NOTE: This determination contains an order at paragraph [6] prohibiting publication of certain information

IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2023] NZERA 772
3147781 & 3158741

	BETWEEN	NATASHA BROWNE Applicant in 3147781
	AND	MELISSA BROWNE Applicant in 3158741
	AND	WAIKATO KINDERGARTEN ASSOCIATION Respondent

Member of Authority:	Robin Arthur
Representatives:	Allan Halse, advocate for the Applicant Shima Grice and Lucy Nolan, counsel for the Respondent
Investigation Meeting:	7, 8 & 9 March 2023 in Hamilton
Submissions:	31 March and 21 April 2023 from the Applicants and 17 April 2023 from the Respondent
Determination:	20 December 2023

DETERMINATION OF THE AUTHORITY

A. Waikato Kindergarten Association (WKA) acted unjustifiably in dismissing Natasha Browne for redundancy.

B. In settlement of her personal grievance for unjustified dismissal WKA must pay Natasha Browne the following remedies within 28 days of the date of this determination:

(i) Twenty-six weeks' wages, at her ordinary time rate for a 21-hour week, as reimbursement for lost wages;

(ii) Four weeks' wages, as notice, at her usual rate for a 34-hour week; and

(iii) **$18,000 as compensation for humiliation, loss of dignity and injury to feelings.**

C. Melissa Brown's employment was not affected to her disadvantage by unjustifiable actions of WKA. Her personal grievance application is declined.

D. Costs are reserved, with a timetable set if an Authority determination of costs is needed.

Employment relationship problems

[1] In November 2020 Natasha Browne, through her union NZEI Te Riu Roa, raised a personal grievance against Waikato Kindergarten Association (WKA). She said WKA's decision to dismiss her on 7 October 2020, on the grounds of redundancy, was unjustified. She had worked as a relieving teacher assistant at Fairfield Kindergarten since 2014 under a series of fixed term agreements.

[2] In her application to the Authority in August 2021 Natasha Browne also sought to pursue further grievances on the grounds that WKA had not provided her with a safe workplace and not protected her from bullying.

[3] In December 2021 Melissa Browne, Natasha Browne's sister, lodged her own personal grievance application in the Authority. She had worked at Fairfield Kindergarten as a qualified relief teacher in 2016 and then again from 2019 onwards. In September 2020 Melissa Brown was appointed to a permanent part-time role following the restructuring of staff positions.

[4] From early May 2021 Melissa Browne has been on sick leave. In July 2021 she raised a personal grievance over concerns described as workplace bullying and a failure by WKA to provide her with a safe work environment.

[5] WKA, in reply, said its dismissal of Natasha Browne was decided and carried out fairly after she had not accepted redeployment to another role at the kindergarten

and her other claims about bullying and a safe workplace were raised too late for the Authority to consider now. It denied Melissa Browne was unjustifiably disadvantaged in a number of events and concerns she raised in her grievance.

Order prohibiting publication of certain information

[6] Publication is prohibited, in relation to these two matters, of the names of WKA staff, children attending WKA kindergartens and their parents who may have been referred to in the written or oral evidence and documents provided for the Authority's investigation.[1] This order does not prohibit publication of the names of anyone who gave evidence at the Authority investigation meeting.

The Authority's investigation

[7] The applications of Natasha Browne and Melissa Browne were investigated together because some events, concerns and witnesses involved in both matters overlapped. For clarity and simplicity, the applicants, who have the same family name, are referred to in the remainder of this determination as Natasha and Melissa.

[8] In addition to Natasha and Melissa, the following people lodged written witness statements and attended the investigation meeting to answer questions, under oath or affirmation, from me and the parties' representatives:

(i) Mark Browne, father of Natasha and Melissa and grandfather of two children who have attended Fairfield Kindergarten;
(ii) Jo Millar, Fairfield Kindergarten administrator from 2002 to 2021;
(iii) June Penn, a WKA human resources advisor;
(iv) Maree Stewart, former chief executive officer of WKA;
(v) Catherine Seeney, a WKA education manager; and
(vi) Elizabeth Waldron, Fairfield Kindergarten head teacher for five months from April 2021.

[9] Jayde Morgan, Fairfield Kindergarten's head teacher from February 2019 to March 2021, also attended the investigation meeting and answered questions under a witness summons issued at the request of Natasha and Melissa.

[1] Employment Relations Act 2000, Schedule 2 clause10.

[10] Following the investigation meeting the representatives lodged detailed written closing submissions on the issues for resolution.

[11] 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.

[12] While the detailed written and oral evidence of the witnesses, relevant background documents and the representatives' extensive submissions have been closely considered in preparing this determination, it has not recorded all evidence and submissions received. This note about the limits of this determination is particularly relevant in this case because the evidence given canvassed the wider context of the involvement of Natasha and Melissa, along with Mr Browne, over many years in the Fairfield Kindergarten community, as parents of children who attend or attended the kindergarten as well as through their working roles there. Part of that context was tension over an extended period between some families and kindergarten staff with WKA managers about the policies and operation of the kindergarten and how it might best meet community needs. This determination can, however, address and resolve only employment relationship problems, not differences over educational philosophy and community needs or the operation of the kindergarten generally.

[13] This determination has been issued outside the usual statutory period as the Chief of the Authority decided exceptional circumstances existed for the delay.[2]

The issues

[14] The issues identified for investigation were:

Natasha

(a) Was WKA's decision to dismiss Natasha on the grounds of redundancy, and how the decision was made, justified?

(b) Were grievances alleging WKA failed to protect her and to address concerns about bullying raised out of time and, if so, were there exceptional circumstances such that Natasha should be granted leave to raise those grievances out of time?

[2] Employment Relations Act 2000, s 174C(4).

(c) If Natasha was within time to raise those grievances or was granted leave to do so, was she unjustifiably disadvantaged on the grounds alleged?

(d) If actions of WKA were not justified (in disadvantaging and/or dismissing Natasha), what remedies should be awarded to her, considering:

- Lost wages (subject to evidence of reasonable endeavours to mitigate her loss); and
- Compensation under s123(1)(c)(i) of the Act?

(e) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Natasha that contributed to the situation giving rise to her grievance?

Melissa

(f) Was Melissa unjustifiably disadvantaged and/or discriminated against by the following alleged actions or inactions of WKA:

- not including her in a consultation process begun on 28 July 2020 about staffing model changes;
- not providing rest breaks complying with statutory and collective agreement requirements;
- how Elizabeth Waldron interacted with her on 27 April 2021 regarding management of a child;
- how Elizabeth Waldron and Cat Seeney dealt with concerns she raised on 4 and 5 May 2021, including in an impromptu meeting held with her on 5 May 2021;
- holding her responsible for a social media post by her father;
- changes to arrangements for her daughter to attend Fairfield Kindergarten (including not allowing her sister Natasha to bring her daughter there); and
- additional concerns about a complaint and her health clearance; and
- by some or all of the above events amounting to bullying of her and/or failure to provide a safe place of work?

(g) If Melissa was unjustifiably disadvantaged by some or all of those actions, what remedies should be awarded, considering:

- lost wages (subject to evidence of reasonable endeavours to mitigate her loss); and
- reimbursement of medical, counselling and psychologist expenses; and

- compensation for humiliation, loss of dignity and injury to her feelings;

(h) If any remedies are awarded, should they be reduced (under s124 of the Act) for any blameworthy conduct by Melissa that contributed to the situation giving rise to her grievance?

Costs

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

Restructuring and redundancy of the Teacher Assistant position

What happened

[15] On 28 July 2020 Ms Stewart advised Fairfield Kindergarten staff and their union, NZEI Te Riu Roa, of a WKA proposal to change staffing arrangements at the kindergarten. At that time the kindergarten's staff rosters allowed for up to 45 or so children attending each day. WKA proposed using a '40/30' limit which it already applied at some of its other kindergartens. This would allow for up to 40 children to be enrolled for morning sessions and up to 30 children for afternoon sessions.

[16] Staffing was set on the basis of maintaining at least a 1:10 ratio. Described as being "in ratio", this allowed for one staff member being available to attend to the needs of ten children at all times throughout the session.

[17] With bookings of up to 45 children a session Fairfield was staffed for five positions to maintain that ratio. However, applying that ratio, a 40/30 limit could reduce the number of staff or staff hours needed on Fairfield Kindergarten's daily roster to four teaching positions.

[18] In a letter outlining the proposal Ms Stewart said WKA was:

> proposing to modify Fairfield Kindergarten staffing to operate in accordance with the [Kindergarten Teachers Collective Agreement] which will support ongoing viability of this service. Fairfield Kindergarten rolls and associated rosters/staffing have had considerable fluctuations; so we are looking to standardise it.
>
> Changes may impact on staffing, contact/non-contact hours; accordingly, but obviously nothing would contravene the [Kindergarten Teachers Collective Agreement]. …
>
> We will be working with kindergarten staff on this proposal and look forward to NZEI involvement for our consideration. Enclosed is:

- Proposed roster. Please note this does not include extra staffing which may be provided at time to cover intermittent initiatives such as Equity/Kidscan etc.
- Consultation process/time frame for this proposal.

