

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

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

[2023] NZERA 754  
3153202

BETWEEN

REBECCA MARSHALL  
Applicant

AND

WANGANUI BALLET &  
DANCE ACADEMY  
LIMITED  
Respondent

Member of Authority: Rowan Anderson

Representatives: Padi Wickramasinghe, counsel for the Applicant  
Abi Borrows, counsel for the Respondent

Investigation Meeting: 20 September 2022 in Whanganui and 25 October 2022  
by AVL

Submissions received: 27 October 2022 and 8 November 2022 from Applicant  
8 November 2022 from Respondent

Determination: 18 December 2023

---

**DETERMINATION OF THE AUTHORITY**

---

**Employment Relationship Problem**

[1] Rebecca Marshall was employed as a Dance Teacher by Wanganui Ballet & Dance Academy Limited (Wanganui Ballet), having commenced her employment on 3 March 2014.

[2] Ms Marshall initially raised a personal grievance on 10 June 2021, by letter dated 9 June 2021, after having earlier raised issues about her rate of pay and annual holiday entitlements. She gave notice of her resignation on 11 August 2021 citing reduced working hours and being excluded from the dance studio by Wanganui Ballet prior to and between classes.

[3] Ms Marshall claims that she was constructively dismissed from her employment and seeks payment for a range of alleged wages arrears, unpaid hours of work, and statutory entitlements including payment for annual holidays.

### **The Authority's investigation**

[4] For the Authority's investigation written witness statements were lodged from Ms Marshall, Denise Marshall, Anna Chandulal (Director of Wanganui Ballet), and Sue Cornish (payroll administrator, Moore Markham's). All witnesses answered questions under oath or affirmation.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received. The Chief of the Authority has decided that exceptional circumstances exist such as to allow this determination to be issued outside of the three month timeframe required by s 174C(3) of the Act.

### **The issues**

[6] I summarise the issues for investigation and determination as follows:

- (a) Was Ms Marshall paid correctly and did she receive her correct annual leave entitlements?
- (b) Is Ms Marshall entitled to payment for other claimed entitlements?
- (c) Was Ms Marshall unjustifiably disadvantaged in her employment?
- (d) Was Ms Marshall unjustifiably constructively dismissed?
- (e) If Wanganui Ballet's actions were not justified (in respect of disadvantage and/or dismissal), what remedies should be awarded?
- (f) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Ms Marshall that contributed to the situation giving rise to her grievance?
- (g) Has Wanganui Ballet breached any of its relevant statutory obligations? If so, should any penalties be imposed?
- (h) Is Ms Marshall entitled to compensation for an alleged breach of confidentiality?

- (i) Should either party contribute to the costs of representation of the other party?

**Was Ms Marshall paid correctly and did she receive her correct annual leave entitlements?**

*Ms Marshall's ordinary hours of work*

[7] Ms Marshall and Wanganui Ballet provided evidence and submissions as to the hours worked by Ms Marshall. The figures provided differed somewhat and are reflected in the following table. The table sets out the hours of work Ms Marshall says she worked each year as compared to the hours of work Wanganui Ballet submits were worked. The hours of work in the below table do not include overtime or other hours of work that Ms Marshall is claiming payment for.

<b>Year</b>	<b>Hours claimed as worked by Ms Marshall</b>	<b>Hours claimed as worked by Wanganui Ballet<sup>1</sup></b>
2014	357	357
2015	489	467
2016	516.75	505.25
2017	498	522
2018	416.25	416.25
2019	551	627
2020	560.5	619.5
2021	427	433
Total	3,815.5	3,947

[8] Unsurprisingly, given the period in question, there are discrepancies in the calculations provided. Such as Wanganui Ballet's calculations reflect that Ms Marshall worked more hours than she claims, exclusive of overtime and other hours that she also seeks payment for, I accept those as being the hours worked by Ms Marshall during each year and they are used where relevant in any calculations.

---

<sup>1</sup> Wanganui Ballet provided separate calculations relating to period in 2020 and 2021 based on a change in what it says was the hourly rate. These have been combined in the table to reflect a total number of hours worked in each year.

*Ms Marshall's hourly rate of pay*

[9] Ms Marshall says that when she commenced her employment, she was provided an individual employment agreement (IEA) but that she did not sign it immediately as she wanted to get clarification about the hourly rate of pay. At the investigation meeting, she explained that she did so because she was not happy with the hourly rate initially offered.

[10] Having sought clarification about the rate of pay, Ms Marshall received an email from Hamish Mackay, Ms Chandulal's former partner and former director of Wanganui Ballet, confirming that she would be paid \$15.00 net of tax. The email from Mr Mackay on 14 March 2014 provided:

...  
Hi Bex

Apologies for the delay in getting this sorted, however you'll be pleased to know we have finally got there! Our accountant, Markhams, has done the numbers, based on 10.5 hrs per week at \$15/hr net of tax. Our calculations were that this amounted to 367.5 teaching hours for the remainder of this year. Anna then paid you for last week, so in establishing regular monthly automatic payments for the 10 months of March-December we have reworked the numbers based on 357 teaching hours remaining.

The numbers work out as follows:

Monthly gross \$801.16

Less:

PAYE	\$153.79
Student loan	\$96.12
KiwiSaver	\$24.03

Net payment \$527.22

....

[11] Ms Marshall ultimately did sign the IEA on 19 March 2014, a few days after having received the email from Mr Mackay. The IEA included the following provision in relation to remuneration:

**6. Remuneration/Wages/Training Bond**

- (a) The employee will be paid a wage of \$15.00 per hour as full remuneration for the duties to be performed under this agreement.
- (b) Wages shall be paid monthly by direct credit to a bank account nominated by the employee.

...

[12] Ms Marshall submitted that, notwithstanding anything to the contrary in the IEA, it was agreed that she would be paid \$15.00 net per hour when she was offered employment. She submitted that once appropriate allowance for relevant deductions are made, that her gross hourly rate of pay was \$22.365. She said that she was paid appropriately for the year 2014 based on that rate. Ms Marshall's calculations reflect that payment would be made on the basis that she would be paid approximately \$15.00 net, in the hand, after all deductions.

[13] The email of 14 March 2014 reflects that Ms Marshall would be paid \$801.16 gross per month, on the basis that she would work 10.5 hours per week.

[14] Ms Marshall calculated the gross hourly rate in a statement provided to the Authority on the basis of having worked 357 hours in 2014 and of receiving total gross income of \$7,984.42. That sum is contested with Wanganui Ballet recording wages paid in 2014 as having been \$6,651.17. I do not accept Ms Marshall's calculation of her hourly rate and I find it does not reflect the agreement reached.

[15] I do not accept that it was agreed that Mr Marshall's hourly rate would be \$15.00 per hour net of all deductions. The email of 14 March 2014, which post-dated the commencement of Ms Marshall's employment but pre-dated the IEA being signed, does not reflect that as having been the agreement. Notably, the email refers to the \$15.00 per hour sum as being "net of tax".

[16] The calculations that followed in the email reflect an approximate rate of \$15.00 per hour (on the basis of 10.5 hours per week) once PAYE (i.e. tax) is deducted. However, once provision for student loan repayments and KiwiSaver are factored in, the real net rate (the sum Ms Marshall would be paid after all deductions) was closer to \$12.50 per hour.

[17] I find that what was agreed was that Ms Marshall was to be paid an hourly rate that would reflect a net payment of approximately \$15.00 per hour after the deduction of PAYE. Based on the calculations provided to Ms Marshall on 14 March 2014, the hourly rate of pay was to be approximately \$19.08 gross.<sup>2</sup> This was reflected in how Ms Marshall was paid, at least following her first year of employment during which I find Ms Marshall was paid at a higher rate by mistake. The hourly rate paid to Ms

---

<sup>2</sup> Calculated based on \$801.16 per month divided by 42 hours of work per month based on 10.5 hours per week.

Marshall from 2015 was in effect the same as was indicated in the email from Mr Mackay (Wanganui Ballet paid Ms Marshall at the rate of \$19.09 from 2015 through to 2018).

[18] In 2015, Ms Marshall, after making an enquiry at the end of the year, was provided a payslip which recorded her hourly rate as \$19.09. Ms Marshall contends that she was, from 2015 onwards, paid incorrectly throughout the course of her employment.

[19] Wanganui Ballet submitted that it was under a mistaken impression that "...the \$15 was the Applicant's net income, rather than gross" and that Ms Marshall "...should be paid 8% on top of her wages and accordingly processed [her] salary in line with this", and further that "[t]his is how the Respondent arrived at the hourly rate of \$19.09.

