

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2024] NZERA 324  
3173166

BETWEEN	CAROL KEUNG Applicant
AND	THE WAATEA SCHOOL BOARD OF TRUSTEES Respondent
AND	THE MINISTRY OF EDUCATION Intervenor

Member of Authority:	Claire English
Representatives:	Allan Halse, advocate for the Applicant Paul Robertson, counsel for the Respondent Calum Cartwright, counsel for the Ministry of Education
Investigation Meeting:	17 October 2023 at Auckland
Submissions received:	Up to 6 May 2024 from Applicant Up to 6 May 2024 from Respondent Up to 6 May 2024 from Ministry of Education as Intervenor
Determination:	31 May 2024

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The applicant, Ms Carol Keung, entered into a Record of Settlement on 21 February 2022 (the record of settlement) with her then-employer, the respondent Board of Trustees of Waatea School (Board). The record of settlement required certain

defined payments to be made to Ms Keung by certain dates and provided that Ms Keung's employment came to an end on 21 February 2022.

[2] It also contained further obligations regarding Ms Keung's access to her school files, matters to do with her yearly appraisal and practicing certificate, that a report would be provided on Ms Keung's salary entitlements, sick days, leave without pay, and accrued entitlement to sick leave, and that the Board would re-instate any shortfall in Ms Keung's entitlement to salary and sick leave.

[3] The Board experienced some difficulties obtaining the information necessary for the completion of this report and obtaining the assistance of suitably qualified and experienced personnel to produce the report.

[4] Some payments were made to Ms Keung in June and July 2022, and a further payment was made in February 2023.

[5] Ms Keung's view is that the Board has breached the record of settlement. Specifically she says that it never provided her with access to documents and related support as it had promised and it still owes her significant sums of money. She says that as a result of the Board's delays she experienced difficulties obtaining a renewed practicing certificate and generally she has not had the benefit of a timely and complete settlement as agreed.

[6] She seeks compliance orders, repayment of monies owing, and penalties.

[7] The Board denies that any further monies are outstanding and points to the payments already made in support of its position. The Board denies that any delays were undue and says that it took steps to obtain the necessary payroll information and make payments in compliance with the record of settlement.

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

[8] For the Authority's investigation written witness statements were lodged from Ms Keung, Mr Rodney Osborne on behalf of the Board and Mr Jared Hutchins on behalf of the Ministry of Education. I indicated to the parties at the investigation meeting that in my view Mr Hutchins was in the position of an expert witness as related to payroll matters and neither him nor the Ministry of Education were parties to the employment relationship or employment relationship problem as between Ms Keung and the Board.

Accordingly, I record my view that the Ministry of Education occupies the position of an intervenor in these proceedings, not a respondent. All witnesses answered questions under affirmation from me and the parties' representatives. The representatives also gave closing submissions.

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

### **The issues**

[10] The issues requiring investigation and determination were:

- (a) Has the Board complied with the terms of the record of settlement, specifically:
  - i. clause 3 relating to access to documents and the finalisation of Ms Keung's appraisal once she had provided evidence to the principal;
  - ii. clause 6 requiring a report on payments made to Ms Keung and certain types of leave recorded; and
  - iii. clause 7 requiring payment of any shortfall in wages to Ms Keung.
- (b) Should there be an order that the Board complies with clauses 3, 6, and 7 of the record of settlement?
- (c) Should there be orders that the Board pay penalties for any breach of the record of settlement, and should all or part of any penalties awarded be paid to Mr Keung?
- (d) Should either party contribute to the costs of representation of the other party.

### **Background – the record of settlement**

[11] As set out in her statement of problem, Ms Keung claims that the Board has breached clauses 3, 6, and 7 of the record of settlement. I will consider these clauses in turn.

[12] Ms Keung sought the sum of \$30,000 in her witness statement, which she says is the amount of unpaid base salary owed to her by the Board, with leave entitlements and entitlements to other allowances to be calculated in addition to this. She says at the time of the investigation meeting she is still owed \$49,047.62.<sup>1</sup> This figure is again claimed in submissions for Ms Keung dated 24 March 2024<sup>2</sup>, plus interest.

