

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2025] NZERA 381  
3249219

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| BETWEEN | JANET DU FALL<br>Applicant                               |
| AND     | THE MOKOIA<br>INTERMEDIATE SCHOOL<br>BOARD<br>Respondent |

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| Member of Authority:                    | Shane Kinley   |
| Representatives:                        | Janet Du Fall, applicant in person<br>Joseph Williams and John Gray-Smith, counsel for the<br>respondent |
| Investigation Meeting:                  | 10 to 13 September 2024 in Rotorua and 26 November<br>2024 by AVL  |
| Submissions and further<br>information: | Up to 13 May 2025  |
| Determination:                          | 1 July 2025  |

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Janet Du Fall was employed by the Mokoia Intermediate School Board (MISB) for over 25 years, initially as Administration Officer before progressing to be the Mokoia Intermediate School (MIS) Executive Officer, a position which was confirmed to be part of the MIS' Executive Management Group in 2014. Mrs Du Fall raised a range of claims, initially related to pay and performance reviews and whether she was paid correctly. Mrs Du Fall's claims have expanded over the course of these proceedings to include claims related to breaches of contract and breaches of a range of statutory provisions.

[2] Broadly speaking the MISB says it has paid Mrs Du Fall correctly. Although the MISB accepts it did not provide Mrs Du Fall with an annual performance appraisal, it says she was not unjustifiably disadvantaged by this, her pay increased over time and there is no quantifiable loss to her. The MISB also says it has not breached contractual or statutory obligations to Mrs Du Fall.

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

[3] Mrs Du Fall initially lodged her statement of problem in September 2023, with the MISB lodging a statement in reply the same month. The first case management conference for this matter was held on 24 October 2023 when I directed an amended statement of problem and amended statement in reply be lodged to clarify Mrs Du Fall's claims, including what specific facts gave rise to those claims. A preliminary list of issues was identified for investigation and determination at this time, with timetable directions for the provision of evidence and initial dates set for an investigation meeting in April 2023.

[4] The timetable for investigating this matter was amended during case management conferences in February 2024, March 2024, April 2024 and August 2024, when the initial investigation meeting dates in September 2024 were confirmed. The changes to the timetable related to clarifying the claims, allowing more time for the lodging of evidence and due to health issues for one witness.

[5] At various stages in the investigation process I have suggested the issues Mrs Du Fall was seeking be investigated and determined be simplified and focussed on her concerns that:

- (a) her pay has not been correctly calculated, which could either be an unjustified disadvantage claim or a dispute about the interpretation, application or operation of Mrs Du Fall's employment agreement; and
- (b) the MISB has failed to review her pay and undertake annual performance appraisals, which is likely an unjustified disadvantage claim.

[6] While Mrs Du Fall agreed these were her primary concerns, she has also raised a range of other claims related to these concerns. The issues addressed by this determination are summarised in paragraph [15] below.

[7] I also recommended during case management conferences that Mrs Du Fall seek advice on a number of aspects of her claims, including:

- (a) the MISB's ability to apply a FTE adjustment to her salary; and
- (b) whether her claim that her salary has been correctly paid is a dispute (under s 129 of the Employment Relations Act 2000 (the Act)), an unjustified disadvantage claim (under s 103(1)(b) of the Act), an arrears claim (under s 131 of the Act), a breach of employment agreement claim or a breach of the provisions of the Act, the Wages Protection Act 1983 (WPA) or the Holidays Act 2003 (HA).

[8] For the Authority's investigation written witness statements were lodged by Mrs Du Fall and her husband, Russell Du Fall, who acted at various times as a support person for Mrs Du Fall. For the MISB written witness statements were lodged by Rawiri Wihapi (Principal of MIS), Bruce Davidson (Presiding Member of the MISB), Glen Law (health and safety representative and staff representative of the MISB), Vernon Wainohu (member of the MISB). Mrs Du Fall, and Messrs Du Fall, Wihapi, Davidson, Law and Wainohu answered questions under oath affirmation from me and from the representatives.

[9] At the conclusion of the investigation meeting I reserved my determination under s 174C of the Act, timetabled for written submissions to be provided and identified a number of points I considered it would be helpful for submissions to address. Mrs Du Fall and counsel for the MISB provided written submissions following the investigation meeting. Extensions to the timetable were granted by consent and then required to allow for another Member to review Mrs Du Fall's submissions to address concerns raised on behalf of the MISB that her submissions included material which should not be placed before me. Further extensions were granted by consent shortly prior to when Mrs Du Fall's final submissions were due to be lodged.

[10] I also directed Mrs Du Fall to provide a simple table setting out the details of each of her grievances or claims, how and when she says they were raised, references to any supporting documents and any comments I should consider. Mrs Du Fall provided a table responding to this direction, however, counsel for the MISB said the table included a range of additional matters which "significantly expands" on Mrs Du Fall's amended statement of problem and the issues investigated by me.

[11] Counsel for the MISB asked that I set aside aspects of Mrs Du Fall's submissions which:

- (a) Introduced new evidence not previously presented;
- (b) Amounted to allegations and assertions related to the MISB's witnesses which were not put to them at the investigation meeting; and
- (c) Added additional matters alleged to amount to unjustifiable disadvantages or breaches of good faith, to the extent they were said to amount to standalone grievances.

[12] The MISB acknowledged, as Mrs Du Fall was self-represented during the Authority's process including at the investigation meeting and in the presentation of submissions, it had been appropriate to grant her some latitude in relation to procedure. The MISB objected however to these aspects of Mrs Du Fall's submissions on the basis they would significantly prejudice the MISB were they to be considered.

[13] I have not considered any aspects of Mrs Du Fall's submissions which would amount to new claims of either unjustifiable disadvantages or breaches of good faith. Mrs Du Fall's reply submissions responded to the MISB's claims she had introduced new evidence or allegations or assertions not put to the MISB's witnesses. To the extent I consider Mrs Du Fall's submissions introduced new evidence or allegations or assertions not put to the MISB's witnesses, this has been taken into account in the weight I have placed on those aspects of Mrs Du Fall's submissions.

[14] As permitted by s 174E of 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**

[15] The issues I identified as requiring investigation and determination were:

- (a) Has Mrs Du Fall's salary been correctly calculated and paid by the MISB?
- (b) Did the MISB unjustifiably disadvantage Mrs Du Fall due to its failures to review her pay and undertake annual performance appraisals?
- (c) Did the MISB engage in unfair bargaining for Mrs Du Fall's individual employment agreement (with reference to s 68 of the Act)?

- (d) Has the MISB engaged in adverse conduct for a prohibited health and safety reason (with reference to s 110A of the Act and s 92 of the Health and Safety at Work Act 2015 (HSWA))?
- (e) Has the MISB breached s 21 of the Protected Disclosures (Protection of Whistleblowers) Act 2022 (PDPWA) (with reference to s 110B of the Act)?
- (f) Has the MISB otherwise failed to act in good faith or unjustifiably disadvantaged Mrs Du Fall, or breached either the terms and conditions of her employment or provisions of the Act, the WPA, the HA or the HSWA?
- (g) Did Mrs Du Fall raise each of her personal grievances within the time periods required by s 114 of the Act?
- (h) If not, did the MISB consent to the raising of those personal grievances, or should leave be granted for Mrs Du Fall to raise those personal grievances, after the expiry of the time periods specified in s 114 of the Act?
- (i) If the MISB's actions were not justified (in respect of disadvantage) or Mrs Du Fall was not paid correctly, what remedies should be awarded, considering:
  - (i) Compliance Orders;
  - (ii) Lost wages under s 123(1)(b) of the Act or arrears of wages under s 131 of the Act;
  - (iii) Compensation under s 123(1)(c)(i) of the Act; and
  - (iv) Compensation for loss of a benefit under s 123(1)(c)(ii) of the Act?
- (j) Should penalties be ordered against the MISB in relation to any of the above issues and, if so, should any part of the penalty be ordered to be paid to Mrs Du Fall?
- (k) Should either party contribute to the costs of representation of the other party?