[20] I do not accept the basis for the calculations as submitted by Wanganui Ballet. I find that the applicable hourly rate was arrived at by seeking to accommodate a payment of \$15.00 post tax (after deduction for PAYE, but not student loan repayments or KiwiSaver) to Ms Marshall. That is consistent with the payments that were made from 2015, Mr Mackay's email in 2014, and the relevant calculations.

[21] I find that Ms Marshall continued to be paid the rate that was agreed, \$19.09 per hour, throughout 2014, 2015, 2016, 2017, and 2018.

[22] Wanganui Ballet then changed the approach to payment in 2019. At that time, according to Ms Chandulal, Wanganui Ballet changed payroll systems and Ms Marshall's hourly rate was recorded from that point as being \$17.70 with 8 percent holiday pay in addition.

[23] The changes made in 2019 resulted in the recorded hourly rate reducing from \$19.09 to \$17.70. However, Wanganui Ballet contends that 8 percent holiday pay was paid in addition. From 1 April 2019 the adult minimum wage was raised to \$17.70. During that period, I find that Ms Marshall was paid at least the agreed rate of \$19.09 if the purported 8 percent holiday pay component is included. However, there remains a significant question as to the incorporation of payment for annual holidays in Ms Marshall's pay.

[24] For the year 2019, Ms Marshall claims she worked 551 hours. Wanganui Ballet says that the hours worked were 627 hours. Ms Chandulal says that an error was

identified in 2019, in the amount of \$1,513.92, and a corrective payment made. I find that that reflects the discrepancy as between the hours worked referred to by Ms Marshall and Wanganui Ballet and I am satisfied that a corrective payment was made.

[25] In 2020, Ms Marshall's hourly rate of pay was increased to \$18.90 gross per hour, in line with an increase to the minimum wage. That change was made on the advice of Ms Cornish, with annual holidays to accrue rather than be paid out from that point. The rate was subsequently increased on a similar basis in 2021 with the minimum wage increasing to \$20.00 per hour on 1 April 2021.

[26] I find Ms Marshall was paid at least \$19.09 having regard to the payments actually made. Those payments included components purporting to represent 8 percent annual holiday pay. Ultimately, I find that Ms Marshall, for a significant period of her employment, did not in fact receive annual holidays compliantly and that there are outstanding payments due. However, I find that the sums actually paid to Ms Marshall were not less than the agreed rate of \$19.09.

[27] Whilst I find that Ms Marshall received payment of the agreed rate, I also find that Wanganui Ballet incorrectly recorded Ms Marshall's rate of pay. That included periods in 2019 and 2020 where rates lower than \$19.09 were recorded. The records and payments did not accurately reflect the agreed rate of pay. I find that this primarily arose from the incorrect approach taken to payment for annual holidays.

#### *Annual leave payment and accrual*

[28] Ms Marshall claims that she was not paid correctly for annual holidays. There is a question as to whether Ms Marshall received payment for annual holidays compliantly. In simple terms, the question is whether Wanganui Ballet complied with any requirements relating to the accrual of, and payment for, annual holidays.

[29] Annual holidays, and the taking of them, are dealt with in Ms Marshall's IEA.

### **7. Holiday Entitlement**

- (a) **Annual Holidays:** After the end of each completed 12 months of continuous employment the employee is entitled to 4 weeks paid annual holiday per annum, pro rated to reflect the hours worked.
- (b) Ordinarily annual holidays are to be taken by the employee during the school holidays when the Academy is closed....

[30] Ms Marshall said that there was no mention of annual leave until 2019 and that no entitlement to annual holidays was recorded on her payslips up to that point. Ms Marshall would work during the school terms, but not during the term breaks, with her pay being spread across the full period of the school year. Ms Marshall submitted that the effect of the changes from 2019 were that her hourly rate was reduced, without agreement, to accommodate that change from payment of annual holidays to accrual.

[31] Ms Cornish's evidence was that Ms Marshall worked between 37 and 39 weeks, and that the school year varied between 43 and 49 weeks. She says that Ms Marshall's wages were pro-rated across all the weeks such that she would receive income over the school holidays. She also says that Ms Marshall was paid 8 per cent on top of her wages. She expressed concern with the approach taken to the wages and the remuneration approach was simplified at the start of 2020. Allowance was made for annual holidays to accrue in 2020 and Ms Marshall's evidence was that she was told of that change at the time.

[32] Ms Marshall submitted that s 28 of the Holidays Act 2003 did not apply in the circumstances such as to permit Wanganui Ballet to pay annual holidays to her on a regular basis together with her pay. Section 28 of the Holidays Act 2003 permits annual holiday pay to be paid with an employee's pay only in very limited circumstances. For present purposes, that includes where an employee works "on a basis that is so intermittent or irregular that it is impractical for the employer to provide the employee with 4 weeks' annual holidays...".<sup>3</sup>

[33] Ms Marshall worked according to a schedule of classes contained in a roster determined in advance. Whilst there was some fluctuation in her hours of work over the course of her employment, that fluctuation was not such as to cause any significant difficulty in providing annual holidays. Indeed, Ms Marshall was provided 'leave' of sorts based on an approach that spread her pay over the school term including weeks when she did not work.

[34] I find that Ms Marshall's work was not so "intermittent or irregular"<sup>4</sup> such that it was impracticable for Wanganui Ballet to provide Ms Marshall with 4 weeks' annual holidays. Given that, I need not make findings in relation to the other conditions

---

<sup>3</sup> Holidays Act 2003, s 28(1)(a)(ii).

<sup>4</sup> Holidays Act 2003, s 28(1)(a)(ii).

provided for in s 28(1) of the Holidays Act 2003. Notwithstanding that, I would have found that Ms Marshall did not agree to regular payment of annual holidays in her employment agreement<sup>5</sup>, and additionally that any annual holiday pay was not a separately identifiable component of her pay,<sup>6</sup> at least for a significant period of the employment.

[35] Section 28(4) of the Holidays Act 2003 deals with the consequences where an employer incorrectly pays annual holiday pay on a regular basis with an employee's pay. It provides:

- (4) If an employer has incorrectly paid annual holiday pay with an employee's pay in circumstances where subsection (1) does not apply and the employee's employment has continued for 12 months or more, then, despite those payments, the employee becomes entitled to annual holidays in accordance with s 16 and paid in accordance with this subpart.

[36] I find that Wanganui Ballet incorrectly paid Ms Marshall's annual holiday pay in circumstances where subsection 28(1) of the Holidays Act 2003 did not apply. In accordance with s 28(4) of the Holidays Act 2003, Ms Marshall is entitled to annual holidays in accordance with s 16 of the Holidays Act 2003.

[37] Ms Marshall is entitled to 4 weeks annual holidays for each completed 12 months of continuous employment. Ms Marshall commenced work on 3 March 2014 and was entitled to 4 weeks annual holidays on 4 March 2015 and on completion of each subsequent 12-month period through to 4 March 2021. Additionally, Ms Marshall was entitled to payment of 8 percent of her gross earnings since she last became entitled to annual holidays<sup>7</sup>, that being from 4 March 2021 to when her employment ended on 14 October 2021.

[38] On the basis set out above, Ms Marshall's total entitlement was to 28 weeks and 8 percent of her gross earnings as between 4 March 2021 and the end of her employment. Ms Marshall took 4 weeks of annual leave in each of 2020 and 2021, albeit she contests the rate at which payment was made in relation to those periods. Any outstanding leave was payable as at the end of Ms Marshall's employment and I find that it is claimable as being within the relevant limitation period.

---

<sup>5</sup> Holidays Act 2003, s 28(1)(b).

<sup>6</sup> Holidays Act 2003, s 28(1)(c).

<sup>7</sup> Holidays Act 2003, s 25(2).

[39] Ms Marshall's ordinary hours of work were 10 hours and 45 minutes and her applicable rate of pay \$20.00 per hour as at the end of her employment. Her ordinary weekly pay on that basis was \$215.00 as at the date her employment ended.<sup>8</sup> That amount is greater than Ms Marshall's average weekly earnings during the 12 month period immediately prior to the last pay period before dismissal. Section 24(2) of the Holidays Act 2003 requires payment at the greater of the two.

[40] Payslips provided by Wanganui reflect annual holidays first starting to accrue in a payslip dated 20 February 2020. Up to the end of 2019, they reflect Ms Marshall as having been paid at 8 percent. The final payslip reflects that there was a balance of negative 20.37 hours as at the pay date of 21 October 2021. That appears consistent with the evidence before the Authority indicating periods of annual leave were taken by Ms Marshall in 2000 and 2021 equivalent to 8 weeks<sup>9</sup>. Ms Marshall was paid accrued annual holiday pay in 2020 and 2021 being a total of 8 weeks.