### **Clause 3 – access to files, appraisal, and related matters**

[13] Clause 3 states:

The Employer will provide the Employee access to her school files to enable her to prepare evidence regarding her teaching. The Employee’s appraisal for 2021 will be finalised within 2 weeks of the Employee providing appropriate evidence to the principal. The principal will also complete any documentation in relation to the Employee’s practicing certificate within the same timeframe.

[14] Looking at the first sentence of clause 3, the school files in question are held on a Google Drive. Ms Keung was provided with a link, which was intended to give her access to her files. Ms Keung explains that (despite some early issues regarding passwords) she has been able to use the link, but the documents it gives her access to are not her documents, and/or her account had been “wiped”. She says she was told this by the Board’s IT person (she and her advocate refer to this person by their first name, but do not agree on its spelling), but they did not attend the investigation to provide evidence of this.

[15] The Board says that it has fulfilled its obligations by giving her a working link to her documents, with access to some 950 documents which all belong to her. Subsequent to the investigation meeting, the Board provided a short written statement from its ICT Services Manager. The Manager advised that subsequent to some initial problems with a password being resolved on about 4 March 2022, Ms Keung had continued to access her drive, including actively making additions, edits, and file re-naming. She refuted that any documents had been deleted by the Board. The Board invites the Authority not to make any findings on this matter, on the grounds that all the documents in the file have not been viewed by me, and that as Ms Keung has found

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<sup>1</sup> Paragraph 34 of Ms Keung’s witness statement dated 12 June 2023.

<sup>2</sup> At paragraph 44 of those submissions.

new employment, no prejudice has occurred and there are no further practical issues arising.

[16] In relation to the second sentence of clause 3, Ms Keung was required to provide “appropriate evidence” to the principal in relation to her appraisal for 2021. Once this occurred, the principal was required to action and complete the appraisal within a certain timeframe. Ms Keung was not able to provide clear evidence that she provided any information to the principal in relation to her 2021 appraisal, or when and how she might have done this.

[17] In relation to the third sentence of clause 3, which creates a similar obligation on the principal to “complete any documentation” in relation to Ms Keung’s practicing certificate, Ms Keung is not able to say when and how she asked the principal to complete any documentation regarding her practicing certificate.

[18] The Board did not provide any direct evidence from the principal about these matters. This is because the principal took up another role in what appears to be the same final week as the final week of Ms Keung’s employment. Evidence was provided on behalf of the Board by Mr Osbourne, who was involved in the negotiations leading to the record of settlement and who performed calculations and undertook other tasks in relation to fulfilling the record of settlement after it had been signed. In regards to the second and third sentences of clause 3, Mr Osbourne says that the new principal was “ready” to assist Ms Keung with both the appraisal and the practicing certificate, but was never contacted by Ms Keung to progress these matters.

[19] In the end, Ms Keung was assisted in completing her appraisal and renewing her practicing certificate by the principal of the school she was newly employed at. No further actions remain to be done in relation to clause 3.

#### **Clause 6 – reports on salary and leave to be provided**

[20] Clause 6 of the record of settlement relates to the provision of a report about Ms Keung’s pay and various entitlements, as follows:

The Employer and the Employee will jointly instruct [a certain staff member] from MUMA<sup>3</sup> to report back to the parties as soon as possible on the following:

- (i) The Employee's salary entitlements for 2020 / 2021 (base salary not including management units);
- (ii) The actual days taken off because of sickness in 2020 / 2021;
- (iii) The total of any other days taken as leave without pay; and
- (iv) Her accrued entitlement to paid sick leave.

[21] There was an initial delay as the staff member nominated in the record of settlement to perform this task went overseas for a period of some weeks. This was a period of planned travel and Mr Osbourne gave evidence that he expected that the staff member would still be able to complete the reports despite traveling, as she had been able to work remotely from her overseas destination in the past. However, this was not able to occur, as Ministry of Education policies prevented any access to Novopay (where Ms Keung's pay data was held) from an overseas ISP address.

