

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2025] NZERA 572
3249219

BETWEEN	JANET DU FALL Applicant
AND	THE MOKOIA INTERMEDIATE SCHOOL BOARD Respondent

Member of Authority:	Shane Kinley
Representatives:	Janet Du Fall, applicant in person Joseph Williams and John Gray-Smith, counsel for the respondent
Investigation Meeting:	On the papers
Submissions and further information:	Up to 5 September 2025
Determination:	16 September 2025

SECOND DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] On 1 July 2025 I issued a determination¹ in relation to claims Janet Du Fall raised in relation to her employment by the Mokoia Intermediate School Board (MISB). That first determination addressed Mrs Du Fall's claims, which initially related to pay and performance reviews and whether she was paid correctly, as well as claims related to breaches of contract and breaches of a range of statutory provisions.

[2] In the first determination I directed the MISB to calculate and pay Mrs Du Fall within 28 days of the date of the first determination:

¹ *Janet Du Fall v The Mokoia Intermediate School Board* [2025] NZERA 381 (the first determination).

- a. overtime for the processing of payroll and attendance at the MISB's meetings;²
- b. for work which she was clearly required to do while on annual leave;³and
- c. for three alternative holidays not provided to her for working on public holidays.⁴

[3] I indicated that the amounts required at paragraphs paragraph [2]a and [2]c above should be relatively straight forward to calculate. I further indicated that if the parties are unable to agree on the quantification of the amounts ordered to be paid at paragraph [2]a to [2]c 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.⁵

[4] I also reserved the issue of costs in the hope the parties would be able to settle this issue between themselves.⁶ Unfortunately, they have been unable to do so, and the MISB now seeks costs, while Mrs Du Fall proposed costs should lie where they fall.

[5] This determination addresses both the calculation of amounts ordered to be paid at paragraph [2]a to [2]c above and costs.

The Authority's investigation

[6] On 25 July 2025 the MISB requested an extension of the timeframes to engage with Mrs Du Fall over the quantification of the amounts ordered to be paid at paragraph [2]a to [2]c above and costs and a stay over the payment of amounts I had ordered the MISB to pay Mrs Du Fall.⁷ In part, the MISB based the request for an extension on the parties involvement in interim reinstatement proceedings regarding a separate but related matter (file number 3381143). Mrs Du Fall's interim reinstatement application which was heard on 18 July 2025 by another Member of the Authority, with a preliminary determination issued on 25 July 2025 declining that application.⁸

² Ibid at [58] and [136]b.

³ Ibid at [60] and [136]c.

⁴ Ibid at [61] and [136]d.

⁵ Ibid at [137].

⁶ Ibid at [139].

⁷ Ibid at [61], [72] and [136]a and d.

⁸ *Janet Du Fall v The Mokoia Intermediate School Board* [2025] NZERA 450 (reinstatement determination).

[7] Mrs Du Fall objected to the request for an extension and also the request for a stay of the payment I had ordered the MISB pay her.

[8] I considered the MISB's request for an extension and stay, as well as Mrs Du Fall's objections. The Authority Officer, at my direction, advised the parties that the MISB's request for a stay of the payment of amounts I had ordered the MISB to pay Mrs Du Fall was declined. The MISB has now paid those amounts.

[9] I granted the MISB's request for further time to discuss other amounts which I had ordered the MISB to calculate and pay to Mrs Du Fall, as well as the issue of costs. I proposed a timetable, if discussions between the parties did not resolve these matters, for the MISB to lodge and serve submissions, with Mrs Du Fall to then respond and the MISB to provide reply submissions. The timetable I proposed for submissions on the remaining issues related to amounts which I had ordered the MISB to calculate and pay to Mrs Du Fall, as well as the issue of costs, was extended several times on request of the parties.

[10] I also proposed this matter be determined on the papers, which was agreed by the parties. Submissions have now been received from the MISB and Mrs Du Fall. The MISB provided an affidavit which Mrs Du Fall has lodged in proceedings regarding the separate but related matter (file number 3381143), as well as a Calderbank offer it made to Mrs Du Fall in May 2024.

[11] 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

[12] The issues requiring investigation and determination were:

- (a) Has the MISB correctly calculated the amounts ordered to be calculated and paid to Mrs Du Fall (in paragraph [2] above)?
- (b) Should either party contribute to the costs of representation of the other party?

[13] Each of the calculations which the MISB were directed to make is approached separately below.

Overarching submission and proposed approach from Mrs Du Fall

[14] Mrs Du Fall says, in relation to all of the aspects of the calculations the MISB were required to undertake, the amounts calculated “was not representative of what was required and [she] didn’t accept it”. She says she sought further information, but the MISB were not willing to engage further as it was confident in its position on the calculations.