[19] The timetable for what were described as "possible operational changes at Fairfield Kindergarten" envisaged a six-week consultation process. It described Ms Stewart and an "HR specialist" as "available to answer questions [and] discuss ideas as required" until 26 August. The timetable also proposed a meeting with staff and union representatives on 13 August, Ms Stewart receiving feedback on the proposal in writing from the staff and their union by 26 August, a "letter outlining the decision" being sent to staff and their union by 1 September, and the changed staffing and roster possibly starting from 14 September.

[20] The proposed roster provided for one head teacher (40 hours), two full-time teachers (40 hours), a part-time teacher (27.5 hours) and a teacher assistant (11.5 hours).

[21] At that time Natasha worked 34 hours a week as the teacher assistant. She was working under the terms of a "variation to fixed term employment agreement" dated 17 June 2020. The variation agreement referred to then recent changes in government funding which were due to come into effect from January 2021 that had the potential to impact on WKA operations. It was one of a series of fixed term agreements, usually lasting one year, she had signed since 2014 saying she had a "fixed-term position as relieving Teacher Assistant at Fairfield Kindergarten". The position was described as being fixed term "due to the current competitive environment in Early Childhood Education and the position being in addition to requirements".

[22] In July 2018 Natasha had raised a concern about whether "the current competitive environment" was a genuine reason to end her employment and asked for mediation on the issue. Notes of a meeting then held with a WKA human resources advisor show Natasha said she considered her role to be permanent but WKA wished to continue with fixed term agreements. Natasha subsequently signed agreements for further fixed terms in August 2018, June 2019 and June 2020.

[23] On 13 August 2020 Ms Stewart and Ms Penn met with two staff members at Fairfield Kindergarten to discuss the proposal for changed staffing and rosters. Documents provided for the Authority investigation show there had been considerable to and fro before then about whether the meeting should be delayed. Natasha and the

head teacher, Jayde Morgan, did not attend. Ms Morgan was on annual leave. Natasha had personal childcare commitments at the scheduled meeting time.

[24] Natasha did not pursue an opportunity Ms Penn offered to organise a separate meeting with her and Ms Stewart. Instead Natasha took what she described as "a key part" in compiling a detailed eight-page written response submitted on behalf of all the kindergarten's staff.

[25] The response opposed the proposed 40/30 limit on child numbers, instead proposing 45/30 or 45/40 as minimum numbers and asking for more information on "the rationale behind the need to cut staffing and reduce numbers". Its criticisms of the proposed roster, with staffing reduced to match child numbers, included saying:

- Three staff 'on the floor' left too many opportunities for inadequate supervision and a minimum of four was needed "as a safety issue".
- The kindergarten's large outdoor space meant two staff were needed outside and two inside "due to supervision including kai and care routines like sleeping and nappy changing".
- There was a community demand and need for 35 or 40 spaces in afternoon sessions.
- Higher staffing would reduce burnout and sick leave.
- The proposed roster did not address staff "rights to two rest breaks, ie staff morning and afternoon team breaks".
- More non-contact time should be included for the staff, similar to non-contact time available at four other named kindergartens.
- The new roster would put staff "on minimum Ministry ratios at all times – 1:10 - which is not best practice" as there would then be insufficient staff to help set up or settle children when they arrived in morning and would create a "rushed and pressured environment" when children arrived.
- A "full staff member" should be funded for at least five hours a day for food provision, including using funding from the Kidscan charity.
- Current staff numbers should be maintained, with equity funding used for extra staff hours.

[26] WKA's response to the feedback, given in a letter from Ms Stewart, advised that a "Kidscan person" would be employed for 20 hours a week and kindergartens that qualified for additional equity funding, as Fairfield did, were allowed to employ extra

staffing for a maximum of 20 hours a week. It also said attendance data for Fairfield showed there were only three sessions in 40 over the past month where numbers of children attending had exceeded the 40/30 level. It said the change was proposed to simplify WKA's operations for the future, not necessarily financial considerations and WKA wanted to encourage families to use another nearby kindergarten to boost numbers on its roll. While it acknowledged some staff had "reservations about reducing child numbers and simplifying Fairfield Kindergarten's operations", the letter advised that WKA has decided undertaking the 40/30 model was the right decision and this could start from 28 September.

[27] Most significantly, for Natasha's personal grievance claim, the letter included the following statement:

> This decision has ramifications for the Teaching Assistant role which becomes 11.5-12 hour; however there are also Equity hours which could be used. We hope it will be possible to provide such options for consideration in relation to this. Consequently, we will meet with the Teaching Assistant to discuss this.

[28] Ms Stewart turned down a request from Ms Morgan for her to meet again with staff at the kindergarten to discuss the changes. Ms Stewart's response to that request included the following note about intended next steps:

> From HR prespective – the part time teaching role will now be advertised. HR will want to meet with Natasha to offer the permanent Teaching Assistant role. Head Teachers can allocate designated Equity hours so this will be something for you to consider Jayde.

[29] On 14 September Natasha, accompanied by an NZEI representative, met with Ms Penn and Ms Seeney. She was given a letter, dated 7 September but later reissued to her with the date of 14 September, formally offering her what was described as a "permanent variation to your current employment agreement". The letter set no timeline for responding to the offer.

[30] An attached form, with the heading "Permanent variation to employment" set out the "details of change" as being hours of work for Monday and Friday from 11.45 am to 2.30 pm and for Tuesday, Wednesday and Thursday from 11.45 am to 1.45 pm. This totalled 11.5 hours a week. The form included the following statement: "All other terms and conditions of your employment remain as per your current employment agreement".

[31] At that time her current employment agreement was a fixed term agreement dated 24 June 2019 which ran to 30 June 2020 but, as noted earlier, this term had been extended on 17 June 2020. The extended term was described as running "until the last working day before the Christmas closedown in December 2020". Neither of those agreements described the hours of work but a previous agreement, dated 30 November 2018, had listed her hours as totalling 34 hours a week.

[32] Accounts of the discussion in the 14 September meeting differ. Ms Penn's witness statement described the "redeployment options" for Natasha by that time as being "redeployment to the 11.5-12 hour teaching assistant role (with the possibility of additional equity hours on a fixed-term basis), [or] redundancy, or being placed on the relieving list". The last option referred to working on a casual basis as a reliever.

[33] However it was not established, taking the evidence available from three of the four participants at that meeting, that those options were set out that clearly in their discussion on 14 September. Ms Seeney's brief notes did list those three options, but it was not apparent whether that was something she had discussed with Ms Penn before or after the meeting or during the discussion with Natasha and the NZEI representative. Natasha's own note about the half-hour long meeting, typed up some days later, said her NZEI representative asked about redundancy and redundancy compensation due to the large drop in hours, from 34 to 11.5, but Ms Penn had said there was no redundancy as the change was a variation in hours.

[34] Natasha and Ms Penn did, however, concur in their evidence that they had talked about how the 11.5-hour permanent role could be supplemented by the use of "equity hours" provided through additional funding available to the kindergarten rather than WKA's core funding for staffing. They also discussed whether additional hours, supported by the equity funding, would be on a permanent and ongoing basis or would be on a fixed-term basis only.

[35] On Ms Penn's account, the availability of those equity hours was identified an issue that Natasha would have to discuss with Ms Morgan who, as head teacher, had the power to authorise their use at Fairfield Kindergarten. On Natasha's account, the availability of equity hours, in addition to the 11.5 "permanent" hours she was offered, was identified by the end of that meeting as a topic on which Ms Penn needed to seek further information on and get in touch with her again.

[36] The scope of what WKA was offering Natasha as the basis of ongoing employment was explained in an email Ms Penn then sent her on 16 September. Under the heading "Offer Variation and Equity Hours Agreement - Fairfield", Ms Penn provided a copy of the offer letter, updated with the date of 14 September, and the following explanation of the prospect of some further hours being provided through equity funding:

> Further, as part of the current budget setting process, I can now inform you that the Association has been looking at moving to Fixed Term agreements for regular hours worked under equity funding where it is appropriate. Equity funded fixed term agreements would be capped at 10 hours per week for the purpose of providing extra support on the floor.
>
> To enable these fixed term agreements, we would require the Head Teacher at a kindergarten to commit in writing to support this 10 hours per week from the kindergarten equity budget for the relevant financial year.
>
> With regard to your situation at Fairfield, a fixed term agreement for equity hours would need to meet the following parameters:
>
> - Written approval from the Head Teacher
> - These 10 hours would need to fit around:
>   - The Teaching Assistant hours on the new 40/30 roster (as per the permanent variation letter offer attached), and
>   - Be the same set daily hours each week. For example, 2 extra hours could be worked each day from 9.45 to 11.45am.
> - Equity hours on a fixed term contract would attract leave entitlements (cumulate with any permanent agreement hours)
> - Be fixed term under the end of the financial year (30/06/201)
>
> Should you wish to pursue the option of a Fixed Term agreement as per the above parameters, I would need written agreement from both you and your Head Teacher to enable the employment agreement to be drawn up.

[37] Around this time there was also correspondence between Ms Morgan and Ms Seeney over implementation of the new staff roster. Ms Morgan said the rosters had not "factored in" enough staff hours to cover morning and afternoon breaks, which was an issue identified in the joint staff response to WKA's proposal for change. Ms Seeney's reply to this concern, sent to Ms Morgan on 16 September, said "as head teacher of a kindergarten receiving equity funding, you can use up to 10 hours per week of equity funds for extra support on the floor. The expectation is that you manage this ten hours to appropriately assist the team with support on the floor." Ms Seeney also said Ms Morgan would be able to apply each quarter to extend those hours up to a maximum of 20 hours.