[22] When it became clear that the staff member could not access the required systems, Mr Osbourne took responsibility for seeking further information about Ms Keung's pay from the Ministry of Education. When his initial attempts at contact did not bear fruit Mr Osbourne escalated his queries and continued to do so including via requests for data to the Deputy Secretary for Education. In the end, Mr Osbourne was provided with information and Mr Hutchins was asked to assist with providing information about Ms Keung's pay and payroll records.

[23] The email correspondence shows that Mr Osbourne was provided with a significant volume of pay records during the month of May 2022 and he spent time collating and checking this.

[24] The statement of problem was validated on 24 May 2022 and the Board's statement in reply was filed on 9 June 2022. While this was occurring Mr Osbourne continued to progress his pay record analysis. As a result of his findings and the subsequent assistance and evidence of Mr Hutchins a total of \$10,993.05 has been paid to Ms Keung.

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<sup>3</sup> MUMA refers to the Manukau Urban Maori Authority. A specific staff member was named in the record of settlement, however, as they did not give evidence or in the end, perform any of the relevant calculations, I have chosen not to record their name in this determination.

[25] In addition to the work done by Mr Osbourne, Mr Hutchins provided a significant amount of payroll information and analysis.

[26] The parties' positions as to compliance with clause 6 may be summarised as set out below.

[27] In relation to the first sentence of clause 6:

- a. Ms Keung says that there was no joint instruction to the named staff member and that the Board should have acted faster to provide her with payroll information, so that she could have the certainty of knowing what her proper entitlements were.
- b. Mr Osbourne for the Board said that once he became aware that the named staff member was not able to complete the task as originally intended he took direction action himself to escalate the problem (of missing information) to the Ministry and continued to follow up at regular intervals until his efforts bore fruit. He then put some considerable time into preparing a report from that information, which was shared with Ms Keung via representatives as promptly as he was able.

[28] In relation to the requirement to report on Ms Keung's salary entitlements for 2020 / 2021 (base salary not including management units):

- a. Ms Keung says she is owed allowances for MITA<sup>4</sup> for two years. She also says she is unsure whether all PSTA allowances<sup>5</sup> have been calculated for the period of her employment.
- b. The Board states that it has undertaken extensive inquiry into Ms Keung's entitlements to salary. It also refers to the evidence of Mr Hutchins provided on 24 October 2023, in particular schedule or appendix C(i) covering the entirety of Ms Keung's employment. The Board says that once the sum of \$10,993.05 and identified overpayments are taken into account, no monies are owing to Ms Keung. In addition,

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<sup>4</sup> Standing for the Maori Immersion Teachers Allowance.

<sup>5</sup> Standing for Priority Supply Teacher allowance.

the Board points out that clause 8 of the record of settlement states that “The parties agree that there is no longer any dispute over the Employee’s entitlement to management units and no extra compensation is payable in that regard” meaning that any dispute and/or payment for these management units has already been resolved.

[29] In relation to the requirement to report on the actual days Ms Keung took off because of sickness in 2020/2021:

- a. Ms Keung says that over the course of her employment, 5 days should be deducted as (genuine) sick leave taken.
- b. The Board refers to the dates of sick leave, leave without pay, and sick leave without pay set out at Appendix D provided by Mr Hutchins on 24 October 2023. It says that all these days of leave were provided to Ms Keung on the basis that she was genuinely unwell and it was appropriate for that leave to be taken.

[30] In relation to the requirement to report the total of any other days taken as leave without pay:

- a. Ms Keung says Mr Hutchinson identified 22 days leave without pay but this was only calculated up to 8 June 2021 rather than to the end of her employment.
- b. The Board says that leave without pay is identified in Appendix D provided by Mr Hutchinson on 24 October 2023. It also says that this identifies an overpayment to Ms Keung in respect of payments made to her under the record of settlement for unpaid leave.

[31] In relation to the requirement to report Ms Keung’s accrued entitlement to paid sick leave:

- a. Ms Keung says her “actual sick leave entitlement has not been accounted for.”<sup>6</sup> She says she had an entitlement to 35.8 days sick leave as at the start of her employment, 5 days should be deducted as sick leave taken

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<sup>6</sup> Paragraph 10(i) of the Memorandum of Applicant dated 20 November 2023.

and 10 days should be accrued, leaving a total of 40.8 days as at the end of her employment.