[15] Mrs Du Fall went on to say that she considered further orders were required from the Authority and “it would be appropriate to simply reserve determination of the outstanding matters of award for remedies and determination of costs pending the determination of the whole of the matter in the Employment Court”. Alternatively, Mrs Du Fall proposed I could either determine remedies consistent with legal requirements, pass the matter to an appropriate specialist auditor, determine costs on the conclusion of the arrears calculations exercise or assist the parties to a consent agreement on arrears and costs.

[16] The MISB says Mrs Du Fall’s challenge to the first determination does not by default operate as a stay under s 180 of the Act and no stay has been sought. The MISB also says other related proceedings are not relevant to my determination of the matters addressed in this determination, being calculation of arrears and costs.

Further reserving this matter or staying the MISB’s costs application is not appropriate

[17] While Mrs Du Fall has challenged the first determination (and potentially the reinstatement determination in the proceedings regarding the separate but related matter (file number 3381143)), doing so does not operate as a stay in relation to consideration of costs in the Authority. It is usual for challenges to substantive determinations to be filed in the Employment Court before the Authority has decided costs. Once a costs determination is issued by the Authority, the party challenging the substantive determination can amend their statement of claim to include a challenge to the costs determination or either party can file a separate challenge to the costs determination.⁹ I decline in this matter to defer determining costs until the Court has determined any challenges to the substantive determination.

[18] I consider an analogous approach is appropriate in relation to the calculations which the MISB were directed to make in the first determination. That is, it is

⁹ See “Employment Court Practice Directions” available at: www.employmentcourt.govt.nz at No 11.

appropriate to conclude the determination of those claims, rather than reserving the matters further as Mrs Du Fall proposed. Once this determination is issued, either party may challenge it, if they wish to do so. I decline in this matter to reserve the determination of the outstanding calculation of arrears which the MISB would then need to pay to Mrs Du Fall.

Has the MISB correctly calculated Mrs Du Fall's overtime for the processing of payroll and attendance at the MISB's meetings?

Submissions of the parties

[19] The MISB provided separate calculations for the time it considers Mrs Du Fall would have reasonably worked to process payroll reports on a Friday, which I found was a non-working day for her, and when attending the MISB's meetings outside of her regular working hours.

[20] The MISB says the payroll report was processed by Mrs Du Fall on Fridays from April 2022 until May 2024, with this action estimated to take approximately half an hour each fortnight. The MISB's calculations use three different hourly rates, reflecting Mrs Du Fall receiving pay rises during this period, and exclude the period from December 2022 until June 2023 when Mrs Du Fall claimed and was paid overtime for processing the payroll reports. The MISB says the total due was \$1,775.34 gross.

[21] The MISB says it has calculated the amount of time it considers Mrs Du Fall would have spent at the MISB's meetings outside of her regular working hours over the six-year period from Term 4 of 2017 to Term 2 of 2025. It says Mrs Du Fall's affidavit evidence in proceedings regarding the separate but related matter (file number 3381143) shows that she did not attend all of the Board meetings in 2024 and 2025. It further says Mrs Du Fall's own evidence is that Board meetings were approximately one hour in duration, with the Finance Committee meetings preceding being approximately half to three quarters of an hour. The MISB says, however, that prior to May 2022 the Finance Committee meetings were held during Mrs Du Fall's working hours. The MISB no longer seeks to rely on time off in lieu arrangements it claims were in place in relation to Mrs Du Fall's attendance at the MISB's meetings.

[22] The MISB's calculations for Mrs Du Fall's attendance at the MISB's meetings use seven different hourly rates, reflecting her pay rises during the relevant period. One hour was allowed for each of MISB's meetings and three quarters of an hour was allowed for each of the Finance Committee meetings. No allowance was made for the

three meetings in 2024 and 2025 which Mrs Du Fall said she did not attend. The MISB says the total due was \$3,145.09 gross.

[23] Mrs Du Fall said she did not have sufficient payroll records to check the hours she would have spent on processing payroll records on a Friday, however, claimed a “pay slip for the 13th December 2023 confirms 1 ¼ hours was taken to complete the task”. Mrs Du Fall said she could “recall that many of the claims were for one hour and it cannot be qualified as to how much work was involved in each fortnight therefore the appropriate basis for this calculation is ... one hour for the calculation per time”. Mrs Du Fall went on to say “the pragmatic approach, given no award of interest on arrears, would involve payment of all arrears at the rate of pay at the date of payment”. Mrs Du Fall claimed the correct calculation would involve 64 occasions at one hour each at \$59.27 per hour, amounting to a total due of \$3,793.28 gross.

[24] Mrs Du Fall said overtime for her attendance at the MISB’ meetings should be paid, based on cl 2.7 of the collective agreement, at time and a half. She also said she communicated with the MISB that previous Boards had significantly longer meetings and it should be able to more accurately calculate the amount of arrears due. Mrs Du Fall also claimed half an hour per meeting should be added for return travel time, as a call back situation, half an hour per meeting should be added for arranging refreshments, and half an hour per meeting should be added for pre and post meeting requirements. Mrs Du Fall said the correct amount when recalculated may be more than \$10,000.00 gross.