[41] When her employment ended, there was a negative balance of 8 days or 20.37 hours. I am satisfied that Ms Marshall took annual holidays in 2020 and 2021 that she received payment for that was sufficient such as to cover any entitlement to annual holidays covering the period of her employment from 5 March 2021 onwards. I am satisfied of that notwithstanding that Ms Marshall was paid for some of those annual holidays at an incorrect rate that was lower than \$19.09, the rate I have found was the applicable for most of the period of employment.

[42] I find that the total of annual holidays accrued, but not taken or paid, were 20 weeks. I have arrived at that by deducting the 8 weeks taken in 2020 and 2021 and the residual period relating to which I am not satisfied for which payment was not made, from the total entitlement. On that basis, I find that Ms Marshall is due \$4,300 as payment for annual holidays.

### **Is Ms Marshall entitled to payment for overtime?**

[43] Ms Marshall claims that she undertook a range of work during her employment for which she was not paid. The relevant periods for which Ms Marshall claims payment relate to four broad categories of activity.

---

<sup>8</sup> \$20.00 gross per hour

<sup>9</sup> Setting aside for the moment a residual argument as to whether Ms Marshall was in fact working overtime during one of those weeks, in addition to any unresolved issues as to the applicable pay rate.

[44] Firstly, she claims she undertook work in preparation for her classes, including choreography, and by performing other tasks for Ms Chandulal such as entering grades electronically and attending the studio to close it up when Ms Chandulal was absent. Secondly, she claims that she undertook work in preparation for, and in attendance at, annual shows. Thirdly, Ms Marshall says that she is entitled to payment relating to time spent in attendance at student examinations. Finally, Ms Marshall also claims payment for her attendance at open days held by Wanganui Ballet.

[45] In submissions, Wanganui Ballet referred to Court of Appeal's judgment in *Idea Services Limited v Dickson* [2011] NZCA 14 as to the criteria to be used in determining what constitutes work. Wanganui Ballet deny Ms Marshall's claims and submit that the relevant activities did not amount to the performance of work for which Ms Marshall was entitled to payment. In the alternative, Wanganui Ballet provided the Authority with calculations as to hours it claims would be applicable to the relevant periods.

#### *Show hours*

[46] Wanganui Ballet would hold a performance/show every year for students to showcase what they had learnt. Ms Chandulal said that rehearsals for the shows would be in class time, but with two additional rehearsals prior to the shows. She says Ms Marshall choreographed dances for her own students and that she understood that would be done in class time. Ms Chandulal also said that Ms Marshall never gave any indication she expected to be paid for that time and never raised with her that she had spent time outside of class doing such work.

[47] Ms Marshall claims that she worked the following overtime hours involved in preparation and attendance at shows during her employment:

- (a) 100 hours of overtime in 2016 for which she was paid \$200 cash;
- (b) 100 hours of overtime in 2017 for which she received \$200 cash;
- (c) 100 hours of overtime in 2018 for which she received \$200 cash;
- (d) 25 hours of overtime in 2020, for rehearsals as the shows not ultimately not held with no payment received;
- (e) 111.5 hours of overtime in 2021 for which she received \$300 cash.

[48] Ms Chandulal said that Ms Marshall was not required to be at the Theatre during rehearsals for Ms Chandulal's students. She said that running the show was her responsibility and that she kept Ms Marshall's involvement to a minimum deliberately.

She said Ms Marshall would assist setting up and packing down, presenting students with awards, and various other odd jobs. If Ms Marshall wasn't there, then "another volunteer" would do it.

[49] Students paid to attend the shows, and parents and the community purchased tickets. Ms Chandulal said the money covered putting on the show and related expenses and that if there was anything leftover it would be shared by her with Ms Marshall as a 'bonus'. She said it was "...not in recognition of the work done in connection with the Show but is my only opportunity to provide a bonus to my employee".

[50] Ms Marshall said that, for example in 2021, there was no discussion about additional hours she said were necessary for preparation for the shows. She said she would get given music and would work with her own students to prepare. Her evidence was that her involvement in the show was expected. Most of the dances would be practised during scheduled class time, but there would also be meetings, rehearsals, coordination tasks, and choreography. Ms Marshall said she had expected to be paid for that work, and that she was paid a cash bonus but didn't challenge the hours of work at the time.

[51] Ms Marshall, in relation to the shows in 2021, said that she was not given the option of not attending. She said she started at 11.00am and was required to be present the whole time. Ms Marshall said that she was paid \$300.00 for the 111.5 extra hours she worked that year.

[52] Ms Chandulal said that Wanganui Ballet is largely reliant on volunteers for tasks carried out for shows, exams and open days. She said that Ms Marshall "...was often asked to perform tasks but was rarely required to carry them out, given their voluntary nature". She said that Ms Marshall never expected payment or reward for that work and that the issue was first raised when Ms Marshall raised her personal grievance.

[53] Ms Chandulal said that show hours would more accurately be quantified as being between 10 and 17 hours, as opposed the 111.5 hours claimed by Ms Marshall. Ms Chandulal says this would be made up of 10 hours of rehearsals, 3 hours of show attendance, and up to 4 hours setting up and packing up. She said that 111.5 hours claimed by Ms Marshall included choreography, but that she would do most of that and that Ms Marshall would teach the routines during normal class hours.

[54] I consider that the attendance at, and some preparation for, the annual shows amounted to the performance of work for which Ms Marshall was entitled to payment. Whilst Wanganui Ballet submitted that the annual shows were not a profit-making endeavour, I find that they were a not insignificant part of Wanganui Ballet's operations. Whilst individual dancers, or more relevantly their parents, may not have paid for their attendance as they would for lessons, I find that it was viewed as part of, or a benefit of, the paid lessons. Put another way, Wanganui Ballet derived a benefit and created or enhanced its goodwill by putting on the shows.

[55] As to the assessment of how many hours were involved in preparation and attendance, I prefer the evidence of Ms Chandulal. To the extent that Ms Marshall's claimed hours of overtime exceed that, I find that she was not required to work those hours and that Wanganui Ballet could not reasonably have anticipated that she would be doing so.

[56] I find that Ms Marshall is due 17 hours pay for each year on which the shows were held, and 10 hours for 2020 when only rehearsals were held, being a total of 78 hours.

[57] I calculate the wages owing as 17 hours at \$20.00 per hour in 2021, and a total of 61 hours at \$19.09 for the other years. The total sum of the overtime owed being \$1,504.49. From that, I deduct the \$900.00 of cash payments made.

[58] Ms Marshall is due payment of \$604.49 in unpaid overtime relating to work undertaken relating to the annual shows.

#### *Exam hours*

[59] Ms Marshall claims she worked significant hours relating to examinations undertaken by students. She said that the work was necessary and required. For example, she said she had to do the music for exams and referred to correspondence in 2015 that she said confirmed that she was required to undertake that task. She explained that in asking in that correspondence as to whether she would be doing to music, that she was enquiring as to whether she was required to do that work, rather than volunteering for it.

[60] Ms Marshall also said she was required to arrive at work an hour early to either run, or assist with, warming up students. She would then remain for the rest of the

relevant period to perform tasks such as further warmups and assisting with meal breaks and clean up. In some cases, she would operate the music in the exam room.

[61] Ms Chandulal's evidence is that Wanganui Ballet facilitated exams for the Imperial Society of Teachers of Dancing and the New Zealand Association of Modern Dancing. Students would be graded and would be examined independently by those organisations. Examination fees were paid directly to the relevant organisations and not to Wanganui Ballet. She said no income was received for Wanganui's service in facilitating the exams. Wanganui Ballet would provide the studio for use and Ms Chandulal says, for her students, she would assist with warm ups and would be on hand to assist generally if needed. She says her attendance was just to support her students and that Ms Marshall was invited to do the same but that she was not required to do so.

[62] I consider some of the hours spent by Ms Marshall in attending exams with students amounted to the performance of work for which she is entitled to payment of wages. I make that finding for the same reasons as I have recorded elsewhere in relation to Ms Marshall's attendance relating to show hours. I do not consider Ms Marshall's involvement was simply voluntary. However, I do not accept that Ms Marshall was required to attend for the full day or otherwise to the extent claimed. That is not to be critical of Ms Marshall, who has had to attempt to effectively reconstruct her hours of work.

