

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2023] NZERA 641  
3187859

BETWEEN

CAROLINE VAN DRAGT  
Applicant

AND

THE CHIEF EXECUTIVE OF  
ORANGA TAMARIKI –  
MINISTRY FOR CHILDREN  
Respondent

Member of Authority: Natasha Szeto

Representatives: Bev Edwards, counsel for the Applicant  
Emma von Veh and Claudia van Zijl, counsel for the  
Respondent

Investigation Meeting: 27 April 2023 at Tauranga and 20 July 2023 at Wellington

Submissions and  
Information Received: 3 August 2023 and 8 September 2023 from the  
Applicant and 7 August 2023 from the Respondent

Date of Determination: 31 October 2023

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**DETERMINATION OF THE AUTHORITY**

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**The employment relationship problem**

[1] Ms Van Dragt was employed as a Care and Protection Social Worker with Oranga Tamariki from 14 April 2021 until 28 February 2022 when she was dismissed for failing to be vaccinated under the COVID-19 Public Health (Vaccinations) Order 2021 (Vaccinations Order) and Oranga Tamariki's own internal vaccination policy. Ms Van Dragt says she was unjustifiably disadvantaged and unjustifiably dismissed from her employment and that Oranga Tamariki breached its duty of good faith to her. She seeks lost wages, compensation and a penalty.

## **The Authority's investigation**

An investigation meeting was held on 27 April in Tauranga and in Wellington on 20 July 2023. The Authority received statements from Ms Van Dragt and her former colleague Ms Cooper. For Oranga Tamariki, former Human Resources advisor Daniel Golder and former Site Manager Donna McNaughten provided written witness statements. All four witnesses attended at the investigation meetings and answered questions from me under oath or affirmation.

[2] As permitted by s174E 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 the orders made. It has not recorded all the evidence and submissions received, however all information provided has been considered.

## **Issues**

[3] The issues identified for investigation and determination are:

- (a) Whether Ms Van Dragt was unjustifiably dismissed because she was not vaccinated, and whether a fair and reasonable process was followed.
- (b) Whether Ms Van Dragt was unjustifiably disadvantaged in her employment in respect of:
  - (i) Identifying the risks associated with Ms Van Dragt's status as a person who was not vaccinated.
  - (ii) Not rescinding Ms Van Dragt's termination based on the decision to review the vaccination policy.
  - (iii) Allegedly engaging in disparity of treatment on the basis that there are unvaccinated employees at Oranga Tamariki.
- (c) If Ms Van Dragt was unjustifiably dismissed and/or disadvantaged, what remedies should be awarded?
- (d) Whether Oranga Tamariki breach its duty of good faith to Ms Van Dragt.

[4] At the investigation meeting on 20 July 2023 and by written memorandum dated 8 September 2023, Ms Van Dragt advised she no longer seeks reinstatement.

## Relevant law

[5] When the Authority considers justification for Oranga Tamariki's actions, including the dismissal decision, it does so by applying the test of justification in s 103A of the Employment Relations Act 2000 (the Act). In determining justification of actions or a dismissal the Authority does not consider what it may have done in the circumstances. It is required to consider on an objective basis whether the actions of Oranga Tamariki and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time of the alleged disadvantage or dismissal.

[6] The Authority must also consider whether the employer's process for making and carrying out the decision to terminate employment was fairly conducted. The Authority must consider the four procedural fairness factors as set out in s 103A(3) of the Act. Fairness, in this context, includes meeting the statutory obligations placed on an employer proposing to make a decision likely to have an adverse effect on the continuation of a person's employment. Workers likely to be affected should have access to information relevant to the continuation of their employment and an opportunity to comment on it before a decision is made.<sup>1</sup>

[7] The Authority may take into account other factors as appropriate and must not determine an action or a dismissal to be unjustified solely because of defects in the process if they were minor and did not result in the employee being treated unfairly.

[8] The circumstances at the time of Ms Van Dragt's dismissal include that there was an additional obligation on employers to exhaust all other reasonable alternatives that would not lead to termination of employment.<sup>2</sup>

[9] Oranga Tamariki could also be expected as a fair and reasonable employer to comply with the good faith obligations set out in s 4 of the Act, in particular, because it was proposing to make a decision that would have an adverse effect on the continuation of Ms Van Dragt's employment.

[10] Oranga Tamariki says that it treated Ms Van Dragt fairly, reasonably and in good faith and that her dismissal was justified. It also says its actions must be viewed in the context of

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<sup>1</sup> Section 4 (1A) of the Employment Relations Act 2000.

<sup>2</sup> Schedule 3A clause 4 of the Employment Relations Act 2000.

all the circumstances at the time, principally that Aotearoa was actively responding to the threat of COVID-19.

### **Ms Van Dragt's role at Oranga Tamariki**

[11] Ms Van Dragt was employed as a Care and Protection Social Worker by Oranga Tamariki in its Tauranga office on 14 April 2021. Prior to working for Oranga Tamariki, Ms Van Dragt had been a social worker for 18 years. She was given in-depth training at Oranga Tamariki for six to eight weeks including induction into Oranga Tamariki's specific processes.

[12] The Tauranga office was managed by Site Manager Donna McNaughten. The team consisted of around 24 Social Workers although at the relevant time they were carrying around six Social Worker vacancies. Oranga Tamariki had different types of Social Workers. Within the Care and Protection Social Workers there were intake, initial, and full assessment roles. The intake social workers would decide whether a case was to be allocated to a social worker, the initial social workers carried out initial assessments, and full assessment social workers carried out site visits. Ms Van Dragt was a full assessment Care and Protection Social Worker. In a typical day, Ms Van Dragt would attend a team meeting where plans would be set for the day. Her work included meeting with whānau and tamariki and carrying out site visits.

### *COVID-19 and the Vaccinations Order*

[13] On 22 October 2021, the New Zealand Government announced the introduction of a new COVID-19 Protection Framework to replace the Alert Level system. On 25 October 2021, the COVID-19 Public Health (Vaccinations) Order 2021 (Vaccinations Order) was amended to include care and support workers.

[14] Oranga Tamariki followed the Government's announcements and convened meetings to determine who was covered by the Vaccinations Order. Oranga Tamariki's response to the Vaccinations Order was described to the Authority as a National-level response, with Regional-level discretion. Ms McNaughten described this time as chaotic.

[15] On 27 October 2021 Oranga Tamariki sent an email to all staff about the Vaccinations Order, noting that certain roles at Oranga Tamariki would be covered by a COVID-19 vaccination mandate and kaimahi would be required to have their first COVID-19 vaccination by Monday 15 November 2021 and second vaccination by 1 January 2022. When Ms Van Dragt received the email, she did not consider her role was covered because she did not work

in residences or community homes, was not a health practitioner and – unlike other Oranga Tamariki Social Workers – she was not regularly based at the hospital or another health provider.