[25] The MISB said in reply that any and all overtime was not required to be paid at time and a half, with cl 2.7.1 of the agreement deeming only hours worked “in excess of 40 working hours or 8 hours per day” to be overtime. It maintained this meant Mrs Du Fall’s arrears for this purpose should be paid based on her ordinary hourly rate.

[26] The MISB also said it had calculated the payment for Mrs Du Fall’s attendance at its meetings based on her sworn affidavit evidence and documentary evidence which showed a number of meetings which ran for an hour or less, or where Mrs Du Fall attended for less than an hour.

Discussion

[27] I consider the MISB has adopted appropriate approaches in the calculations it has made of arrears for overtime for Mrs Du Fall's processing of payroll and attendance at the MISB's meetings.

[28] For both aspects of arrears, I do not accept it would be appropriate to calculate arrears based on Mrs Du Fall's rate of pay at the end of employment. Rather the payments should be calculated based on her rate of payment when the payment should have been made.

[29] Mrs Du Fall's submissions did not include evidence to support her claim she had worked and was paid in her "pay slip for the 13th December 2023 ... 1 ¼ hours was taken to complete the task". I have reviewed the documents provided as part of these proceedings and could not locate this payslip.¹⁰ While Mrs Du Fall says "many of the [payroll processing overtime] claims were for one hour", I do not consider she has provided sufficient evidence to substantiate this claim. This should have been a matter where the claims were easily supported by evidence based on the actual payments made to Mrs Du Fall for the period from December 2022 until June 2023 when she claimed and was paid overtime for processing the payroll reports.

[30] In the absence of evidence to the contrary, I accept the MISB's calculation that the amount due for Mrs Du Fall processing payroll reports is \$1,775.34 gross. In doing so, I accept that while I indicated the timeframe for this should run back for six years from June 2022¹¹, the MISB says Mrs Du Fall was only required to undertake this task on Fridays from April 2022.

[31] In relation to attendance at MISB meetings, I do not accept Mrs Du Fall's claims to be paid for travel time, arranging refreshments, or for pre and post meeting requirements. These elements of her claim were raised only in submissions for this determination and were not supported by any documentary evidence.

[32] The limited evidence of MISB meeting minutes provided suggested these meetings did not take more than one hour in 2023 and for many of the meetings where

¹⁰ Mrs Du Fall provided almost 3,000 pages of documents for the investigation process which led to the first determination. I have reviewed the indexes for that material and could not locate this payslip.

¹¹ First determination at [58].

minutes were provided, Mrs Du Fall did not attend the entire meeting. Mrs Du Fall's own affidavit evidence supported this as being the duration of recent meetings.

[33] In the absence of evidence to the contrary, I consider it appropriate to adopt the calculations the MISB proposed of one hour for MISB meetings and three-quarters of an hour for Finance Committee meetings, where these occurred outside of Mrs Du Fall's regular working hours ie from May 2022 onwards. I also accept the calculations should be based on eight meetings of the MISB per year, back to Term 4 2017, with exclusions for the meetings Mrs Du Fall acknowledged she did not attend.

[34] I make a minor correct to the MISB's calculation of the amount due to Mrs Du Fall for attendance at the MISB's meetings, as the total calculated appears by the MISB is 2c less than the total I calculated, presumably due to rounding errors. I consider the correct amount is \$3,145.11 gross.

Outcome

[35] For the reasons set out above, I order that the MISB pay Mrs Du Fall arrears for the processing of payroll of \$1,775.34 gross and for attendance at the MISB's meetings of \$3,145.11 gross.

Has the MISB correctly calculated amounts due to Mrs Du Fall for work which she was clearly required to do while on annual leave?

Submissions of the parties

[36] The MISB has calculated, based on evidence Mrs Du Fall provided of having worked when on annual leave, arrears of \$1,688.49 gross are due. The MISB's calculation used one hour for each established instance of Mrs Du Fall working, even if the emails involved may have taken "a few minutes only", and covered both work done while Mrs Du Fall was on leave in Spain and at other times. The MISB's total is based on Mrs Du Fall's hourly rate at the time of each instance of established work.

[37] Mrs Du Fall says Mr Wihapi, Principal of MIS, was aware she was working while on leave and claims this amounted to her performing the whole of her role while on leave.

[38] My understanding of Mrs Du Fall's position is that she is unable to provide evidence of the actual time she has worked while on leave. For example, Mrs Du Fall says:

The evidence available to the Respondent of the performance of my work during all occasions of my leave is at the control of the Respondent and includes all of the performance of my work during those periods which is evidenced in computer records, computer processing, email records available to be assessed by the Respondent, Bank records and paper records confirming the performance of my role throughout those periods. For want of a proper audit, that work was the full performance of my position.