[63] I am satisfied that, on each day she attended for the purposes of the examinations, that Ms Marshall performed two hours of overtime. I am not satisfied that Ms Marshall's attendance and/or duties exceeded those hours. I accept Ms Marshall's evidence that between 2016 and 2020 she attended on 14 separate days, and I conclude that Ms Marshall is due payment for 28 hours of overtime for work undertaken for the examinations.

[64] Ms Marshall is due payment of \$534.54 in unpaid overtime relating to work undertaken relating to the examinations.

#### *Open days*

[65] Ms Marshall claims that she undertook work for which she should have been paid at open days held by Wanganui Ballet. She said that Ms Chandulal asked her to

attend an open day the weekend before teaching began in February 2015, and that similar work was undertaken in subsequent years. She said that the duration of the open day, and therefore her work, was approximately 2.5 hours in 2015. She said the same occurred in 2016, 2017, 2018, 2019, 2020, and 2021.

[66] Ms Chandulal said that open days were held to encourage new students to join the ballet and dance school. She said it involved little preparation and generally a few short classes were taken during the open days. She said that Ms Marshall was not required to attend, asked to attend herself, and that she did so voluntarily.

She said there was no open day in either 2020 or 2021 due to COVID, nor in 2019 as the costs of advertising outweighed the benefit of holding the open days. When they were held, she said they only lasted 2 hours between 10.00am and 12.00pm.

[67] I accept Ms Marshall's evidence as to being asked to attend the relevant open days and I find that she should have been remunerated for her time and the work undertaken. However, on balance, I prefer the evidence of Ms Chandulal as to the duration of the open days and time required during which work could have been undertaken. In doing so, I note that Ms Marshall's figure was an approximation.

[68] I conclude that Ms Marshall is due payment for 2 hours of overtime for each of the open days held in 2015, 2016, 2017, and 2018. That being a total of 8 hours.

[69] Ms Marshall is due payment of \$152.72 in relation to work performed relevant to the open days.

#### *Class preparation and other tasks*

[70] Ms Chandulal's evidence was that Ms Marshall taught modern theatre and contemporary dance, except for one ballet class in 2021. She said she would create a timetable at the beginning of each term and send a copy to Ms Marshall. Ms Marshall was only required to work, and was paid, for the actual classes. She also said there was no requirement to commence work prior to the classes starting and that the classes were the only fee generating service offered by Wanganui Ballet.

[71] Ms Chandulal said at the investigation meeting that she did not pre-prepare for classes. In relation to this category of activity I am not satisfied that Ms Marshall was undertaking work for which she was entitled to be paid wages. Ms Marshall was not

working when she attended the studio prior to lessons, nor do I accept that she was undertaking work by being present, observing, or even occasionally assisting during Ms Chandulal's lessons.

[72] I find that Ms Marshall's attendance at such times was entirely voluntary in nature, she was not expected or required to be in attendance or otherwise to perform the relevant tasks, and I do not consider that there was any expectation of payment relating to those periods. The responsibilities, if any, were negligible, there were no constraints placed on Ms Marshall as to her freedom, and whilst her attendance might have been helpful and appreciated, it was of no significant benefit to Wanganui Ballet.

[73] The closest thing to an exception in relation to this category of activities, is the preparation for lessons. Ms Marshall says that she spent time preparing for lessons, including in developing choreography. Ms Chandulal's evidence is that such work was neither expected nor necessary. I prefer Ms Chandulal's evidence on this point.

[74] Ms Marshall said that she undertook other work that she should have been paid for but was not. This included attending for a photography session for media purposes relating to the business and making phone calls for Ms Chandulal while she was overseas. Ms Marshall provided a list of the hours she claims, including as to work related to administration, rehearsals, music administration, costume organising, and theatre setup and rehearsals. The total claimed was 111 hours and 29 minutes which Ms Marshall claims reflected the unpaid hours during term 1 of 2021. Ms Marshall said she sent her hours of work in to be paid as overtime.

[75] Ms Marshall also claims she is entitled to payment relating to work performed during a period when Ms Chandulal was overseas between 28 June 2015 to 10 July 2015. Ms Marshall gave evidence that she was paid cash for extra teaching during that time but did not receive payment relating to other tasks such as following up phone calls and cleaning. I am not satisfied that payment is due. No payment was claimed at the time, and I am not satisfied that there is sufficient evidence such as to establish what, if any, time was spent working by Ms Marshall.

[76] Ms Chandulal said that a period of 3 hours claimed by Ms Marshall for work on updating 'motivae groups' may have only taken 20 minutes and only involved assigning/amending grades to students on an iPhone application. She said that Ms

Marshall provided no indication that she expected to be paid for the task and the offer made to her was because she had indicated she was 'bored'.

[77] Several the activities relating to Ms Marshall's claims related to what I find were very occasional favours which Ms Marshall was generally happy to volunteer for and for which there was no expectation of remuneration. They were not in the nature of her regular work and nor did she communicate any expectation of payment. It is also the case that I cannot be satisfied as to the time at which most of those activities occurred, nor how much time they took. I do not consider that a matter of Wanganui Ballet not keeping sufficient wage and time records, but rather a product of there not having been any agreement or expectation that Ms Marshal would be remunerated.

[78] I find that Ms Marshall is not due payment for any other claimed overtime relating to class preparation or other periods claimed.

[79] In conclusion as to Ms Marshall's claim for payment of overtime, I order Wanganui Ballet to pay, within 28 days, a total of \$1,291.75, as overtime worked but not paid.

### **Is Ms Marshall entitled to payment for other claimed entitlements?**

#### *Sick leave*

[80] Ms Marshall claims that she is entitled to payment for unpaid sick leave on the basis that she was required to take "make up classes" without additional payment to cover any work missed when on sick leave. Ms Marshall said that she has calculated the amount she is entitled to based on an hourly rate of \$22.365, as a total of \$715.68.

[81] The Authority was provided pay slips from between March 2019 and October 2021. The payslips do not reflect sick leave having been taken at the relevant times claimed by Ms Marshall. However, they do reflect that other periods of other sick leave were taken and paid.

[82] Ms Chandulal's evidence is that Ms Marshall received full sick leave entitlements during her employment and was paid on days when she was unable to work. She said that Ms Marshall would reschedule the classes so that they were taken on another day. Ms Chandulal also said that Ms Marshall would change the timetable

so that her hours were not affected, allowing her to receive full pay for the week without impacting her sick leave entitlements.

[83] Ms Marshall accepted at the investigation that she did receive payment for some sick leave, including a two-week period where she was to have medical treatment. She said that she had wanted two weeks leave but had agreed on two weeks for that period.

[84] At the investigation meeting, Ms Chandulal said that Ms Marshall was paid for rescheduled classes from 2021. That appears to have been when the issue arose, with no evidence of there being a dispute or disagreement prior. She said there were some occasions on which Ms Marshall was not paid for makeup classes and after the issue was fixed in 2021, there was no retrospective process undertaken in relation to previous occasions where that may have occurred. Wanganui Ballet submitted that Ms Marshall is seeking payment of her accrued sick leave balance and that no such entitlement exists.

[85] Section 65 of the Holidays Act 2003 provides that an employee may take sick leave in certain circumstances, including where they are sick or injured. Clause 8 of Ms Marshall's IEA provided an entitlement to 5 days paid sick leave per year, with 15 days of sick leave being able to be carried forward to a maximum entitlement of 20 days.

[86] I have considered the pay records provided, including that they reflect other periods of leave, including sick leave taken on 7 December 2020 and leave without pay on 9 October 2020. I find that Ms Marshall did not seek to take paid sick leave on the occasions she has specified, and instead chose to retain her accumulated sick leave balance by rearranging her classes. I am also not satisfied that Ms Marshall notified Wanganui Ballet of her intention to take sick leave in terms of s 64 of the Holidays Act 2003 in that, whilst there is no dispute that she notified of her non-attendance, it is not apparent that she notified an intention to take paid sick leave.

#### *Bereavement leave*

[87] Ms Marshall's grandmother died in July 2015 and Ms Marshall said she was given one day's bereavement leave and asked to return to work in the evening to teach a class. Ms Marshall submitted that she was entitled to 3 days bereavement leave in the event of the death of a grandparent and that Wanganui Ballet did not provide that leave.

[88] Clause 8(h) of the IEA signed on 19 March 2014 provided as follows:

- (h) **Bereavement Leave:** The employee on the completion of 6 months current continuous service is entitled to be paid parental leave of:
  - (i) 3 days if the employee suffers a bereavement on the death of that employee's spouse, parent, child, brother or sister, grandchild or spouse's parent;
  - (ii) or 1 day on the death of any person if the employer accepts the employee has suffered a bereavement as a result of the death.