**Has Mrs Du Fall's salary been correctly calculated and paid by the MISB?**

*Approach to this issue*

[16] In order to determine this issue the following need to be addressed:

- (a) Should Mrs Du Fall's claims in relation to her salary be considered as an unlawful deduction, an unjustified disadvantage or a dispute;
- (b) What findings of fact should be made;
- (c) *If required, based on findings of fact:* Are there implied terms or should relief in relation to a mistake be granted;

- (d) Did Mrs Du Fall work more than the 24 hours per week she was contracted to work and, if so, was the MISB aware or did the MISB require, by its actions, she work extra hours; and
- (e) What are the consequences for Mrs Du Fall's claims in relation to her salary?

*Should Mrs Du Fall's claims in relation to her salary be considered as an unlawful deduction, an unjustified disadvantage or a dispute?*

[17] As discussed in paragraphs [5](a) and [7](b) I identified the need to determine on what basis Mrs Du Fall's claims in relation to her salary should be considered and recommended she take advice on this issue.

#### Submissions of the parties

[18] Mrs Du Fall's initial submissions did not directly address this issue, rather presented her claims in relation to her salary as unlawful deductions or unjustified disadvantages.

[19] Submissions for the MISB said this claim was "best characterised as a dispute regarding the correct interpretation of [Mrs Du Fall's] employment terms under s 129 of the Act; and a related wages arrears claim", with reference to the Court's judgment in *Breen v Prime Resources Company Ltd*.<sup>1</sup>

[20] Submissions in response from Mrs Du Fall said the MISB had previously claimed there was no dispute about her terms of employment, there was clear evidence about what those terms were, what hours were worked and what Principals of MIS had applied and interpreted her employment agreement. In terms of the Court's judgment in *Breen*, Mrs Du Fall said there was not an interpretation issue but said there had been an unlawful variation to her employment terms, which led to unlawful deductions from her wages.

#### This matter should be determined as a dispute

[21] I have considered the Court's judgment in *Breen*, in particular the Chief Judge's comments about when a matter must be considered as a dispute with reference to the Court of Appeal's judgment in *Auckland College of Education v Hagg*.<sup>2</sup>

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<sup>1</sup> *Breen v Prime Resources Company Ltd* [2023] NZEmpC 199.

<sup>2</sup> *Auckland College of Education v Hagg* [1996] 2 NZLR 402.

[22] The Chief Judge said:<sup>3</sup>

The following points emerge from the Court of Appeal's judgment. The way in which a litigant crafts their claim (as a personal grievance or as a dispute) is not the central issue and does not impact the jurisdictional bar imposed by (now) s 103(3). The central issue is what the claim derives from. If it derives solely from the interpretation and/or operation of the employment agreement, or derives solely from a dispute about the interpretation and/or operation of the agreement, it must be pursued by way of the disputes procedure — it cannot be pursued by way of personal grievance.

[23] I find Mrs Du Fall's claims in relation to whether her pay was calculated correctly derive solely from a dispute about the interpretation and/or operation of the agreement. Mrs Du Fall's amended statement of problem presented her pay claim as being whether her salary had been calculated and paid correctly, including considering both whether the MISB had breached her employment agreement and whether the MISB was able to legally apply a FTE adjustment to her salary or whether doing so amounted to an unlawful deduction. I consider these are clearly questions founded on what Mrs Du Fall's employment agreement provided and how it was intended to operate.

[24] I do not consider comments from the MISB which Mrs Du Fall referred to prevent this issue from being correctly classified as a dispute. I consider this is a situation where both Mrs Du Fall and the MISB were firmly presenting their positions on what Mrs Du Fall's terms of employment were and the MISB advised if Mrs Du Fall did not agree with its position, she could raise the matter in the Authority, as she has done. While Mrs Du Fall was entitled to ask for a joint application or for the MISB to make such an application about the interpretation of the disputed terms, the fact the MISB declined to make such an application does not alter the fact there was a dispute between Mrs Du Fall and the MISB.

[25] I also consider the context of when Mrs Du Fall raised her claim she was entitled to be paid the full-time salary for her position and raised a claim she worked 40 hours per week is relevant to my finding this claim should be considered as a dispute. When Mrs Du Fall was requesting in May 2023 that the MISB apply to the Authority for the interpretation and application of the disputed terms of employment, her claim was focussed on whether she should have been receiving salary progression or annual

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<sup>3</sup> Above n 1, at [17].

reviews. Mrs Du Fall's own evidence including her witness statement confirmed she raised her claim her salary was not being paid correctly in July 2023.

[26] I consider this strongly supports the fact the parties are in disagreement about interpretation and/or operation of Mrs Du Fall's employment agreement, specifically whether Mrs Du Fall was employed on a full-time basis and/or entitled to be paid the full-time salary for her role, which is a matter appropriately determined as a dispute under s 129 of the Act.

*What findings of fact should be made in relation to Mrs Du Fall's claims in relation to her salary?*

[27] The core issues on which findings of fact are required are whether Mrs Du Fall was employed on a full-time basis and/or entitled to be paid the full-time salary for her role. I have approached these findings of fact based on a balance of probabilities of what is more likely than not to have been agreed between the parties and understood between the parties as to how Mrs Du Fall's employment operated.

#### Submissions of the parties

[28] Mrs Du Fall submitted the intention of the parties was for a full-time 52-week worker and "Despite recording what the hours of work will normally be, I was employed for a fulltime position". Her position is that her "IEA did not specify the agreed hours of work but rather they indicated the arrangements relating to the times I was to work at the school premises". She says a FTE adjustment should not have been applied to her salary as this was not permitted under the collective agreement and in any event the MIS was a 37.5 hours per week operation and she worked full-time hours.

[29] She also says her working additional hours of work was acknowledged by Mr Wihapi and Mr Davidson. She says those hours were "unknown until performed, as required for the role" and she was able to decide when and where she performed those hours "being autonomous in my role".

[30] The MISB say Mrs Du Fall has never been employed on a full-time basis and "her agreed hours of work are, as set out in the relevant IEA from 2014 and subsequently, 24 hours per week – worked Monday to Thursday". The MISB says Mrs Du Fall's claims cannot be both for "(alleged) unpaid additional hours, and (alleged) underpaid full-time hours" and "the evidence is irrefutable that her contractual hours of work have always been 24 hours per week".

## Analysis

[31] I consider the documentary evidence about Mrs Du Fall's employment is clear and unambiguous. Originally when she was employed as Executive Officer in 1999 her individual employment contract stated her "hours of work would normally be 20-25". When she received an updated employment agreement in 2014 as "Executive Officer – Executive Management Group" it stated "hours of work will normally be 24 per week Mon-Thurs 9am – 3pm". The underlined text from the 2014 employment agreement was confirmed to be in Mrs Du Fall's handwriting.

[32] A subsequent employment agreement from 2020 restated "hours of work will normally be 24 per week" with the salary annotated to be an "Annual Full time Rate". The handwritten text, underlined in these quotes, appeared to match Mrs Du Fall's handwriting.

[33] While it is well recognised terms of employment can evolve over time to become different to those recording in writing, this is not what Mrs Du Fall says happened here. Rather her claim is that she was always employed on a full-time basis.

[34] In order to reach this conclusion, I would need to apply the principles of contractual interpretation in a way which is not supported by the evidence. The Court has recently said, in relation to the application of principles of interpretation to employment agreements:<sup>4</sup>

The proper approach is an objective one, the aim being to ascertain the meaning the written agreement would convey to a reasonable person having all the background knowledge that would reasonably have been available to the parties at the time of the agreement. This objective meaning is taken to be that which the parties intended. The context provided by the agreement as a whole and any relevant background informs meaning. Nevertheless, while context is a necessary element of the interpretive process, and the focus is on interpreting the document as a whole, rather than particular words, the text remains centrally important. If the language at issue, construed in the context of the whole agreement, has an ordinary and natural meaning, that will be a powerful, albeit not conclusive, indicator of what the parties meant. But the wider context may point to some interpretation other than the most obvious one and may also assist in determining the meaning intended in cases of ambiguity or uncertainty.