[38] On 24 September Ms Penn sent Natasha a further email referring to her email of 16 September as she had received no response to it. Her message said:

> Please note that we require receipt of a signed copy of the attached offer for permanent employment of 11.5 hours per week as TA at Fairfield Kindergarten by 4.30pm Friday 25th September 2020; after which time this offer will expire.

[39] Later that day, in a letter dated 22 September but not sent until 24 September, an NZEI representative wrote to Ms Stewart on Natasha's behalf about the fixed term agreements for her appointment to the Teaching Assistant position in the years 2018, 2019 and 2020. She wrote that Natasha was electing under s 66 of the Act to treat the fixed terms as ineffective. The Act allows for that election where the reason for a fixed term is not genuine. The NZEI letter said Natasha now asserted her employment was "permanent and ongoing beyond the end of this year". The letter also challenged the reduction of her hours from 34 to 11.5 in the offer made to her about ongoing work:

> There is no genuine reason to reduce Natasha's hours of work so significantly for the rest of the kindergarten year and ongoing years. We expect the current hours of work to remain in place and her permanency confirmed (sic).

[40] Ms Penn responded to that letter on 25 September with the following message to the NZEI representative:

> I acknowledge receipt of your email and letter regarding Natasha Browne. However, as you are aware, we have been through a restructuring process which Tasha was involved in.
>
> As a result of the restructuring process, Tasha's role has been disestablished. Tasha now needs to decide if she wants to take up the offer of the permanent 11.5 hours per week, or not.
>
> As you know the new roster starts Monday 28th September.
>
> In light of your letter we will extend the requirement for Tasha to get back to me with an answer to the offer of Teaching Assistant at Fairfield to 4.30pm on Tuesday, 29th September, to give you time to talk to Tasha.

[41] In a response by email on 28 September the NZEI representative wrote that she was surprised by "new information" in Ms Penn's 25 September mail that the kindergarten had been through a restructuring process and Natasha's role had been disestablished as a result.

[42] She referred to provisions in the Kindergarten Support Staff Collective Agreement about redundancy and said notice of the redundancy of the disestablishment of Natasha's position should be taken from the date of Ms Penn's 25 September email.

She also wrote that Natasha was entitled to eight weeks' notice but, in a further email sent soon after, corrected that to the four weeks' notice referred to in the collective agreement.

[43] Within the hour Ms Penn replied that "the decision resulting from the consultation process outlining this change to Natasha's role was advised via email to the team at Fairfield on Wednesday 2nd September, along with the new roster".

[44] On Tuesday, 29 September the NZEI representative replied by a further email that Natasha was seeking advice and would respond to the offer of employment by the end of the week (that is, Friday, 2 October). Ms Penn responded: "We will wait to hear from Tasha at the end of this week".

[45] On the Friday, the NZEI representative advised Ms Penn by email that she was on leave but someone else would respond about the job offer to Natasha but "unfortunately it will be early next week now". She said Natasha had no responsibility for the delay and apologised for any inconvenience "our belated reply may have caused".

[46] In a further email sent on Monday, 5 October the NZEI representative said:

> NZEI contends that Natasha is redundant in her position as an untrained teacher at Fairfield Kindergarten and has an entitlement to redundancy compensation. This is a provision in terms of section 5.4 of the Kindergarten Associations Support Staff Collective Agreement.

[47] After quoting terms in the collective agreement about four weeks' notice of redundancy and an entitlement to four week's compensation after one year's service, the message continued:

> FYI Natasha was advised on the 25th September for the first time, in an email, that her position had been disestablished. This is therefore the date for the notice period of her redundancy.
>
> I look forward to your further communication in respect to this claim.

[48] The next step in the correspondence was a letter from Ms Penn to Natasha headed "Termination of employment – Redundancy" and dated 7 October 2020.

[49] Ms Penn's letter said the 2 September message to Fairfield staff:

> specifically confirmed the Teaching Assistant role would be 11.5-12 hours per week, plus potential Equity hours (subject to Head Teacher approval). The

> 2nd September is therefore the date at which you were given notice that the role of Teaching Assistant, working 34 hours per week, had been disestablished and that only a 11.5-12 hour per week role remained, which we wanted to redeploy you to.

[50] She referred to the 14 September meeting as an occasion to hear from Natasha on "which option you preferred, including whether you would accept redeployment to the 11.5 hours per week role and your interest in the Equity hours". Ms Penn wrote that she had not heard from Natasha since as Natasha had "elected to communicate via your union representative" and by the 5 October email from that representative "that you contend that you are redundant from your position".

[51] The letter then referred to the four weeks' notice period as running from 2 September and meaning Natasha's "termination date was 30 September 2020". It said her final pay, redundancy compensation and annual leave would be paid in the next pay cycle. She was asked to return kindergarten keys and any other kindergarten belongings and to let Ms Seeney know if she wanted to come back for a farewell morning tea with staff, children and families.

[52] As part of processing paperwork for the termination of Natasha's employment, a message was sent to the kindergarten's staff and community group email address on 7 October advising that WKA had "received and accepted" her resignation and her last working day was 7 October.

[53] The following day Natasha's NZEI representative wrote to Ms Penn saying that a sentence in her 5 October message, about redundancy, "was read in a context it wasn't written". It said a reference to the date for the notice period for redundancy was "not intended to give you notice of a resignation". The representative said she apologised for any confusion and "would appreciate a rescinding of the resignation notice as this was not the intended outcome". She wrote that the email was intended to encourage discussion about the reason why more secure hours could not be offered and "Natasha is still open to considering her options at Fairfield Kindergarten".

[54] In a response on 9 October Ms Penn said that Natasha was given until 25 September to get back to WKA if she had wanted to take up the "offer [of] variation and equity hours" and that date had been extended twice, to 29 September and then 2 October. Ms Penn then referred to the representative's 5 October email that advised

"NZEI contends that Natasha is redundant in her position" and ended her response: "We agree that Natasha is redundant".

[55] On 12 October WKA advertised a part time Teacher Assistant position at Fairfield Kindergarten for 21.5 hours a week, described as "a mix of permanent and fixed-term hours". The advertisement said the hours were to be worked 11 am to 3.30 pm Monday to Thursday and 11.30 am to 3 pm on Friday. Applications were required by 19 October, seven days later.

[56] Also on 12 October, another NZEI representative emailed Ms Penn about the advertised position. The message said NZEI accepted the Teaching Assistant position was surplus to Fairfield's staffing requirements and, consequentially, Natasha was redundant in that position. It then referred to the collective agreement terms on redundancy and, specifically, a clause that required WKA to explore redeployment options with the union where numbers of staff might be reduced. The clause said WKA would identify "any available or impending vacancies for which the employee may wish to be considered".

[57] Ms Penn responded, on 13 October, citing a further clause that an employee offered redeployment was not entitled to redundancy compensation. She said WKA had, despite this and in good faith, agreed to pay redundancy compensation to Natasha. She wrote that Natasha's notice period had ended on 30 September so "Natasha's employment with WKA has now ended, and it has no further obligations to her".

[58] Natasha applied for the job but was not interviewed. She also encountered difficulties being reinstated to WKA's list of relievers for casual work at Fairfield or other kindergartens.

[59] On 4 November Natasha, through her NZEI representative, raised a personal grievance for "unjustified dismissal and unjustified actions" over the process and the decision to terminate her employment by way of redundancy.

The legal obligations

[60] WKA's actions have to be considered in relation to its obligations under the relevant collective agreement and, under the Act, its duty of good faith in making

changes to its business, including consulting about proposals that may have an adverse effect on a worker's continued employment.[3]

[61] As a teaching assistant, Natasha's terms and conditions were set by the Kindergarten Associations Support Staff Collective Agreement. The agreement includes these provisions for redundancy (bold emphasis added):

> **5.4 REDUNDANCY**
>
> a) Where a potential redundancy situation could occur, the employer shall consult with the union and potentially affected employees, where practicable, prior to making final decisions.
>
> b) Employees made redundant are entitled to 4 weeks' notice of termination. This is not in addition to the notice period under clause 5.1. The employer may elect to pay in lieu of some or all of the notice period.
>
> c) An employee who has at least one year's service with their employer at the time they are given notice of termination due to redundancy shall be entitled to four weeks' payment as redundancy compensation. **Redundancy compensation shall not be payable where the employee is offered redeployment in accordance with this clause.** An employee who does not have one year's service with the employer at the time notice is given is not entitled to redundancy compensation.
>
> d) Where a kindergarten is to close, or the number of staff may be reduced, and where natural attrition will not achieve the desired decrease in positions, **redeployment options shall be explored in consultation with the union**. The employer will, in consultation with the union, identify **any available or impending vacancies** for which the employee may wish to be considered.
>
> e) During the notice period **both the employer and the employee shall make reasonable efforts to locate suitable alternative employment** for the employee. **In the event that a reasonable offer of employment is made, the employer's responsibilities under these provisions shall be fulfilled**.
>
> …

[62] WKA's actions in changing staffing arrangements and dismissing Natasha for redundancy are considered in light of those obligations under the test of justification set by s 103A of the Act. The test asks whether WKA decisions, about the staffing proposal and later dismissing Natasha, and its actions in reaching those decisions were what a fair and reasonable employer could have done in all the circumstances at the time. Minor defects in its process which did not result in Natasha being treated unfairly would

[3] Employment Relations Act 2000, s 4(1)(1A) and (4)(c), (d) and (e).

not render her dismissal unjustified. There may also be more than one justifiable outcome open to a fair and reasonable employer.

