural failings and the later disclosed emails. I do not consider that most of them including the issue about whether the investigation would be delayed because P was overseas satisfy the criteria for a penalty.

[153] Only one aspect satisfies the criteria for a penalty. That is the advice from the senior HR advisor to Mr Acland on 9 August 2022 that the decision to proceed with an independent investigation was made at a meeting of the panel on 20 July 2022. On the same day, the 9

August letter was sent, the senior HR advisor sent an email to the panel members asking them to meet for the first-time attaching copies of complaints. I conclude in the circumstances that the incorrect and misleading advice was likely not the result of an innocent mistake but deliberate and probably to cover an error. It is a serious matter. The incorrect advice was not corrected before the HR business partner swore an affidavit for the Authority interim injunction process in or about early October likely relying on the information provided by the senior HR advisor. It was therefore sustained for that extended period.

[154] The maximum penalty in this matter is \$20,000. I have considered the factors in s 133A of the Act in determining the amount of a penalty and other factors that may be relevant. The nature and extent of the breach was limited but was intentional. Ms Harte concluded she had been lied to and that undermined the relationship at a time when the parties were experiencing difficulties that had resulted in a grievance being raised and interim injunction proceedings. I do weigh that Te Whatu Ora took this matter into account in its offer of compensation on 14 October 2022 and acknowledged and apologised for the incorrect advice and not following the policy process in all aspects.

[155] I have considered penalties in similar cases. I conclude an appropriate penalty in this matter is the sum of \$4000.

[156] It is appropriate to order the sum of \$3000 be paid to Ms Harte because of the impact on her that caused a loss of confidence in her employer and the balance to the Crown.

Summary of findings and orders

- (a) Jackie Harte was unjustifiably disadvantaged in her employment.
- (b) Te Whatu Ora is to pay to Jackie Harte the sum of \$15,000 without deduction under s 123(1)(c)(i) of the Act to settle this grievance.
- (c) Jackie Harte was not constructively dismissed.
- (d) Te Whatu Ora is ordered to pay a penalty for a breach of good faith of \$4000. \$3000 is to be paid to Jackie Harte and \$1000 is to be paid into the Authority for payment to the Crown within 28 days.

Costs

[157] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, Mr Acland may lodge, and serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum Te Whatu Ora will 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.

[158] If the Authority were asked to determine costs, the parties could expect the Authority to apply its usual daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.¹²

Helen Doyle
Member of the Employment Relations Authority

¹² For further information about the factors considered in assessing costs, see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1