[35] Mrs Du Fall said the intentions of the parties were evidenced by both the 2014 employment agreement and a payroll form (titled "NOVO2nt") related to that employment agreement, also from 2014, which was signed by the MIS Principal at that

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<sup>4</sup> *E Tū Inc v New Zealand Steel Ltd* [2024] NZEmpC 29 at [16].

time, Mrs Epp. Mrs Du Fall submitted only Mrs Epp could give evidence about her intentions when entering the employment agreement, yet the MISB had failed to engage with Mrs Epp on this point. While the MISB provided no evidence of engaging with Mrs Epp in relation to these proceedings, equally Mrs Du Fall did not take any steps to present evidence from Mrs Epp to the Authority including by summoning her to give such evidence. As there is no such evidence before me, I am unable to conclude Mrs Epp would have supported Mrs Du Fall's view on the intention of the parties.

[36] I do not accept the 2014 NOVO2nt payroll form supports the parties having intended Mrs Du Fall be employed on a full-time basis. Submissions for the MISB referred to a range of correspondence between Mrs Du Fall and Novopay clarifying Mrs Du Fall's employment arrangements, including whether she was a part or full-time worker, whether she worked 24 hours per week and whether she worked five days a week or not. I consider the correspondence with Novopay supports Mrs Du Fall having accepted in 2014 she was employed for 24 hours per week, Monday to Thursday, for six hours per day and pro-rating of her salary was appropriate on the basis of a 60% FTE equivalent.

[37] Mrs Du Fall says there is no evidence she sent the emails from her email address to Novopay and others were able to access her email address. While I accept there may be issues with her communicating with Novopay about her own situation, there was no evidence presented that other people had used her email address in relation to those response and I am unable to conclude this is what occurred. In fact, Mrs Du Fall said in her submissions in reply she had sent some of those emails, including confirming an hourly rate and altering a form to include the hourly rate as she said she was directed to do.

[38] I do not consider there is any evidence of a subsequent agreed variation to Mrs Du Fall's terms of employment in relation to hours of work or the pro-rated pay rate she received. Mrs Du Fall herself said there had been no variation, although I acknowledge this was advanced in conjunction with her view she was employed on a full-time basis.

[39] This is not to say Mrs Du Fall did not work more than 24 hours per week. There is ample evidence of her performing additional work outside the time she was working at the MIS premises, including in response to requests or correspondence from Mr Wihapi and other senior employees of MIS. There was also evidence of Mrs Du Fall

requesting payment for extra work on a small number of occasions, including as discussed at paragraphs [40], [41], [45] and [49] to [53] below, which reinforces the MISB's position she was employed on a part-time basis and acted as if she had been employed on that basis until she raised her claims in 2023 that she should have been treated as a full-time worker.

[40] Emails Mrs Du Fall provided from February 2021 and June 2022 supported her being a part-time employee. On 18 February 2021 Mrs Du Fall emailed Mr Wihapi, in the context of discussions about the hours she had worked over the Christmas break. Her message included the following comments:

I took Annual Leave of 16 days .... For me this is 4 weeks of leave as I do not work on Fridays. ...

You are aware that I often clear and respond to school emails texts and queries, contact Novopay, and take calls from numerous different staff in evenings, Fridays or weekends. ... When I have travelled overseas I have always taken care of every aspect of my job while on leave or otherwise and have always put in extra hours or taken work home on my return as required. I have never claimed payment for any extra hours. ...

My start and finish times were from 9am to 3pm but I usually left school around 3.20pm. My new times are 8.15am to 2.15pm.

[41] Mrs Du Fall emailed Mr Wihapi on 23 June 2022 after a disagreement about her taking time off for a personal appointment and concerns having been raised about her working hours. Her email included the following comments:

We discussed the many extra hours that I do for school during my own time including payroll every second Friday on my day off due to changes in cutoff and you said I should probably be paid for those.

#### Mrs Du Fall was employed on a part-time basis, not as a full-time employee

[42] I find the real nature of Mrs Du Fall's employment was as a part-time employee, employed to work 24 hours per week over Monday to Thursday. This is supported by both Mrs Du Fall's employment agreements from 2014 and 2020, and her own emails from 2021 and 2022.

[43] I return to whether Mrs Du Fall is due any additional payments for extra hours, which she undoubtedly worked, at paragraphs [58] to [62] below.

*Should there be implied terms or should relief in relation to a mistake be granted?*

[44] Given the above finding Mrs Du Fall was a part-time employee, I do not need to consider further whether there should be implied terms or relief in relation to a mistake should be granted.

*Did Mrs Du Fall work more than the 24 hours per week she was contracted to work and, if so, was the MISB aware or did the MISB require, by its actions, she work extra hours?*

[45] As indicated above I consider there is ample evidence of Mrs Du Fall working more than 24 hours per week. Mrs Du Fall provided numerous emails which showed her replying to emails and actioning requests including from Mr Wihapi and other senior employees of MIS outside her regular hours of work. The MISB accepted Mrs Du Fall actioned payroll on Fridays, which were not her working days, and attended the MISB meetings outside of her regular hours of work. In some instances additional payment was made for this work.

#### Submissions of the parties

[46] Mrs Du Fall submitted the expectation she work full-time was evidenced by the 2014 NOVO2nt payroll form and the MISB did not know what her hours were or what arrangements were for her. She also said the MISB, Mr Wihapi, Mr Davidson and other MISB members knew she worked other hours, including for the MISB's meetings, while all MIS staff knew she was available to do tasks outside the hours she worked at MIS.

[47] The MISB said any claim for arrears would be limited to the six-year period provided under s 142 of the Act. I agree as there was no evidence of prior claims by Mrs Du Fall which had not been responded to. The MISB also addressed whether availability provisions under s 67D of the Act were appropriate, however, I do not consider this to be relevant in relation to Mrs Du Fall's situation and Mrs Du Fall herself did not think an availability provision was required, albeit her position was based on her view she was a fulltime worker.

[48] While the MISB said it was aware Mrs Du Fall "occasionally performed work outside of her ordinary hours, it did not require this, nor was it aware of her working beyond the quantity of hours (i.e. 24) that she was employed and paid for". The MISB said for any work outside of regular hours such as "attendance at board meetings, [where] there was an informal arrangement in place whereby [Mrs Du Fall] took time off in lieu".

[49] The MISB also said as Mrs Du Fall was involved in processing payroll it was incumbent on her to seek approval and payment for any overtime worked, which she did not do other than on isolated occasions. The MISB also provided an analysis of

emails sent and received by Mrs Du Fall, which it said did “not suggest [she] was regularly performing work outside of her 24 hours per week prior to May 2024”. The MISB said a wages arrears claim for hours the MISB did not have knowledge of, approve or require would be unconscionable.

[50] Mrs Du Fall in response submitted there was no structured arrangement for time in lieu for attending the MISB’s meetings, although she also said there was no recording of hours consistent with her position this was not required as she was on a salary for full-time work. She also said the full-time nature of her employment was why she had not claimed for processing payroll on Fridays; however, she started doing so six months after Mr Wihapi told her in June 2022 “he should probably pay me for that work”. She said she “stopped claiming in June 2023 when I was coming to the realisation that the fulltime nature of my position was meant to be paid as an annual salary”.

[51] Mrs Du Fall said it was the MISB’s responsibility to ensure systems were in place to record hours of work and it would be unconscionable to not pay her for her full-time role. She also said there was clear evidence the MISB and Mr Wihapi knew she was in a salaried position with no obligation to record hours, and asserted they assumed she had arrangements to take time in lieu.

While Mrs Du Fall worked extra hours, she has not established her full arrears claim

[52] I consider Mrs Du Fall more likely than not regularly worked more than 24 hours per week, however, the evidence is not clear how many hours she worked. I find the MISB or Mr Wihapi were aware she was working some extra hours outside her regular 24 hours per week, particularly for the processing of payroll and attendance at the MISB’s meetings. In relation to those limited tasks, I consider Mrs Du Fall is entitled to be paid overtime and return to the calculation of this at paragraphs [58] and [59] below.

