IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2025] NZERA 754
3300199

	BETWEEN	STEPHEN MCCORMACK Applicant
	AND	RESERVE BANK OF NEW ZEALAND Respondent

Member of Authority:	Andrew Gane
Representatives:	Michael O'Brien and Joseph Plunket, counsel for the Applicant Peter Chemis and Nikita Raman, counsel for the Respondent
Investigation Meeting:	4, 5 and 21 August 2025 at Auckland and by AVL
Submissions received:	14 and 20 August 2025 from the Applicant 18 August 2025 from the Respondent
Determination:	21 November 2025

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] On 17 January 2022 the Reserve Bank of New Zealand (RBNZ) employed Stephen McCormack as a senior analyst. On 6 September 2024, Mr McCormack's employment ended by way of dismissal.

[2] On 11 December 2024 Mr McCormack lodged a statement of problem with the Authority in which Mr McCormack claimed that he was unjustifiably disadvantaged by RBNZ, that RBNZ breached the duty of good faith and breached his employment

agreement. He also claimed he was unjustifiably dismissed and applied for interim and permanent reinstatement.[1]

[3] In response to Mr McCormack's claims RBNZ states that it has acted fairly and reasonably, and in good faith throughout Mr McCormack's employment. It said that Mr McCormack was justifiably dismissed following his completion of a performance management process where he was assessed as failing to perform to the required level of a senior analyst. RBNZ also opposed Mr McCormack's reinstatement applications.

Interim reinstatement application

[4] In a determination issued on 14 April 2025, the Authority declined Mr McCormack's application for interim reinstatement.[2] The background narration to this employment relationship problem and reasons for declining his application was set out in that determination.

The Authority's Investigation

[5] The matter was set down for a substantive investigation meeting for Mr McCormack's claims for unjustified disadvantage, breaches of his employment agreement and good faith, and unjustified dismissal on 4 August 2025.

[6] This determination resolves those claims. During the course of investigating this employment relationship problem the Authority heard evidence from Mr McCormack. In support of RBNZ the Authority heard evidence from Jessica Rowe, director of prudential policy. All witnesses answered questions under affirmation. At the close of hearing evidence from the parties on 5 August 2025 the investigation meeting was adjourned until 21 August 2025 where the parties' representatives made oral closing submissions.

[7] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and for specified orders to be made. It has not recorded all evidence and submissions received. In determining this matter, I have carefully considered all the material before me, including all the evidence provided by the parties and their submissions.

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[1] Employment Relations Act 2000, s 127(4).
[2] *Stepen McCormack v Reserve Bank of New Zealand* [2025] NZERA 210.

The issues

[8] The issues for investigation and determination as set out in the amended statement of problem were:

(a) Whether Mr McCormack raised a personal grievance against RBNZ for unjustified disadvantage in accordance with s 114(2) of the Act?

(b) Was Mr McCormack unjustifiably disadvantaged pursuant to s 103(b) of the Act in regard to;

(i) The implementation of an 'informal action plan' (IAP) on 10 October 2023, as well as the upholding of that 'informal action plan' (IAP 2 Disadvantage);

(ii) RBNZ's tabling and upholding of a disciplinary allegation regarding an email Mr McCormack sent on 7 December 2024 (Disciplinary Disadvantage);

(iii) RBNZ's failure to provide Mr McCormack a pay increase based on the unjustified disciplinary action against him (Pay Disadvantage); and

(iv) RBNZ's ongoing unfair performance management of Mr McCormack and threats to terminate his employment (PM Disadvantage)?

(c) Does Mr McCormack have a personal grievance for alleged retaliation following the making of a protected disclosure under the Protected Disclosures (Protection of Whistleblowers) Act 2022 (PDA 2022) pursuant to s 103(1)(k) of the Act.

(d) Did RBNZ breach Mr McCormack's individual employment agreement?

(e) Should penalties be imposed on RBNZ for breaches of Mr McCormack's employment agreement?

(f) Did RBNZ breach good faith obligations owed to Mr McCormack?.

(g) Should penalties be imposed on RBNZ for breaches of good faith?

(h) Does Mr McCormack have a personal grievance for unjustified dismissal pursuant to s 103(1)(a) and unlawful retaliation pursuant to s 103(1)(k) ERA2000 in relation to the dismissal?

(i) If RBNZ's actions were not justified, what remedies should be awarded to Mr McCormack, considering:

(i) Reinstatement to his former position under s 123(1)(a) of the Act;

(ii) Reimbursement of lost wages, including employer KiwiSaver contributions and holiday pay, pursuant to s 123(1)(b) of the Act (subject to evidence of reasonable endeavours to mitigate this loss)

(iii) Compensation under s 123(1)(c)(i) of the Act; and

(iv) Any other remedies the Authority deems reasonable?

(j) If any remedies are awarded, should they be reduced (under s 124 of the Act) for blameworthy conduct by Mr McCormack that contributed to the situation giving rise to his grievance?

(k) Should Mr McCormack be awarded special damages:

(i) for legal costs incurred by Mr McCormack in respect of representation regarding the IAP process and the disciplinary disadvantage; and

(ii) for legal costs incurred by Mr McCormack in respect of non-litigation related matters?

(l) Should any declarations be made?

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

Background

[9] On 17 January 2022 Mr McCormack was employed by RBNZ as a senior analyst in the financial system policy and analysis department (FSPA department). Mr McCormack was employed pursuant to an individual employment agreement.

[10] Mr McCormack, in his role as a senior analyst, was responsible for undertaking and leading analysis, research, and project work to support the development and refinement of policy, regulation and legislation.