[39] In summary, Mrs Du Fall says she has been denied the ability to take annual leave at all and as a consequence "all leave periods must be treated as not meeting the minimum standards required by legislation". Mrs Du Fall says she is therefore due "6 years at 5 weeks per year paid out at \$59.27 per hour on the basis of 24 hour weeks". This amounts to \$42,674.40 gross.

[40] Mrs Du Fall claims later in her submissions, however, that the six year limitation period should be extended from when she first raised her claims until May 2024, which she says was the date of determination. On this basis, she claims eight years' worth of annual holidays entitlements, based on five weeks per year and 24 hours per week, totalling 960 hours. She then calculated this amount at \$59.27 giving a total of \$56,899.20 gross.

[41] Mrs Du Fall also claims as she was working outside New Zealand "the lawfully required calculation will involve some more complex calculations for the payment of overtime". She says for the hours she has evidenced working during annual leave, she should be paid time and a half to recognise overtime.

[42] The MISB in reply says Mrs Du Fall has not established she worked as normal during her leave, rather her evidence showed she performed some tasks during leave. The MISB says Mrs Du Fall filed extensive evidence to show the instances where she worked outside of her normal hours or when on leave, and it is reasonable to infer that if there were evidence of more work being performed, then Mrs Du Fall would have provided it.

[43] The MISB also does not accept Mrs Du Fall's claim these hours should be paid at her final hourly rate, or with overtime applied, and maintains its calculations based on hourly rates at the time each instance of evidenced work is appropriate.

Discussion

[44] In the first determination I ordered the MISB to calculate and pay Mrs Du Fall for for work which she was clearly required to do while on annual leave.¹² I consider the MISB have made an appropriate calculation based on the evidence before me.

[45] While it is possible Mrs Du Fall performed additional work during periods of annual leave, I do not consider Mrs Du Fall's claims to have not benefited from her annual leave at all, such that I should order the MISB to pay her full annual leave for a period of six or eight years, or that overtime should apply, to be credible or supported by the evidence. What evidence was before me showed Mrs Du Fall performed some tasks when on annual leave, including trips to Spain. At the investigation meeting, Mrs Du Fall also talked in general terms about performing some tasks while on boating trips and other holidays.

[46] In the absence of further evidence of hours Mrs Du Fall actually worked during annual leave, I adopt the calculations of total hours identified by the MISB. While the actual amount of time Mrs Du Fall would have spent on each task is unclear, I consider the approach of the MISB applying one hour to each task to be fair in the circumstances and reflective of the Authority's equity and good conscience jurisdiction. As a result, I find Mrs Du Fall is due 43 hours of annual leave for work clearly required to be performed while she was on annual leave. I decline to apply an overtime adjustment to this amount.

[47] I do not consider, however, the MISB's approach of calculating each payment based on Mrs Du Fall's hourly rate at the time to be appropriate. While I have found the incorrect payment occurred at the time Mrs Du Fall performed the work, these arrears arise because Mrs Du Fall was paid for annual leave when she should have been paid for working. As a consequence I consider this means she should have received a greater amount of annual holiday pay under ss 24(2) and 25(2) of the Holidays Act 2003 (HA2003) at the ending of her employment. These amounts would have been paid at her final hourly pay rate. Based on her final hourly pay rate of \$59.27, the total arrears due for 43 hours of annual holiday pay is \$2,548.61 gross.

¹² First determination at [60] and [136]c.

Outcome

[48] For the reasons set out above, I order that the MISB pay Mrs Du Fall arrears for annual holiday pay of \$2,548.61 gross.

Has the MISB correctly calculated amounts due to Mrs Du Fall for three alternative holidays not provided to her for working on public holidays?

Submissions of the parties

[49] The MISB initially calculated the payment to Mrs Du Fall for three alternative holidays based on six hours per day, at an hourly rate of \$56.45, applying the calculation of payment for alternative holidays in s 60(2)(b) of the HA2003.

[50] Mrs Du Fall says she should have been awarded five days' alternative holidays. Her submissions refer to a table provided in the MISB's submissions for the first determination, which identified five public holidays which the MISB acknowledged Mrs Du Fall had worked on. Mrs Du Fall says cl 6.1.7 of the collective agreement provides she should receive alternative holidays irrespective of whether those days were an otherwise working day or not.

[51] Mrs Du Fall also referred to the possibility of two additional holidays being due to her from the period following the ending of her employment. Mrs Du Fall's calculations were based on five alternative holidays, at six hours per day and an hourly rate of \$59.27, generating a total of \$1,778.10 gross.

[52] The MISB acknowledged the hourly rate to be applied should have been \$59.27 and updated the calculation for three alternative holidays to be \$1,066.86 gross. The MISB says Mrs Du Fall's employment agreement does not provide entitlements above the statutory minimum specifically that there is "no reference to [Mrs Du Fall] being entitled to be paid for public holidays that are not otherwise her working days". The MISB cite cls 6.1.1, 6.1.3 and 6.1.5 of the collective agreement in support of its position.