[16] On 1 November 2021, Oranga Tamariki sent out a further email advising that even if a worker's role might not require them to be vaccinated, there may be tasks that need to be completed by a vaccinated person. By this time, Oranga Tamariki had established a Vaccination Programme advisory group and had been working to identify roles within the organisation it considered were subject to the Vaccinations Order. Care and Protection Social Workers were identified as being roles that may, from time to time, be required to perform tasks covered by the Vaccinations Order. An internal Oranga Tamariki memorandum dated 4 November 2021 noted:

Managers of individuals in [those] roles will make an assessment of whether the individual performs the following tasks as part of their role and if so, they are to be notified that they are an affected person and their vaccination information will need to be collected.

[17] The tasks Oranga Tamariki assessed as being covered by the Vaccinations Order were:

May need to carry out work where health services are provided to members of the public by one or more health practitioners and whose role involved being within 2 metres or less of a health practitioner or a member of the public for a period of 15 minutes or more...

May need to carry out work at or for an affected education service...and who may have contact with children or students in the course of carrying out that work, or will be present at the affected education service at a time when children or students are also present.

[18] On 8 November 2021, Oranga Tamariki wrote to Ms Van Dragt confirming she was an affected person under the Vaccinations Order because in her role she was required to, from time to time:

- (a) Attend ECE centres and schools at times when children are present in these environments; and/or
- (b) Attend healthcare settings for work where social distancing from health practitioners and/or members of the public is not possible.

[19] Oranga Tamariki said under the Public Health Order Ms Van Dragt was required to have received her first dose of the vaccination by 15 November 2021 and her second dose of the vaccination by 1 January 2022.

[20] Ms Van Dragt was initially undecided about vaccination, but she did advise Oranga Tamariki she did not intend to be vaccinated. On 12 November 2021 Ms Van Dragt was invited to a meeting with her manager Ms McNaughten and Human Resources Senior Advisor Daniel Golder to discuss the Vaccinations Order and how the Order impacted Ms Van Dragt and her ability to carry out her duties.

[21] Ms Van Dragt met with Ms McNaughten and Mr Golder on 15 November 2021. Ms Van Dragt set out her reasons for not wanting to become vaccinated and said that she did not want to go on special leave because of her caseload and she would prefer alternative arrangements. Ms McNaughten raised whether Ms Van Dragt would consider a Social Worker intake role. Ms Van Dragt was reluctant to do that as she was committed to the families she was working with and the ideal that Social Workers would stay with their allocated whānau if possible. The consensus reached and recorded was that Ms Van Dragt and Ms McNaughten would find alternative arrangements.

[22] Oranga Tamariki subsequently confirmed that Ms Van Dragt would be able to work on an “alternative duties” arrangement for a month from 16 November 2021 to 16 December 2021. Ms Van Dragt was able to carry out most of her role, with the alternative duties being “those parts of your role that do not require you to enter a health and education facility”. Oranga Tamariki said that while it could accommodate Ms Van Dragt performing these alternative duties on a temporary basis, it would need to consider whether it would be possible to accommodate this on a long-term basis.

[23] On 2 December 2021, Ms Van Dragt was invited to another meeting on 9 December 2021 to discuss the upcoming expiry of her temporary alternative duties arrangement. Oranga Tamariki set out that possible permanent outcomes included redeployment into another role at Oranga Tamariki that did not require vaccination, permanent alternative arrangements to Ms Van Dragt’s role, end of employment, or becoming vaccinated. Oranga Tamariki set out that an extension of temporary alternative duties was also a consideration.

### *Oranga Tamariki's Vaccination Policy*

[24] On 6 December 2021, the Chief Executive of Oranga Tamariki sent an email to all staff initiating consultation on a vaccination policy for the organisation.

[25] Ms Van Dragt provided Oranga Tamariki with a medical certificate covering the period 6 December 2021 to 20 December 2021 on the basis that she was medically unfit to attend work, but she returned to work after a week at Ms McNaughten's request. Over this time, Oranga Tamariki was operating a split-shift model in the office, and Ms Van Dragt worked both in the office and from home. Sometimes Ms Van Dragt would go into the office when she was not on shift to access paperwork and prepare for Family Group Conferences. She also had site visits over this time.

[26] At the meeting on 9 December 2021, Ms Van Dragt confirmed with her employer that she had no intention of becoming vaccinated although Novavax was a vaccination that she would consider. In terms of redeployment, Ms Van Dragt said she would consider roles in Tauranga within her skillset and she raised the possibility of work in the intake team. Ms McNaughten advised Ms Van Dragt that she did not see her as a suitable fit for the intake team due to lack of experience.

[27] On 10 December 2021, Oranga Tamariki confirmed an extension to Ms Van Dragt's temporary alternative duties from 16 December 2021 to 28 January 2021. While Ms Van Dragt had some reservations about "delaying the inevitable", Ms McNaughten said that she remained optimistic about a positive outcome from the process.

[28] On 15 December 2021, Ms Van Dragt sent Oranga Tamariki a letter stating that she would not be taking any COVID-19 vaccines "now or in the future". She set out her concerns about COVID vaccination mandates and how she was being treated in the workplace. She concluded by saying that she was willing to continue to work in the capacity agreed in the meeting of 9 December.

[29] From Ms Van Dragt's perspective, there was very little practical difference to her role when she was working on alternative duties. There was a skeleton staff working at the office every day while other staff were on leave. Ms Van Dragt kept working on her current caseload of families and she was not assigned new families over this time. Ms Van Dragt did have some face-to-face engagement with families, but she did not go into schools or hospitals.

[30] On 22 December 2021, the Chief Executive of Oranga Tamariki confirmed that Oranga Tamariki's COVID-19 Vaccination Policy (the Vaccination Policy) would come into effect on 1 March 2022. The Vaccination Policy required all Oranga Tamariki kaimahi to have had a first vaccination by 1 February 2022, and to be fully vaccinated from 1 March 2022 to continue in their roles (subject to some limited exceptions). From 1 March 2022, all Oranga Tamariki kaimahi would also be required to present their My Vaccine Pass to enter Oranga Tamariki sites and offices they were visiting.

[31] Given the impending expiry of her alternative duties, Ms Van Dragt met with Ms McNaughten and Mr Golder on 19 January 2022. Ms Van Dragt confirmed that she did not intend to receive the vaccination until the end of the trial period in February 2023, that she had not been looking into redeployment options because she had been busy and did not consider redeployment was an option in light of the Vaccination Policy.

[32] On 26 January 2022, Oranga Tamariki confirmed Ms Van Dragt's termination with one month's notice, on the basis that under the Vaccinations Order she was unable to legally fulfil the duties of her role. Oranga Tamariki stated:

As we discussed, under the Public Health Order you are now unable to legally fulfil the duties of your role.  
Oranga Tamariki has carefully considered whether we are able to accommodate your inability to perform these tasks but we have determined that this is not possible because of the requirement for you to work with tamariki and whanau in a health or educational environment and because of the vaccination policy that now requires all staff to be fully vaccinated, from 1 March 2022.