[63] Where questions are raised about the commercial or financial rationale for an employer's decision, or ulterior motives are alleged for selecting a position or a worker for redundancy, the Authority's evaluation may consider whether the employer's decisions were made for genuine business reasons and "not used as a pretext for dismissing a disliked employee".[4]

Failures of fairness in the process followed and the decision to dismiss

[64] In closing submissions made on her behalf, Natasha criticised WKA actions in reducing the hours allocated to the teacher assistant role, along with the other changes adopted by its decision of 2 September 2020, on three broad grounds. Firstly, she said WKA had not proven genuine business reasons for the change to roll limits and the staffing arrangements. Secondly, she said WKA had not met its good faith obligations to provide information and consult staff. Thirdly, as a result of the second ground, she said WKA had also not met its obligations to her under the terms of the collective agreement.

Sufficient reason given

[65] Ms Stewart's evidence established WKA had a genuine reason to consider whether enrolment and staff arrangements at Fairfield Kindergarten made effective use of its funds. WKA was entitled to address its concerns that fluctuations in child attendance, on what was described as Fairfield's "45/35" model, did not match the staffing level provided by the kindergarten's rosters. Limiting attendance levels at Fairfield in order to encourage families to enrol their children at another nearby kindergarten, where WKA wanted to boost its roll, was also a legitimate operational reason for WKA's actions in proposing changes to Fairfield's enrolment numbers and, consequently, necessary staffing. And, while the staff feedback on the proposal criticised WKA for wanting staffing reduced to a level that met only minimum Ministry ratios of 1:10, this was nevertheless a genuine reason for change.

[4] *Grace Team Accounting Ltd v Brake* [2014] NZCA 541 at [85]

Failure in providing information and considering alternatives

[66] From the extended account given earlier in this determination about what happened during the restructuring process and termination of Natasha's employment, a number of failures of fairness were apparent.

[67] Late in that process Natasha accepted, through her NZEI representatives, that WKA had decided her 34-hour-a-week teaching assistant role was surplus to its requirements. In making that decision, advised to Fairfield staff on 2 September, WKA had committed to meeting with Natasha to discuss options for an ongoing 11.5-hour role with additional equity hours.

[68] However, WKA never got a far as confirming an offer of a role of 11.5 hours with additional hours of equity funding for Natasha to accept or reject. The closest it got was Ms Penn's letter of 16 September telling Natasha that if she was interested in working for 11.5 hours on a permanent basis, and a further 10 equity-funded hours for an unspecified fixed-term, she and the head teacher would need to provide written agreement to do so. It was not clear from that correspondence who was responsible for seeking the written agreement from the head teacher.

[69] Ms Morgan, in her evidence, said Natasha did ask her about approving the additional equity funding and she had agreed. Natasha denied having asked.

[70] WKA, in its closing submissions, said it was not requiring Natasha to get the head teacher's written agreement herself. There was, however, no evidence that Ms Penn, or anyone else on WKA's behalf, made any effort to talk with Ms Morgan about approving equity hours specifically for the role to be offered to Natasha. Ms Seeney had, on 16 September, told Ms Morgan ten hours of equity funding was available for "extra support on the floor" but her message did not link that information to any specific or concrete offer to Natasha. Neither was there any evidence that Ms Penn or anyone else for WKA had explored whether a quarterly extension of up to 20 extra hours of equity funding, referred to in Ms Seeney's message to Ms Morgan on 16 September, might be sought for and applied to the Teacher Assistant role being offered to Natasha. And, as Ms Penn accepted in her oral evidence, the prospect of up to 20 hours of equity funding was not clear from the contents of her 16 September letter to Natasha.

[71] Failure to further explore the use of equity funding may, in part, have been caused by a dispute between Ms Morgan and Ms Seeney over whether that type of funding could be used to provide cover for morning and afternoon rest breaks. Whatever the reason, WKA made no sufficiently specific and complete offer to Natasha about the terms of the Teacher Assistant role described as a "variation" to her hours.

[72] Measured against the requirements of clause 5.4 of the collective agreement, WKA had not met its obligation to make a reasonable offer of employment where suitable alternative employment was available.

[73] The role offered to Natasha on 16 September had only 11.5 secured hours, a significant reduction of 22.5 hours from her then current role. The prospect of including a further 10 hours, equity funded, or even up to 20 hours a week as a redeployment option was not adequately "explored in consultation with the union" as required by clause 5.4(d).

[74] The extent of this failure was apparent when WKA promptly advertised a fully described 21.5-hour Teacher Assistant job on 12 October, in the week after WKA dismissed Natasha on the grounds of redundancy. It was plainly, in the word used in clause 5.4(d), an "impending" vacancy that had not been put as clearly and squarely to Natasha in the previous weeks. What she was told was available as an alternative job was still contingent on further steps or information which had not been taken or gathered and confirmed to her to consider.

[75] The differences were not minor or technical and the approach taken by WKA did result in her being treated unfairly. The consequence was Natasha did not get the proper opportunity envisaged by terms of redundancy clause to consider accepting a suitable alternative role that, on WKA's own account, it could have deployed equity funding to provide. As a result, her dismissal on the grounds of redundancy was not within the range of options that a fair and reasonable employer could have taken in all the circumstances at the time.

Inadequate notice of redundancy

[76] A further concern about the unfairness of the process followed by WKA arose from the question of when Natasha had notice that her 34-hour-a-week Teacher Assistant role was redundant.

[77] WKA said this prospect was clear from the roster attached to its 28 July proposal, which showed a position for a Teacher Assistant working only 11.5 hours a week. It said this was confirmed by the 2 September announcement, from Ms Stewart, that WKA would go ahead with those changes and the specific reference in Ms Stewart's letter that "this decision has ramifications for the Teaching Assistant role".

[78] Alternatively, WKA submitted Natasha was given notice "at the latest on 14 September 2020 when it met with Natasha and her NZEI representative to discuss her options, including redeployment, redundancy or relief work and presented her with a formal offer of redeployment".

[79] Neither description accords with the reference in clause 5.4 to when employees are "made redundant". For Natasha this occurred when Ms Penn sent her the letter headed "Termination of Employment – Redundancy" on 7 October 2020. Even if Natasha could be taken to have been notified on 2 September or 14 September that her role was to be disestablished, which is doubtful, the consequences of that decision did not come into effect until the redeployment options had been exhausted without suitable alternatives being arranged. It was only after that point that termination of employment on the grounds of redundancy could be confirmed. The notice period of four weeks ran from that date.

[80] Accordingly, Natasha was entitled to further four weeks' paid notice, for the period from 7 October to 4 November 2020.

[81] As a consequence of this conclusion, the notice period was running and Natasha was, technically at least, still an employee of WKA when the 21.5-hour "Part Time Teacher Assistant" role was advertised on 12 October, when she applied for that role on 18 October and when, without being interviewed, she was advised on 30 October that she was not successful in her application.

[82] It was a further indication of unfairness in the approach taken by WKA. On Ms Penn's evidence, Natasha was supposedly offered and suitable for a job on those terms as recently as late September but, two weeks later, was not even interviewed for it.

Outcome

[83] For the reasons given, Natasha had established a personal grievance of unjustified dismissal for which she was entitled to an assessment of remedies.

Other grievance claims out of time

[84] The personal grievance Natasha raised on 4 November 2020, through her union representative, related only to her redundancy. In April 2021 she engaged her current advocate, Allan Halse, who lodged her application to the Authority in August 2021. The application sought to pursue further grievances relating to alleged failures by WKA to protect Natasha from bullying and unsafe work practices. WKA objected to those grievances being raised outside the 90-day statutory period. If they were out of time, Natasha sought leave to pursue those grievances now on the grounds that exceptional circumstances had prevented her from doing so earlier.

[85] As submitted by WKA there was no evidence Natasha had raised any concerns or claims about bullying during her employment. In the Authority investigation her evidence included some concerns about events after her employment had ended, such as a dispute over visiting the kindergarten to drop off and pick up her niece, but they arose after the employment relationship, so were outside the scope of matters about which a grievance could be raised.

[86] Her submissions said Natasha had "technically raised a personal grievance" in 2018 over repeated use of fixed-term agreements. She had, however, met with WKA representatives in 2018 about those concerns and subsequently signed further fixed-terms agreements. There was no 'live' grievance about that concern.

[87] There was no evidence given or submissions made that established exceptional circumstances had prevented Natasha raising additional grievances, at the time of raising her grievance about her dismissal or within the statutory period after it. Her involvement in raising her dismissal grievance in November 2020 showed she had the means of raising a grievance then and understood the process to do so.

[88] One ground of exceptional circumstances is where reasonable arrangements have been made with a representative to raise a grievance and that has not been done.[5]

[5] Employment Relations Act 2000, s 115(b).