[11] Mr McCormack reported to David Hargreaves from 17 January 2022 to 1 July 2024. Mr Hargreaves was the manager of policy projects, FSPA department/prudential policy department. From I July 2024 Annette Crequer took over Mr Hargreave's role.

Informal Action Plan 1 (IAP 1) (April 2023 – June 2023)

[12] By April 2023, RBNZ had concerns about Mr McCormack's performance. RBNZ's position is that on 11 April 2023 Mr Hargreaves discussed the matter with his manager Jessica Rowe, and decided to initiate an informal action plan (IAP 1) for Mr McCormack which was focussed on the quality and quantity of his work outputs. IAP 1 identified two performance objectives; to undertake an analytical process that focuses on the right policy questions at a sufficient level of detail and without trying to do legal drafting, and to work collaboratively with colleagues. Mr McCormack disputed whether he was ever placed on an IAP and this is discussed below.

[13] The plan provided for regular weekly meetings and a reassessment upon completion. Mr McCormack made sufficient progress and IAP 1 concluded on 6 June 2023.

[14] During IAP 1 RBNZ also arranged for Mr McCormack to attend a Policy Quality Framework Course run by the Department of the Prime Minister and Cabinet to assist him with the foundational policy skills expected of policy practitioners.

[15] On 20 July 2023 Mr McCormack emailed RBNZ working group, including Mr Hargreaves, about the concerns he had with RBNZ's interpretation of the Depositors Compensation Scheme (DCS).

[16] In August and September 2023 Mr McCormack claimed to be suffering from a medical condition which impaired his performance.

Informal Action Plan 2 (IAP2) (October 2023 – December 2023)

[17] In October 2023, RBNZ commenced a second informal action plan (IAP 2). Ms Rowe's director requested Ms Rowe step in more to support Mr Hargreaves in managing the process. The parties exchanged emails about IAP and there were also a number of meetings during the period IAP 2 was in place.

[18] On 9 October 2023 Mr McCormack emailed Mr Hargreaves raising further concerns about RBNZ's interpretation and operation of the DCS.

[19] On 10 October 2023 RBNZ informed Mr McCormack that it was commencing another informal plan to address ongoing performance concerns (IAP 2). Mr Hargreaves and Mr McCormack met and exchanged emails about IAP 2.

[20] IAP 2 identified the same two objectives as IAP 1 and a third new objective; "Delivering work on time and to the quality expected of a senior analyst". Mr McCormack was required to provide detailed drafts which required minimal additions within agreed timelines.

[21] During IAP 2 Ms Rowe and Mr Hargreaves met with Mr McCormack on a regular basis to review his performance against the IAP 2's objectives.

Disciplinary matter

[22] On 7 December 2023 Mr McCormack sent an email to Mr Hargreaves and Ms Rowe raising concerns with the DCS.

[23] On 13 December 2023 RBNZ commenced a disciplinary process in relation to Mr McCormack's 7 December 2023 email. RBNZ considered the email contained inappropriate language in breach of the code of conduct and proposed issuing him with a written warning. On 20 December 2023 Mr McCormack accepted that outcome. On 17 January 2024 the process concluded with Mr McCormack being issued with a first written warning when he returned from leave.

[24] During this period Mr Hargreaves and Ms Rowe became concerned with Mr McCormack's behaviour. An assessment was then undertaken by RBNZ as to whether Mr McCormack was an insider threat to RBNZ. The insider threat pathway (ITP) is a process under the New Zealand Governments protective security requirements which provides guidance on how to manage security governance, including personal. Although no specific security concerns were identified, Mr McCormack was placed on an insider threat pathway and monitored by RBNZ until at least 4 July 2024.

[25] On 18 December 2023 Mr McCormack requested assistance from RBNZ's General Counsel (General Counsel) with making a protected disclosure.[3] Mr McCormack was referred to the director of risk & compliance, and met with the director

[3] Protected Disclosures (Protection of Whistleblowers) Act 2022.

on several occasions between December 2023 and February 2024 to discuss his concerns. The director had no further involvement.

[26] On 13 January 2024 Mr McCormack made a protected disclosure to the Chair of the Board of RBNZ, Professor Neil Quigley. Professor Quigley advised he would let Mr McCormack know about the approach he would take to the protected disclosure by 19 January 2024.

[27] On 19 January 2024 Ms Rowe met with Mr McCormack and advised him that she did not consider he was meeting the standard of performance for a senior analyst in terms of the quality and delivery of his work.

First performance improvement plan (PIP 1) (January – April 2024)

[28] On 31 January 2024 RBNZ proposed putting a formal performance improvement plan (PIP) in place for Mr McCormack. Ms Rowe wrote to Mr McCormack setting out her concerns about his performance and proposing the PIPs objectives.

[29] On 8 February 2024 Mr McCormack raised a personal grievance in relation to IAP 2 by lodging a statement of problem with the Authority. A mediation date was set for 22 March 2024. Mr McCormack cancelled this mediation and on 11 April 2024 advised RBNZ that he had withdrawn his claim in the Authority. Mr McCormack then lodged a second statement of problem the same day in regard to the alleged retaliation to the protected disclosure.

[30] RBNZ met with Mr McCormack on 9 February 2024 to discuss the proposed PIP. PIP 1 formally commenced on 13 February 2024.

[31] On 13 March 2024 RBNZ provided Mr McCormack with specific feedback about his performance and proposed a first written warning. It also invited Mr McCormack to a formal review meeting set for 15 March 2024.

[32] On 15 March 2024, after reviewing Mr McCormack's feedback, RBNZ issued him with a first written warning stating that he was not meeting the performance expectations of a senior analyst. He was advised that the PIP would be extended into a second review period.