Discussion

[53] I find the correct rate to apply to alternative holidays is \$59.27 per hour, for six hours per day, as now agreed between the parties.

[54] This leaves the question of how many alternative holidays should be paid for. While the first determination ordered that the MISB calculate and pay Mrs Du Fall for

three alternative holidays¹³, having reviewed the clauses of the collective agreement referred to by Mrs Du Fall and the MISB, I consider the correct number of alternative holidays to be paid for is five. This is due to cl 6.1.7 of the collective agreement, which Mrs Du Fall referred to and which provides:

An employee who is required to work on a public holiday shall be paid at the rate of time and one half of their relevant daily pay for all time worked and shall be entitled to a paid day in lieu to be taken at a subsequent mutually agreed date.

[55] While the MISB have cited other clauses which provide the HA2003 applies except where otherwise provided (cl 6.1.1), I consider cl 6.1.7 go beyond the provisions in the HA2003 to provide days in lieu or alternative holidays without this being limited to the work on public holidays which are otherwise working days. The MISB are correct that cls 6.1.3 and 6.1.5 have references to entitlements being provided where an employee “normally works on the day of the week”, but that reference is not present in cl 6.1.7.

[56] As a consequence, I accept Mrs Du Fall’s submission that she is entitled to an alternative holiday for working on the five public holidays which the MISB has accepted she worked on and which are within the limitation period. She is entitled to arrears for five alternative holidays calculated at six hours each at \$59.27 per hour. This totals \$1,778.10 gross.

[57] I have not considered Mrs Du Fall’s references to two additional holidays possibly being due to her from the period following the ending of her employment. The matter before me related to public holidays between 2017 and 2023. While later events may well be covered by in proceedings regarding the separate but related matter (file number 3381143), it is not appropriate for me to consider claims in relation to later public holidays.

Outcome

[58] For the reasons set out above, I order that the MISB pay Mrs Du Fall arrears for alternative holidays of \$1,778.10 gross.

¹³ Ibid at [61] and [136]d.

Combined amounts due to Mrs Du Fall and consideration of whether an award of interest is appropriate

[59] The combined amounts I have ordered the MISB to pay to Mrs Du Fall at paragraphs [35], [48] and [58] above is \$9,247.16 gross.

Is an award of interest under the Interest on Money Claims Act 2016 appropriate?

[60] Clause 11 of sch 2 of the Act provides that the Authority may, in any matter involving the recovery of money, order the payment of interest on amount due in accordance with sch 2 of the Interest on Money Claims Act 2016 (IoMCA).

[61] Mrs Du Fall's submissions referred to a lack of discussion of whether interest should be applied to arrears, which appears to be a reference to this not being discussed in the first determination. This then led to her submission that all arrears should be calculated based on her hourly rate when her employment ended.

[62] The MISB's reply submissions acknowledged an award of interest could have been appropriate on arrears, but did not agree to the broader use of Mrs Du Fall's final rate of pay to calculate arrears. The MISB also says an award of interest would not be appropriate as Mrs Du Fall was responsible for payroll, had advanced her claims based on being employed for 40 hours per week, which meant it could not engage with her earlier to quantify and resolve any outstanding arrears, and Mrs Du Fall had contributed significantly to the time this matter has taken to resolve.

[63] I have reviewed Mrs Du Fall's amended statement of problem and it was clear interest was claimed on arrears. I consider it appropriate to award interest in relation to the arrears for the processing of payroll and for attendance at the MISB's meetings, as these amounts should have been paid at the time. There were challenges, however, to the MISB in engaging with Mrs Du Fall on these and other calculations of arrears, due to her position that she was employed on a full-time basis. I consider, given these circumstances, the appropriate dates to award interest from are the last date on which these payments should have been made. For processing payroll, this appears to have been 6 June 2024, while the last MISB meeting Mrs Du Fall attended appears to be 13 April 2025. I order the MISB to calculate and pay Mrs Du Fall interest on these two amounts from the dates specified above until these two amounts have been paid in full.

[64] The situation in relation to the arrears of annual leave payments and alternative holidays is different. The obligation to pay these amounts did not crystallise until

employment ended, which I understand was 30 April 2025. While there may have been difficulties for the MISB in engaging with Mrs Du Fall to calculate these two arrears amounts, I consider it is still appropriate to order the MISB to calculate and pay Mrs Du Fall interest on these two arrears amounts from 30 April 2025 until these two amounts have been paid in full.

[65] I have calculated the interest due, using the civil debt calculator on the Ministry of Justice website¹⁴, as \$256.07 as at 15 September 2025.¹⁵ Interest will continue to accrue until this amount is paid in full. The MISB will need to calculate and pay additional interest, using the civil debt calculator on the Ministry of Justice website.

Costs

[66] In the first determination I reserved costs in the hope the parties would be able to settle this issue between themselves¹⁶, alongside the calculation of arrears which has now been addressed by this determination. Unfortunately, they have been unable to do so, and the MISB now seeks costs.