Documents provided by Natasha included her communication with NZEI representatives in 2020. While this showed she had some concerns about how they had dealt with her issues through the redundancy process, it did not disclose any request for a grievance to be raised about bullying or workplace safety that had not been acted on.

[89] Accordingly, Natasha was not able to pursue grievances on those additional grounds.

Remedies

Reinstatement

[90] In the event she was found to have been unjustifiably dismissed, Natasha sought an order for reinstatement to her previous position as Teaching Assistant at Fairfield Kindergarten and to the "Jitbug" application WKA uses to allocate relieving work in its kindergartens.

[91] Reinstatement may be ordered wherever "practicable and reasonable".[6] In considering such an order the Authority has to make a realistic assessment that productive working relationships can be successfully re-established.

[92] In this case, and with the benefit of seeing and hearing from people involved during a three-day investigation meeting, the prospects for success were too slim to order reinstatement to a permanent role. Someone else is presently working in the Teacher Assistant role, comprising 11.5 permanent hours and 10 additional "fixed-term" hours. And, while not a daily basis, Natasha, Ms Seeney and Ms Penn would need to have some ongoing, occasional contact if Natasha were reinstated to a permanent staff role. This would be difficult given the level of antagonism apparent in the evidence Natasha gave and nature of some allegations she made, either directly or through the submissions of her advocate, in the course of the Authority investigation.

[93] There was, however, some realistic prospect that restoration to the Jitbug relieving application could give Natasha an opportunity to work using her kindergarten experience in a way that may assist rebuild her income, restore working confidence and develop positive working relationships. The opportunity to seek relieving work through the application would not guarantee work at Fairfield but Natasha referred in her

[6] S 123(1)(a) and s125(2).

evidence to the prospect of getting relieving work at a nearby kindergarten. Natasha was registered, although not active, on the Jitbug application during her employment at Fairfield. Continued access to the prospect of relieving work at Fairfield, or in other WKA kindergartens, was also, arguably, an arrangement WKA should have facilitated at the time of the termination of her employment for redundancy as a way of mitigating the loss of her job.

[94] Accordingly, WKA is ordered to facilitate Natasha being restored to use of the Jitbug application and the opportunity to seek relieving assignments at WKA kindergartens.

Lost wages

[95] In the event she was found to be unjustifiably dismissed, Natasha's application to the Authority sought an order for lost wages, at the rate paid for her previous 34-hour working week, from the date of her dismissal on 7 October 2020 until "the date of settlement". Taking that later date to mean the date of determination, lost wages were therefore sought for a period of more than three years.

[96] Her evidence did not support an award for such an extended period.

[97] At the time of her dismissal Natasha's individual terms of employment, varied in June 2020, provided for work through to 24 December 2020. One measure of her loss from unjustified dismissal was therefore, at the least, 11 weeks' pay. However the circumstances of this case warranted exercise of the Authority's discretion to order WKA to pay Natasha a sum greater than that loss or three month's ordinary time remuneration required under s 128(2) of the Act.[7]

[98] The circumstances of her dismissal knocked Natasha's confidence in seeking or arranging other work, including a proposal she reported in her evidence from some parents that she set up a home-based childcare service. Her removal from the Jitbug application also reduced her post-dismissal opportunities to earn income from picking up relieving work, with Fairfield or other WKA kindergartens within easy reach of her home in Hamilton.

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[7] Employment Relations Act 2000, s 123(1)(b) and s 128(2) and (3).

[99] The appropriate period for an award of lost wages was 26 weeks, not including the four weeks' notice period also due to her.

[100] An award for longer than 26 weeks was not warranted as there was not sufficient evidence Natasha sought new work and earnings by using her childcare and other skills in the early childhood education sector or elsewhere after that period. While she had more recently undertaken voluntary work, making an important contribution to her local community and rebuilding her confidence and connections for potential future employment opportunities, WKA should not be required to support her choice to work in local roles without remuneration by ordering it to pay for a longer period of lost wages.

[101] An assessment of the level at which those lost wages must be paid should also take account of "all contingencies" by answering the counter-factual question of what might have happened if WKA had carried out a fair process.[8] In this case, this should allow the realistic prospect that Natasha may ultimately, albeit reluctantly, have accepted the 21-hour position if that had been confirmed in a properly completed offer to her.

[102] Accordingly, WKA must pay Natasha lost wages, at her ordinary hourly rate, for 26 weeks, calculated on the basis of the 21-hour week of that part-time Teacher Assistant position as it was ultimately worked when someone else was appointed to the role.

[103] This is in addition to the four weeks' notice which she must also be paid, at her ordinary hourly rate, for the 34 hours a week that Natasha was working at the time of her dismissal for redundancy.

[104] Both amounts must be paid within 28 days of the date of this determination.

Compensation for humiliation, loss of dignity and injury to feelings

[105] Natasha's evidence established she was upset and embarrassed by her dismissal and how it happened. This was more acutely experienced because of her connections as part of the Fairfield community, not solely as an employee, with families with children attending the kindergarten. It included her embarrassment at notice of what

[8] *Telecom New Zealand Limited v Nutter* [2004] 1 ERNZ 315 at [81] and *Sam's Fukuyama Food Services Ltd v Zhang* [2011] NZCA 608 at [36].

was described as her "resignation" being sent to the kindergarten staff and family group email, albeit inadvertently, as part of what was said by WKA to be a standard process, as this misrepresented both why her employment was ending and that her sudden departure from a kindergarten in which she was closely involved was a voluntary decision on her part. She also reported anxiety and sleeplessness resulting from her dismissal.

[106] Considering Natasha's evidence, and the general range and trend of awards of compensation in similar cases, the sum of $18,000 was appropriate compensation for the injury to her feelings, loss of dignity and humiliation resulting from her dismissal and how it came about. This amount must also be paid within 28 days of the date of this determination.

[107] The award does not include any amount related to the upset Natasha reported feeling over the circumstances in June 2021 where she was asked not to pick up and drop off her niece at the kindergarten. Those circumstances are discussed more later in this determination in relation to Melissa's application. They were, for Natasha, well beyond the time of her employment relationship with WKA so not within the scope of time for which compensation could be ordered in her case.

No reduction for contribution

[108] Section 124 of the Act requires the Authority consider whether any remedies awarded should be reduced if there was some blameworthy conduct by Natasha that had contributed to the situation giving rise to her grievance.

[109] WKA submitted three aspects of Natasha's conduct during the restructuring and redundancy process warranted such a reduction.

[110] Firstly, WKA submitted Natasha had failed to accept its offer of employment but, as found earlier in this determination, the offer was not complete or clear. Secondly, WKA submitted Natasha had failed or refused to do enough herself to try and clarify the proposal but the obligation to clarify the nature and terms of any job offered, including by confirming how many additional equity hours were included as part of the proposed working hours, rested with WKA, not Natasha. Thirdly, WKA submitted Natasha had not actively engaged in the redeployment consultation process. Clause 5.4(e) does require both the employer and the employee to "make reasonable

efforts" to locate suitable alternative employment. In this case Natasha had sought to engage in that process through her union representatives, which was not blameworthy conduct.

[111] No sufficient grounds were established for a reduction in the remedies awarded.

Melissa Browne

[112] Following WKA's decision to adopt a 40/30 enrolment policy for Fairfield Kindergarten and resulting changes to its staffing, Melissa was appointed to the permanent part-time teaching position. At the time she was working at Fairfield Kindergarten on a part-time relieving basis.

[113] When the permanent position was created Melissa told Ms Morgan she wanted the role. Ms Morgan told Ms Seeney she wanted Melissa to get the role. Although others applied, Melissa was the only person interviewed for the post and she was verbally offered the job at the conclusion of her interview, on 21 September 2020.

[114] She began working in that role under the new roster in late September.

[115] A little over seven months later Melissa went on sick leave, from 6 May 2021. On 25 July 2021, through her advocate, Melissa raised a personal grievance on the grounds of unjustified disadvantage. Her grievance letter said she was subjected to "various incidents of workplace bullying and failures by WKA to provide a safe work environment" at Fairfield Kindergarten, including by not responding to grievances she had raised during her employment.

[116] During the seven months Melissa had worked in the permanent role her sister Natasha had been made redundant and raised her own grievance (4 November 2020), Ms Morgan had resigned as head teacher over her dissatisfaction with working arrangements at Fairfield Kindergarten (finishing work on 26 March 2021) and WKA had appointed Ms Waldron as head teacher for a fixed term of five months (from 19 April 2021) while a permanent head teacher was sought and appointed.

[117] In those seven months Melissa was twice involved in preparing letters sent to WKA managers by the kindergarten's staff as a group. The first, on 23 November 2020, described WKA as sacrificing a healthy work environment and adherence to the collective agreement in an effort to achieve financial stability. The second, on 26 March

2021, asked why Ms Waldron was appointed to the fixed-term head teacher role without the kindergarten staff being consulted.

[118] The concerns raised in Melissa's 25 July 2021 grievance letter and canvassed in the Authority's investigation meeting in March 2023 have been considered under the following seven headings to assess whether she has been disadvantaged in her employment by unjustified actions of WKA:

(i) Consultation about the 2020 change proposal;
(ii) Taking rest breaks, in ratio and out of contact;
(iii) Conflict over care and management of children;
(iv) How concerns about child management were addressed;
(v) How concerns over a media post by her father were dealt with;
(vi) Arrangements for her daughter's attendance at Fairfield Kindergarten; and
(vii) Additional concerns, regarding a complaint and health clearance.