[33] On 6 April 2024 Professor Quigley emailed Mr McCormack advising that RBNZ did not consider the disclosures he made on 13 January 2024 were protected disclosures

as defined by the PDA 2022.[4] RBNZ later accepted that Mr McCormack's 13 January 2024 disclosures were protected disclosures.

[34] On 11 April 2024 Mr McCormack filed a statement of problem with the Authority regarding IAP 2 and RBNZ's subsequent PIP process. Mr McCormack considered that RBNZ's was retaliating against him for making a protected disclosure.

PIP 2 (April 2024 - May 2024)

[35] On 17 April 2024 Mr Hargreaves directed Mr McCormack to spend more time working from RBNZ's Auckland offices. At the time Mr McCormack was largely working from home.

[36] Mr McCormack was advised PIP 2 would commence on 18 April 2024 and end on 17 May 2024. It continued the objectives from PIP 1 and work on identifying performance gaps, strategies to close the gaps, deliverables, and timeframes. It provided for regular meetings with Ms Rowe, Mr Hargreaves, and a human resources advisor.

[37] On 23 May 2024 Mr McCormack attended a formal review meeting and later gave feedback.

[38] On 28 May 2024 RBNZ confirmed its decision to give Mr McCormack a second and final written warning in relation to his performance and advised he was not meeting the performance expectations of a senior analyst. RBNZ stated he was also advised that a finding of unsatisfactory performance following a third formal review period could result in dismissal.

PIP 3 (May 2024- August 2024)

[39] Mr McCormack was placed on a third PIP (PIP 3) with a provisional end date of 3 July 2024. This was extended to 26 July 2024.

[40] On 15 July 2024 Mr McCormack and RBNZ attended mediation.

[41] On 25 July 2024 RBNZ provided Mr McCormack its opinion of the third review period. Mr McCormack was invited to a meeting on 30 July 2024 to discuss his performance during the PIP 3. RBNZ stated it advised Mr McCormack that after the

[4] Protected Disclosures (Protection of Whistleblowers) Act 2022, ss 9 and 10.

meeting it would consider what the appropriate outcome of the PIP should be. Mr McCormack did not attend the 30 July meeting.

[42] On 9 August 2024 RBNZ wrote to Mr McCormack regarding his annual remuneration review and advised him that as he was subject to a performance management process there would be no increase to his pay.

Dismissal

[43] On 2 September 2024 RBNZ wrote to Mr McCormack with its preliminary decision that after being put on three PIPs he had not met the performance expectations of a senior analyst and had failed to appropriately engage with the PIP process. RBNZ advised him it was proposing to terminate his employment on notice.

[44] On 11 September 2024 the parties met with their respective legal representatives present, for Mr McCormack to provide his feedback on RBNZ's preliminary decision. During the meeting General Counsel stated that Mr McCormack had made a protected disclosure to the Minister of Finance.

[45] On 12 September 2024 Mr McCormack's legal representative sent a letter to RBNZ referring to an earlier request made on 29 July 2024 for all relevant information under s 4(1A) of the Act and asserted that RBNZ had failed to comply with that request.

[46] On 26 September 2024, RBNZ wrote to Mr McCormack to follow up on aspects of the 11 September 2024 meeting, and to provide a further opportunity for Mr McCormack to respond to its preliminary decision.

[47] Between 1 October and 7 November 2024 the parties exchanged correspondence.

[48] On 11 November 2024 Ms Rowe met with Mr McCormack, with their legal representatives present. Mr McCormack argued that he was meeting the performance requirements of a senior analyst and that RBNZ was retaliating against him for making a protected disclosure. Mr McCormack stated the preliminary decision to terminate was predetermined and fundamentally flawed. Mr McCormack requested that Ms Rowe review two recent pieces of work, which was agreed. On 20 November 2024, RBNZ wrote to Mr McCormack setting out its views that the written work did not meet the performance standards expected of a senior analyst. Mr McCormack responded on 26 November 2024 largely disagreeing with RBNZ's views.

[49] On 6 December 2024, RBNZ met with Mr McCormack to inform him of its final decision to terminate his employment on notice on the grounds of his failure to meet the required standards expected of a senior analyst. Ms Rowe wrote to Mr McCormack following the meeting confirming his termination setting out the performance concerns and the matters that had been taken into consideration, including alternatives to dismissal. Ms Rowe determined that termination was on notice, to be paid in lieu.

[50] On 10 December 2024 Mr McCormack raised personal grievances pursuant to ss 103(1)(a) and 103(1)(k) of the Act. On 11 December 2024 Mr McCormack lodged a second amended statement of problem for unjustified dismissal and lodged an application for interim and permanent reinstatement.

[51] On 10 January 2025 RBNZ lodged a second amended statement in reply.

[52] On 30 July 2025 Mr McCormack lodged a third amended statement of problem which combined his previous applications.

Was Mr McCormack unjustifiably disadvantaged under s 103(b) of the Employment Relations Act 2000 (the Act) in regard to:

Unjustified action causing disadvantage

[53] An unjustified action causing disadvantage personal grievance is set out in section 103(1)(b) of the Act. This provides that an employee may have a personal grievance where their employment or any condition of employment is or was affected to their disadvantage by some unjustified action by their employer:

> 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 as at the time the dismissal or action occurred.

[54] Whether the conditions of employment are affected to the employee's disadvantage by some unjustifiable action involves focussing on what has occurred and then assessing the impact on the employee's employment.[5]

[55] Based on section 103(1)(b) of the Act, the questions to be addressed in respect of an unjustified action causing disadvantage personal grievance are:

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[5] *Wiles v University of Auckland* [2024] NZEmpC 123 at [98].

(a) What were the alleged actions carried out by RBNZ in respect of Mr McCormack?