[67] The investigation meeting for this matter involved two parts, with four full-days in person investigation in Rotorua, followed by a day by AVL. The final day concluded at 2pm, with submissions timetabled to follow.

[68] In the first determination I indicated as Mrs Du Fall had some success, but represented herself, 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.¹⁷

[69] I further indicated, if the parties were unable to resolve costs, and an Authority determination on costs was required, then the parties could 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.¹⁸

¹⁴ <https://www.justice.govt.nz/fines/civil-debt-interest-calculator/>.

¹⁵ Comprising \$123.45 interest in relation to the arrears for processing payroll, \$60.02 in relation to arrears for attendance at MISB meetings, and \$72.60 combined for arrears of annual leave and alternative holidays.

¹⁶ First determination at [139].

¹⁷ Ibid at [140].

¹⁸ Ibid at [141] and [142].

[70] The MISB considers it is entitled to costs including an uplift. Mrs Du Fall did not agree and proposed costs should lie where they fall.

Contribution to Costs

[71] The power of the Authority to award costs is contained in cl 15 of sch 2 of the Act. The Authority has adopted a daily tariff approach as the starting point for considering costs. This is well known, and the current daily tariff is \$4,500 for the first day of hearing, and \$3,500 for subsequent hearing days.¹⁹ The parties can expect the Authority to adhere to this approach, unless there is good reason to depart from it.

[72] The principles and the approach adopted by the Authority in which an award of costs is made are settled and set out in *PBO Limited (formerly Rush Security Limited) v Da Cruz*²⁰ as confirmed in *Fagotti v Acme and Co Limited*.²¹ The principle set out in the above cases is that costs are to be modest. As to quantification, the principle is one of a reasonable contribution to costs actually and reasonably incurred. Costs are not to be used as a punishment or expression of disapproval of the unsuccessful party's conduct.

Submissions

[73] The MISB claims a contribution to costs and an uplift to reflect a Calderbank offer which it made to Mrs Du Fall on 10 May 2024. The MISB offered Mrs Du Fall \$10,000.00 in compensation under s 123(1)(c)(i) of the Act and an ex-gratia payment of \$10,000.00 to recognise "hours worked over and above your contractual hours in the past six years". The MISB says this amount was close to twice what Mrs Du Fall has been awarded as remedies.

[74] The MISB says it clearly placed Mrs Du Fall on notice as to the nature of the Calderbank offer and has then subsequently incurred inordinate costs as a result of it not being accepted, including due to "the manner in which the proceeding was pleaded and conducted (before, during and after the investigation meeting) [being] out of step of what is contemplated by the Authority's notional daily tariff".

¹⁹ For further information about the factors considered in assessing costs, see: <https://www.era.govt.nz/determinations/awarding-costs-remedies/>

²⁰ [2005] 1 ERNZ 808.

²¹ [2015] NZEmpC 135 at 114.

[75] The MISB says Mrs Du Fall's actions unreasonably and unduly inflated the cost of the proceedings as she:

... pleaded her claims in a highly convoluted and unclear manner, including initially seeking compliance orders which were not available ...

... pursued a number of clearly unviable claims at law, including in relation to alleged unfair bargaining claims dating back to 1999, and the remedies sought. This was despite the Authority directly cautioning her regarding this, including the costs implications of doing so, and recommending she seek advice, by way of its directions dated 13 February 2024. ...

... place[d] an extraordinary amount of information before the Authority – far beyond what could ordinarily be anticipated in such a case. ...

... unduly prolonged the investigation meeting as a result of not having prepared questions for witnesses in advance and having to request additional time during the hearing in order to do so. ...

... [in] final submissions, [Mrs Du Fall] continued to attempt to add fresh grievances and evidence, which required additional responses over and above ordinary closing submissions. ...

[76] The MISB says its total costs up until the time of the first determination were approximately \$149,000.00 excluding GST, after substantial discounts off ordinary commercial rates. The MISB based its claim on the daily tariff for five hearing days and sought an uplift from the daily tariff of 50% to \$27,750.00, or in the alternative an award of the daily tariff of \$18,500.00. The MISB also sought disbursements of \$5,119.56 “associated with the need for out-of-town counsel to travel to Rotorua to brief witnesses and for the first four days of the hearing.”

[77] Finally, the MISB says it is in the Authority's hands whether amounts due to Mrs Du Fall should be ordered to be paid, with costs then ordered to be paid by Mrs Du Fall to it, or whether Mrs Du Fall should be ordered to pay the balance of these amounts. The MISB acknowledged it could identify no precedent for an “offset” approach but suggested it could be pragmatic to do so.

[78] Mrs Du Fall says costs should lie where they fall as her primary claims, related to her salary and fulltime employment status, were a dispute. She also says it was reasonable she did not accept the Calderbank offer as it was “of uncertain and unqualified terms”. She says the Calderbank was not in the correct form to be able to be agreed and executed, and was on a ‘no liability’ basis, which is not resolved as evidenced by the proceedings currently before the Court.