[89] Section 70(1)(a) of the Holidays Act 2003 provides that an employer must allow an employee to take 3 days bereavement leave, including in relation to bereavements of the type described at s 69(2)(a), which includes grandparents. The IEA excludes references to grandparents as appears at s 69(2)(a)(v) of the Holidays Act 2003.

[90] At the investigation meeting, Ms Marshall said that she had asked Ms Chandulal if she could take more than one day off and that Ms Chandulal's responded saying "no". Ms Marshall said that she was given 1 day's leave, felt mistreated, and felt pressured by being asked to return to work. Ms Chandulal said that she never denied Ms Marshall bereavement leave and Ms Marshall was given the leave that was requested by her.

[91] Wanganui Ballet submitted that Ms Marshall's contractual entitlement was to one day's bereavement leave and that Ms Marshall, on her evidence only being aware of the contractual entitlement, only requested one day's leave. Ms Chandulal's evidence is that Ms Marshall was not required to return to work on the day that she took bereavement leave, and that had Ms Marshall requested three days leave it would have been granted.

[92] I prefer Ms Chandulal's evidence and find that leave in addition to that sought was not refused. No additional leave was applied for, and I conclude that Ms Marshall, in any event, agreed to return to work. I do not accept that that was a result of any undue pressure being exerted by Wanganui Ballet.

[93] Ms Marshall's claims to payment for alleged unpaid sick and bereavement leave are unsuccessful.

*Interest on any outstanding payments*

[94] The total of the relevant payments due to Ms Marshall for unpaid annual leave and overtime are \$5,591.75. Wanganui Ballet are ordered to pay Ms Marshall, in

accordance with the Interest on Money Claims Act 2016<sup>10</sup> and within 28 days of this determination, on that sum from the date the employment relationship ended until the date on which payment in full is made. This is to be calculated using the Civil Debt Interest Calculator.<sup>11</sup>

### **Was Ms Marshall unjustifiably disadvantaged in her employment?**

#### *Disadvantage and the test of justification*

[95] Ms Marshall notified Wanganui Ballet that she had a personal grievance for unjustified disadvantage by letter dated 9 June 2021. The basis of the disadvantage grievance related to several issues noted by Ms Marshall in that letter, primarily as to allegations of the incorrect payment of wages and entitlements. Further grounds for Ms Marshall's unjustified disadvantage claim, including a reduction in her hours of work and exclusion from the studio, were detailed in her resignation letter dated 11 August 2021.

[96] Section 103A of the Act sets out the relevant test for justification, that being whether the employer's actions, and how the employer acted, were what a reasonable employer could have done in all of the circumstances at the time the dismissal or other action occurred.<sup>12</sup> In applying the test of justification, I must consider the factors listed at s 103A(3) of the Act that, in a non-exhaustive manner, set out procedural considerations.

[97] The question of justification applies in two parts, to the process adopted by the employer and the substantive justification.

#### *Incorrect payments and entitlements*

[98] Ms Marshall claims that she was unjustifiably disadvantaged by a failure to pay wages and holiday pay accurately.

[99] Wanganui Ballet submitted that it promptly investigated and acted when payment issues were raised by Ms Marshall, including 2019. Ms Chandulal also said that steps were taken to address the pay issues, including by proposing an independent contracting arrangement and a pay increase following Ms Marshall's raising of payment

---

<sup>10</sup> Interest on Money Claims Act 2016, s 10.

<sup>11</sup> Interest on Money Claims Act 2016, s 12 and 13.

<sup>12</sup> Employment Relations Act 2000, s 103A(2).

related issues in 2021. Wanganui Ballet submitted that Ms Marshall had the ability to raise any genuine concerns with Wanganui Ballet but that she did not.

[100] I accept there was some significant confusion about the basis on which Ms Marshall's pay and her entitlement to annual holidays were calculated. Enquiries were made by Ms Marshall, including in and December of 2015 and February of 2018. Ms Marshall accepted in cross examination that she ultimately didn't challenge the responses provided but said that was because she couldn't follow what was provided.

[101] Ms Marshall's concerns as to being paid at the appropriate hourly rate are inextricably linked to the issue of annual holidays. That is because if it were accepted that annual holidays were paid for the period up to 2019, the consequence would be that Wanganui Ballet unjustifiably reduced Ms Marshall's hourly rate to accommodate for that. On either view, Ms Marshall was not provided accurate pay and entitlements in accordance with her IEA and in compliance with Wanganui Ballet's statutory obligations.

[102] Ms Chandulal says that the claims of unpaid hours had never been raised by Ms Marshall prior to her giving notice of a personal grievance. Ms Chandulal said that Wanganui Ballet therefore did not have the opportunity to address or resolve the issue prior to the personal grievance being raised. I do not accept that was the case in relation to annual holidays and Ms Marshall's correct hourly rate. Wanganui Ballet had, or alternatively should have had, knowledge that those entitlements were not being correctly paid and accrued, and that Ms Marshall was being disadvantaged in her employment.

[103] Ms Marshall submitted that she was unjustifiably disadvantaged by Wanganui Ballet's failure to provide her 3 days bereavement leave, and by Wanganui Ballet asking Ms Marshall to return to work. Her personal grievance notification of dated 9 June also raises issues as to sick leave, other unpaid hours, and activities Ms Marshall wished to pursue outside of work. I have found that Ms Marshall did not request sick leave and I do not consider Ms Marshall was disadvantaged by Wanganui Ballet's actions in relation to that issue. I also do not consider that Ms Marshall was disadvantaged in terms of her employment by the other issues identified as to additional hours I have found she is not entitled to payment for, nor as to her desire to perform in a production outside of her work with Wanganui Ballet.

[104] Having regard to my findings elsewhere in this determination, I conclude that Ms Marshall was unjustifiably disadvantaged by Wanganui Ballet's failure to pay her for overtime worked, and by its actions in failing to compliantly provide Ms Marshall with her entitlement to annual holidays.

[105] I find that Wanganui Ballet's actions in failing to ensure Ms Marshall received the correct pay and entitlements were not those of a fair and reasonable employer. Additionally, whilst I accept some steps were taken to address issues raised by Ms Marshall in 2021. I conclude that there was no substantive justification for Wanganui Ballet's actions. Such as procedural justification is relevant, having considered the matters I am required to by s 103A of the Act, I find there was no procedural justification for Wanganui Ballet's actions.

#### *Reduction in the hours of work*

[106] Ms Marshall claims that she was unjustifiably disadvantaged by a reduction in her hours of work that occurred in 2021.

[107] Ms Marshall said at the investigation meeting that her hours of work would be scheduled in accordance with a timetable provided to her. That timetable listed the relevant classes that she was to teach and each of those classes would usually be approximately 60 minutes.

[108] Ms Marshall's evidence was that she was understanding of a reduction in her hours from 14 to 13 hours per week in 2021, but that after she notified Ms Chandulal of her personal grievance her hours were further reduced from 13 to 10. Ultimately her hours were then increased slightly to 10.75 per week. She accepted that a reshuffle of the classes was necessary but says that the reduction of her hours of work was significant. She said there weren't really any alternatives and accepted that the approach taken was genuine. However, she also said that there had been a decline in the relationship and that may have been one of the reasons for the change.

[109] Ms Chandulal's evidence was that Ms Marshall, as of July 2021, was teaching three classes that were being run at a loss and that the classes would not be offered the following term. She said that changes in Ms Marshall's rostered hours often happened throughout Ms Marshall's employment. She said that she engaged with Ms Marshall about the proposed change and offered Ms Marshall an independent contractor

arrangement as an alternative to provide her “autonomy to control her own hours and increase her independent work...”. She said that Ms Marshall thanked her for the offer, but that she did not hear back from her about it.

[110] Ms Chandulal said that she had concerns about the operation of the business and classes prior to Ms Marshall advising of her personal grievance. She denied that the change in hours was related to the personal grievance or its notification.

[111] The IEA does not specify a minimum number of hours to be worked each week. Wanganui Ballet submitted that it was entitled to reduce Ms Marshall’s hours of work because the IEA provided it the flexibility to do so. Marshall’s hours of work, in practice, were determined by the availability of classes to teach and the schedule of classes.

[112] I find that it was the case that Ms Marshall’s hours of work would fluctuate, including by at times being reduced, subject to the classes to be assigned to Mr Marshall. Ms Marshall’s evidence, for example, is that she worked 10.5 hours per week in 2014, 13.25 hours per week in 2016, 9.75 hours per week in term 4 of 2017, and 11.25 hours per week in 2018.