(b) Were the actions of RBNZ unjustified?

(c) If so, did these actions cause any disadvantage to Mr McCormack's employment or a condition of employment?

Personal grievances raised within 90 days

[56] Section 114(1) of the Act sets out that any employee wishing to raise a personal grievance must do so within 90 days of when the action giving rise to the grievance occurred or when it came to the notice of the employee.

[57] Section 114(2) of the Act sets out what constitutes the raising of a personal grievance:

> For the purposes of subsection (1), a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.

[58] The two parts are:

(a) Whatever communication being relied on as raising the personal grievance must be made within 90 days of the action by RBNZ giving rise to the grievance occurring or coming to Mr McCormack's notice.

(b) The communication must make RBNZ aware that the employee is alleging a personal grievance. That is, did the communications sufficiently outline Mr McCormack's claims, in line with the applicable principles, so that RBNZ was aware that Mr McCormack was alleging a personal grievance?[6]

(i) *The implementation of an 'informal action plan' on 10 October 2023, as well as the upholding of that 'informal action plan' (IAP 2 Disadvantage)*

[59] Mr McCormack's claims the imposition of IAP 2 on 10 October 2023 unjustifiably disadvantaged him.

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[6] *Creedy v Commissioner of Police* [2006] ERNZ 517 (NZEmpC) at [36].

IAP 1 (April 2023 – June 2023)

[60] Ms Rowe's evidence was she became aware of concerns around Mr McCormack's performance in approximately February 2023.

[61] RBNZ submitted that in April 2023 Mr Hargreaves discussed his concerns regarding Mr McCormack's performance as a senior analyst with Ms Rowe, and decided to implement an IAP for Mr McCormack. IAP 1 was focussed on improving the quality and quantity of Mr McCormack's work outputs. Mr McCormack made sufficient progress and IAP 1 concluded on 6 June 2023.

[62] RBNZ submitted that an IAP is about assisting and supporting employees with their performance. It is not a performance improvement plan, or disciplinary in nature.

[63] RBNZ submitted that on 12 April 2023 Mr Hargreaves sent Mr McCormack an email which set out the key objectives of IAP 1 and included suggestions to address the gaps identified in Mr McCormack's performance. IAP 1 identified the following performance objectives:

(a) Undertake an analytical process that focuses on the right policy questions at a sufficient level of detail and without trying to do legal drafting.

(b) Work collaboratively with colleagues.

[64] RBNZ stated Mr Hargreaves then met with Mr McCormack on 14 and 19 April, and 3, 10 and 17 May 2023. In these meetings Mr Hargreaves explained the nature and process of IAP 1 and that he would like to meet with Mr McCormack regularly to help improve his performance. Throughout this process Mr McCormack sent his work to Mr Hargreaves for feedback. On 28 April, 17 May, and 6 June 2023 Mr Hargreaves provided significant written feedback to Mr McCormack about his work.

[65] As Mr Hargreave's manager, Ms Rowe supported him in this process during their regular catch ups and reviewed the supporting material on occasion, as well as discussing options for training and development of Mr McCormack.

[66] Mr McCormack has questioned the authenticity of IAP 1 and disputes that he was ever placed on IPA 1. He states that prior to IAP 2 being implemented there was no previous 'Informal Action Plan'. He refers to IAP 1 as the "phantom" IAP. He stated he

was never advised he had been placed on IPA 1 by Mr Hargreaves at the meeting on 14 April 2023 or any subsequent meetings.

[67] RBNZ claimed Mr McCormack had been advised of IAP 1 during meetings with Mr Hargreaves and that Mr McCormack had been updated of the status of the IAP 1 in a meeting on 19 April 2023. Mr Hargreaves sent an email to Mr McCormack on 28 April 2023 attaching a file that contained his performance plan including notes from the 19 April 2023 meeting with Mr McCormack and recorded the following;

> "As discussed, this is an informal plan aiming to address areas where we need to see some development/better deliverables (as below). The process is for us to meet more regularly (generally weekly) for a month (April 14, 19, May 3, May 10, May 17) and then reassess

[68] Mr McCormack submitted IAP 1 was not called an IAP. It was referred to as being development materials". By contrast, IAP 2 was titled "Informal Action Plan".

[69] Mr McCormack stated he believed the development materials were a regular part of the 'six monthly reviews and objectives', alongside the self-assessments as outlined in Mr Hargreaves's 22 March 2023 email. Mr McCormack stated that the first time that he became aware that RBNZ considered this to be an IAP was when Mr Hargreaves emailed him regarding the commencement of IAP 2.

[70] Although Mr McCormack stated he was not aware he had previously been on an IAP, IAP 1 documents set out the objectives, deliverables, weekly meetings, and a review assessment of Mr McCormack's performance at the end. Further, Mr McCormack participated in the annual review cycle on 30 June 2023, after the April 2023 plan was implemented, which supports RBNZ's position that they were two distinct processes.

[71] Mr Hargreaves did not give evidence on the implementation of IAP 1 or his discussions with Mr McCormack about it. However, noting the email Mr Hargreaves sent to Mr McCormack on 28 April 2023 attaching IAP 1 and other documented evidence, I prefer the evidence of Ms Rowe, who was assisting Mr Hargreaves, that Mr McCormack was aware, or should have been aware that he was on an IAP during this period.

[72] Although the IAP 1 document was not labelled an IAP, the plan set out objectives, deliverables, weekly meetings, and a review assessment of Mr McCormack's

performance at the end. The documentation mentioned above also refers to the informal action plan. Also RBNZ was providing significant support to Mr McCormack regarding his performance during this period.

[73] Ms Rowe stated that after the completion of IAP 1, which concluded in June 2023, there was some improvement in Mr McCormack's performance.