[33] Ms Van Dragt was advised that her last day of employment would be 28 February 2022, but if she chose to be vaccinated during her notice period and provided evidence of her vaccination to Oranga Tamariki, her notice of termination would be withdrawn.

[34] On Ms Van Dragt's last day of employment, the Chief Executive emailed all staff to say that Oranga Tamariki would be reviewing its approach in situations where kaimahi are not compliant with the Vaccination Policy, given the potential shift in the current approach to vaccinations in Aotearoa. The Chief Executive placed a "temporary pause on employment processes with kaimahi who are not vaccinated by 1 March". An exception was roles covered by the Vaccinations Order.

[35] Ms McNaughten and Ms Van Dragt spoke on the last day of Ms Van Dragt's employment, but the Chief Executive's email did not change the process. Ms Van Dragt's employment with Oranga Tamariki ended on 28 February 2022.

[36] Oranga Tamariki withdrew its Vaccination Policy in August 2022.

### **Did Oranga Tamariki unjustifiably dismiss Ms Van Dragt?**

#### *Substantive Justification*

[37] Oranga Tamariki says it was substantively justified in dismissing Ms Van Dragt because she was required to be vaccinated to carry out her role under the Vaccinations Order and Vaccination Policy. Ms Van Dragt says that she was not covered by the Vaccinations Order but accepts that she was covered by the Vaccination Policy.

#### *Was Ms Van Dragt covered by the Vaccinations Order?*

[38] Ms Van Dragt claims that she was disadvantaged in her employment from around 8 November 2021 when she was advised her role and tasks were covered by the Vaccinations Order. Ms Van Dragt says her role was not covered by the Vaccinations Order, because she did not meet the definition of a public health worker who performed part of her role in health or educational facilities, and she was not required to carry out the tasks that were covered in the Order.

[39] Oranga Tamariki's national-level position was that all its Social Workers had the same job description and all were covered by the Vaccinations Order. However, managers were required to determine whether their staff were individually covered by the Vaccinations Order because there was some site-specific context.

[40] The Vaccinations Order defined an 'affected person' in clause 4 as being "a person who belongs to a group (or whose work would cause them to belong to a group)". Schedule 2 listed the Groups of affected persons which included a mix of specific roles (for example "Health Practitioners") and tasks "in relation to" certain sectors and services (for example, "Workers who carry out work where health services are provided to members of the public by 1 or more health practitioners and whose role involves being within 2 metres or less of a health practitioner or member of the public for a period of 15 minutes or more"). "Social Worker" was not an identified role covered by the Order. However, Care and Protection Social Workers at Oranga Tamariki were captured by Item 7.2 (in relation to the health and disability sector)

and Item 9.1 (in relation to affected education services) because they were required to attend at hospitals where their role would require them to be within 2 metres or less of a health practitioner or member of the public for a period of 15 minutes or more, and to carry out work at an affected education service (including early childhood centres and schools) and who may have contact with children or students in the course of carrying out that work, or would be present at a time when children or students are also present.

[41] In her evidence to the Authority, Ms Van Dragt conceded it was “technically was not incorrect” that certain tasks in her role were covered by the Vaccinations Order. Her evidence was that she could have been, but in reality was not, asked to carry out those tasks. She said tasks she may have carried out that were covered by the Order were infrequent and even if the Vaccinations Order applied to Social Workers at Oranga Tamariki generally, it did not apply to her in the way that she carried out her role. To the extent the Vaccinations Order did cover her tasks, Ms Van Dragt felt there were ways she could have been supported to continue to work.

[42] I prefer Oranga Tamariki’s position that Ms Van Dragt’s role was covered by the Vaccinations Order. Oranga Tamariki identified the parts of the Social Worker’s role covered by the Vaccinations Order as being “after hours duty” and “Assessment and planning” in its internal memorandum dated 4 November 2021. Oranga Tamariki says all Social Workers were required to carry out the tasks covered by the Vaccinations Order “from time to time” and this meant that the workers were covered by the Order. The Vaccinations Order does not specify the frequency of tasks. Given the accepted precautionary context at the time,<sup>3</sup> it was fair and reasonable for Oranga Tamariki to adopt a relatively strict interpretation of the Order.

*Was Ms Van Dragt covered by the Vaccination Policy?*

[43] Oranga Tamariki gave as its reason for dismissing Ms Van Dragt, that she was required to work with tamariki and whānau in a health or educational environment and because its Vaccination Policy required all staff to be fully vaccinated from 1 March 2022. Oranga Tamariki considered that Ms Van Dragt was unable to perform certain tasks of her role - namely visits to health and education facilities - without being vaccinated, and that it was not tenable to continue to employ Ms Van Dragt as a Social Worker without her being able to perform

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<sup>3</sup> *Four Aviation Security Service Employees v Minister of COVID-19 Response* [2021] NZHC 3012; [2022] 2 NZLR 26 at 110.

those tasks. In particular, Oranga Tamariki stated that the work that comes into site is often unpredictable and all Social Workers need to be able to respond “as and when required” to all types of social work situations:

It is unreasonable for our site to preclude any Social Worker from doing the work that is required with vulnerable tamariki and whānau in a health or educational environment.

[44] The Vaccination Policy required kaimahi to be fully vaccinated prior to 1 March 2022. Ms Van Dragt accepts she would have been subject to the Vaccination Policy when it came into effect on 1 March 2022, as all staff at Oranga Tamariki were covered.

#### *Procedural Fairness*

[45] Ms Van Dragt says there was no consultation with Social Workers about whether they were covered by the Vaccinations Order. Oranga Tamariki says the consultation with Ms Van Dragt began when it first corresponded with her on 8 November 2021 to advise her role was covered by the Vaccinations Order.

[46] By 8 November 2021 Oranga Tamariki had already determined the scope and coverage of the Vaccinations Order as recorded in its internal memorandum of 4 November 2021. In its letter of 8 November 2021, Oranga Tamariki stated that Ms Van Dragt had been identified as an affected person under the Vaccinations Order and the organisation required her to be vaccinated.

[47] In reaching the outcome communicated to Ms Van Dragt, Oranga Tamariki had made two decisions – that the Vaccinations Order applied to all its Social Workers and that the Vaccinations Order specifically applied to Ms Van Dragt. Based on the evidence before the Authority, I accept that Ms Van Dragt was not provided with the internal memorandum and the only information she had about the reasons for Oranga Tamariki’s interpretation of the Vaccinations Order were contained in the 8 November 2021 letter. There was no evidence before the Authority that the initial decision about the coverage of the Vaccinations Order was made in consultation with affected kaimahi (other than those involved in the Vaccination Programme group). Nor did Oranga Tamariki provide staff with any mechanism to challenge its interpretation of the Vaccinations Order.