[113] I accept that Wanganui Ballet’s actions in changing Ms Marshall’s hours of work was justified, both in substance and process. There was a genuine basis for the change and I find that Wanganui Ballet genuinely and appropriately engaged and consulted with Ms Marshall. I find that Ms Marshall was not unjustifiably disadvantaged by the reduction in her hours of work.

#### *Exclusion from the studio*

[114] Ms Marshall claims that she was unjustifiably disadvantaged in that Wanganui Ballet, in the context of Ms Marshall having made claims relating to her hours of work and associated payments, took action to exclude her from the studio prior to her lessons.

[115] Ms Chandulal said that Ms Marshall was not excluded from the studio. She said she advised Ms Marshall that she would need to seek approval to use the studio except when she had a class. Her evidence is that she raised this with her because “...it was clear to [her] that she expected to be paid for being at the studio whether required or not...” given the personal grievance that she had raised.

[116] Ms Chandulal said that, on 3 August 2021, she asked Ms Marshall why she was in the studio before class and that Ms Marshall responded saying she was preparing for class. She then says that she told Ms Marshall that she could not risk her charging her for overtime. She says Ms Marshall then said, “ok I’m leaving then!” and ran out of the studio. At the investigation meeting, Ms Chandulal said that the overtime claim that had been made was generalised and she had been nervous that Ms Marshall might claim for that time. However, Ms Chandulal denied that her approach was vindictive.

[117] Ms Chandulal claims she was not aggressive, that she did not require Ms Marshall to leave, and that she simply told Ms Marshall she needed to get authorisation to use the studio out of hours. She said she was unsure of Wanganui Ballet’s legal obligations and that Wanganui Ballet could not afford to pay for additional work hours.

[118] At the investigation meeting, Ms Marshall explained that Ms Chandulal came in to turn the lights off and asked Ms Marshall why she was there. She said she explained she was there preparing for a class and that Ms Chandulal then said that she could not have Ms Marshall in the studio because she might charge her. She said Ms Chandulal then told her she would need to leave until her next class started. Ms Marshall then said she would return in 25 minutes, 5 minutes before her next class.

[119] Ms Marshall said that she left and went to see her mother, that she was in a “mess” given everything that had built up over time, and that the combination of events were such she was unable to return. She then advised that she would not be returning for that class due to stress.

[120] Following the incident on 3 August 2021, Ms Marshall sent a text message to Ms Chandulal at 5.22 pm advising she would not be back to teach her class. The following exchange occurred:

**Ms Marshall**

Hi Ann I’m sorry but I will not be back to work this evening. I have been given advice from my lawyer that I am entitled to a sick day due to the stress of the current situation at work. Your reaction to my arrival at the studio to prepare for tonight’s classes has upset me enough to not be able to conduct my classes in a professional manner.

**Ms Chandulal**

Bex, legally, I cannot have you in the studio outside your teaching hours as I am liable to be charged by you for ‘being at work’. I have been advised that this must now be the terms and conditions at work. You are

entitled to a sick day, but it is your students you are letting down in this case.

I had also asked you in writing to give me notice that you would like to use the studio for preparation of classes. I didn't receive any notification from...

[121] I conclude from the evidence that Ms Chandulal made it clear to Ms Marshall that she was not to be in the studio on 3 August 2021. Whilst I do not consider it critical, I prefer Ms Marshall's evidence and find that she was either directly instructed to leave or otherwise that it was made clear she was not to be there. On either version, I find the actions of Wanganui Ballet were unjustified.

[122] Ms Marshall had previously had access to the studio prior to commencement of her classes. I also consider such access was, at least to some degree, necessary in order for Ms Marshall to be in a position to carry out her work. Ms Chandulal's instruction to Ms Marshall, and Wanganui Ballet's approach to the issue on 3 August 2023 was inconsistent with long standing practice going back to 2014. I find, notwithstanding Ms Chandulal's denial, that the approach taken was, at least in significant part, taken as a response to Ms Marshall's raising of a personal grievance.

[123] Ms Marshall was entitled to raise the personal grievance that she did by the letter dated 9 June 2021. Ms Marshall raised issues about unpaid hours in that letter. She also stated in that letter that, in effect, she understood that time spent in class preparation time and arranging choreography were not paid, in contrast to hours she was claiming which included for shows.

[124] The change implemented, and actions of Wanganui Ballet in excluding Ms Marshall, were destructive of the necessary good faith in the employment relationship and that Ms Marshall was disadvantaged by that action. I do not accept the justification put forward by Wanganui Ballet as to the prospect of Ms Marshall claiming for time spent in the studio before or between classes. That conflicts with the statements made by Ms Marshall in her letter dated 9 June 2021.

[125] Ms Marshall also claims that asking her to leave the premises between classes, contrary to the practice that had been in place for seven years, was unfair and unreasonable. It was submitted that doing so amounted to a breach of duty in terms of s 69ZD of the Act. I am not satisfied of that and I consider the alleged exclusion from

the studio, said to have been between rostered classes, is a question distinct from whether breaks as required by s 69ZD were provided at all.

[126] I find that Ms Marshall was unjustifiably disadvantaged in her employment by the actions taken by Wanganui Ballet, including on 3 August 2021, to exclude her from using the studio before and between classes.

*Conclusion as to disadvantage claims*

[127] I find that Ms Marshall was unjustifiably disadvantaged in her employment by Wanganui Ballet's failure to correctly pay and record her wages and annual leave entitlements. I also find that Ms Marshall was unjustifiably disadvantaged by being excluded from the studio before and between classes following the raising of her personal grievances in 2021. Ms Marshall's claim that she was unjustifiably disadvantaged by a reduction in her hours in 2021 is unsuccessful.

**Was Ms Marshall constructively dismissed?**

[128] Ms Marshall claims that she was constructively dismissed from her employment. Ms Marshall provided Wanganui Ballet a resignation letter dated 11 August 2021 in which she made clear that actions taken by Wanganui Ballet had resulted in the resignation.

[129] The first question is whether the resignation was caused by a breach of duty on the part of Wanganui Ballet having regard to all of the circumstances and not just the communication of the resignation. If there was a breach of duty by Wanganui Ballet, the Authority must determine whether it was of sufficient seriousness such as to make resignation reasonably foreseeable.<sup>13</sup> The onus is on Ms Marshall to show that the resignation was a dismissal.

[130] Ms Marshall submitted that the following events are relevant to her claim of unjustified dismissal:

- (a) A request made by Ms Marshall to perform in a production of the Phantom of the Opera in September 2021, and a subsequent refusal by Wanganui Ballet of her request.

---

<sup>13</sup> *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 1 ERNZ 168.

- (b) An incident on or about 2 April 2021 whereby Ms Marshall said she was admonished for providing the key to the set designer and not staying behind herself.
- (c) A delay and/or failure to address issues she raised in a letter to Wanganui Ballet on 20 February 2021.
- (d) The matters raised in the personal grievance letter dated 10 June 2021, including the reduction in her hours of work.
- (e) Being restricted as to use of the studio outside of classes and the use of heating.
- (f) The incident on 3 August 2021 involving what Ms Marshall said was an instruction to leave the studio.

[131] Ms Marshall sent a letter raising issues to Ms Chandulal on 30 April 2021 and then sent her notification of a personal grievance on 10 June 2021.

[132] The issues raised by Ms Marshall included her rate of pay, sick leave arrangements and having been required to take ‘make up’ classes, hours said to have been worked without payment, and issues with holiday pay. In the personal grievance notification, Ms Marshall recorded that she has raised the issues in writing on 30 April 2021 and that she had sought to meet with Ms Chandulal but that a meeting at a time when her support person was available had not been arranged. Ms Marshall also noted:

...  
I have sought advice in the meantime due to stress while I wait for Anna to contact me to arrange a meeting. Almost 6 weeks have now passed since my initial email. Still there has been no update on her gathering of information or arranging a meeting. I have continued to work professionally in the meantime but feel more & more stressed as time passes with this matter unresolved....

[133] Ms Marshall informed Ms Chandulal of her resignation by letter dated 11 August 2021. That letter set out the reasons for the resignation:

...  
Dear Anna

Unfortunately I have made a decision to resign from my teaching position at Whanganui Ballet and Dance Academy for the following reasons:

1. Reduced working hours. In May 2021 my weekly teaching hours were reduced from 14 to 13 due to low class numbers.  
Since I filed a personal grievance with you on 09-06-2021, my working hours have been significantly reduced from 13 to 10 in the 2 months following. As of the beginning of term 3, 26-07-2021, I have 10 hours of

teaching per week. Due to the financial impact this has had on me I am forced to consider other options to support my children.