- b. The Board says that Ms Keung's entitlements are identified in Appendix D provided by Mr Hutchinson on 24 October 2023. I note that Appendix D identifies that 35.8 days sick leave were available to Ms Keung as at the start of her employment. It identifies that Ms Keung became entitled to a further 10 days of paid sick leave during the course of her employment.<sup>7</sup> It identifies that a total of 36 days of paid sick leave were deducted as sick leave taken during the course of employment.

### **Clause 7 – payment for any identified shortfall in wages**

[32] Clause 7 requires the employer to “reinstatement any shortfall” in Ms Keung’s “contractual entitlement to salary” and her “entitlement to sick leave”. This was to be done on the basis of:

- a. the report identified above (which I consider now to have been replaced by Mr Hutchins’ evidence);
- b. the parties’ acknowledgement that there had been agreement on compensation for 27 days of sick leave;<sup>8</sup> and
- c. (at clause 8) that there was no dispute over the entitlement to management units and “no extra compensation is payable in this regard”.

[33] It is helpful to note here that after the signing of the record of settlement the following payments totalling \$10,993.05 were made to Ms Keung:<sup>9</sup>

- a. On 31 May 2022 a payment of \$6,788.72 reversed 29 days of leave without pay;
- b. On 14 June 2022 a payment of \$1,044.10 was made; and
- c. On 21 February 2023 a payment of \$3,160.23 was made to reverse 1 days of leave without pay and correct various other underpayments.<sup>10</sup>

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<sup>7</sup> This is consistent with the requirements of the Holidays Act 2003 and no dispute arises from this.

<sup>8</sup> An amount for this was paid to Ms Keung as part of the agreed compensatory payment. This was paid in addition to the amount set out at [34](c).

<sup>9</sup> The sums and dates as set out in the Joint Memorandum of Respondents dated 16 October 2023, at paragraph 10.

<sup>10</sup> As set out in Mr Hutchins’ Affidavit dated 6 May 2024, at paragraph 9.

[34] In relation to whether there is any shortfall in Ms Keung's contractual entitlement to salary (excluding management units as required by clause 8):

- a. Ms Keung says that she is owed \$49,047.62 plus interest. It is not clear whether this includes the three payments set out above.
- b. The Board relies on Mr Hutchins' evidence, particularly his Appendix C(i) covering the entirety of Ms Keung's employment. This shows a total shortfall in salary payment of \$8,629.97. The Board points to the payments it has made plus what it says are further sums in inadvertent overpayments to Ms Keung, to say that no further sums are due to her.

### **Analysis - Clause Three**

[35] In relation to the first sentence of clause three, which requires the Board to provide Ms Keung to "access to her school files" to enable her to provide evidence as to her teaching for the anticipated next steps in that clause, I am not persuaded that any breach has occurred. There was no dispute that, after issues around password access had been resolved, Ms Keung did get access to her google drive.

[36] This then became a claim by Ms Keung that the Board had deleted files. Ms Keung was not able to be specific as to why she believed some of her files had been deleted by the Board. The Board's evidence was that some 950 documents were made available to Ms Keung.

[37] Overall, my view is that there has been no breach by the Board of the requirement in the record of settlement to allow Ms Keung to access her files to enable her to prepare for her 2021 evaluation. On the contrary, the evidence suggests that access was provided. No orders are made.

[38] In relation to the second sentence of clause three, which required that Ms Keung's appraisal for 2021 would be finalised within 2 weeks of her providing appropriate evidence to the principal, the evidence shows that the appraisal was never finalised because Ms Keung never provided any evidence to the principal to allow it to be finalised. Ms Keung cannot complain that the appraisal was not completed when she herself has not fulfilled the agreed requirements that would allow it to be completed. No breach by the board has occurred and no orders are made.