[53] I also consider the nature of some communications from Mr Wihapi and other senior employees of MIS outside her regular hours of work were such that the MISB could reasonably be said to have required Mrs Du Fall to perform work outside her regular hours of work in some circumstances. The records Mrs Du Fall provided interspersed general contact which did not appear to be time critical with requests which conveyed greater urgency, for example, one text message from Mr Wihapi on Friday 28 February 2020 read “Have u seen my email?”, which Mrs Du Fall replied to later

that day. Another text message from Mr Wihapi on Friday 14 August 2020 read “Please fill in form I have sent via email asap please”, which Mrs Du Fall replied to later that day. I consider there was a reasonable inference from these text messages, amongst others, that Mr Wihapi sometimes expected or required Mrs Du Fall to work outside her normal working hours.

[54] The challenge in relation to these communications is more likely than not the MISB, Mr Wihapi and other senior employees of MIS did not turn their mind to whether Mrs Du Fall should be paid extra for this work, a proposition supported by Mr Wihapi’s evidence where he acknowledged Mrs Du Fall “does occasionally do work outside of her normal hours, as do most of us”. Mr Wihapi also said “I do my best to respect her normal hours of work, and I do not require her to be available beyond those hours”. I am not satisfied however Mr Wihapi expected Mrs Du Fall to work extra hours to the extent she claimed to have done or turned his mind to whether she needed to be paid extra for the occasions he was aware she was doing work outside her regular hours.

[55] Given Mrs Du Fall’s evidence was she came to realise in June 2023 she was in a fulltime role and should have been paid a salary on that basis, it is unclear why she had not previously raised issues about not being paid for work beyond 24 hours per week. I am not satisfied Mrs Du Fall has provided sufficient evidence of working on the basis she claimed to have been employed (ie fulltime) and decline to consider further claims for extra pay for overtime or work which the MISB arguably expected Mrs Du Fall to perform beyond the amounts for the processing of payroll and attendance at the MISB’s meetings, payment for work during times when Mrs Du Fall was on annual leave, and payment for related to public holidays, discussed at paragraphs [58] to [61] below.

*What are the consequences for Mrs Du Fall’s claims in relation to her salary?*

[56] Mrs Du Fall’s claims to be paid a fulltime salary are unsuccessful.

[57] For completeness, I do not consider she would have been successful in her claims had they been considered as an unlawful deduction or an unjustified disadvantage, given the finding of fact I have made that Mrs Du Fall was employed as a part-time employee, employed to work 24 hours per week over Monday to Thursday.

[58] Mrs Du Fall is entitled to be paid overtime for the processing of payroll and attendance at the MISB’s meetings, to the extent she has not already been paid for that

overtime unless there is clear evidence of time in lieu having been taken, subject to the limitation of the six-year period provided under s 142 of the Act. My preliminary view is given Mr Wihapi told Mrs Du Fall in June 2022 she should probably be paid for the processing of payroll on Fridays, this is an appropriate date for the limitation period to flow from ie back to June 2016.

[59] The parties will need to discuss the quantification of this claim, based on records of when Mrs Du Fall processed payroll on Fridays and attended the MISB's meetings outside of her regular working hours, and any evidence of time in lieu arrangements. If the parties are unable to agree on the quantification of overtime, then they may return to the Authority for further orders.

[60] I also find Mrs Du Fall is entitled to payment for work when this was clearly required while she was on annual leave, including when in Spain and Melbourne in 2017. Again, the parties will need to discuss the quantification of this claim, as it is not clear how much time Mrs Du Fall spent performing work although there were clearly requests she do things while on leave. If the parties are unable to agree on the quantification of payment for this work, then they may return to the Authority for further orders.

[61] Finally, Mrs Du Fall set out in her submissions a table with details of when she was contacted and worked on seven public holidays between 2017 and 2023. The MISB has accepted payments are due in relation to five of those public holidays, saying the first two public holidays at Easter 2017 are outside the six-year limitation period for a claim under the Holidays Act 2003. I accept the MISB calculation in relation to these amounts, with one exception. One of the public holidays when Mrs Du Fall worked at Easter 2017 was a Monday, so would have generated an alternative holiday entitlement which is not extinguished until taken. It appears, however, the MISB said alternative holidays were due for work performed on Fridays and Saturdays, which would not have been an otherwise working day for Mrs Du Fall. I consider the correct number of alternative holidays is three rather than five. I order the MISB to pay Mrs Du Fall the arrears it calculated of \$810.41 together with payment for three alternative holidays.

[62] In relation to the quantification of all of these amounts, I encourage the parties to consider pragmatically where there is evidence of a request for Mrs Du Fall to undertake a certain task, how long that might reasonably have been expected to have taken (as the MISB appear to have done in relation to calculations of pay for work

undertaken on public holidays). I also encourage the MISB to set aside its view that Mrs Du Fall was unwilling to allow others to perform her role while she was on leave, as it has benefitted from her doing so.

**Did the MISB unjustifiably disadvantage Mrs Du Fall due to its failures to review her pay and undertake annual performance appraisals?**

[63] In relation to this claim, during the second case management conference for this matter in February 2024 the MISB conceded it had not undertaken annual pay reviews or performance appraisals, although also said it had sought to remedy this issue with Mrs Du Fall and she had not been disadvantaged by its inactions in this respect. The MISB clarified its concession at the fifth case management conference in August 2024 to say it had failed to undertake annual performance appraisals only. I have investigated this issue as an unjustified disadvantage claim, taking into account the revised concession by the MISB.

*Relevant law*

[64] For an unjustified disadvantage claim under s 103(1)(b) of the Act to be successful, I must be satisfied that:

- a. Mrs Du Fall's employment, or one or more conditions of her employment, was affected to her disadvantage; and
- b. This was due to some unjustifiable action by the MISB.

[65] To determine whether Mrs Du Fall was unjustifiably disadvantaged by the MISB I need to apply the test of justification set out at s 103A of the Act. The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the employer's actions occurred.<sup>5</sup>

[66] I may also take into account any other factors I think are appropriate.<sup>6</sup> I must not determine an action to be unjustifiable where there were defects in the MISB's process that were minor and did not result in Mrs Du Fall being treated unfairly.<sup>7</sup>

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<sup>5</sup> Given the nature of Mrs Du Fall's disadvantage claims, I have not specifically stepped through the procedural considerations under s 103A(3) of the Act which are more relevant when considering an employer's response to an employee's actions.

<sup>6</sup> Subsection 103A(4) of the Act.

<sup>7</sup> Subsection 103A(5) of the Act.

*Submissions of the parties*

[67] Mrs Du Fall submitted she had been disadvantaged as the collective agreement, which her terms of employment were based on, included obligations on the MISB for an annual appraisal and associated pay reviews. She said this had not occurred and had been accepted to have not occurred by the MISB, including in correspondence with Mr Davidson about her claims, for example referring to a letter dated 13 February 2023 which restated an acknowledgement:

the committee stated they agree and accept that you should have been provided an annual appraisal and it is open to working through an appropriate compensation due to the fact you were not offered an annual appraisal and review of your job description.

[68] Mrs Du Fall's position was that as references to annual appraisals were connected to annual review cycles, she had been subject to an ongoing breach of her employment conditions since 2015, after she had been appointed to the Executive Management Group. She also said this position should be treated as having a range of rates attached to it, which were above the minimum entry rate specified in the collective agreement, supported by references to her role being recorded in the Edpay payroll system as "Executive Management Range of Rates" in the column titled "Grade".

[69] The MISB submitted there was no disadvantage to Mrs Du Fall due to its omission to provide an annual performance appraisal and there was no entitlement to a pay increase following such a performance appraisal. The MISB also said Mrs Du Fall received a number of pay increases after 2014 in line with collective agreement increases and the various collective agreements did not provide pay scales for positions in the Executive Management Group.