2. Difficulties in the workplace have arisen recently as I have been told via email on the morning of the 28-07-2021, that I am not allowed to be in the studio between teaching classes if I have a gap due to the cost of having the lights & heating on. That same evening, I went into the studio where you were teaching to do my preparation notes in the quiet & warmth as the heating was already in use. I was then informed via text message when I finished teaching at 9pm that my presence in the studio between classes is not welcome & that I am to leave & go home unless I am teaching.
3. On Tuesday 03-08-2021 I arrived 35 minutes before my 5.30pm class to prepare. As I was teaching some new work to my students that day, I wanted to go through it before they arrived as I have done without any issues over the 7.5 years that I have taught at WBDA.  
You came into the studio & said that I am not allowed to be here until my class starts as I might charge you for working & that you have been given advice for these to be the working conditions from now on. I gathered my things & said that I will leave the building for 30 minutes & return at 5.25pm for my class.  
This was unfair & heartbreaking (sic). I completely broke down & was unable to return to work. Further to this, when I notified you that I could not work that evening due to the stress & emotional state I was in, you mentioned in your reply that I am letting my students down. I felt let down, Anna. I have given so much of my time & energy to WBDA & this emotional manipulation has taken a huge toll on me. I give everything to my students. They know that & so do you. This is purely an issue between you & I. I cannot continue to work in this environment. It is having a serious impact on my mental health & wellbeing, causing me to require therapy to cope.
4. It is impractical to perform my job by arriving moments before my class without being able to prepare myself for the class. In this very cold weather it is physically harmful to arrive at a cold studio that I haven't been able to pre-warm before students arrive. If students wish to speak to me about their physical well-being prior to class such as informing me of injuries I need to know about, then this cuts into the students' lesson time.

These points outlined above have contributed to my decision to resign. I have absolutely loved teaching at WBDA for what will be, nearly 8 years when my notice period ends. It is devastating that my time here has become so stressful in such a short space of time.

As of the date of this resignation letter 11-08-2021 I am giving you 3 months notice as per section 9. (a) of my contract which is to end on 11-11-2021.

...

[134] In relation to the use of the studio, Ms Marshall's evidence was that she had explicitly told Ms Chandulal that she was not claiming wages for preparation time before classes. She said it was in that context, that Ms Chandulal excluded her from the studio despite that express statement. I have found that Ms Marshall was unjustifiably disadvantaged by Wanganui Ballet's actions relating to the exclusion.

[135] Ms Marshall's evidence referred to an incident in relation to the show week in April 2021. She said that Ms Chandulal informed a set designer that Ms Marshall and another person would stay behind to lock up at the end of the day. Ms Marshall said that when she informed Ms Chandulal that she couldn't do that, Ms Chandulal responded saying "you only live around the corner, you could pop back when she's done". Ms Marshall said that she was upset by that as she had family commitments to attend to. She says Ms Chandulal insisted she stay but that the set designer ultimately said she would lock up.

[136] The incident, Ms Marshall said, resulted in Ms Chandulal making accusations against her for a door being locked and for giving the key to the set designer. Ms Marshall said she was upset by the incident but that she pulled herself together and continued with rehearsals later that day. She said that she felt trapped into doing exactly what Ms Chandulal wanted her to do despite not being paid.

[137] Ms Chandulal said the April 2021 incident occurred when she had to leave as her partner had arranged a birthday dinner. She said that Ms Marshall nodded acknowledging her request when she left and that she found the lighting box shut the next day. She said she raised the issue with Ms Marshall, including as to concerns about giving the key to the set designer but that things went back to normal.

[138] Ms Chandulal said that following the 3 August 2021 incident, Ms Marshall continued to scheduled classes. Ms Chandulal said that there was no indication that Ms Marshall might resign as at 11 August 2021 when the resignation letter was received. She said mediation had been scheduled to occur after 11 August 2021 and that attempts had already been made to address issues, including by increasing Ms Marshall's hours from 10 to 10.75 per week. She said she had expected that the matters would be solved at mediation.

[139] Ms Marshall submitted that the actions of Wanganui Ballet in failing to address issues as to wages, holiday pay and overtime caused her to lose trust and confidence in it. It was submitted that the situation got worse after Ms Marshall raised a personal grievance in the letter dated 9 June 2021, and then further escalated on 3 August 2021 to the point where Ms Marshall could not continue. While Ms Marshall had made application for mediation she said she ultimately could not carry on.

[140] Wanganui Ballet had a duty to pay Ms Marshall in accordance with the terms and conditions that were agreed. It also had a duty to ensure it provided Ms Marshall with annual holidays in accordance with the Holidays Act 2003. That failure was not one that was rectified with due urgency and the situation persisted for a number of years. Those duties were significant, and I find a substantial risk of resignation was reasonably foreseeable.

[141] I also find that Wanganui Ballet breached its implied obligation not to act in a manner calculated to destroy or damage the relationship of confidence and trust in the employment relationship and obligation of good faith. I find that Wanganui Ballet did so by failing to address Ms Marshall's concerns about payment and annual leave fully and in a timely manner, and by taking action against her by excluding her from the studio in response to her raising of a personal grievance.

[142] I find that Ms Marshall was constructively dismissed from her employment. I am not satisfied that the dismissal was substantively or procedurally justified. I conclude that Ms Marshall was unjustifiably dismissed from her employment.

**Is Ms Marshall entitled to remedies relating to unjustified disadvantage and/or dismissal?**

*Lost wages*

[143] I am satisfied that Ms Marshall lost wages as a result of the dismissal. Ms Marshall is entitled to be compensated for that loss, and I consider an award of lost wages of 3 months' ordinary time remuneration to be appropriate. I calculate that on the basis of \$20.00 per hour at 10.75 hours for 13 weeks.

[144] I order that Wanganui Ballet make payment to Ms Marshall, within 28 days of this determination, of \$2,795.00 for lost wages.

*Compensation for humiliation, loss of dignity, and injury to feelings*

[145] Ms Marshall gave evidence of a medical condition that she said was exacerbated by the stress relating to the inconsistency of her wages. She said she had been unwell in 2017 and 2018 and that that was outside of her control. Ms Marshall provided medical evidence as to that condition, including referral and consultation records.

[146] Ms Marshall was asked about those records in cross examination and agreed that stress relating to work was not mentioned in the records until at least April 2021.

[147] Denise Marshall gave evidence that Ms Marshall came to see her on 3 August 2021. She had thought initially that there had been an accident as Ms Marshall appeared to be in shock and was a “nervous wreck”. She said that the work issues Ms Marshall was dealing with changed her personality and that she had otherwise been bubbly and friendly. She said there was a gradual change up to 3 August 2021 when there was a significant change. She said Ms Marshall started “perking up” sometime after the dismissal.

[148] Ms Marshall said that she has three children and that she has suffered from long term stress. She said that this had impacted not just her, but also her children. While her role with Wanganui Ballet was not full time, Ms Marshall had worked in her job since 2014 and was clearly significantly impacted by the dismissal and other relevant events.

[149] I am satisfied that Ms Marshall is entitled to compensation given the impact Wanganui Ballet’s actions had on her. I find that Ms Marshall was impacted on an ongoing basis during her employment by Wanganui Ballet’s approach to wages, annual leave, and record keeping. I find that that impact was, albeit less pronounced, present for some period of time during Ms Marshall’s employment and prior to the dismissal. Ms Marshall was also significantly impacted by Wanganui Ballet’s actions relating to 3 August 2021.

[150] I find that a total sum of \$18,500 is an appropriate award of compensation taking into account both the impacts during Ms Marshall’s employment and those relating to the dismissal.

### *Contribution*

[151] Section 124 of the Act requires that the Authority consider the extent to which Ms Marshall’s actions contributed towards the situation that gave rise to the personal grievances, and if those actions so require, that the Authority reduce the remedies that would otherwise have been awarded accordingly.<sup>14</sup>

---

<sup>14</sup> Employment Relations Act 2000, s 124.

[152] I do not consider there is any basis on which Ms Marshall's actions could be said to have contributed to the situation that gave rise to their personal grievances. I decline to make any reduction on account of contribution.

**Did Wanganui Ballet breach any of its relevant statutory obligations, and if so, should any penalties be imposed?**

*Breach of obligations?*

[153] Ms Marshall claims that Wanganui Ballet failed to act in accordance with its duty of good faith in terms of s 4 of the Act. She submitted that Wanganui Ballet undermined the agreed terms and conditions of the employment agreement and took no steps to resolve the issues, that the breach was serious, and that Wanganui Ballet took advantage of the inherent inequality of power in the employment relationship.