IAP 2 (October 2023- January 2024)

[74] RBNZ submitted that during mid-August 2023 it had further concerns regarding Mr McCormack's performance. This concerned Mr McCormack's involvement in a meeting with IRD where he was allegedly not prepared. Mr Hargreaves spoke to Mr McCormack about these concerns at the time.

[75] RBNZ submitted Mr Hargreaves also spoke to Ms Rowe and her director about these concerns. As a result, they agreed that a second IAP was necessary. In order to help Mr McCormack improve his performance. Ms Rowe's director then requested Ms Rowe step in more to support Mr Hargreaves in managing the process.

[76] RBNZ submitted Mr Hargreaves met with Mr McCormack on 10 October 2023 to discuss implementation of IAP 2. Mr Hargreaves emailed Mr McCormack later that day setting out the rationale for IAP 2 and attached the formal IAP 2 documentation, setting out the concerns and the objectives and necessary deliverables.

[77] On 12 October 2023, in response to IAP 2, Mr McCormack emailed Mr Hargreaves on two occasions noting that the concerns about his performance in August and September 2023, which resulted in IAP 2, included a period where he was unwell. Those health issues had been previously raised by Mr McCormack directly with Mr Hargreaves, via a phone call on 9 August 2023.

[78] Mr Mc Cormack submitted the imposition of IAP 2 on 10 October 2023, the day after his raising serious concerns regarding the DCS, was a retaliatory action, and amounted to an unjustified action by RBNZ that disadvantaged him. Mr McCormack also claimed that RBNZ's implementation of IAP 2 was unfair and unreasonable, because there had not been an actual IAP process in April 2023 through to June 2023. That meant there was no proper foundation for IAP 2.

[79] RBNZ accepts that it knew Mr McCormack had been unwell for parts of August 2024, however, RBNZ stated it did not consider that Mr McCormack's health issues mitigated the need for an IAP. While Mr McCormack provided feedback on the proposed plan and about the impact of his illness, RBNZ concluded that he had been underperforming for some time which justified proceeding with the plan. Ms Rowe and Mr Hargreaves believed Mr McCormack's required additional support to assist him in improving his performance.

[80] RBNZ submitted the IAP 2 process involved regular meetings between Mr McCormack, his manager Mr Hargreaves and Ms Rowe, who had been asked to step into support the process. Ms Rowe attended every meeting during IAP 2.

[81] Ms Rowe's evidence and the meeting notes disclosed that during these meetings they discussed how Mr McCormack was tracking against the objectives and provided detailed and comprehensive feedback, and support and strategies to address the ongoing concerns they had with his performance. Ms Rowe described Mr McCormack during these meeting as being generally professional, focussed on the details of his work, but not really engaging with the feedback that his performance did not meet the standard required of a senior analyst. Subsequently, IAP 2 was extended into January 2024 to give Mr McCormack more time to improve his performance. Between 17 October 2023 and 19 January 2024, there were six meetings.

[82] At the final IAP 2 meeting on 19 January 2024 Ms Rowe advised Mr McCormack that he had not met the standard expected of a senior analyst in terms of the quality and delivery of his work. In this meeting Ms Rowe provided Mr McCormack with specific feedback on each objective of the IAP, While Mr McCormack acknowledged some of his work was "undercooked", he did not otherwise explicitly acknowledge the performance concerns.

[83] Mr McCormack's view was that IAP 2 was the initiation of the disciplinary action against him and eventually the termination of his employment.

[84] RBNZ states it was already considering supporting Mr McCormack with his performance as early as February 2023.

[85] RBNZ says that Mr McCormack did not raise this personal grievance regarding the implementation of the IAP 2 within the 90-day statutory timeframe and it does not consent to his raising the personal grievance out of time.

[86] In Mr McCormack's earlier statement of problem dated 8 February 2024 he stated that "By 8 Jan 2024 the matter appeared to be closed as the Applicant had opted not to submit a personal grievance within the 90-day period."

[87] RBNZ submitted that in any event, its processes were fair and reasonable, and warranted, and were carried out in a procedurally fair manner.

Conclusion

[88] After reviewing the ongoing correspondence between the parties through October to December 2023 I find Mr McCormack's personal grievance was raised in time. The correspondence refers to discussions between Mr McCormack and Mr Hargreaves regarding Mr McCormack's concerns about IAP 2, citing reasons as to why he felt the plan was unfair; because of his unwellness and a potential for the plan to be a retaliatory action.

[89] The communications between the parties met the requirements of the Act in providing sufficient information to address the grievance and alerted RBNZ that Mr McCormack had a grievance he wanted to address.[7]

[90] However, I also find that RBNZ reasonably implemented IAP 2 after Mr Hargreaves and Ms Rowe had genuine concerns about Mr McCormack's performance. Mr McCormack argued that IAP 2 was based on an assessment during a period when he alleged he was impaired due to a tooth ailment. I accept RBNZ's evidence was that Mr McCormack had been underperforming for a significant period, prior to being impaired, which justified proceeding with the plan.

[91] I do not find that IAP 2 was a retaliatory action or a punishment for Mr McCormack raising issues regarding the DCS. An IAP is by definition not a disciplinary process and the focus was to support him in lifting his performance

[92] I find Mr McCormack was not unjustifiably disadvantaged by RBNZ implementing IAP 2.

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[7] *Creedy v Commissioner of Police* [2006] ERNZ 517 (NZEmpC) at [36].

(ii) *RBNZ's tabling and upholding of a disciplinary allegation regarding an email Mr McCormack sent on 7 December 2024 (Disciplinary Disadvantage)*

[93] Mr McCormack claims he was unjustifiably disadvantaged by being issued with a written warning after a disciplinary investigation.