[39] In relation to the third sentence of clause three, which requires the principal to complete any documentation in relation to Ms Keung's practicing certificate, the same situation arises. The evidence shows that Ms Keung never asked the principal to take any action in relation to her practicing certificate. Therefore, none was taken. Even if this requirement is read very widely to infer that the principal would take unrequested steps in relation to Ms Keung's practicing certificate at the same time as he completed the 2021 appraisal, Ms Keung never provided any documents or correspondence that would have started this process. In the absence of any initiating action by Ms Keung, there is no breach by the Board. No orders are made.

### **Analysis - Clause Six**

#### *Clause 6 - first sentence*

[40] This requires the parties to jointly instruct a named employee to report back to the parties as soon as possible on certain payroll issues. I am not persuaded that there has been any actionable breach for a number of reasons.

[41] Although this clause named a certain employee and in the end the information was obtained from Mr Hutchins instead, I do not accept that this was a breach. The original employee was named because at the time the record of settlement was signed, both parties understood that she would have access to payroll records as well as the skills needed to assist. For reasons outside the control of either party this turned out not to be the case and Mr Osbourne sought the assistance of the Deputy Secretary of Education to find a suitable replacement. No criticism can arise from this, as without this it is unclear how the matter would have progressed at all.

[42] Ms Keung has concerns that the instructions to Mr Hutchins were not "joint". In saying this she relies on the fact that the initial correspondence to the Ministry of Education and Mr Hutchins were by Mr Osbourne without any specific input from her. This may be superficially correct, but Mr Osbourne was fulfilling the requirements of the record of settlement in this correspondence. What Mr Osbourne did was to collate and share information he received from the Ministry with Ms Keung with the intention of resolution. Ms Keung was not deprived of any ability to comment or feedback on the information provided. Nothing flows from this.

[43] Ms Keung also states that a breach occurred because matters were not actioned "as soon as possible". This complaint relates specifically to the delay following the full

certification of the record of settlement on 24 February 2022. On 25 February 2022, the named employee was instructed and requested information from Novopay. When no response had been received some 4 weeks later Mr Osbourne inquired first of the named employee, then of the CFO of the relevant organisation. He then continued to follow up matters repeatedly until he received a response from the relevant Deputy Secretary. Mr Osbourne was then provided with a considerable amount of raw data, which he analysed and collated in spreadsheet form, which was provided to Ms Keung via representatives in May.

[44] Although Ms Keung may well have hoped for this process to be completed sooner, the delay was not caused by the Board. In fact, Mr Osbourne was both consistent and persistent in seeking the help and information needed at the highest levels. His evidence was that he did provide information to Ms Keung “as soon as possible”. Bearing in mind that there was no date specified in the record of settlement and considering the evidence of Mr Osbourne as to the many steps he took to obtain payroll data, I accept his evidence that he and the Board did in fact provide payroll information to Ms Keung “as soon as possible” which is what was required by the record of settlement. No breach is made out and no orders are made.

*Clause 6(i)*

[45] This clause requires a report be provided on Ms Keung’s salary entitlements for 2020/2021 (base salary not including management units). The correspondence shows that Mr Osbourne provided a summary showing Ms Keung’s pay for those two years, as at the end of May 2022.<sup>11</sup> I note that this sets out Ms Keung’s total salary over that time as being \$175,310.10. This is very similar to the total calculations by Mr Hutchins who reached a figure of \$178,629.60 (the difference being explained by some other additional payments).

[46] There is no doubt and both parties now accept that the information provided by Mr Hutchins fulfils this requirement. Given that this breakdown was provided by Mr Osbourne, albeit maybe in a less easily digestible manner, back in May 2022, I am not persuaded that a breach in the record of settlement has actually occurred. No orders are made.

*Clause 6(ii)*

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<sup>11</sup> Detailed spreadsheets and summary provided to representatives on 24 May 2022.

[47] This requires a report on “the actual days taken off because of sickness in 2020/2021”. Appendix D provided by Mr Hutchins lists out the dates and number of days of sick leave taken as recorded in the payroll system. This shows that:

- a. Ms Keung’s starting entitlement to sick leave was 35.58 days.
- b. Ten days of sick leave were accrued.
- c. Forty-five and a half (45.5) days of sick leave with pay were taken.
- d. Twenty-six days of sick leave without pay were taken.