[154] I find that Wanganui Ballet breached s 4 of the Act by failing to be active and constructive in addressing the issues raised by Ms Marshall and also by undermining the employment relationship by failing to ensure Ms Marshall received accurate wages and entitlements. Those failures were serious. However, I consider the relevant conduct relates to the same factual matrix as Ms Marshall's claims of unjustified dismissal and disadvantage. I decline to issue a penalty in terms of s 4A of the Act.

[155] Ms Marshall claims that Wanganui Ballet breached its obligations in relation to the payment of and/or her entitlement to sick leave and bereavement leave. I have found that Ms Marshall is not entitled to further payment in relation to those issues. I further find that Wanganui Ballet did not fail to provide Ms Marshall with either of those entitlements in accordance with its statutory obligations.

[156] Ms Marshall claims that Wanganui Ballet failed to keep and provide compliant records for the purposes of ss 81 of the Holidays Act 2003.<sup>15</sup>

[157] I find that Wanganui Ballet failed to keep compliant records as to Ms Marshall's entitlement to annual holidays and accurate hours of work and that a penalty is appropriate. That is a failure that persisted to the end of the employment relationship. Ms Marshall seeks the imposition of a penalty under s 75 of the Holidays Act 2003.

---

<sup>15</sup> Including current, and accurate, entitlements to annual holidays, Holidays Act 2003, s 81(2)(e).

Section 75 of the Holidays Act 2003 provides that a penalty may be imposed not exceeding \$20,000.<sup>16</sup>

[158] Having had regard to other issues identified, including as to the alleged inadequacy of the records relating to, for example, matters arising in 2019, I do not consider the claim for penalties to be within time.<sup>17</sup> Nor am I satisfied that penalties should be imposed relating to the alleged failure to provide records on request. Such that any of the claims are within time, I consider the records, albeit inaccurate, were provided within a reasonable period of being requested. I would, in any event, have considered any penalties taking a global approach to quantum given the similarity in issues.

[159] Ms Marshall also claims that Wanganui Ballet breached ss 16 and 21 to 28 of the Holidays Act 2003 by failing to correctly pay annual leave for the periods 2014 to 2019, and 2020 and 2021. I find that Wanganui breached ss 24, 25, and 27 of the Holidays Act 2003. It did so by failing to make payment for annual holidays when the employment came to an end.

[160] Ms Marshall claims that Wanganui Ballet failed to comply with its obligations under her IEA and that penalties should be imposed for the purposes of s 134 of the Act. I find that Wanganui Ballet breached clause 7 of the IEA by failing to provide 4 weeks paid annual leave each year. To the extent Ms Marshall was paid during term breaks, at least for a significant part of her employment, I find those payments were not paid annual leave, but rather were wages that were due to Ms Marshall for hours worked but for which payments had been spread over the school year. I find that given the inaccurate approach to record keeping, the course of action only became known to Ms Marshall within 12 months of her initiating an action for recovery of penalties.

[161] I decline to make any order relating to alleged breach of the IEA as to the withholding of overtime payments given the non-payment of those hours now claimed were within Ms Marshall's knowledge well in excess of 12 months prior to commencing proceedings.

---

<sup>16</sup> Holidays Act 2003, ss 75(1)(b) and 75(2)(e).

<sup>17</sup> Section 76(5) of the Holidays Act 2003 provides that an action for recovery of a penalty must be commenced within 12 months after the earlier of when the course of action became known, or should reasonably have become known to the employee.

## *Penalties*

[162] I have applied the four-step consideration of penalties as outlined by the Full Court in *Borsboom (Labour Inspector) v Preet PVT Ltd*<sup>18</sup> and had regard to the mandatory considerations at s 133A of the Act.

[163] The maximum penalty in this case for a single breach is \$20,000.<sup>19</sup> There are a total of five breaches in relation to which I need to consider further the issue of penalty. I consider the breaches of the annual holiday provisions of the Holiday's Act 2003 should also be treated in a globalised manner. As such, I find that there were two breaches, with the total maximum penalties amounting to \$40,000.

[164] The breaches are not trivial, and I find that all the breaches are serious.

[165] I am not satisfied that the breaches in relation to annual holidays were initially deliberate. However, while attempts were made to rectify Wanganui Ballet's approach to annual leave accrual moving forward from 2019, no process was undertaken to ensure compliance as to Ms Marshall's annual holidays more generally. Ultimately, I find that the breaches were deliberate given that there were known issues with the accrual of annual leave that were not rectified by the time the employment relationship came to an end and payment was due.

[166] I am not satisfied that the breaches in relation to the keeping of relevant records rise to the same level. However, I am satisfied that Wanganui Ballet, at best, was reckless in relation to its record keeping. I have taken into account that there is some relationship between the failure to compliantly make payment of the relevant entitlements and to keep compliant records of them.

[167] There is no apparent history of similar compliance issues relating to Wanganui Ballet. Having regard to the severity of the breaches, and mitigating and aggravating factors, I consider an appropriate starting point as follows:

- (a) 40 per cent for the breach of s 81 of the Holidays Act 2003. The provisional starting point being \$8,000;
- (b) 60 per cent for the breach of the Holiday's Act 2003 relating to annual holidays. The provisional starting point being \$12,000.

---

<sup>18</sup> [2016] NZEmpC 143.

<sup>19</sup> Employment Relations Act 2000, s 135(2)(b); Holidays Act 2003, s 75(1)(b).

[168] In considering the issue of proportionality, I consider that a reduction to the provisional penalties is appropriate. I consider a global penalty in the total sum of \$4,000 appropriate.

[169] Compensation has been awarded to Ms Marshall in relation to her unjustified dismissal and unjustified disadvantage claims. While there is some degree of overlap as to the claims, I do not consider that apportioning part of the penalty ordered to Ms Marshall would result in her being twice compensated.

[170] I order that Wanganui Ballet pay, within 28 days, a penalty of \$4,000. \$2,500 of that sum is to be paid to the Authority via the Crown account, and \$1,500 to Ms Marshall.

**Is Ms Marshall entitled to compensation for an alleged breach of confidentiality?**

[171] Ms Marshall, in her statement of problem, sought the imposition of penalties upon Wanganui Ballet relating to an alleged breach of confidentiality by Wanganui Ballet relating to statements or information discussed at mediation. Wanganui Ballet submitted that the Authority has no jurisdiction to award a penalty for breach of confidentiality in the mediation process.

[172] Section 148(3) of the Act, which deals with admissibility and confidentiality of information discussed at mediation, is not a penalty provision. Ms Marshall's submissions made no challenge to submissions lodged by Wanganui Ballet as to jurisdiction, noting counsel for Ms Marshall were engaged after the statement of problem had been lodged. Having regard to that concession, I need not consider the matter further in terms of claim initially raised.

[173] In submissions, Ms Marshall instead asked the Authority to consider the alleged disclosure as an unjustified disadvantage using its discretion in terms of s 160(3) of the Act.

[174] The alleged disclosure is said to relate to 16 December 2021. The parties first attended mediation on 14 September 2021 and a second mediation occurred on 26 November 2021. Ms Marshall resigned from her employment on 10 August 2021 with three weeks' notice, later negotiating her final day of employment as being 14 October 2021. Ms Marshall was not employed as at the time of the alleged breach of

confidentiality and no submissions have been made as to an alleged disadvantage based on any condition surviving termination of employment.

[175] I am not satisfied that any breach of s 148(3) has been made out. I am also not satisfied that Ms Marshall has been disadvantaged in terms of s 103(1)(b) of the Act, nor that it would be appropriate to exercise discretion under s 160(3) of the Act.

### **Summary of orders**

[176] Wanganui Ballet and Dance Academy Limited is ordered, within 28 days of the date of this determination, to make payment of:

- (a) \$4,300 to Ms Marshall as unpaid annual holiday pay;
- (b) \$1,291.75 to Ms Marshall as unpaid overtime;
- (c) Interest on the sum of \$5,591.75 to Ms Marshall as specified in this determination.
- (d) \$2,795.00 for lost wages.
- (e) \$18,500 as compensation for hurt and humiliation under s 123(1)(c)(i) of the Act relating to the unjustified dismissal and disadvantage claims; and
- (f) A penalty of \$4,000. \$2,500 of that sum is to be paid to the Authority via the Crown account, and \$1,500 to Ms Marshall.

### **Costs**

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

[178] If they are not able to do so and an Authority determination on costs is needed Ms Marshall 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 Wanganui Ballet would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[179] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>20</sup>

Rowan Anderson  
Member of the Employment Relations Authority

---

<sup>20</sup> For further information about the factors considered in assessing costs, see [www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1).