[48] However, Ms Van Dragt did not clearly articulate to Oranga Tamariki that she considered its interpretation of the Vaccinations Order to be incorrect. Oranga Tamariki says

Ms Van Dragt had multiple opportunities to raise concerns about the coverage of the Vaccinations Order but did not do so, including when Ms Van Dragt wrote to Oranga Tamariki on 15 December 2021.

[49] The failure to consult with Ms Van Dragt about the coverage of the Vaccinations Order was a technical procedural flaw but the failure did not lead to Ms Van Dragt's dismissal. I do find, however, that the failure to consult with Ms Van Dragt about the coverage of the Vaccinations Order was relevant to whether Oranga Tamariki engaged with her in good faith, and this is discussed further below.

[50] Of more significance in terms of procedural fairness is Oranga Tamariki's decision to proceed with terminating Ms Van Dragt's employment on 28 February 2022, despite the Chief Executive's email placing a temporary pause on employment processes for non-vaccinated kaimahi.

[51] Ms McNaughten rang Ms Van Dragt on her last day of employment and they had a 15-minute conversation during which Ms Van Dragt asked about pausing her termination, and Ms McNaughten said Oranga Tamariki had to follow process. According to Ms Van Dragt, Ms McNaughten said this would all be over at some stage, and she said at least three times that she could not see any reason why Ms Van Dragt would not be re-employed by Oranga Tamariki in the future.

[52] In the period leading up to Ms Van Dragt's dismissal, Oranga Tamariki had been relatively consistent in its position that while it could accommodate Ms Van Dragt performing alternative duties on a temporary basis, it considered it may not be possible to accommodate her inability to perform key tasks long-term. Oranga Tamariki's position was the email from the Chief Executive concerned the Vaccination Policy, not the Vaccinations Order, so the email did not change Ms Van Dragt's situation. Oranga Tamariki further said that the Vaccination Policy was only relevant to Ms Van Dragt insofar as it eliminated internal redeployment options within the organisation.

[53] However, I find that the email - and the timing of it - was significant because the implementation of the Vaccination Policy was one of the two substantive reasons Oranga Tamariki relied on to justify Ms Van Dragt's dismissal. The Chief Executive's email in effect removed (or at least undermined the basis for) one of those substantive reasons. A fair and

reasonable employer could have reviewed the decision to terminate Ms Van Dragt's employment at that point.

[54] My view is reinforced by the fact that the other substantive reason given by Oranga Tamariki for Ms Van Dragt's dismissal – namely that under the Public Health Order Ms Van Dragt was now unable to legally fulfil the duties of her role – only applied to certain tasks of her role, and not her entire role. Oranga Tamariki's dismissal letter suggested that the application of the Public Health Order was its current concern, but the Public Health Order had technically required Ms Van Dragt to be vaccinated by 1 January 2022 and she continued to work until 28 February 2022 under arrangements which took her outside the scope of the Vaccinations Order and then the Vaccination Policy. From 1 to 31 January 2022 Ms Van Dragt worked on the alternative duties arrangement, and from 1 to 28 February 2022 Ms Van Dragt worked from home on temporary alternative duties as she was not permitted to enter the workplace in accordance with the Vaccination Policy.

[55] I conclude that Oranga Tamariki's failure to acknowledge the change in the COVID-vaccination landscape on the last day of Ms Van Dragt's employment on 28 February 2022 and review its position on terminating her employment was not fair and reasonable and was a significant procedural flaw that was unfair in the circumstances. On that basis, I find that Ms Van Dragt was unjustifiably dismissed.

#### *Schedule 3A considerations*

[56] Clause 3 of Schedule 3A of the Act deals with the termination of employees for vaccination-related reasons. Clause 3(1)(a) applies to an employee who is subject to a vaccination mandate (among other things). It applies in situations where an employee had a duty imposed on them under the Vaccinations Order not to carry out work unless they were vaccinated. Schedule 3A applied to Oranga Tamariki and Ms Van Dragt by virtue of her Care and Support Social Worker role meeting the definition of a care and support worker and it came into force on 26 November 2021 prior to the decision to dismiss Ms Van Dragt.

[57] Clause 3(4) of Schedule 3A of the Act states:

Before giving a termination notice under subclause (3), the employer must ensure that all other reasonable alternatives that would not lead to termination of the employee's employment agreement have been exhausted.

[58] Oranga Tamariki considered it met the requirement to exhaust all reasonable alternatives. The priority over this time was safety - Oranga Tamariki had to be conscious as an organisation it was dealing with vulnerable tamariki and whānau who were more susceptible to contracting COVID-19 than the general population.

[59] Ms Van Dragt says that Oranga Tamariki did not genuinely consider alternatives to dismissal and that it did not follow a fair procedure in considering alternatives. A number of alternatives to dismissal were discussed between the parties. Some of the options for redeployment roles were appropriately disregarded due to Ms Van Dragt having insufficient experience (such as a research role), or because the role was also covered by the Vaccinations Order (such as transfer to a Social Worker role in the Rotorua office). The reasonable alternatives are discussed further below.

#### *Alternative Duties*

[60] Ms Van Dragt's first preference was continuing to work in her role on "alternative duties" which meant that she would carry out tasks in her role that were not covered by the Vaccinations Order. In a letter dated 10 December 2021, Oranga Tamariki recorded that Ms Van Dragt will not be able to perform those duties of her role that require her to enter a health or education facility, and she may be asked to perform other social worker duties to compensate for the restrictions of the alternative duties arrangement.

[61] Ms Van Dragt worked on alternative duties for an initial four-week period, and then a six-week period which included having face to face contact with families. Over the Christmas break from December 2021 to January 2022 Ms Van Dragt worked on alternative duties partly from home and partly in the office, as part of a skeleton staff. Ms Van Dragt had no engagement in health or educational settings. She could not be on the emergency call-outs roster because she could not enter hospitals.

[62] It was an evolving situation, and Ms Van Dragt suspected that the mandates could not last forever based on what was happening globally. But the uncertainty about the duration of the 'COVID situation' presented a challenge as alternative arrangements became increasingly difficult to manage. Oranga Tamariki acknowledged that Ms Van Dragt was not required to attend hospitals as much as other Social Workers, but there was still crisis work and after-hours work. In Oranga Tamariki's view, Ms Van Dragt's unvaccinated status compromised the flexibility that Social Workers needed. Ms McNaughten also said the latitude extended to have

Ms Van Dragt working on alternative duties impacted other social workers because the team was carrying approximately six Social Worker vacancies over the November 2021 to January 2022 period and was short-staffed. In order to be fair to everyone, Ms McNaughten said that any alternative duties arrangement needed to have an end date. Oranga Tamariki also said that Ms Van Dragt's inability to carry out certain tasks would impact on the service provided to tamariki and their whānau.