[48] In addition, the Board has now reversed or more accurately made compensatory payments to Ms Keung in respect of certain amounts of leave, as follows:

- a. Of the 45.5 days of sick leave with pay, a payment covering 27 days of “entitlement to sick leave” was made;<sup>12</sup> and
- b. Of the 61 days of leave without pay, payments covering 33 days of leave without pay have been made.<sup>13</sup>

[49] On its face, this suggests that clause 6(ii) has been complied with. The Board has fulfilled the requirements of the settlement agreement to report to Ms Keung on the dates and types of sick leave taken.

[50] However I note that Ms Keung says that over the course of her employment, only 5 days should be deducted as (genuine) sick leave taken. She states that these days are 3 and 4 February 2020, 10 and 11 February 2020, and 3 March 2020.<sup>14</sup>

[51] The Board states that it arranged payment to Ms Keung on the basis that she was unwell and that remains its position.<sup>15</sup>

[52] In my view, the requirements in clause 6(ii) for the Board to provide a report on the actual days taken off because of sickness is a requirement for the Board to report on the days and dates on which Ms Keung was granted sick leave (both paid sick leave and unpaid sick leave, which the parties correctly understood to be recorded using separate and specific codes in the payroll system). Ms Keung is now effectively suggesting that

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<sup>12</sup> This is recorded at clause 7 of the record of settlement and was made shortly after signing.

<sup>13</sup> On 31 May 2022 a payment of \$6,788.72 reversed 29 days of leave without pay. On 14 June 2022 a payment of \$1,044.10 reversed 3 days leave without pay. On 21 February 2023 a payment reversed 1 day of leave without pay.

<sup>14</sup> As set out in the Memorandum of Applicant dated 6 May 2024.

<sup>15</sup> Submissions dated 6 May 2024.

the reference in clause 6(ii) to “actual days” does not refer to the sick leave recorded by her employer in satisfaction of its statutory obligations to record leave but refers to a very different concept. I understand from Ms Keung’s in-person evidence that her position is that during her employment she took approved sick leave (both paid and unpaid) due to stress rather than physical illness and she now seeks to be reimbursed for that leave.

[53] This is not what the plain words of the clause require. The Board has payroll records that enable it to report to Ms Keung on the days and dates that it provided her with approved sick leave. The record of settlement provides for this outcome. The record of settlement does not state that the parties had agreed that only 5 days of the recorded sick leave taken by Ms Keung was “genuine” and that she would be repaid for other dates. In addition, if there was a dispute as to sick leave and the reasons for taking it, Ms Keung’s in-person evidence made clear that this was part of her personal grievance claim against the Board that was settled by way of the record of settlement. I do not find it appropriate to re-open this matter here.

[54] The requirement of clause 6(ii) to report on the actual days taken off because of sickness has been satisfied. No breach is made out and no orders are made.

*Clause 6(iii)*

[55] Clause 6(iii) requires the Board to report on the total of any other days taken as leave without pay. As mentioned above, the Board has identified 26 days recorded as sick leave without pay.

[56] In addition, the Board has identified 61 days of leave without pay and payments covering 33 days leave without pay have been made.

[57] Given that the evidence shows the required reporting has occurred, this clause has been complied with. No breach has occurred and no orders are made.

*Clause 6(iv)*

[58] Clause 6(iv) requires the Board to report on Ms Keung’s accrued entitlement to paid sick leave. A report has been provided detailing the amount of paid sick leave Ms Keung had as at the beginning of her employment being 35.58 days, which is not in dispute. The board has reported on the accrual of 10 days of sick leave, which is not in dispute. The report shows that 45.5 days of sick leave were recorded as taken, and

payment has been made to Ms Keung for 27 of those days. The provisions of this clause have been complied with.

[59] Insofar as there is any dispute as to the paid sick leave taken, this is the same as the personal grievance claim identified above about the reasons for Ms Keung taking sick leave that was settled by way of the record of settlement. No further orders are made.

### **Analysis - Clause 7**

[60] Clause 7 requires the employer to “reinstate any shortfall” in Ms Keung’s “contractual entitlement to salary” and her “entitlement to sick leave”.