[79] Mrs Du Fall says the duration of the investigation meeting was four full days, then half a day by AVL, rather than the five days claimed by the MISB.

[80] Mrs Du Fall points to a number of actions of the MISB in relation to the dispute which she says made her claim reasonable, including the MISB referring her to the Authority in relation to the dispute and refusing to mediate, engage in direct discussion or to “mutually progress” the matter in a way which would have had an impact on costs.

[81] Mrs Du Fall also says while she was “not successful in every respect, [she] was successful overall”, receiving arrears and remedies, so costs should follow the event. She says the Calderbank offer is not sufficient to override the degree of success that she has had.

[82] Mrs Du Fall says the Authority could continue to reserve costs, as she had challenged the first determination to the Court, as well as the reinstatement determination and this would also allow her unjustified dismissal claim to be considered.

[83] The MISB submitted in reply that Mrs Du Fall’s claims were not brought reasonably, with her wage arrears claims based on her being employed on a fulltime basis exceeding \$300,000.00, despite what the MISB considers is Mrs Du Fall’s clear understanding she was employed for 24 hours per week. The MISB says many of Mrs Du Fall’s claims “were improperly pleaded, or had no realistic prospect of success – and the Authority warned the applicant of this”. The MISB says Mrs Du Fall was not successful overall, with the vast majority of her claims being unsuccessful, the established disadvantage grievance being low-level and remedies available less than the Calderbank offer and “pal[ing] in comparison to the hundreds of thousands of dollars sought by way of the proceedings”.

Analysis

[84] If Mrs Du Fall had been represented, then I would have considered the appropriate starting point for an assessment of costs was that she was entitled to recover a reasonable contribution to the legal costs she had incurred, based on four full days and a further half of a day for the AVL hearing. My records show each of the in-person investigation meeting days in Rotorua were full days and, while the final day concluded at 2pm, there was only a limited period of AVL hearing after the lunch break. This provides a starting point of \$16,750.00.

[85] The Employment Court in *Coomer v JA McCallum and Son Limited* said any success for an applicant is sufficient success for the purposes of costs²², including observing “it was appropriate to consider costs in this case by standing back and looking at things “in the round” and, in doing so, to conclude there had been mixed success”.²³ The Court’s approach in *Coomer* was “to adopt the tariff in the Authority, but to reduce it to reflect the measure of success McCallum & Son had”.²⁴

[86] While I accept Mrs Du Fall was not successful on all her claims, she was successful in relation to an element of her unjustified disadvantage claims and I have found she was due a range of arrears. Her success, albeit limited, could not have been achieved without filing a case in the Authority.

[87] However, Mrs Du Fall was not represented and has not indicated any representative costs or costs of professional advice have been incurred. This was the basis on which I indicated it may be appropriate for costs to lie where they fall.²⁵

[88] The question which follows is has the MISB established reasons to displace this position. The MISB argues it should be eligible for an award of costs based on a Calderbank offer it made on 10 May 2024.

[89] The rejection of a Calderbank offer is a ground for an uplift in costs or an award of costs against an otherwise successful party, where they have achieved less than was provided for under the Calderbank offer.²⁶ The Court of Appeal have commented that a “steely” approach should be taken when a party has rejected what turned out to be a reasonable offer to settle.²⁷

[90] I am satisfied that the Calderbank offer made by the MISB was made sufficiently prior to the Authority’s rescheduled investigation meeting²⁸, after evidence including witness statements and supporting documents had been lodged, and had sufficiently clear and certain terms for it to be capable of acceptance. The quantum offered by the MISB was clear and I consider the reference to a denial of liability on the part of the MISB, with Mrs Du Fall then needing to withdraw all claims with no

²² *Coomer v JA McCallum and Son Limited* [2017] NZEmpC 156 at [42].

²³ *Ibid* at [43].

²⁴ *Ibid* at [45].

²⁵ First determination at [140].

²⁶ *Fifita v Dunedin Casinos Ltd* [2013] NZEmpC 171 at [34].

²⁷ *Bluestar Print Group (NZ) Ltd v Mitchell* [2010] NZCA 385 at [20].

²⁸ An investigation meeting scheduled for May 2024 was vacated in April 2024 due to health issues of one witness.

issue as to costs, was clear and reasonable. I consider the 14-day period that the Calderbank offer was open was a reasonable timeframe for Mrs Du Fall to consider it.

[91] In terms of the outcome, the Calderbank offer of \$20,000.00, in addition to the \$2,500.00 that the MISB had already paid to Mrs Du Fall needs to be compared to the amounts I ordered the MISB pay Mrs Du Fall in the first determination, which totalled \$3,310.41 gross²⁹, and the combined amounts I have ordered the MISB to pay to Mrs Du Fall at paragraphs [35], [48] and [58] above ie \$9,247.16 gross. This provides a total award to Mrs Du Fall (excluding interest) of \$12,557.57 gross. I am satisfied that Mrs Du Fall would have significantly improved the financial aspects of her outcome had she accepted the Calderbank offer.