[63] I accept that having Ms Van Dragt work on alternative duties did impact on her manager and the other Social Workers in her team. Ms McNaughten said Ms Van Dragt required oversight to ensure she was safe in the decisions she was making which intensified the role for her supervisor, but I am not satisfied based on the evidence before the Authority that the situation became untenable. I also accept the validity of Ms Van Dragt's feeling that there was no real conversation with her about how to work around challenges that alternative duties presented. Ms Van Dragt was the only unvaccinated Social Worker in her team, and she felt that Oranga Tamariki could have been more flexible about alternative ways to carry out the Social Worker role, especially as new ways of working had developed during COVID lockdowns.

[64] Based on the evidence before the Authority, I am not persuaded that Oranga Tamariki gave genuine consideration to extending Ms Van Dragt's alternative duties for a further term.

[65] Oranga Tamariki appears to have relied firstly on its understanding that Ms Van Dragt wanted finality and had told the organisation she would prefer to end her employment rather than dealing with uncertainty (as raised in the meeting on 9 December and recorded in Oranga Tamariki's letter of 10 December 2021). Ms Van Dragt strongly denies this. Following the 9 December meeting, Ms Van Dragt wrote to Ms McNaughten and Mr Golder on 15 December, stating:

I am willing to continue to work in the capacity that I am still able as agreed in the letter following the meeting 9<sup>th</sup> December. I would however bring to your attention the difficult position this is for myself and would hope and expect this is taken into consideration.

[66] Oranga Tamariki may have confused Ms Van Dragt's desire for the process to come to an end, with her desire for her employment to come to an end. However, I prefer Ms Van

Dragt's evidence that she wanted her employment with Oranga Tamariki to continue, as reflected in her letter of 15 December 2021.

[67] Secondly, it was Oranga Tamariki's position that the alternative duties arrangement could not continue long-term because of pressure on the team. I am not persuaded that Ms Van Dragt's inability to carry out the full extent of her duties was the main source of this pressure in light of the evidence that the team was carrying approximately six Social Worker vacancies at the time. To the contrary, terminating Ms Van Dragt's employment would, at least in the short term, have added pressure to Social Workers' workloads.

[68] Thirdly, in its letter of 26 January 2022, Oranga Tamariki said that the work that comes in is often unpredictable and all Social Workers need to be able to respond as and when required to all types of social work situations. Oranga Tamariki said it is unreasonable to preclude any Social Worker from doing the work that is required with vulnerable tamariki and whānau in a health or educational environment. Based on the evidence before the Authority, Oranga Tamariki appears to have overemphasised the impact of not having Ms Van Dragt carry out these tasks. Her evidence was that she rarely needed to enter health or education environments. Although the arrangement did involve some workarounds for Ms Van Dragt in her role, she worked in this way over the Christmas break, and she continued to meet with whānau and tamariki, including face to face. She was also the only Social Worker in the team requiring alternative arrangements.

[69] I acknowledge the alternative duties arrangement would not have been a permanent solution for the parties and that extensions would have needed to be kept under review. However for the reasons given above, based on the evidence before the Authority, I find that a further extension to the existing alternative duties arrangement was a reasonably practicable alternative to terminating Ms Van Dragt's employment in the circumstances.

#### *Redeployment into an intake role*

[70] The Tauranga Office had a Care and Protection Social Worker "intake" role. The evidence given about this role was slightly inconsistent, but I prefer Ms Van Dragt's "front-line" understanding that the intake role had far less contact with members of the public than her full assessment Care and Protection Social Worker role. Ms Van Dragt said that the intake role was predominantly office-based and involved initial assessment work over the phone. Ms Van Dragt felt that she could carry out the intake role without risk to tamariki or whānau. Ms

McNaughten said the intake role was almost like a “statutory social worker position” and was relatively independent in the sense that intake social workers did not get access to much oversight or supervision. It was also a “rotating role” meaning Oranga Tamariki only put people into the role who were experienced kaimahi of Oranga Tamariki. The role tended to benefit staff who were not comfortable to, or able to, go out into the community. Based on the evidence before the Authority from both parties, the intake role appeared to be more amenable to task workarounds that could exclude the role from coverage under the Vaccinations Order.

[71] The possibility of Ms Van Dragt working on the intake team was first raised by Ms McNaughten in a meeting with Ms Van Dragt on 8 November 2021. It was not clear whether it was raised as a temporary or permanent option. Mr Golder – who was also at the meeting – was not aware Ms McNaughten was going to propose an intake role but he told the Authority that Oranga Tamariki’s Recruitment Policy requires hiring managers to follow a process which would have required Ms Van Dragt to apply for a vacancy and a panel would appoint a candidate. Mr Golder said it would be appropriate to apply some flexibility and preferential treatment to Ms Van Dragt given her situation, but all candidates have to be appointed on merit. The evidence before the Authority also suggests that - at least initially - Oranga Tamariki did not consider the intake role to be covered by the Vaccinations Order. Ms McNaughten said in an early letter to Ms Van Dragt that working on the intake team would not require her to enter an environment that requires vaccinated employees such as health and education facilities.<sup>4</sup>

[72] Ms Van Dragt was not initially interested in an intake role. When Ms McNaughten first raised the possibility, Ms Van Dragt believed working on alternative duties was a better way to prioritise contact with her own client whānau. Ms Van Dragt’s view about the desirability of undertaking an intake role later changed when she realised that alternative duties were a time-limited option from Oranga Tamariki’s perspective.

[73] Although Ms McNaughten believed Ms Van Dragt may have been suitable for an intake role when she raised it at the meeting on 8 November 2021, following the meeting she spoke to Ms Van Dragt’s supervisor and others to better understand Ms Van Dragt’s experience and formed the view Ms Van Dragt did not have the experience required for the role because she was still on a learning curve with the organisation. When Ms Van Dragt later raised the intake role on 9 December 2021, Ms McNaughten told her she was not suitable for the role because

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<sup>4</sup> Incorrectly dated 7 November 2021.

she was not experienced enough and it was no longer an option. No other explanation was provided and it was a surprise to Ms Van Dragt. Ms Van Dragt was also unaware at the time, that Ms McNaughten had discussed Ms Van Dragt's level of experience with others. Ms Van Dragt says she was unable to respond to the reasons for the decision not to consider her for redeployment to an intake role, because she was not provided with them. In its letter of 26 January 2022, Oranga Tamariki expanded on the reason for not considering Ms Van Dragt for the intake role where it said:

I did not think you had the experience required for this role, which is preferably the role of a Senior Practitioner with sufficient experience in the analysis of risk. Further, there is no current vacancy for a Senior Practitioner to triage intakes.