[94] As a result of an email Mr McCormack sent on 7 December 2023 to Mr Hargreaves and Ms Rowe raising concerns with the DCS, RBNZ commenced a disciplinary process on 13 December 2023.

[95] On 18 December 2023 Mr McCormack attended a disciplinary meeting regarding the matter. Mr McCormack was legally represented at the time.

[96] RBNZ concluded that the email contained inappropriate language criticising his manager and breached the code of conduct. Following the meeting with Mr McCormack, Ms Rowe advised him that RBNZ's preliminary decision was that it proposed to give him a written disciplinary warning for misconduct.

[97] Ms Rowe claimed she advised Mr McCormack that if he wished to speak to the decision maker, Ms Rowe's director, this could be arranged. On 20 December 2023 Mr McCormack emailed Ms Rowe accepting the outcome that he would be issued with a written warning.

> Hi Jess
> I confirm I am accepting the outcome.
> Cheers Steve

[98] On 17 January 2024 the process concluded with Mr McCormack being issued with a written disciplinary warning for misconduct when he returned from leave. It is noted Mr McCormack did not provide any feedback regarding the proposed written warning prior to it being issued.

[99] Mr McCormack stated at the Authority's investigation meeting that he felt unable to speak up during the disciplinary meeting to discuss the warning, and that he "nominally accepted the outcome" as he did not feel that there was ever going to be a different result. Mr McCormack claimed that the written warning was in retaliation against him making a protected disclosure.

[100] RBNZ submitted that this grievance was out of time and it has not consented to this grievance being raised out of time.

[101] Mr McCormack said in evidence that this claim was first made in his statement of problem filed on 3 September 2024. This was about eight months after receiving the warning, and is outside the 90-day time limit specified in the Act.

Conclusion

[102] Mr McCormack provided no other evidence at the investigation meeting that he had raised a personal grievance for unjustified disadvantage with RBNZ prior to Mr McCormack's lodging his statement of problem with the Authority on 3 September 2024. RBNZ has not consented to the personal grievance being raised out of time.

[103] I find Mr McCormack did not raise an unjustifiable disadvantage personal grievance regarding RBNZ's upholding of a disciplinary allegation concerning the 7 December 2023 email within the statutory time limit.[8]

[104] Even if Mr McCormack has raised a personal grievance in time, I would have found Mr McCormack was not unjustifiably disadvantaged by RBNZ's actions.

[105] I find RBNZ carried out a fair and reasonable disciplinary process, and the issuing of a written warning was an outcome that a fair and reasonable employer could have come to. I also note McCormack accepted the outcome of RBNZ's disciplinary process and was legally represented at the time.

(iii) *RBNZ's failure to provide Mr McCormack a pay increase based on the unjustified disciplinary action against him (Pay Disadvantage)*

[106] Mr McCormack submitted he was unjustifiably disadvantaged by not receiving a pay increase while being on a PIP. The only reason stated for the lack of adjustment to Mr McCormack's remuneration was that he was on a PIP.

[107] RBNZ submitted that it undertakes annual remuneration reviews in accordance with its remuneration policy and one of the considerations in this review include an employee's performance and competency.

[8] Employment Relations Act 2000, s 114(2).

[108] RBNZ submitted that employees who are on a formal PIP are excluded from annual remuneration reviews. RBNZ submitted Mr McCormack was advised on 9 August 2024 by his director that there would be no adjustment to his annual remuneration because he was undergoing a performance management process.

Conclusion

[109] Mr McCormack in evidence accepted RBNZ's policy that an employee is precluded from receiving a pay rise if they are on a PIP. Mr McCormack's unjustifiable disadvantage claim rests on the premise that the performance management process he was undergoing was an unjustifiable action by RBNZ, and therefore he should not have been precluded from receiving a pay rise. I address in detail the justification of RBNZ implementing a performance management process and placing Mr McCormack on a PIP below (see paragraphs [151] to [153]). RBNZ had reasonable grounds to place Mr McCormack on the PIP due to issues arising from his performance.

[110] I find Mr McCormack was not unjustifiably disadvantaged by not receiving a pay increase as at the time of the annual pay review, as he was under a PIP and therefore excluded from receiving a pay increase under RBNZ's remuneration policy.

(iv) *RBNZ's ongoing unfair performance management of Mr McCormack and threats to terminate his employment (PM Disadvantage).*

[111] Mr Mc Cormick claims he was unjustifiably disadvantaged by the significant failings of the performance management process he was subjected to by RBNZ. Both Ms Rowe and Mr Hargreaves were inexperienced in running a performance management process.

[112] Mr McCormack submitted RBNZ did not genuinely seek to lift performance and help him improve. Rather it utilised the performance process to drive him out of his employment,

[113] Mr McCormack stated that the imposition of PIP process was unlawful as it followed on from the unlawful IAP 2.

[114] As I found in paragraphs [88] to [92] the implementation of IAP 2 not unlawful, it follows that undertaking a PIP process was a continuation of the performance management process following on from the themes included in the previous IAPs.

PIP 1 (January – April 2024)

[115] After completion of IAP 2 both Ms Rowe and Mr Hargreaves considered whether a PIP should be implemented. On 31 January 2024 Mr Hargreaves wrote to Mr McCormack outlining the ongoing concerns with his performance and proposed the implementation of a PIP.

[116] On 9 February 2024 Ms Rowe and Mr Hargreaves met with Mr McCormack to hear his feedback on the proposed PIP. In this meeting, as recorded in the minutes Mr McCormack acknowledged that he saw the issues and expectations outlined in the proposed PIP document as a continuation on themes included in the IAP process. Mr McCormack stated that he understood that as his performance had not improved sufficiently the formal PIP process is the next step. During this meeting the PIP was finalised and put in place.