Consultation on the 2020 change proposal

[119] Melissa's grievance letter said she was not "named" in WKA's July 2020 letter advising proposed changes to its enrolment policy and the staffing at Fairfield Kindergarten and was "not included in any of the consultation process".

[120] The letter was addressed to Ms Morgan and "staff". As noted in WKA's closing submissions, Melissa confirmed during the Authority investigation meeting that she was aware of the 13 August 2020 meeting but did not attend it or ask WKA about attending it or having any other meeting to discuss the proposal.

[121] Melissa, as confirmed in her own evidence and closing submissions, took part in the staff meetings where their feedback to the proposal, as a group, was discussed and written. Through that activity she was involved in the consultation process.

[122] She also benefitted from the outcome of that process with her appointment to a permanent, ongoing position in a process in which she was identified to and accepted by WKA as the preferred candidate. Her evidence did not establish any unjustified disadvantage or discrimination resulted from any limits to her involvement in the consultation process.

Taking rest breaks, in ratio and out of contact

Alleged lack of breaks

[123] Melissa's grievance letter said she was not provided with adequate breaks in line with employment law and the kindergarten teachers' collective agreement.

[124] She said Ms Seeney had "confirmed a number of times" that kindergarten teachers do not get breaks. She also said Ms Seeney had, incorrectly, claimed on 21 September 2020 during a meeting with the kindergarten staff that the collective agreement stated staff would have their ten-minute break "in contact", that is in the same area as the children and with the expectation that they would be counted as "in ratio" as a staff member supervising up to ten children at that time.

[125] Her grievance letter said Ms Seeney deliberately misinterpreted the collective agreement and WKA was "knowingly refusing" to meet its obligations to provide breaks.

[126] She said that, in a meeting with Ms Seeney and Ms Waldron on 5 May 2021, Ms Seeney admitted "not being provided with 10-minute rest breaks is illegal" and "mocked" Melissa's attempt to request rest breaks.

[127] In her witness statement for the Authority investigation Melissa described WKA's "stance" on rest breaks as "that we simply do not get them".

WKA's obligation to provide breaks

[128] Clause 2.6 of the kindergarten teachers' collective agreement includes the following provision for rest breaks:

> 1. No child shall be left unattended during rest and lunch breaks.
>
> 2. a Rest breaks
>
> i. Each teacher shall be entitled to take rests during their hours of work.
>
> ii. Each teacher working more than six hours per day, shall be entitled to two paid rest breaks per day of no less than 10 minutes.

[129] Those provisions are subject to the obligations set in Part 6D of the Act requiring employers to provide rest breaks. While the Act permits better or extra entitlements to

be provided, any term of an employment agreement excluding, restricting or reducing an entitlement is of no effect.[9]

[130] The Act states an employee is entitled to at least one 10-minute paid rest break if their work period on any day is more than four hours but less than six hours. Where an employee's work period is more than six hours but not more than eight hours, the employee is entitled to at least two 10-minute paid rest breaks during that time.

[131] The provisions of the collective agreement and the Act refers to a period of time, not necessarily a location. It is a period of time where the worker is freed from the performance of his or her work duties, during a working day or a working period.[10]

[132] A worker in a fast-food restaurant is not on a break if they are expected to remain at their workstation and occasionally flip a burger on the grill or shake a basket of chips in a deep fryer. Similarly, if kindergarten staff are required to take their break in an area open to children, in order to continue to keep a watchful eye on what those children are doing (described as being "in contact") and to maintain the proportion of staff to children at required minimum levels (described as being 'in ratio'), they are not really getting a break from their duties.

[133] The evidence of Ms Stewart, as chief executive, and Ms Penn, as a human resources advisor, confirmed they accepted those breaks could be taken "away from the children". The meaning of the relevant clauses in the collective agreement was, therefore, and by the time of the Authority investigation meeting at least, not in dispute.

Fairfield Kindergarten's practice

[134] The afternoon break did not really raise questions about whether the 1:10 staff-to-child ratio could be maintained or whether teachers were 'in contact' while trying to take a break. Teachers usually took their afternoon break some time between 3 pm and 3.30 pm, after children were picked up at the end of the afternoon session. They would then complete the remainder of their working day with a rostered 'non-contact' hour between 3.30 pm and 4.30 pm used for preparation, paperwork and staff meetings.

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[9] Employment Relations Act 2000, s 69ZG.
[10] *Greenslade v Jetstar Airways Limited* [2014] NZEmpC 23 at [34].

[135] Whether what staff did for their morning break met, or could have met, requirements for staffing to be ‘in ratio’ but not ‘in contact’ was hotly contested.

[136] Ms Millar, who had observed what the teachers did over her years as an administrator at Fairfield Kindergarten, described the usual practice as the children having morning tea and then teachers sitting down, at the children’s kai table, to have a break. She said the kindergarten’s cook usually provided the teachers with a tray with some biscuits and fruit, along with cups of tea and coffee. She said teachers sitting at the table were regarded as being ‘in ratio’ and taking their break that way “sometimes worked and [was] sometimes quite interrupted”.

[137] The evidence of Melissa and Natasha, paraphrased, was that they were expected to take their morning rest break ‘in contact’ with the children so the staffing remained ‘in ratio’.

Analysis

[138] Through 2020 and 2021 the issue of whether teachers could take the morning rest break became a cipher for what was really an ongoing dispute between Fairfield staff and WKA managers over whether there were enough staff after the reduction from five to four teaching positions from September 2020.

[139] The Teacher Assistant position included two hours a day of time ‘on the floor’ (totalling 10 hours a week), with a further one-and-a-half-hour period rostered as ‘non-contact’ time (in a 45-minute block on two days of the week). Those ten hours were enough time to provide lunch cover for staggered 30-minute lunch breaks for each of the four teaching staff, but did not appear to be enough to also cover morning tea breaks (amounting to another 40 minutes of time each day).

[140] The view taken by Melissa, Ms Morgan and other staff was that this limited staffing level breached the collective agreement provisions for the morning rest break as any teacher taking that ten-minute break would have to stay ‘on the floor’ in order to be ‘in contact’ and count as part of the ‘in ratio’ staffing on duty at all times. Their argument, paraphrased, was that WKA should fund additional hours sufficient to cover that time and also show the time allocated for a morning break on their work roster.

[141] WKA managers considered there was sufficient staffing to cover the morning break but if further hours were needed Ms Morgan had the delegated discretionary

power, as head teacher, to use 'equity hours' funding to provide necessary cover. They also disagreed that the time for taking morning break times should be recorded on the roster. Rather, they said when breaks were taken was a matter for the head teacher to arrange on a day-to-day basis, taking into account the needs of the children and the kindergarten each day.

[142] Ms Morgan, however, took the view that equity funding was not intended for and should not be used to provide cover for staff breaks. She considered it was intended for staffing to meet particular needs of children, with breaks cover to be staffed and funded from WKA's general funds. Ms Seeney, in her oral evidence, described Ms Morgan as having said that it was "against her kaupapa to use equity staff for cover".

[143] Ms Waldron's evidence was completely contrary to Ms Morgan on this point. Relying on her experience of having reviewed the use of equity funding in a previous role with the Education Review Office, Ms Waldron said using that funding to provide cover for breaks was within the discretion open to the employer.

[144] Ms Stewart gave this explanation of the situation in her written witness statement:

> "Equity hours" are not included on rosters … as they are meant to be an additional teaching person on the floor and additional to compliance requirements. However the equity funded person can be available to assist on the floor to meet compliance requirements, if required. … In hindsight, it appears that the staff believed that because rest breaks were not specified on the roster, they were not allowed. This was not correct. Breaks should be managed by the Head Teacher in accordance with the kindergarten's needs on any given day, which is why they were not specified in the roster.

[145] Accepting and preferring the evidence of Ms Stewart and Ms Waldron on this point, Melissa was not disadvantaged by an action of WKA in respect of the availability of morning breaks out of contact with the children while other staff, on duty, maintained the necessary ratio with children. Rather, to the extent breaks were not allowed or arranged during the period of concern raised in Melissa's grievance, responsibility rested with Ms Morgan as head teacher who took a view and followed a practice different from advice and direction given to her by WKA managers. Ms Seeney's evidence established she had encouraged Ms Morgan to make arrangements that would have allowed for breaks in ways that would have met concerns expressed by Melissa and other staff. While WKA is, technically, responsible for the actions of its head teacher that may have fallen short of meeting its collective agreement obligations,

Melissa firmly supported the head teacher's rejection of equity funding as a solution so could not fairly found a grievance on the consequences of doing so.

[146] Against that background, other concerns raised over discussions about the breaks issue with Ms Seeney over the relevant weeks and months fall away. If she did say the morning breaks must be taken "in contact", Ms Seeney was wrong. However, she also promoted a solution to that concern which was not acted on by Ms Morgan.

[147] Two further points of fact confirmed Melissa was not unjustifiably disadvantaged by WKA failing to make adequate provision for morning breaks to be provided in ratio and out of contact with the children.