[74] By the time this matter came before the Authority, Oranga Tamariki had determined the intake role would likely also have been covered by the Vaccinations Order (being a Care and Protection Social Worker role which included tasks under coverage of the Vaccinations Order). Oranga Tamariki says that even if this was not identified at the time, this issue would have been identified, had discussions about the intake role progressed further.

[75] Oranga Tamariki's justification for not redeploying Ms Van Dragt into an intake role changed over time. Various reasons were proffered including Ms Van Dragt's lack of experience, there being no available role, the need to follow proper recruitment processes, and that the role was likely covered by the Vaccinations Order so would not have been an appropriate redeployment option in any event.

[76] The process that Oranga Tamariki has followed with respect to redeployment, including changing justifications and failing to provide Ms Van Dragt with full information about the reason for declining her request casts doubt on whether it genuinely considered the intake role as a redeployment option. In the circumstances, I conclude that in relation to redeployment to an intake role, Oranga Tamariki did not exhaust all reasonable alternatives to termination.

*Other options – Annual leave? Leave without pay?*

[77] Ms Van Dragt did not have a large annual leave balance. Her evidence to the Authority was that she tried to initiate a conversation with Oranga Tamariki about taking leave without pay but it was not an option.

[78] Oranga Tamariki's position was that staff could not be put on extended leave without pay because it would leave a gap in the team that they would be unable to recruit for, which would have compromised the safety of tamariki and whānau, as well as kaimahi who had to pick up the work left by the gap. Given Ms McNaughten's evidence that the team was carrying six Social Worker vacancies at the relevant time, it is questionable whether that impact could have been attributable to Ms Van Dragt's absence. However as there is little information before the Authority about annual leave and leave without pay and whether these were options that were genuinely pursued by either party, I am unable to make any conclusions about whether taking leave was a reasonably practicable alternative to termination.

*Summary on Schedule 3A*

[79] Based on the information before the Authority, I find that Oranga Tamariki did not exhaust all reasonable alternatives to termination in Ms Van Dragt's case because an extension of the alternative duties arrangement would have been a reasonable alternative. Further, redeployment to an intake role (whether on a temporary or permanent basis) was likely to have been a reasonable alternative, and Oranga Tamariki did not ensure it exhausted this option.

[80] While I am sympathetic to Oranga Tamariki's submission that temporary arrangements could not have continued indefinitely, the obligation on Oranga Tamariki at least on a plain reading of the provision, to exhaust all other reasonable alternatives that would not lead to termination was an onerous one. The timing is critical in Ms Van Dragt's case because Oranga Tamariki relaxed its position on implementation of its Vaccination Policy on Ms Van Dragt's last day of employment, signalling a potential shift in the approach to vaccinations in Aotearoa. In the context of the rapidly evolving COVID-19 situation, it would have been fair and reasonable for Oranga Tamariki to have also paused to ensure it had exhausted all other reasonable alternatives to termination in Ms Van Dragt's case.

[81] I have found that Oranga Tamariki did not genuinely consider extending Ms Van Dragt's alternative duties, or redeploying her into an intake Social Worker role, and I have found that these options were reasonable alternatives to termination. It follows that Oranga Tamariki has not ensured that all other reasonable alternatives had been exhausted, and Ms Van Dragt was unjustifiably dismissed from her employment.

## **Was Ms Van Dragt unjustifiably disadvantaged?**

### *Risk Assessment*

[82] Ms Van Dragt said she felt disadvantaged by Oranga Tamariki not conducting a risk assessment for unvaccinated individuals or considering alternative ways to keep unvaccinated individuals safe.

[83] Oranga Tamariki says it was not required to conduct a separate risk assessment, as vaccination was required under the Vaccinations Order, and later by the Vaccination Policy.

[84] I have earlier concluded that I agree with Oranga Tamariki's application of the Vaccinations Order and Policy as it applied to Ms Van Dragt's role. I am similarly persuaded that in the circumstances of this case Oranga Tamariki was not required to conduct a separate risk assessment for Ms Van Dragt. Had I found Oranga Tamariki genuinely considered alternatives to dismissal including extension of alternative duties or redeployment, then it may have been a logical and reasonable step for Oranga Tamariki to conduct a risk assessment before assimilating Ms Van Dragt into further alternative duties or redeployment to a different role. However, based on the information before the Authority, there was no specific disadvantage to Ms Van Dragt in Oranga Tamariki failing to carry out a risk assessment.

### *Not pausing the termination process*

[85] Ms Van Dragt says Oranga Tamariki should have paused, revoked or rescinded her termination on the last day of her employment when all staff received an email from the Chief Executive of Oranga Tamariki placing a "temporary pause on employment processes with kaimahi who are not vaccinated by 1 March".

[86] Even though Ms Van Dragt had been given a notice of termination, it was open to Oranga Tamariki to revoke or rescind this notice and it seems evident that Ms Van Dragt would have agreed to this.

[87] I have addressed the underlying facts of this claimed disadvantage above, in terms of the procedure followed by Oranga Tamariki. Having found the failure to pause Ms Van Dragt's termination was not fair and reasonable and was a significant procedural flaw giving rise to an unjustifiable dismissal claim, I do not consider it is necessary to consider this separate disadvantage claim.

### *Disparity of treatment*

[88] The leading case on disparity of treatment is a Court of Appeal decision in *Samu v Air New Zealand Limited* in which the Court of Appeal held that:<sup>5</sup>

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

[89] The Court of Appeal in its later decision of *Chief Executive of the Department of Inland Revenue v Buchanan and Symes*<sup>6</sup> confirmed that test, and identified three issues that need to be considered in disparity of treatment claims, namely:

- (a) Is there a disparity of treatment?
- (b) If so, is there an adequate explanation for the disparity?
- (c) If not, is the dismissal justified, notwithstanding the disparity for which there is no adequate explanation?

[90] Ms Van Dragt submitted that she was treated differently than an unvaccinated Care and Protection Social Worker in the Christchurch East team, Ms Cooper. Similarly to Ms Van Dragt, Ms Cooper was initially placed on alternative duties which excluded her from attending hospitals or educational facilities, participating in the after-hours emergency roster, or attending critical callouts. When Ms Cooper returned from a pre-arranged period of leave at the end of January 2022, she worked from home. She was told she was required to be vaccinated by 1 February 2022, and 1 May 2022. On 28 February Ms Cooper was advised that the Vaccination Policy was paused and her situation was paused. Ms Cooper returned to the office in June 2022. In all, Ms Cooper worked from home and on alternative duties between 1 February 2022 and June 2022.

[91] Oranga Tamariki urges caution in whether and how the Authority takes Ms Cooper's situation into account. It says it is unreasonable to expect a consistent approach across the

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<sup>5</sup> *Samu v Air New Zealand Limited* [1995] 1 ERNZ 636 at 639.