[70] The MISB also raised a limitation issue in relation to Mrs Du Fall's claim, saying as this claim was advanced as an unjustified disadvantage the 90-day limitation period applies under s 114(7)(b) of the Act. As Mrs Du Fall had first raised this claim in September 2022 the MISB said it was limited to the annual review which she would have been entitled to in the year ending 5 July 2022. Finally, the MISB said to the extent there was a disadvantage, the compensation it has already paid Mrs Du Fall of \$2,500 was adequate, taking into account her contribution to the disadvantage through not earlier raising concerns about the lack of an annual appraisal.

[71] Mrs Du Fall submitted in response the Executive Management Group was not intended to be excluded from the grading system. She also said the MISB had not met

its commitment to develop a policy framework for annual appraisals and she not contributed to the failure for appraisals to occur.

*Mrs Du Fall was unjustifiably disadvantaged by the lack of annual appraisals*

[72] I find Mrs Du Fall was unjustifiably disadvantaged by the lack of annual appraisals, in that the MIS' Principals including Mr Wihapi and earlier Principals failed to put in place an annual review or appraisal process with Mrs Du Fall. There was no evidence of annual discussions about her performance. This disadvantaged Mrs Du Fall due to the lost opportunity to discuss her development or whether her job description or terms of employment, including pay, remained appropriate. I accept, had these discussions occurred there would have been no guarantee of a pay increase to Mrs Du Fall given she was in a position with a minimum pay rate and no clear contractual right to step-based pay increases. However, I consider there certainly would have been an opportunity for the parties to discuss if a pay rise was appropriate.

[73] I accept the MISB's submission that Mrs Du Fall's claims were limited however to the grievance raised in September 2022, in relation to the annual review which she would have been entitled to in the year ending 5 July 2022. I consider this appropriate with reference to the limitation period under s 114(7)(b) of the Act as there was no evidence of Mrs Du Fall raising earlier concerns about a lack of annual pay reviews or performance appraisals. I acknowledge there are arguably ongoing omissions by the MISB in failing to provide performance appraisals overtime, which could be considered analogous to the ongoing failure to provide supervision in *Emmerson v Northland District Health Board*<sup>8</sup>, referred to in the MISB's submissions. I consider, however, the Court's judgment in *Emmerson* can be distinguished as in this case there were clear points in time each year when an annual appraisal should have occurred.

*Remedies for unjustifiable disadvantage due to the lack of annual appraisals*

[74] While the MISB's failure to provide Mrs Du Fall with an annual appraisal caused some disadvantage to her, I do not accept she would automatically have been entitled to a pay increase based on those other support staff received under the step-based pay scales if annual appraisals had occurred. I consider the various collective agreements which her terms of employment were based upon are clear in differentiating between the Executive Management Group position which she was employed in with a

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<sup>8</sup> *Emmerson v Northland District Health Board* [2019] NZEmpC 34 at [116] and [117].

minimum rate of pay only, and the clear contractual right to step-based pay increases for other support staff.

[75] In these circumstances, the loss which Mrs Du Fall has suffered is towards the lower end of those compensable under s 123(1)(c)(i) of the Act in terms of impact, and of uncertain quantification under s 123(1)(c)(ii) of the Act in terms of loss of benefit. I consider an award of compensation of \$5,000 under s 123(1)(c)(i) of the Act is appropriate, rather than the \$2,500 the MISB has already paid as compensation to Mrs Du Fall.

[76] Mrs Du Fall said the amount already paid should not be taken into account as it was a gratuitous payment and she rejected it, meaning it was not remedies. I do not agree. The payment made by the MISB was clearly a compensatory amount to reflect its failure to undertake annual pay reviews or performance appraisals. I consider the MISB is entitled to offset this amount, meaning a net payment of compensation of \$2,500 only is ordered.

[77] I am required to consider if remedies should be reduced (under s 124 of the Act) for blameworthy conduct by Mrs Du Fall that contributed to the situation giving rise to her grievance. I do not consider this is a situation where Mrs Du Fall contributed in a blameworthy way to the MISB's failures to meet its obligation to provide her with an annual appraisal, although acknowledge there was some evidence of issues with progressing an annual appraisal process after 2022 due to Mrs Du Fall's disagreement with the MISB's proposed approach to rectify the issue. I decline, however, to reduce remedies in relation to the above award.

**Did the MISB engage in unfair bargaining for Mrs Du Fall's individual employment agreement (with reference to s 68 of the Act)?**

*Relevant law*

[78] Section 68 of the Act sets out situations where bargaining for an individual employment agreement is unfair. Where a party is found to have bargained unfairly under s 68 of the Act, then they may access remedies of compensation or orders cancelling or varying the agreement (subject to conditions) under s 69 of the Act. Section 68 also links to s 63A of the Act in relation to an employer's minimum obligations when bargaining for terms and conditions of employment, including obligations to provide a copy of the intended agreement and to advise the employee that they are entitled to seek independent advice about the intended agreement.

*Submissions of the parties*

[79] Mrs Du Fall referred to issues with her employment agreements from 1999 when she was originally employed at MIS and 2014 when she was appointed to her Executive Management Group role. She said obligations to provide her required information were not met nor were copies of the terms and conditions of her employment properly retained as required by s 64 of the Act. She also said she was not appropriately notified when bargaining for collective agreements was initiated as required under s 43 of the Act.

[80] Mrs Du Fall said she had relied on the skill, care or advice of her employer, and had not had the opportunity to seek advice as required under s 63A of the Act. Mrs Du Fall sought remedies in relation to unfair bargaining of compensation and appropriate orders varying her individual employment agreement.

[81] The MISB said a claim of unfair bargaining under s 68 of the Act would be subject to a limitation period of six years under s 142 of the Act, while any aspects of the claim which were unjustified disadvantage claims would be subject to s 90-day limitation period under s 114 of the Act. The MISB said the correct approach was as an unfair bargaining claim under s 68 of the Act, meaning her claims about bargaining in 1999 and 2014 were out of time.

[82] The MISB denied having unfairly bargained with Mrs Du Fall, said she did not satisfy the diminished capacity requirements of s 68(2)(a) of the Act, had not provided evidence to support other grounds for an unfair bargaining claim and had presented individual employment agreements from 2014 and 2020 which included acknowledgements she had the opportunity to seek independent advice. The MISB also said these claims were not fully pleaded prior to submissions or put to the MISB's witnesses during the investigation meeting.

[83] Mrs Du Fall's submissions in reply referred to acknowledgements the MISB had not provided the statutorily required notices of initiation of collective bargaining and connected the unfair bargaining claim to being a condition of employment, and part of unjustified disadvantage claims. Mrs Du Fall says she became aware of the facts related to this grievance in 2023 and raised it within time, also alleging bad faith behaviour on the part of the MISB.

*Mrs Du Fall has not established unfair bargaining on the part of the MISB*

[84] While witnesses for the MISB acknowledged there may have been breaches of record-keeping related to Mrs Du Fall's employment agreements and notice obligations in relation to initiation of collective bargaining, I am not satisfied Mrs Du Fall has established the MISB has unfairly bargained in terms of s 68 of the Act.

[85] I do not consider Mrs Du Fall has shown she had diminished capacity to understand her employment agreement or that she relied on the skill, care or advice of her employer when bargaining for or entering into the agreement either in 1999 or 2014, or when subsequent variations occurred.

[86] In any event, due to the limitation issues raised by the MISB, only the subsequent variations after 2017 could have been subject to an unfair bargaining claim. After this time, only Mrs Du Fall's 2020 employment agreement was provided in evidence. The 2020 employment agreement includes an acknowledgement Mrs Du Fall had a reasonable opportunity to seek independent advice, as the 2014 employment agreement also did. No evidence was presented which contradicted this signed acknowledgement.

[87] Mrs Du Fall's unfair bargaining claim is unsuccessful.