*Is there any shortfall in Ms Keung’s entitlement to salary?*

[61] I will first consider whether there is any shortfall in Ms Keung’s contractual entitlement to salary that remains outstanding/unpaid.

[62] The evidence shows that, over the entirety of Ms Keung’s employment, there was a total shortfall in salary payments of \$8,629.97. This is the figure calculated by Mr Hutchins, which I regard as reliable after hearing his evidence. I do not consider Ms Keung’s calculation of some \$49,000 to be reliable. In arriving at this figure, Ms Keung did not have access to the resources or expertise Mr Hutchins had, her initial calculations had underlying errors with the potential to invalidate end results,<sup>16</sup> and this figure has been inflated by the improper inclusion of allowances.<sup>17</sup> Clause 7 of the record of settlement specifically refers to the “contractual entitlement to salary” only, and clause 8 goes further and specifies that any entitlement to management units has been resolved and “no extra compensation is payable in that regard”.

[63] Accordingly, I am satisfied that it is proper to proceed on the basis that the figure of \$8,629.97 is the total amount of any shortfall in salary payments. The question then becomes is all or any part of this figure still outstanding?

[64] Mr Hutchins advises that when calculating the figure of \$8,629.97, he took into account the payment of \$6,788.73 made to Ms Keung on 31 May 2022. The two further payments made by the Board, of \$1,044.10 on 14 June 2022 and \$3,160.23 on 21

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<sup>16</sup> Ms Keung calculated weekly and daily rates on the basis of 48 weeks in a year.

<sup>17</sup> Inclusion of allowances as confirmed in the Memorandum of Applicant dated 6 May 2024.

February 2023, were not included when calculating this sum<sup>18</sup>. Accordingly, these payments must be deducted from the amount owing to Ms Keung.

[65] The Board has also provided details of inadvertent overpayments made to Ms Keung, amounting to a further \$1,890.03.<sup>19</sup> This should also be deducted from the sum of \$8,629.97.

[66] Once this is done, the remaining amount outstanding is \$2,535.61. Orders are made for payment of this sum.

*Is there any shortfall in Ms Keung's entitlement to sick leave?*

[67] I will now consider whether there is any shortfall in Ms Keung's entitlement to sick leave that remains outstanding/unpaid. In my view, there is no shortfall remaining. As has already been set out above a total of 45.5 days of sick leave with pay were recorded and an agreed payment covering 27 days of "entitlement to sick leave" was made. Insofar as there is any dispute as to the reason for these days being taken, my view is that this has already been the subject of the record of settlement overall. No breach exists and no orders are made.

[68] For the sake of completeness, I note that Ms Keung also raised concerns that the amount of unpaid leave taken (as recorded through the payroll system) had resulted in her receiving less annual leave payments than she would otherwise have received. Mr Hutchins' evidence is that the reversal of incorrect holiday pay reductions has been factored into his calculations (and therefore totals) in Appendix C(i), which is confirmed in legal submissions on behalf of the Ministry. On this basis my view is that no further issues arise here.

## **Other matters**

*Penalties sought by Ms Keung*

[69] As part of her statement of problem, Ms Keung seeks penalties for each breach of the record of settlement and that any penalties imposed be paid to her. My finding that a sum of money remains outstanding and needs to be paid to Ms Keung means I need to consider whether there has been a breach of the record of settlement to which penalties might apply.

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<sup>18</sup> This is set out at Note 4 to Mr Hutchins' Appendix C(i).

<sup>19</sup> As set out at paragraph 13 of the Submissions of First Respondent dated 5 December 2023.

[70] The law in respect to quantification is well established given the content of s 133A of the Act and cases such as *Borsboom (Labour Inspector) v Preet PVT Limited and Warrington Discount Tobacco Limited*,<sup>20</sup> *A Labour Inspector v Prabh*<sup>21</sup> and *A Labour Inspector v Daleson Investment*.<sup>22</sup> Section 133A requires I have regard to the object of the Act, the nature and extent of the breach(s), whether they were intentional or not, the nature and extent of any loss or damage, steps to mitigate effects of the breach, circumstances of the breach and any vulnerability and finally previous conduct.