<sup>6</sup> *Chief Executive of the Department of Inland Revenue v Buchanan and Symes* CA 2/05 22 December 2005.

whole organisation. Oranga Tamariki said it offered Ms Van Dragt the same alternative duties opportunity as Ms Cooper. Ms McNaughten accepted there was probably quite a lot of disparity between regions and said it was impossible to judge consistency across the whole of Oranga Tamariki, particularly because managerial decisions were made in confidence between the employee, manager and Human Resources.

[92] While superficially there may have appeared to have been a disparity because Ms Van Dragt had her employment terminated while Ms Cooper remained employed on alternative duties, there was an adequate explanation for the disparity. I was provided with evidence that shows that from November 2021, Ms Cooper was engaging with her employer over a medical exemption process. Ms Van Dragt was not. Consequently, Ms Cooper's personal situation fundamentally differed from that of Ms Van Dragt's.

[93] Based on the information before the Authority, I find that there was an adequate explanation for any disparity in treatment, and consequently that there was no unjustifiable disadvantage to Ms Van Dragt.

### ***Conclusion on disadvantages***

[94] I find that Ms Van Dragt's separate disadvantage claims in terms of its failure to carry out a specific risk assessment, in not rescinding Ms Van Dragt's termination, and in terms of alleged disparity of treatment are not made out. To the extent that these matters provide context for her unjustifiable dismissal, they have been discussed above.

### **Breach of good faith**

[95] Ms Van Dragt submits that Oranga Tamariki breached its obligation of good faith by not giving her the opportunity to comment on information likely to have an adverse effect on her continued employment.<sup>7</sup> This includes Oranga Tamariki's decision that Ms Van Dragt was covered by the Vaccinations Order, and that she was unsuitable for the intake role.

[96] For Oranga Tamariki to be acting in good faith, it would have been necessary to provide access to information relevant to the continuation of Ms Van Dragt's employment. In relation to the coverage of the Vaccinations Order, Oranga Tamariki did provide Ms Van Dragt with a summary of the reasons it considered her role was covered but I accept that she only received

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<sup>7</sup> Section 4(1A)(c) of the Employment Relations Act 2000.

the internal memorandum containing the detail of the rationale at the Authority's investigation. In terms of reasonable alternatives to termination, Ms Van Dragt was not provided with detailed information about why extending the alternative duties arrangement would have been unreasonable. She was provided with very little information about why redeployment to the intake role was unreasonable and she was not aware that Ms McNaughten had spoken to others about her level of experience at the time the parties were discussing redeployment options.

[97] Oranga Tamariki made decisions about two very critical matters relating to Ms Van Dragt's continued employment without giving her access to the information it had used to make those decisions, and the opportunity to comment as required by the Act. In the circumstances, the downstream consequences of these decisions included potential loss of employment. I find that Oranga Tamariki breached its obligation of good faith in respect of access to information.

#### *Additional claims*

[98] Ms Van Dragt has raised breaches in relation to the 'good employer' obligation in s 73 of the Public Service Act 2020 and breach of tikanga in the employment relationship. These are new claims only raised in submissions and are encompassed by the breach of good faith claim for which a penalty is sought. Oranga Tamariki denies it has breached s 73 of the Public Service Act 2020 or acted contrary to tikanga. In *GF v Comptroller of the New Zealand Customs Service*<sup>8</sup> the Chief Judge held that public sector employers have "heightened good employer obligations". Having incorporated tikanga values into the employment relationship, the employer was then obligated to comply with them. While I note the findings in *GF*, given my conclusion that Oranga Tamariki unjustifiably dismissed Ms Van Dragt and breached its obligation of good faith to her, this is not a case where a separate finding on these grounds is required.

#### **Findings**

[99] Given the conclusions reached above, Ms Van Dragt has made out her claim for a personal grievance in that her dismissal was unjustified when the test in s 103A of the Act is applied together with the additional obligations on employers to exhaust all reasonable options set out in Schedule 3A of the Act before deciding to terminate an employee's employment because of their vaccination status.

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<sup>8</sup> *GF Comptroller of the New Zealand Customs Services* [2023] NZEmpC 101.

[100] Oranga Tamariki breached its obligation of good faith in section 4(1A)(c) of the Act in terms of providing access to information and opportunity to comment.

### **Remedies**

[101] Ms Van Dragt seeks:

- (a) Reimbursement under s 123(1)(b) for lost wages from 28 February 2022 to date of determination, holiday pay, Kiwisaver and interest.
- (b) Compensation under s123(1)(c) at the top end of band 2 \$12,000 - \$50,000.
- (c) Penalty for breaches of the Act and good faith.
- (d) Costs.

### *Reimbursement*

[102] Under section 128(2) of the Act, the Authority must order the employer to pay the employee the lesser of 3 months' ordinary time remuneration, or a sum equal to the actual lost remuneration. This is the default position if the employee has lost remuneration as a result of the personal grievance. Awards of compensation are discretionary and moderation is appropriate. Section 128(2) clarifies that reimbursement will normally be limited to "the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration". However, s128(3) allows that the Authority "in its discretion" may award a greater sum where appropriate. When deciding whether to apply my discretion and award more than three months ordinary time remuneration my starting point is that there is no automatic entitlement to full loss. Whether I award more than three months ordinary time remuneration, and if so how much more (bearing in mind the actual loss merely represents the upper award) this should be assessed based on to the circumstances of the case, allowing for any contingencies that might have resulted in termination of the employee's employment such that they would not have earned the total amount of the claimed loss.<sup>9</sup> I need to ask and answer the hypothetical question as to how the employee would have been placed in the absence of the legal wrong in issue (counter-factual analysis).<sup>10</sup>

[103] Ms Van Dragt seeks reimbursement of a sum of lost wages from 28 February 2022 to the date of the determination with commensurate lost holiday pay, Kiwisaver and interest. Ms

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<sup>9</sup> *Sam's Fukuyama Food Services Ltd v Zhang* [2011] NZCA 608.

<sup>10</sup> *Telecom New Zealand Ltd v Nutter* [2004] NZCA 127/03, 2 NZELR 83 at 73.

Van Dragt has the onus of showing that she has lost income as a result of the personal grievance, which is subject to a duty to mitigate her loss.

[104] Ms Van Dragt did not apply for new roles until after mediation with Oranga Tamariki in May 2022. Her confidence was severely impacted, she felt lost and all of a sudden was “out”. She knew prospective employers would want to talk to her previous manager. Ms Van Dragt took up contracting work although she said it took time to get the work underway as she had to get accredited for sensitive claims work which was a rigorous process. It took three months to get social worker registration approval to work with children. Ms Van Dragt also had to proactively contact prospective clients herself including counsellors and psychologists to let them know she was contracting. Ms Van Dragt has provided evidence to the Authority which supports she was first paid for contracting work on 2 September 2022 - six months after her employment with Oranga Tamariki ended.