[117] The objectives were similar to those identified in the earlier IAPs. RBNZ advised Mr McCormack that if he did not meet the requirements of the PIP this could result in a first written warning for failing to meet PIP expectations. In feedback Mr McCormack described the draft PIP as a "fairly standard procedural development".

[118] The objectives of the PIP were to see improvement in Mr McCormack's performance in three key areas:

(a) Producing high quality policy analysis – working independently to identify the right steps to get a compelling answer.

(b) Producing high quality written and verbal communication.

(c) Working collaboratively with colleagues through the policy process.

[119] The notes of this meeting and the PIP were sent to Mr McCormack on 12 February 2024. In response to this email Mr McCormack confirmed he understood the contents of the PIP.

[120] During PIP 1 Ms Rowe and Mr Hargreaves met with Mr McCormack seven times to provide support and feedback.

[121] On 13 March 2024 RBNZ provided Mr McCormack with specific feedback about his performance and proposed a first written warning. It also invited Mr McCormack to a formal review meeting set for 15 March 2024.

[122] On 15 March 2024, after the formal review meeting Mr McCormack was advised that he had made progress in relation to the third objective of working collaboratively with colleagues, however, he had not met the first two objectives of the PIP to the standard required. After having heard Mr McCormack's feedback, he was issued with a first written warning that he was not meeting the performance expectations of a senior analyst.

[123] Mr McCormack then went on wellness leave from 28 March to 12 April 2024.

Training or mentoring not provided

[124] Mr McCormack submitted RBNZ's position on providing training to Mr McCormack shifted over the course of the PIP, and at the investigation meeting. First, RBNZ suggested that Mr McCormack required writing training. At the investigation meeting, Ms Rowe suggested that Mr McCormack did not require writing training per se, but rather 'policy writing training' (targeted more at substance than punctuation).

[125] Mr McCormack submitted RBNZ accepts that no such training was provided. As RBNZ failed to organise and provide the writing training RBNZ's actions fall short of the proactive and supportive approach reasonably expected of a public sector employer.

[126] RBNZ submitted it was Mr McCormack's inability to undertake policy analysis to the required standard was the main concern regarding his underperformance. A writing course was unlikely to address this concern in any material way. Ms Rowe considered that the multiple hours during meetings of one-on-one coaching he received from herself and Mr Hargreaves, two experienced analysts, was far more beneficial to him.

[127] RBNZ submitted in late February 2024 it explored obtaining an individual writing coach, however, unfortunately the writing coach was unavailable for several months and this coincided with Mr McCormack taking leave. When Mr McCormack returned, he had difficulties engaging in the PIP process and on 8 May 2024, he declined additional support from Ms Rowe.

PIP 2 (April - May 2024)

[128] On 17 April 2024 Mr Hargreaves directed Mr McCormack to spend more time (at least 2 days) working from RBNZ's Auckland offices. At the time Mr McCormack was largely working from home. Mr McCormack considered this directive was an attempt to cause him stress and adversely impact his performance.

[129] Mr McCormack was advised a second PIP would commence on 18 April 2024 and end on 17 May 2024. It continued the three objectives from the first PIP and once again identified performance gaps, strategies to close the gaps, deliverables, and timeframes. It provided for regular meetings with Ms Rowe, Mr Hargreaves, and a human resources advisor.

[130] During PIP 2 Ms Rowe and Mr Hargreaves met with Mr McCormack six times to provide support and feedback. RBNZ provided Mr McCormack with specific feedback about his performance and provided support, proposing strategies to address any ongoing concerns they had with his performance.

[131] On 21 May 2024 RBNZ provided Mr McCormack with its feedback about his performance in PIP 2. RBNZ noted that although he had progressed on working collaboratively with colleagues, he struggled to prioritise his time and provide timely updates to Mr Hargreaves and failed to produce high-quality draft papers to the required analysis and logic. RBNZ proposed a second and final written warning in relation to his performance.

[132] On 23 May 2024 Mr McCormack attended a formal review meeting and later gave feedback. His feedback did not change RBNZ's preliminary view.

[133] On 28 May 2024 RBNZ confirmed its decision to give Mr McCormack a second and final written warning in relation to his performance and advised he was not meeting the performance expectations of a senior analyst. RBNZ stated he was also advised that a finding of unsatisfactory performance following a third formal review period could result in dismissal.

PIP 3 (May - July 2024)

[134] Mr McCormack was placed on a third PIP (PIP 3) with a provisional end date of 3 July 2024. This was extended to 26 July 2024 to allow for four weeks wellness leave taken by Mr McCormack during this period.

[135] On 1 July 2024 when Mr McCormack returned from leave, Annette Crequer became his manager. Mr McCormack sent RBNZ an email raising health and safety concerns he had about the workplace and his "need to be able to operate in a psychologically safe work environment". He declined to attend meetings in relation to the PIP on the basis that employment issues needed to be resolved before he could safely resume work.

[136] To ensure Mr McCormack was sufficiently supported RBNZ endeavoured to seek his views on a referral to RBNZ's EAP provider. Mr McCormack later advised RBNZ that he did not need any heath or wellbeing assistance.

[137] Mr McCormack declined to meet with Ms Rowe on a number of occasions. He also did not attend scheduled meetings with his new manager Ms Crequer and did not undertake any substantive work. Ms Rowe then wrote to Mr McCormack raising concerns about his lack of engagement and warning him that this could be an unfavourable factor when reviewing his performance under the third PIP.

[138] On 15 July 2024 Mr McCormack and RBNZ attended mediation.