**Has the MISB engaged in adverse conduct for a prohibited health and safety reason (with reference to s 110A of the Act and s 92 of the Health and Safety at Work Act 2015 (HSWA))?**

[88] Mrs Du Fall's amended statement of problem described her claim the MISB had engaged in adverse conduct as being related to "consistent requests for engagement and intervention by the Health and Safety resources" of MIS, which had been denied. She specifically referred to both bullying complaints which had not been processed and bullying by the MISB, her inability to access the support she sought from Mr Law in his capacity as a health and safety representative, her inability to meet with the full MIS health and safety committee and lack of response to a compliant she made to WorkSafe.

*Relevant law*

[89] Section 110A of the Act and s 89 of the HSWA combined provide protections for employees from adverse conduct for a prohibited health and safety reason. Relevant to Mrs Du Fall's claim is whether the MISB subjected her to detriment which other

employees would not have been subject to (s 110A(1)(c) of the Act), because she had raised or proposed raising health and safety concerns (s 89(h) of the HSWA).

*Submissions of the parties*

[90] Mrs Du Fall says she raised bullying allegations which were not processed appropriately and were incorrectly designated as a personal grievance. She says she was then threatened with a serious misconduct process if she engaged with the MIS' health and safety committee or representatives about those concerns. The actions (or inactions) of the MISB were said to be adverse to her raising or progressing those concerns, including Mr Davidson and Mr Wihapi's actions in persuading Mr Law, in his capacities as a health and safety representative at MIS and the staff representative on the MISB, that her concerns were personal grievances rather than bullying claims.

[91] Mrs Du Fall alleged Mr Law was coerced to not perform his duties in relation to health and safety in breach of s 92 of the HSWA. Mrs Du Fall says her differential treatment compared to other employees is established as other employees had their concerns remediated, whereas her bullying concerns were not fixed. She also says there were a range of prohibited health and safety reasons under s 89 of the HSWA which applied to her circumstances, including her having raised or proposed raising health and safety concerns, but she was unable to get traction to address or resolve her health and safety concerns.

[92] The MISB denies having subjected Mrs Du Fall to adverse conduct and having coerced or induced anyone into acting or failing to act in relation to health and safety issues. The MISB also says Mrs Du Fall has attempted to expand her claims to bring into evidence a WorkSafe complaint made after she raised her claims and raised issues in submissions which were not put to the MISB's witnesses at the investigation meeting, which it said could not form part of Mrs Du Fall's claims.

[93] The MISB said Mrs Du Fall had not established she had been subject to adverse conduct. When she had raised bullying allegations those had been looked into and responded to, and the MISB did not consider the allegations were capable of amounting to bullying. The MISB said declining Mrs Du Fall's request for external intervention or investigation was warranted and Mrs Du Fall had not established that she suffered any detriment as a result. The MISB denied coercing or inducing Mr Law or anyone else in breach of s 92 of the HSWA, and says Mr Law voluntarily declared a conflict of interest

and formed his view Mrs Du Fall's alleged health and safety concerns were industrial matters, which he could not assist with as a health and safety representative.

*Mrs Du Fall has not established the MISB engaged in adverse conduct for a prohibited health and safety reason*

[94] I do not consider Mrs Du Fall has established the MISB engaged in adverse conduct for a prohibited health and safety reason. The foundational elements of this claim appear to relate back to Mrs Du Fall's claims related to her hours of work and salary, with specific bullying claims related to Mr Wihapi's interactions with her about hours of work and her job description, and another member of the MIS' Leadership team questioning her hours of work, and the MISB's response to her claims.

[95] I consider the MISB acted as a fair and reasonable employer in considering Mrs Du Fall's claims, both in regards to whether those claims amounted to health and safety concerns, and in relation to whether there could have been any other basis to further investigate Mrs Du Fall's concerns, for example, as a standalone unjustified disadvantage claim, which she also claimed they were. I consider it was reasonable for the MISB to conclude Mrs Du Fall's concerns were effectively a repackaging of her earlier concerns and to firmly advise that it did not consider the same concerns could be presented as health and safety concerns through another forum.

[96] One of Mrs Du Fall's complaints of bullying behaviour<sup>9</sup> related to the MISB and specifically Mr Davidson advising her that the MISB would not consider matters which had it had previously responded to when presented in a different light. I consider the MISB's actions were fair and reasonable when presenting its response in a firm manner, given the efforts it had already taken to engage with Mrs Du Fall in relation to her underlying concerns, and doing so did not amount to bullying behaviour.

[97] I have also considered these elements of Mrs Du Fall's claims as standalone unjustified disadvantage claims. I find the MISB's actions were those of a fair and reasonable employer, as it considered and investigated Mrs Du Fall's concerns, reached a view on those concerns and advised her of that view. Mrs Du Fall's fundamental issue was that the MISB's view was not appropriate and it should have responded to her claims related to her hours of work and salary differently. I do not accept the MISB's approach was inappropriate or that it was required to reconsider its approach simply

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<sup>9</sup> Other complaints by Mrs Du Fall of bullying are addressed at paragraphs [129] to [131] below.

because Mrs Du Fall sought to have the issues considered through a health and safety lens.

[98] I also do not consider Mrs Du Fall has established there was any coercion or inducement of Mr Law or anybody else, including Mrs Du Fall, in breach of s 92 of the HSWA. Rather, I accept Mr Law's evidence he considered Mrs Du Fall's situation and elected himself to declare a conflict of interest in relation to the MISB consideration of Mrs Du Fall's complaints (as discussed further in paragraphs [120] to [124] below).

[99] Finally, I note that in respect of this issue Mrs Du Fall's reply submissions sought some latitude in relation to the evidence she presented of ongoing behaviours relevant to this claim. I do not consider I could expand Mrs Du Fall's claims in the way implied in her request, although that is not to say subsequent actions of the MISB could not give rise to separate claims if properly raised with the MISB. That would however be a matter for a separate proceeding.

### **Has the MISB breached s 21 of the PDPWA (with reference to s 110B of the Act)?**

#### *Relevant law*

[100] Section 103(1)(k) of the Act provides a personal grievance may include a claim an employer has retaliated, or threatened to retaliate, against an employee in breach of s 21 of the PDPWA because the employee intends to make or has made a protected disclosure. Section 110B says retaliate has the meaning given in s 21 of the PDPWA, which includes dismissing the employee, refusing to offer the employee the same terms of employment or conditions of work as made available to other employees, or subjecting the employee to any detriment or disadvantage that other employees would not be subjected to.

[101] Section 9 of the PDPWA defines a protected disclosure as a disclosure of information where the discloser believes on reasonable grounds that there is, or has been, serious wrongdoing in or by the discloser's organisation, the disclosure is made in accordance with the PDPWA and is not made in bad faith. Serious wrongdoing is defined in s 10 of the PDPWA.

#### *Submissions of the parties*

[102] Mrs Du Fall says Mr Wihapi retaliated against her in a number of ways, including taking steps which may have caused her to resign and in saying in email

correspondence on 13 August 2023 “Unbelievable is all I can say and dismissal be the right way to do it if the lawyer says”. Mrs Du Fall referred to a range of correspondence which preceded Mr Wihapi’s statement, which included her expressly seeking protection on 13 August 2023 under the PDPWA for identifying matters of serious wrongdoing (in an email which ran to 11 pages).

[103] Mrs Du Fall’s concerns then trace back to an email Mrs Du Fall had sent to the MISB’s then counsel on 18 July 2023 titled “A matter of serious misconduct and serious wrongdoing”. While a number of issues were traversed in that email (which ran to 9 pages including background), it included the following:

The broader issues warrant appropriate intervention given the expenditure undertaken by the Board in taking the actions they have been advised to take. I request that the matter be referred to an appropriate authority and wish to be protected from retaliation associated to these disclosures.