[148] Firstly, WKA produced a summary of staffing records for the period from 28 September 2020, when Melissa started in her permanent part-time role, until 5 May 2021, the last day she worked before beginning what became extended sick leave. As described by Ms Penn in her evidence, the summary showed that for "each day Melissa was at work, there was sufficient staffing to cover 10-minute morning breaks away from the children, while still staying within required Ministry of Education ratios".

[149] Secondly, Ms Waldron confirmed in her evidence that, for the period she was head teacher, staff took their rest breaks and there was a room in the office area and a staff-access only veranda where those breaks could be taken away from the children. Teachers taking their breaks in the children's area did so as a matter of choice and custom at the kindergarten.

Conflict over child management

[150] In her grievance letter Melissa described herself as being belittled and humiliated by Ms Waldron in an interaction over how Ms Waldron was dealing with an upset child on 27 April 2021.

[151] As described in Ms Waldron's evidence, the five-year-old child was often allowed into the office area to engage with teachers in there on non-contact time and to print out stencils. The child had a close relationship, which Ms Waldron described as dependent, with Melissa.

[152] On this particular day the child was asked to return to her play on the kindergarten floor and became upset when the office door was closed. Melissa described the child as "screaming and stomping her feet".

[153] In managing the interaction with the child Ms Waldron took the view that it was best for the child to "self-regulate", that is leaving her to calm herself down, rather than give attention to what she was doing and risk reinforcing that way of behaving. When Melissa approached the child to comfort her, Ms Waldron asked Melissa to move away and do something else while she managed the situation. Melissa described this as "ordering me away from the child and across to the other side of the room". She said Ms Waldron "showed a lack of care towards the child" and had humiliated her and the child in front of other staff and children. Melissa was also upset to learn, from a subsequent discussion with the child's parent, that when Ms Waldron had told the parent about the incident later that day, Ms Waldron had said what happened indicated the child was bored at kindergarten and ready for school.

[154] Accepting WKA's submission on this point, the evidence showed Ms Waldron's interactions with the child and Melissa on 27 April reflected a difference in professional opinion on how to handle the situation, coupled with a reasonable work instruction given by Ms Waldron, as head teacher, to Melissa as a staff member. While Melissa had strongly held views about what happened, the account that she and Ms Waldron gave disclosed differences in teaching philosophy and practice, not bullying as Melissa alleged.

[155] Even if Ms Waldron's instruction to Melissa was delivered in a brusque or tactless way, it was not repeated or unreasonable behaviour so fell outside the scope of WKA's own policy against bullying and the widely used WorkSafe definition of workplace bullying. The latter definition does not encompass instances of one-off or occasional tactlessness, a manager requiring reasonable work instructions to be carried out or a single incident of unreasonable behaviour.

[156] The evidence, considered as a whole, did not establish Melissa was unjustifiably disadvantaged by Ms Waldron's actions on that occasion.

Meetings over concerns

[157] Melissa's grievance letter said she was frustrated and upset that concerns she expressed in a staff meeting on 4 May 2021 were dismissed and ignored by Ms Waldron. She said she tried to talk about those concerns with Ms Seeney, who visited the kindergarten on 5 May, but Ms Seeney had called Ms Waldron into their discussion and they "ganged up" on her, mocking and belittling her beliefs and practices.

[158] Before the 4 May meeting there had been a further instance involving Ms Waldron, on 29 April, which Melissa said caused her deep concern about how Ms Waldron managed children.

[159] Melissa said she had overheard, from the nearby resource room, an instance where she considered Ms Waldon had "abused her power by pressuring and coaxing a young child to eat – even while he was crying and gagging".

[160] Ms Waldron's account of that event was that she had spoken to the mother of a four-and-a-half years old boy whose only source of food for his six-hour day at kindergarten, at that time, was two teated bottles of milk. Together with the boy's mother, Ms Waldron had developed a plan to encourage the child to try some food provided at the kindergarten before his milk. In accordance with that plan, Ms Waldron said she had been encouraging the child to eat on 29 April, as other teachers did on later days. This resulted, in a short time, in the boy trying food and drinking from a sipper cup supplied by his mother and, in later weeks, joining in a lunch box day where he ate sandwiches and other food.

[161] Ms Waldron, in her evidence, noted Melissa had not come out of the resource room on the day she said was of concern to her and had not seen what was happening. In an account of events on 29 April that Melissa said she had written in early May she said she had heard Ms Waldron "assuring the child to 'keep chewing, you are doing well'" and "the encouragement from [Ms Waldron] sounded calm".

[162] At their staff meeting on 4 May Melissa raised her concerns about the 27 April incident involving the crying child. She said she had asked if, on any similar future occasion, Ms Waldron "would have an open discussion, after any situation had deescalated".

[163] Ms Waldron, in her written evidence, said she had responded to Melissa raising that concern by giving her own perspective on what had happened and apologising for Melissa feeling humiliated by what happened. Melissa denied Ms Waldron had apologised to her but said Ms Waldron had "agreed to communicate differently and thanked the team for their honesty".

[164] On her own account, no unjustified disadvantage occurred to Melissa in the discussion at that 4 May meeting. As submitted by WKA, Ms Waldron had a different perspective on what had happened on 27 April and a difference of opinion, in that context, did not constitute bullying.

[165] On the following day, 5 May, Ms Seeney visited the kindergarten as part of her duties as education manager responsible for a group of WKA kindergartens. After speaking with another staff member individually, Ms Seeney asked to speak to Melissa.

[166] Melissa said Ms Seeney spoke to her in a condescending tone and questioned her commitment to the team. She said Ms Seeney referred to being aware of some tension in the previous afternoon's staff meeting. Melissa took from that comment that Ms Seeney was talking to her because of "accusations" by Ms Waldron.

[167] Melissa said she "stated that the accusations were incorrect and attempted to raise serious concerns regarding the 27 April and 29 April incidents involving [Ms Waldron]". She said Ms Seeney, "instead of hearing me out or requesting I provide a written complaint", called Ms Waldron into the room. Melissa said she was criticised throughout the ensuing conversation and was told not to involve herself in matters concerning the kindergarten's management.

[168] In her account of their conversation Ms Seeney said Melissa, when asked how she thought things were going, referred to some tension within the team. She said Melissa had described Ms Waldron as twice lying to parents. When asked to elaborate on that accusation Melissa had talked about the 27 and 29 April incidents.

[169] Ms Seeney said she then called Ms Waldron into the room because the collective agreement promoted resolving complaints by direct discussion between teachers and she felt Melissa's concerns showed "philosophical differences" in how Melissa and Ms Waldron perceived those two incidents and how messages were relayed to parents.

[170] Ms Seeney said, during their discussion, both she and Ms Waldron had praised Melissa's abilities as a teacher and her positive relationships with children.

[171] Ms Seeney said the meeting ended with an arrangement for Melissa to have some additional professional time, that is free from contact with the children, to improve her knowledge of kindergarten policies and administration tasks. During the meeting Ms Seeney approved time for Melissa and Ms Waldron to work through that training together. Relievers were booked for 11 May but this was cancelled as Melissa went on sick leave from 6 May and had not returned.

[172] While Melissa may have found some of the conversation on 5 May uncomfortable, it was not unreasonable for Ms Seeney as an overseeing manager to seek to have a head teacher and teacher promptly discuss differences or problems. Rather than being overwhelmed or undermined by the discussion, the evidence showed Melissa's concerns were listened to and a step planned that could improve her working relationship with Ms Waldron by having them spend scheduled time together working on an aspect of professional development. The conduct of Ms Seeney and Ms Waldron in that discussion were not unjustified actions.

[173] From mid-May 2021 onwards Melissa provided WKA with a series of medical certificates for being on sick leave. Her GP's certificate on 13 May 2021 said Melissa was "medically unfit for work". In a further certificate on 24 May her GP advised Melissa "continues with work stress leave". Subsequent certificates through to early November 2022 described Melissa as "still unfit for work".

Concern over father's media post

[174] On 20 May 2021 Melissa's father Mark Brown posted a comment on Fairfield Kindergarten's platform in the StoryPark application. The platform is a forum for staff and family to share activities, progress and celebrations of children.

[175] Mr Brown's post said:

> Kia Ora Whanue (*sic*). Tomorrow is Anti Bullying day. A big thank you to staff and volunteers that look after our children. Hopefully some Waikato Kindergarten Association Management Staff could use Friday to reflect on their continued bullying, harassment and intimidation of staff and some parents. Cheers. MB

[176] In his evidence at the Authority investigation meeting Mr Brown said his view of events at the kindergarten came from what his daughters Natasha and Melissa told him as well as from other parents and families he mixed with. He had been involved with kindergarten activities over a number of years through the attendance of two grandchildren, including dropping them off and picking them up, and sometimes went as an adult helper when groups of children went out for trips.

[177] Melissa said she only learned of his StoryPark post when she got a notification on her phone while travelling in a car with Natasha that day. She recalled saying "what has he done"? She was concerned the post would have some negative consequence for her at work so immediately rang Mr Brown. He recalled she was very upset that he had put up that post and, at her request, he "immediately took it down, within two minutes".