[105] I do not accept Oranga Tamariki’s submission that Ms Van Dragt has not lost any wages as a result of the grievance because the Vaccinations Order prevented her from working in her full role from 16 November 2021 and so she was not ‘ready, willing and able to work’ – it is uncontested that Ms Van Dragt did continue to work on alternative duties and from home from 16 November 2021 until her last day of employment on 28 February 2022. I do, however, accept Oranga Tamariki’s submission that Ms Van Dragt has not provided evidence that she looked or applied for alternative jobs – particularly in relation to employment roles – and there is therefore an absence of information about how Ms Van Dragt mitigated her loss.

[106] Ms Van Dragt has lost remuneration as a result of the personal grievance. Stepping back to look at the matter objectively, I see no reason to depart from the default position of 3 months’ ordinary time remuneration and I consider that an appropriate amount to order. Ms Van Dragt had an annual salary of \$78,795 with Oranga Tamariki and therefore 3 months’ ordinary time remuneration amounts to \$19,698.75. Claims for lost holiday pay and Kiwisaver have not been quantified and I do not make any orders for those amounts.

[107] Ms Van Dragt has also claimed interest on any reimbursement award. The Authority’s power to award interest arises under clause 11, Schedule 2 of the Act. This provision gives the Authority discretion to order interest in any matter involving the recovery of any money, such interest to be calculated in accordance with Schedule 2 of the Interest on Money Claims Act 2016.

[108] However, the reimbursement of remuneration lost as a result of a personal grievance under s 128 of the Act is not a matter involving money recovery and so interest is not available in respect of such awards. This interpretation is consistent with the primary purpose of the Interest on Money Claims Act 2016 which is:

...to provide for the award of interest as compensation for a delay in the payment of debts, damages, and other money claims in respect of which civil proceedings are commenced.

[109] Accordingly I do not make an order for any interest to be paid.

### *Compensation*

[110] Ms Van Dragt seeks compensation under section 123(1)(c)(i) of the Act at the top end of band 2 set by the Employment Court<sup>11</sup> of \$12,000 to \$50,000 under. Oranga Tamariki says Ms Van Dragt has offered little in the way of evidence of impact on her, and accordingly a nominal award of compensation would be warranted if a personal grievance is made out.

[111] Based on the information before the Authority, I find Ms Van Dragt was distressed and suffered a loss of dignity following her dismissal. Oranga Tamariki considered Ms Van Dragt to be a good employee, and Ms Van Dragt enjoyed her role and was generally positive about the culture at Oranga Tamariki. The parties had a constructive working relationship in the lead up to Ms Van Dragt's dismissal. Ms Van Dragt had a significant birthday during this time and said it was her intention for her job at Oranga Tamariki to be her final job until retirement. Following her dismissal, she felt disadvantaged in attaining new employment due to her age and due to the stigma around the reason for her dismissal. She had serious anxiety and loss of confidence in applying for other roles and at the time of the Authority investigation was working as a contractor.

[112] Subject to any contribution and considering the general range of awards in other cases, I consider that an appropriate award of compensation under s 123(1)(c)(i) of the Act is \$20,000.

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<sup>11</sup> *Waikato District Health Board v Archibald* [2017] NZEmpC 132, and *Richora Group Limited v Cheng* [2018] NZEmpC 132 as adjusted in *GF Comptroller of the New Zealand Customs Services* [2023] NZEmpC 101.

## *Contribution*

[113] In deciding the nature and extent of remedies for any personal grievance, I must consider the extent to which Ms Van Dragt may have acted in a way that contributed to the situation that gave rise to her grievance.<sup>12</sup> The Employment Court has summarised key principles relating to contribution as follows:<sup>13</sup>

- (a) First, was the employee's alleged contributory conduct culpable and/or blameworthy?
- (b) Second, did that conduct create or contribute to the situation giving rise to the dismissal/disadvantage?
- (c) Third, what is a fair assessment of the extent of the contribution?
- (d) Fourth, should the reduction for contribution be applied across one, or some, or all of the remedies ordered in the employee's favour?

[114] Oranga Tamariki has not raised any issues of contribution with the Authority. Given my finding that Ms Van Dragt's dismissal was unjustifiable because Oranga Tamariki did not exhaust all reasonable alternatives to termination I do not ascribe any responsibility to Ms Van Dragt and I find no evidence of contribution.

## **Penalties**

[115] Ms Van Dragt asks for a penalty to be imposed on Oranga Tamariki in respect of good faith breaches under s4 of the Act.

[116] Section 4A of the Act states:

A party to an employment relationship who fails to comply with the duty of good faith in section 4(1) is liable to a penalty under this Act if—

- (a) the failure was deliberate, serious, and sustained; or
- (b) the failure was intended to—
  - (i) undermine bargaining for an individual employment agreement or a collective agreement; or

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<sup>12</sup> Section 124 of the Employment Relations Act 2000.

<sup>13</sup> *Maddigan v Director General of Conservation* [2019] NZEmpC 190 at [71] – [76].

- (ii) undermine an individual employment agreement or a collective agreement; or
  - (iii) undermine an employment relationship; or
  - (iv) undermine the pay equity claim resolution process under Part 4 of the Equal Pay Act 1972; or
- (c) the failure was a breach of section 59B or section 59C.

[117] While I have found Oranga Tamariki did breach its duty of good faith, based on the information before the Authority, none of the grounds in section 4A of the Act apply to warrant the imposition of penalties. The breaches related to failure to give Ms Van Dragt access to information, but were not deliberate, serious and sustained or intended to undermine the employment relationship. I agree with Oranga Tamariki's submission that it is clear from the evidence that those involved in this matter acted respectfully and with good intentions and the imposition of a penalty would not be justifiable. I also acknowledge the unique and unprecedented context of the COVID-19 global pandemic and find it is appropriate that no penalty is imposed.

### **Orders**

[118] Ms Van Dragt's claim that she was unjustifiably dismissed from her employment with Oranga Tamariki has been successful and remedies are appropriate.

[119] I order that:

- (a) Oranga Tamariki is to reimburse Ms Van Dragt for lost wages for a period of three months following her dismissal under s123(1)(b) of the Act in the amount of \$19,698.75 (gross).
- (b) Oranga Tamariki is to pay Ms Van Dragt compensation for humiliation, loss of dignity and injury to feelings under s123(1)(c)(i) of the Act in the amount of \$20,000.00.

### **Costs**

[120] 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 of costs is needed, any party seeking costs 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 other party 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.

[121] The parties could expect the Authority to determine costs and ask to do so on its usual notional daily rate, unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>14</sup>

Natasha Szeto  
Member of the Employment Relations Authority

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<sup>14</sup> Practice Direction of the Authority Te Ratonga Ahumana Taimahi at:  
<https://www.era.govt.nz/assets/Uploads/practice-direction-of-era.pdf>