[92] I also need to consider whether Mrs Du Fall was acting reasonably in seeking vindication, which would not have been provided had she accepted the Calderbank offer, given her focus on obtaining an acknowledgement that she had been a full-time worker. This was the primary element of her claims and was not successful. At a case management conference in February 2024, I recommended Mrs Du Fall seek advice on a number of aspects of her claims, primarily in relation to the calculation of her pay based on the MISB's contention she was not a full-time worker. I also drew Mrs Du Fall's attention to the potential costs implications if she was not successful in relation to those claims and recommended she seek advice on that point.

[93] I consider this to be different to other cases where a party seeking vindication has been taken into account. The Court, in *Lancom Technology Ltd v Forman* said:³⁰

In summary, while the Court of Appeal in *Bluestar* warned against reliance on the element of vindication where the offer of money reasonably contained an element of vindication, the courts also have recognised that not all monetary offers deal adequately with this issue.

[94] The Court then went on to consider on the facts how vindication could be taken into account, balanced against other factors, in determining how costs should be approached. I consider that is what is required here, but the circumstances differ as Mrs Du Fall's claim to be a full-time worker both had aspects of vindication but also a significant financial element associated with it.

[95] On balance, I consider Mrs Du Fall's rejection of the MISB's Calderbank offer falls into the relatively rare situation which warrants an award of costs against an

²⁹ First determination at [136]a and d.

³⁰ *Lancom Technology Ltd v Forman* [2018] NZEmpC 30 at [47].

otherwise successful party. The question which then follows is what award is appropriate. While I accept there were some aspects where Mrs Du Fall's conduct of the proceedings may have extended the investigation meeting or extent of preparation required by the MISB, as claimed at paragraph [75] above, I am not satisfied this warrants an increase above the daily tariff to the extent the MISB proposed. I consider a modest increase is warranted, reflecting the overall principle that costs should be modest. On the basis of a starting point of \$16,750.00, I consider an appropriate increase to be to \$20,000.00 ie an increase of \$3,250.00 or approximately 19.4 per cent.

[96] I reiterate that I do not accept Mrs Du Fall's submission that costs should continue to be reserved, given she has challenged the first determination in the Court. Mrs Du Fall's challenge does not operate as a stay in relation to consideration of costs in the Authority, which is what reserving the matter further would amount to. As discussed at paragraph [17] above, I have declined in this matter to defer determining costs until the Court has determined any challenges to the substantive determination.

[97] In relation to the MISB's claimed disbursements, it is a matter for a party whom it chooses to represent it (or indeed whether or not to have representation), but it is not usual for the Authority to grant costs in request of a party's representative's travel and accommodation costs. I decline to award reimbursement of the disbursements claimed by the MISB.

[98] I also decline to approach the orders for arrears and costs on an offsetting basis, as the MISB invited me to do. I am not aware of any precedent for doing so and do not consider sufficient reasons have been presented to take this approach.

Outcome regarding costs

[99] For the reasons set out above, I order that Mrs Du Fall pay the MISB \$20,000.00 as a contribution to costs, taking into account the Calderbank offer which the MISB made to Mrs Du Fall.

[100] As Mrs Du Fall was partially successful in her claims, she is entitled to reimbursement from the MISB of the filing fee of \$71.55.

Orders

[101] For the above reasons I order the Mokoia Intermediate School Board (the MISB) to pay Janet Du Fall within 28 days of the date of this determination arrears under s 131 of the Employment Relations Act 2000 totalling \$9,247.16 gross, comprising:

- a. arrears for the processing of payroll of \$1,775.34 gross and for attendance at the MISB's meetings of \$3,145.11 gross;
- b. arrears for annual holiday pay of \$2,548.61 gross; and
- c. arrears for alternative holidays of \$1,778.10 gross.

[102] In addition, I order the MISB to pay Mrs Du Fall interest on the amount of \$9,247.16 gross in accordance with the Interest on Money Claims Act 2016. I have calculated the interest due as interest of \$256.07 as at 15 September 2025, using the dates specified at paragraphs [63] and [64] above. The MISB will need to calculate and pay Mrs Du Fall further interest until the amount of \$9,247.16 gross has been paid in full, to be calculated using the civil debt calculator on the Ministry of Justice website.³¹

[103] In relation to costs, I order Mrs Du Fall to pay the MISB \$20,000.00 as a contribution to the costs it has incurred.

[104] Finally, I order the MISB to reimburse Mrs Du Fall the filing fee of \$71.55.

Shane Kinley
Member of the Employment Relations Authority

³¹ <https://www.justice.govt.nz/fines/civil-debt-interest-calculator/>.