[71] The background to these proceedings is that once the Board had entered into the record of settlement with Ms Keung, it promptly made those payments to her that were not in doubt and promptly embarked on obtaining the records required to comply with other aspects of the record of settlement. As information came to light the Board made two further payments when it had sufficient information before it. The Board also engaged with the Authority and Ms Keung throughout the Authority's process.

[72] The evidence is that the Board took active steps to comply with its obligations, including making further payments and supplying more information to Ms Keung and the Authority as more and better information came to hand.

[73] It may be said that Ms Keung has suffered a loss from a delay in receiving monies. On the other hand, the amount owed is relatively small and both parties were in genuine dispute as to what was actually owed and how any amounts should be calculated. These matters have only become clear following the large volume of information provided by the Ministry for Education and Mr Hutchins' helpful attendance at the investigation meeting and subsequent filing of submissions and further information.

[74] Weighing these matters together, I am not persuaded that there has been a breach of the record of settlement given the genuine dispute as to the amounts outstanding. No penalties are awarded and no further orders are made.

#### *Further Payment for Management Units*

[75] In submissions filed after the investigation meeting, Ms Keung made a belated claim for payment in respect of two unpaid permanent management units. Ms Keung

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<sup>20</sup> *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited* [2016] NZEmpC 143

<sup>21</sup> *A Labour Inspector v Prabh Limited* [2018] NZEmpC 110

<sup>22</sup> *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12

acknowledges that this claim has been “waived” or settled by a specific term in the record of settlement. She says that despite this, she wishes to claim for it as she considers the record of settlement to be “null and void” because in her view the Board has breached its terms.

[76] Clause 8 of the record of settlement states that: “The parties agree that there is no longer any dispute over the Employee’s entitlements to management units and no extra compensation is payable in that regard”. Ms Keung has already resolved any dispute she may have had with the Board over such matters. There is no ambiguity about this clause especially in light of Ms Keung’s own evidence that this was the agreement she had reached. It would be inappropriate to attempt to re-open this matter at such a late stage, especially as the current proceedings are compliance proceedings where Ms Keung is attempting to uphold and enforce the record of settlement. No claim is made out and no orders are made.

*Late Claim of Interest*

[77] Ms Keung has also claimed in submissions filed on 24 March 2024 for interest on the shortfall of salary. I note that this was not claimed in the statement of problem but was added to the submissions filed after the investigation meeting. It is not proper to award interest on non-payment of monies where there remains a genuine dispute over what sums are actually due and when. I decline to award interest.

*References to additional clauses of the Record of Settlement following the Investigation Meeting and compensation for unjustified disadvantages*

[78] The submissions on behalf of Ms Keung dated 24 March 2024 state that the Board did not comply with clause 5, clause 8, clause 9, and clause 10, of the record of settlement in addition to clauses 3, 6, and 7 as set out in the statement of problem and that were the subject of the investigation meeting. My view of the record of settlement is that these clauses have not been breached. Further, I do not consider it fair or appropriate for the applicant to attempt to adduce further claims of breach some time following the investigation meeting. Accordingly, no orders are made.

[79] In addition, these submissions refer to Ms Keung being unjustifiably disadvantaged and seek compensation. Again, I do not consider it fair or appropriate for the applicant to attempt to adduce further claims of breach some time following the investigation meeting. These matters are not pleaded fully, but it is important to record

that I do not understand that these claims could be made out. This is firstly because on the face of it any unjustified disadvantage Ms Keung suggests occurred during her employment with the Board has been resolved by way of the record of settlement, and secondly because this is an action for compliance with the record of settlement under s 137 of the Act and compensation is not one of the available remedies. Taking all these matters into account, I am satisfied that no further orders should be made.

### **Orders**

[80] In relation to clause 7 of the record of settlement, there remains a salary shortfall of \$2,535.61 gross. This is to be paid by the Board to Carol Keung within 28 days of the date of this determination.

### **Costs**

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

[82] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Ms Keung may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum the Board will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[83] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.<sup>23</sup>

Claire English  
Member of the Employment Relations Authority

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<sup>23</sup> For further information about the factors considered in assessing costs see: [www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1)