[178] On 31 May 2021 WKA's lawyers wrote to Melissa's advocate, Mr Halse, expressing concern about the post. While acknowledging the post had been removed, the letter said this did not resolve the upset and distress caused to WKA staff accused of bullying. It noted "the post was made by a person with such a close personal connection to Melissa" and was behaviour "unacceptable" to WKA. It said WKA wanted to remind Melissa she was bound by professional expectations to respect the rights of others, not bring her employer into disrepute and not to cause distress or disruption to the organisation. It asked Melissa to ensure there was no further such behaviour from her, her family or other supporters.

[179] Melissa, in her written evidence, said the letter was intended to intimidate her and unrealistically hold her accountable for the actions of others. While it was correct that WKA could not fairly hold her responsible for what others might say, it was reasonable for WKA to make clear Melissa had ongoing responsibilities as its employee. Even if its expectations were unrealistic, WKA's request did not detrimentally affect Melissa's employment. No unjustified disadvantage resulted from that action.

Arrangements for daughter's attendance at Fairfield Kindergarten

[180] Melissa's daughter was attending the kindergarten before Melissa began what became extended sick leave on 6 May 2021. In the following four weeks, however, her daughter did not go to kindergarten.

[181] On 2 June Natasha arrived at the kindergarten with Melissa's daughter. Initially there was some confusion about her daughter's attendance that day because she had been removed from the roll. The reason for her removal was of some concern to Melissa however, at the Authority investigation meeting, it was clarified through the evidence of Ms Millar that the child's removal from the roll was an automatic administrative measure applied, for funding reasons, after any child was absent for three weeks. It was not something specifically initiated because of any issues between WKA and Melissa. The daughter's reenrolment had also been reconfirmed by 4 June anyway.

[182] A further concern arose, however, because Natasha had stayed at the kindergarten after bringing Melissa's daughter on 2 June. Natasha told staff she intended staying when she brought Melissa's daughter to kindergarten on future occasions.

[183] Ms Waldron, in her evidence, said the person who had been appointed as the teacher assistant reported being concerned about Natasha watching her.

[184] Natasha returned with Melissa's daughter on 9 June.

[185] Ms Stewart said WKA became concerned about Natasha's intention to stay at the kindergarten when Melissa's daughter was attending because, by that time, Natasha had raised a personal grievance about the end of her work there as a teacher assistant, Melissa was off sick and claimed she was bullied and Mr Browne had made a recent StoryPark post about WKA staff bullying other staff and parents.

[186] WKA's lawyers wrote to Natasha's advocate, also Mr Halse, stating it was not appropriate for her to be on WKA premises given she was in dispute with WKA. Their message said Natasha was "on notice that she is not to return to Fairfield Kindergarten".

[187] The issue in relation to Melissa was whether stopping Natasha attending kindergarten with Melissa's daughter was an unjustified action affecting Melissa as an employee. As submitted by WKA, the daughter's attendance was not a condition of employment. The situation could, however, be assessed more broadly as a check on whether WKA was acting unfairly towards Melissa in a way that spilled over into its attitude and approach to her as an employee and whether that might be inconsistent with its good faith obligations to her as employee, particularly as she was absent on sick leave. The evidence did not support such a conclusion.

[188] The requirement that Natasha not visit the premises was a reasonable stance for WKA to take given concerns expressed by at least one current staff member and given Natasha's own employment dispute with her former employer at that time.

[189] Importantly, too, this did not prevent the daughter being able to attend the kindergarten as the evidence of Mr Browne established that he and Melissa's mother were available and often assisted anyway in dropping off and picking up their granddaughter. Mr Browne also said his granddaughter was still attending the kindergarten at the time of the investigation meeting.

[190] No unjustified action against Melissa as WKA's employee was established in relation to directing Natasha not to come on the kindergarten premises.

Additional concerns

[191] Two further issues had arisen since Melissa's original application to the Authority which were examined through evidence given in the Authority investigation meeting.

[192] One issue related to concerns WKA had raised about Melissa's involvement in an anonymous complaint made to the Ministry of Education about an aspect of Fairfield Kindergarten's operation.

[193] The second issue related to WKA's wish to discuss those concerns with Melissa as well as talk about its expectations if she were well enough to return to work and what would be required to confirm her safe return to work.

[194] WKA received notice from the Ministry of Education in mid-December 2021 and late January 2022 of anonymous complaints alleging regulations about child safety and Covid-19 protection framework rules had been breached at Fairfield Kindergarten.

[195] The complaints concerned, in part, whether a contractor carrying out repair or maintenance work at the kindergarten, had been at the premises and working in breach of Covid-19 restrictions in place at the time.

[196] By letter on 9 March 2022, the Ministry advised WKA that its investigation of the complaints was complete and no breach of regulations was identified.

[197] WKA then asked for and received copies of photographs that had been submitted with the complaints. It did so because staff at Fairfield Kindergarten had reported that Natasha and Melissa were seen taking photographs from outside the premises on 13 December 2021. From looking at the photographs provided by the Ministry, including looking at the children shown in them, WKA was able to confirm the photographs were taken on 13 December from the position at which Natasha and Melissa were reported to have been standing outside the premises. Some children and a worker visible in the photographs were only present at the kindergarten on that day.

[198] WKA was concerned Melissa was reportedly involved in taking those photos at a time when she was its employee and on sick leave.

[199] In a letter sent on 3 November 2022, at a time when Melissa's then current medical certificate was near expiring, WKA's lawyers wrote to her advocate advising WKA wanted to meet with her "to discuss expectations" before she returned to work.

[200] Her advocate responded that the letter was "a threat of constructive dismissal" and "disciplinary actions proposed on her return" were unmerited.

[201] On 7 November 2022 Melissa provided a medical certificate stating she was "fit to return to work provided it is a safe working environment".

[202] WKA's lawyers responded with a request that Melissa clarify whether she was fully fit to return to work and, if so, to provide a certificate confirming this. It said she would remain on sick leave if a certificate showed she was not fit to work. In the event Melissa was fit to return, WKA asked her to advise when she was available to attend a return-to-work meeting.

[203] In discussion at the Authority investigation meeting Melissa, through her advocate, expressed the view that WKA could not investigate any involvement in taking photographs as whoever made the complaints did so as protected disclosures.[11] WKA's position was that no such protections were identified in the Ministry's advice to it about the complaints or in response to WKA's request for the photographs. It was not clear from the evidence available at the investigation meeting whether the statutory

[11] Protected Disclosures (Protection of Whistleblowers) Act 2022

immunity from disciplinary proceedings would or could apply to these particular circumstances.

[204] Melissa's oral evidence at the Authority investigation meeting confirmed she had been involved in making those complaints but she said she had done so anonymously and as a parent. She had expected her involvement with those complaints to remain confidential.

[205] WKA did not have that direct information from her in November 2022 but in light of what it suspected at that time, due to the report of Melissa being involved in taking photographs outside the kindergarten shortly before the complaints were made, it was not unreasonable for WKA to ask to meet with her to discuss its expectations if she was ready and well enough to return to work. In accordance with mutual good faith obligations, such a discussion could be expected to be a two-way process. The request to do so did not amount to an unjustified action by WKA.

[206] Similarly, it was not unreasonable for WKA to seek to resolve the conditional nature of Melissa's supposed medical clearance. In light of the mutual good faith obligations, an employer could reasonably seek to understand what limitations or expectations a worker may have for their working environment to be "safe" for them and what each party might need to do or not do to achieve that standard. A certificate of fitness to work or setting out whatever limitations there might be on the capacity to work, as is a regular feature in health documentation about return to work from physical injury, was something a fair and reasonable employer could have asked for in all the circumstances at the time. It was not an unjustified action by WKA.

Allegations about bullying and not providing a safe workplace: conclusion

[207] Melissa's evidence showed she had strong and deeply held views about the importance of principled, professional practice in early childhood education and where she felt WKA's management had gone astray in the policies and practices applied at Fairfield Kindergarten. It also revealed that pursuit of her personal grievance had taken a toll on her physical and mental well-being.

[208] The evidence also showed WKA managers had not doubted Melissa's commitment to children or professional practice, whatever other concerns or differences had arisen between them. This was demonstrated in Ms Seeney's support

for renewal of Melissa's teacher registration in October 2021, which included an acknowledgement that there were no concerns about her teaching practice.

[209] An assessment of all the evidence from all witnesses did not support a conclusion that the upset Melissa felt had resulted from actions by WKA which were unjustified, that is what a fair and reasonable employer could have done in all the circumstances at the time. An employer is not required to cocoon employees from stress or upset.[12] Melissa had worked alongside Ms Waldron for only 12 days before finding the situation intolerable and going on sick leave. The evidence, as WKA submitted, disclosed this was the result of differences in opinion and teaching philosophy, not bullying.

[210] For the reasons given in this determination, Melissa had not established she was unfairly treated in her work as a teacher at Fairfield Kindergarten. Her personal grievance application to the Authority is declined.

Costs

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

[212] If they are not able to do so and an Authority determination on costs is needed any party seeking costs may lodge, and then should serve, a memorandum on costs within 28 days of the date of issue of the written determination in this matter. From the date of service of that memorandum, the other party 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.

[213] 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.[13]

Robin Arthur
Member of the Employment Relations Authority

[12] *Attorney-General v Gilbert* [2002] 1 ERNZ 31 (CA) at [83].
[13] See www.era.govt.nz/determinations/awarding-costs-remedies.