[104] The MISB says Mrs Du Fall was not retaliated against as a result of making a protected disclosure under the PDPW and she had not raised a valid protected disclosure under the PDPW. The MISB says Mrs Du Fall’s 18 July 2023 email did not refer to any acts or omissions or course of conduct capable of amounting to serious wrongdoing, as defined under the PDPWA, as it referred to her “ongoing personal grievance claims and her (negative) view of the expenditure undertaken by the board and advice it had received”. The MISB also said as the disclosure had been sent to its then counsel, they were not an appropriate authority to make a protected disclosure to.

[105] The MISB also says Mrs Du Fall was not retaliated against as Mr Wihapi’s email comment did not meet the definition of retaliation under s 21 of the PDPWA. Rather it says his email comment was part of his frustration at a long and drawn-out process, in response to a long email from Mrs Du Fall and without reference to her alleged protected disclosure. As there were no disciplinary processes in response to Mrs Du Fall’s email, the MISB says she was not retaliated against.

[106] Mrs Du Fall said in reply she had made a protected disclosure separate to her communications with the MISB’s former counsel. She also reiterated her view Mr Wihapi’s email was retaliatory.

*Mrs Du Fall has not established she was retaliated against*

[107] I find this claim is not established based on the evidence. While Mr Wihapi clearly expressed a desire to explore dismissing Mrs Du Fall, she was not dismissed or

otherwise subjected to retaliatory conduct as a consequence of either her emails of 18 July 2023 or 13 August 2023. The plain meaning of Mr Wihapi's email was that he wanted to have a discussion amongst the MISB and with its then counsel about whether dismissal was appropriate. There was no evidence of his email progressing to any action beyond discussion.

[108] There was however another aspect of how this email exchange involving the MISB, its then counsel and Mr Wihapi was handled which requires consideration. It appeared the exchange was not immediately stored in a private folder set up for the purposes of handling Mrs Du Fall's complaints. I consider this to be a minor procedural shortcoming in MISB's handling of sensitive information, which did not result in Mrs Du Fall being treated unfairly in terms of s 103A(5) of the Act, particularly as no action was taken as a result of the exchange and it was moved to a private message setting relatively quickly.

**Has the MISB otherwise failed to act in good faith or unjustifiably disadvantaged Mrs Du Fall, or breached either the terms and conditions of her employment or provisions of the Act, the WPA, the HA or the HSWA?**

*Approach to this issue*

[109] Throughout the investigation process for this matter Mrs Du Fall has raised numerous additional claims, which overlap with the agreed primary issues of whether she was paid correctly and whether she was unjustifiably disadvantaged by the MISB's failures to review her pay and undertake annual performance appraisals. I indicated to Mrs Du Fall at case management conferences the grouping of her claims under this issue would not limit the matters to be investigated and determined.

[110] At the conclusion of the investigation meeting I requested Mrs Du Fall provide a simple table for each of her grievances or claims with the following information:

- (a) Details of grievance / claim
- (b) How and when raised
- (c) Supporting documents referred to
- (d) Comment (only if necessary).

*Submissions of the parties*

[111] Mrs Du Fall provided a ten-page table, which identified 37 different grievances. Mrs Du Fall's submissions in relation to this issue ran to 45 pages, including identifying when and how she said each grievance had been raised, references to relevant evidence

and submissions on whether her grievances had been raised within the timeframes required under s 114 of the Act or leave should be granted for grievances to be raised outside those timeframes. This material also included alleged breaches of multiple contractual provisions and statutory requirements.

[112] I have not summarised Mrs Du Fall's submissions, given their breadth and overlap with other issues addressed at paragraphs [16] to [108] above. Rather, I have addressed a selection of Mrs Du Fall's specific claims at paragraphs [114] to [131] below.

[113] The MISB submitted that many of Mrs Du Fall's additional claims overlapped with those investigated by the Authority, denied it had failed to act in good faith or as a fair and reasonable employer, and denied it had breached the terms and conditions of Mrs Du Fall's employment or pleaded breaches of statutory requirements. The MISB said while Mrs Du Fall's claims had developed or morphed over time, it had sought to maintain a productive employment relationship with her. When engagement with Mrs Du Fall's initial claim was unsuccessful, the MISB says its position was not accepted by Mrs Du Fall, with further grievances then raised. The MISB submitted "anything short of the [MISB] agreeing with [Mrs Du Fall] was considered bullying and bad faith behaviour, giving rise to numerous additional claims".

*Mrs Du Fall's additional claims are not established*

[114] I consider Mrs Du Fall's claims have been fully addressed above where there is overlap with the agreed primary issues of whether she was paid correctly and whether she unjustifiably disadvantaged by the MISB's failures to review her pay and undertake annual performance appraisals. While Mrs Du Fall claimed the MISB's responses to her concerns about her pay and hours of work involved breaches of good faith, and contractual or statutory requirements, I do not accept she has established or provided evidence of standalone, additional personal grievances in relation to those matters.

[115] That is not to say Mrs Du Fall did not raise concerns about the responses of the MISB, as there clearly was a significant volume of correspondence between her, the MISB and its representatives, including counsel, former counsel, Mr Wihapi, Mr Davidson and with the MISB as a whole or addressed to the personnel committee of the MISB. Almost 3,000 pages of documents were provided by Mrs Du Fall, including some duplicate material and emails supporting her claims. The MISB provided a bundle

of over 400 pages of what it considered were the key documents, although this duplicated material provided by Mrs Du Fall.

[116] I address a number of Mrs Du Fall's discrete claims below, which I do not consider establish the MISB failed to act in good faith, unjustifiably disadvantaged Mrs Du Fall or otherwise breached contractual or statutory provisions. Given this, I do not need to determine whether any of these claims were raised within the time period required by s 114 of the Act. Many but not all of Mrs Du Fall's additional claims would however have faced issues in relation to whether they were raised within the required timeframes.

[117] Mrs Du Fall claimed the MISB had failed to follow its own policies in responding to her claims, including failing to document its delegations as those were changed. I am not convinced any technical failures by the MISB to formally update its delegations register caused any material disadvantage to Mrs Du Fall. Throughout the process of responding to her concerns, I consider the MISB substantively responded to her concerns and endeavoured to follow its own policies in a fair and reasonable manner, taking into account the circumstances where it was endeavouring to maintain the appropriate privacy in relation to Mrs Du Fall's complaints and its consideration of and response to those complaints. I consider any failures by the MISB in this respect would have amounted to minor defects in the MISB's process, which did not result in Mrs Du Fall being treated unfairly, in terms of s 103A(5) of the Act.

[118] Mrs Du Fall claimed the MISB did not act in good faith in requiring her to progress her claims to the Authority and the MISB as a whole refusing to meet with her and Mr Du Fall. I do not accept the MISB's actions were inappropriate or unjustifiably disadvantaged Mrs Du Fall. Rather I consider the MISB acted as a fair and reasonable employer in determining who would meet with Mrs Du Fall to hear her concerns and seek to resolve those concerns, including deciding who would respond to her correspondence. When Mrs Du Fall was not satisfied with the MISB's response to her concerns, for example in advising her it did not accept her interpretation of her pay arrangements and hours of work or her bullying complaints, I consider it was not unreasonable of it to advise her that she could raise these matters with the Authority and doing so was not a breach of the MISB's duty of good faith.

[119] Mrs Du Fall claimed there was inappropriate involvement of the NZSTA<sup>10</sup> and Ministry of Education in relation to her pay claims. I do not accept the MISB acted inappropriately by seeking advice from either organisation, given the role the NZSTA provides in supporting school boards and the Ministry of Education plays in the education sector, including in relation to negotiating collective agreements and supporting the administration of school payroll functions.

[120] Mrs Du Fall claimed Mr Law declaring a conflict of interest disadvantaged her, Mr Davidson deceived Mr Law into declaring the conflict of interest, Mr Davidson failed to share advice from the NZSTA that a staff representative did not need to declare a conflict of interest, and combined this was “deliberate serious and sustained conduct and intended to undermine my employment”.

[121] Having heard both Mr Davidson and Mr Law’s evidence, and reviewed supporting documentary evidence, it is clear from the email exchanges at the time Mr Davidson did not directly disclose in full the advice he had received from NZSTA. Rather Mr Davidson’s email expressed a view in response to a question from Mr Law whether it was appropriate he attend a MISB meeting to discuss Mrs Du Fall’s situation “if you do attend I would expect that you declare a conflict of interest or perceived conflict of interest and wouldn’t take part in any decision making”.

[122] This was a stronger expression than the advice Mr Davidson had received by email from NZSTA, which was:

The staff rep is able to be at the PEB meeting and is able to be on the committee but it is not something I recommend, so when the board are moving the motion to delegate a committee it would be helpful for the staff rep to declare an actual or perceived conflict, especially if he or she have a close working relationship with either [Mr Wihapi or Mrs Du Fall].

[123] Mr Law’s email reply advised “I don’t feel that it would be appropriate for me to be at the meeting as there will be a definite conflict of interest”. When questioned at the investigation meeting Mr Law was adamant it was his personal choice to declare a conflict, including stating he did not want to be involved in personal matters about people he worked with and he was surprised staff matters were not automatically a conflict of interest.

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<sup>10</sup> The NZSTA is the former name of the New Zealand School Boards Association. Its website states that it is “the professional body for school boards in New Zealand, representing and advocating for our members and providing services to all state and state-integrated schools and kura”. Source: [www.tewhakaroputanga.org.nz](http://www.tewhakaroputanga.org.nz).

[124] While I consider Mr Davidson should have provided the full advice received from NZSTA, I consider his failure to do so was a minor procedural fault which did not result in Mrs Du Fall being treated unfairly in terms of s 103A(5) of the Act, given Mr Law's personal view he should not be involved in staff matters.

[125] Mrs Du Fall claimed the MISB had breached good faith by failing to keep and provide her with access to wages and time records, and holidays and leave records, eventually providing "Summary and incomplete/insufficient details". It appears the MISB did not fully comply with its record-keeping obligations, particularly where it knew Mrs Du Fall was working variations to her normal hours of work, although this may have been due to the MISB's understanding Mrs Du Fall generally worked regular hours on Mondays to Thursday.

[126] Given the MISB's views of Mrs Du Fall's working arrangements, I am not convinced any shortcoming by the MISB in relation to record-keeping amount to breaches of the duty of good faith. I also consider Mrs Du Fall has been adequately compensated for additional hours worked in relation to the orders made for the payment of overtime at paragraph [58] above.

[127] Mrs Du Fall submitted there had been a breach of her entitlements to bereavement leave under s 70 of the HA2003 when Mr Wihapi contacted her while she was on bereavement leave. While Mr Wihapi's actions were not fully considerate of Mrs Du Fall's bereavement, her claim in relation to the impact of this appears to be that she was underpaid because her salary was underpaid. I am not satisfied Mrs Du Fall has established a compensable breach in relation to being contacted during bereavement leave.

[128] Mrs Du Fall raised a number of bullying complaints, including against the MISB itself, Mr Wihapi in one instance, and in a combined manner about the actions of Mr Wihapi and another staff member<sup>11</sup>, who was a member of the MIS' leadership group. I have found at paragraph [96] above Mrs Du Fall was not bullied by the MISB itself.

[129] In relation to the alleged bullying by Mr Wihapi alone, this related to Mr Wihapi not recalling having given Mrs Du Fall permission to access her own personnel file, which led to the MISB raising concerns with Mrs Du Fall about her having done so.

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<sup>11</sup> The other staff member did not give evidence during the Authority's process. I have not referred to them by name as I do not consider there is public interest in doing so.

When Mrs Du Fall responded by providing evidence Mr Wihapi had given her permission to do so, the MISB acknowledged this, Mrs Du Fall was apologised to and the matter was closed. I do not consider this amounts to an unjustified disadvantage, rather I consider the MISB has acted fairly and reasonably in apologising and closing the matter.

[130] In relation to the alleged bullying by Mr Wihapi and another staff member, these complaints related to questions being by them about Mrs Du Fall's hours of work. Mrs Du Fall said Mr Davidson's consideration of her bullying complaints about was insufficient and did not comply with the MISB's policies. She referred to Mr Davidson's evidence at the investigation meeting, which I recorded as Mr Davidson saying he discussed the incident with the other staff member and did not consider it needed to go further based on what they said had happened and what Mrs Du Fall had alleged. Mr Davidson said he did not speak further to Mrs Du Fall as he believed he had enough information from her email complaint. Mr Davidson also said he discussed Mrs Du Fall's complaints about Mr Wihapi bullying her with the MISB, which decided they did not amount to bullying.

[131] I consider the MISB's actions in resolving these complaints were substantively those of a fair and reasonable employer. While Mrs Du Fall was offended by being asked questions about these matters, I am not satisfied either Mr Wihapi or the other staff member's actions amounted to bullying.

#### **Other remedies sought by Mrs Du Fall**

[132] Mrs Du Fall also sought compliance orders and the imposition of penalties against the MISB.

[133] Consideration of compliance orders is not necessary, as those orders were primarily sought focussed on Mrs Du Fall's claims which have not been successful related to hours of work, salary and generally about her terms and conditions of employment and in relation to the duty of good faith.

[134] Mrs Du Fall sought penalties for a wide range of statutory breaches however these can only be considered for established breaches. I do not consider penalties against the MISB to be appropriate in relation to the MISB not undertaking annual pay

reviews or performance appraisals. Neither do I consider penalties to be appropriate in relation to the breaches associated with the limited circumstances where:

- a. I have found the MISB should have paid Mrs Du Fall overtime for the processing of payroll and attendance at MISB meetings, as discussed at paragraph [58];
- b. I have found the MISB should pay Mrs Du Fall for work which she was clearly required to do while on annual leave, as discussed at paragraph [60]; and
- c. the MISB acknowledged arrears of \$810.41 in relation to work performed on public holidays and where I have found the MISB should pay Mrs Du Fall for three alternative holidays not provided to her for working on public holidays, as discussed at paragraph [61].

[135] I do not consider the MISB's failures in these aspects were blameworthy or deliberate in such a way which would warrant penalties under s 133A of the Act. In forming this view I have taken into account the MISB's attempts to put in place a performance appraisal and review process, which the MISB says were unsuccessful as "that process faced irreconcilable issues caused by [Mrs Du Fall's] assertions regarding hours of work that later arose". I accept the MISB made those efforts and decline to consider penalties in those circumstances.

### **Orders**

[136] For the above reasons I order the Mokoia Intermediate School Board (MISB) to, within 28 days of the date of this determination:

- a. pay Janet Du Fall \$2,500 in compensation under s 123(1)(c)(i) of the Employment Relations Act (the Act), in relation to the MISB not undertaking annual pay reviews or performance appraisals, as found at paragraph [72] above;
- b. calculate and pay Mrs Du Fall overtime for the processing of payroll and attendance at the MISB's meetings, as discussed at paragraph [58];
- c. calculate and pay Mrs Du Fall for work which she was clearly required to do while on annual leave, as discussed at paragraph [60]; and
- d. pay Mrs Du Fall acknowledged arrears of \$810.41 in relation to work performed on public holidays, and calculate and pay Mrs Du Fall for three alternative holidays not provided to her for working on public holidays, as discussed at paragraph [61].

[137] The amounts required at paragraphs paragraph [136]b and [136]d above should be relatively straight forward to calculate. If the parties are unable to agree on the quantification of the amounts ordered to be paid at paragraph [136]b to [136]d above, and cannot reach a compromised agreement based on what each party considers is due, then they may return to the Authority for further orders.

### **Costs**

[138] Mrs Du Fall requested costs be reserved, while the MISB sought costs in its favour.

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

[140] While Mrs Du Fall has had some success, she represented herself and this may well be a matter where it is appropriate costs lie where they fall, given her lack of success on her main claims related to her hours of work and pay.

[141] If the parties are unable to resolve costs, and an Authority determination on costs is needed, either party 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 other party 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.

[142] 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>12</sup>

Shane Kinley  
Member of the Employment Relations Authority

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<sup>12</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)