[139] On 25 July 2024 RBNZ provided Mr McCormack its opinion of the third review period. Mr McCormack was invited to a meeting on 30 July 2024 to discuss his performance during the third PIP. RBNZ stated it advised Mr McCormack that after the meeting it would consider what the appropriate outcome of the PIP should be. Mr McCormack did not attend this meeting.

[140] On 7 August 2024 Mr McCormack began to engage with Ms Crequer. This was approximately a month after she had become his manager. On 16 August 2024 Ms Crequer emailed Mr McCormack's concerns about his work, including his inappropriate and disrespectful feedback on a colleague's work. The feedback included phrases that the work "appears to lack common sense" and "look like a waste of space". Ms Crequer also highlighted that his assessment that the work was "wrong", was incorrect and advised him against such categorical statements. Ms Crequer advised Mr McCormack

that he needed to provide work without it requiring a significant rewrite. She suggested he do so, including refining the tone and correcting the identified errors.

Analysis

[141] Mr McCormack submitted that RBNZ failed to reasonably and fairly assess his performance. He provided examples of what he considered to be RBNZ shifting the goal posts including two pieces of his work Ms Rowe reviewed in November 2024 before deciding to terminate his employment.

[142] The first piece of work involved working on a solution to a policy problem. Ms Rowe thought that Mr McCormack did not identify well-articulated solutions to the policy project in the Ropū evidence and had failed to identify and offer a recommended solution. It was Ms Rowe's view that the policy Ropū evidence did not meet the standard expected of a senior analyst.

[143] The second piece of work was a memorandum on which Mr McCormack had already received feedback from Ms Crequer. Ms Rowe was critical of his failure to incorporate the feedback and the time taken to produce the work.

[144] Mr McCormack believes Ms Rowe's feedback demonstrated that he was not being treated fairly in the PIP process. RBNZ submitted Ms Rowe's feedback was given during the final stages of a formal PIP process where she was explaining why Mr McCormack's work was not meeting the expectations for his role.

[145] Mr McCormack submitted that without IAP 2, the PIP would never have been imposed. Mr McCormack also stated that "all good faith communications ended on 8 February 2024", that RBNZ "circled the wagons" and that he had no support.

[146] Mr McCormack submitted to the extent that his performance in his role with RBNZ did suffer throughout the course of the various processes, was RBNZ's intention, or at the least, a direct result of its actions. It would be unconscionable to allow RBNZ to capitalise on defects it intentionally (or factually) brought about.

[147] RBNZ submitted that at no time during the performance and disciplinary processes did Mr McCormack address his performance in a meaningful way, or even accept that he might be underperforming. His position in this case was that he was performing.

[148] RBNZ submitted it had substantial and reasonable grounds to be concerned about Mr McCormack's sustained lack of performance, and that after lengthy, detailed and well documented processes, and without a noticeable improvement or (near the end) significant engagement by Mr McCormack, it was justifiable to bring his employment to an end.

[149] RBNZ says that performance management processes and the decisions it made to provide warnings and to propose termination were fair and reasonable in all the circumstances.

[150] At the end of PIP 3, RBNZ wrote to Mr McCormack on 2 September 2024 advising him that its preliminary decision was to terminate his employment on notice. This was based on Ms Rowe's view that Mr McCormack's performance did not meet the standard expected of a senior analyst, that he had failed to cooperate and engage appropriately with the PIP process, and the two earlier warnings Mr McCormack had received for poor performance.

Conclusion

[151] RBNZ's performance review process for Mr McCormack lasted for a period of 18 months. During this time RBNZ provided Mr McCormack with support by one-on-one coaching and mentoring through the IAP and PIP meetings, and guidance on how to improve his performance to assist him in meeting the performance expectations of a senior analyst.

[152] When the performance process moved on from the IAP to the PIP process, RBNZ set expected standards and put Mr McCormack on notice of the possible consequences if he failed to improve his performance. RBNZ has provided extensive evidence, including a large amount of documentation provided as part of its process, and the intensive coaching and one-on one feedback from management.

[153] In the circumstance I find RBNZ fairly carried out the performance management of Mr McCormack. In the circumstances I find Mr McCormack was not unjustifiably disadvantaged by being performance managed by RBNZ.

Mr McCormack's personal grievance for alleged retaliation under s 21 of the PDA 2022 pursuant to s 103(1)(k) of the Act

[154] Mr McCormack's formal protected disclosure was made to the Chair of RBNZ's board on 13 January 2024. Mr McCormack made a further protected disclosure (which was the same in substance as his first protected disclosure) to the Minister of Finance on 1 August 2024.

[155] Mr McCormack submitted where it is alleged that an RBNZ's action or omission was retaliation for him making a protected disclosure, the onus shifts to RBNZ to prove on the balance of probabilities that the disclosure was not the substantial reason for RBNZ's actions or omissions.[9] [10] Mr McCormack states RBNZ has failed to meet that burden.

[156] Mr McCormack claims the actions of RBNZ towards him, including the performance management process, were in retaliation for him 'having stepped out of line', not knowingly overlooked issues which concerned him, and potentially had serious implications for the banking sector.

[157] Mr McCormack submitted that on the basis of having read his protected disclosure, Ms Rowe formed the view that Mr McCormack had animosity towards RBNZ, and that was in her mind throughout the performance management and subsequent disciplinary processes.

Outed as having made a protected disclosure to the Minister of Finance

[158] Mr McCormack submitted that on 11 September 2024, at a meeting to discuss Mr McCormack's employment issues, and in front of two of Mr McCormack's RBNZ managers, General Counsel outed Mr McCormack as having made a protected disclosure. Although he had expressed in a letter to the Treasury that he had no issue with his name being disclosed to RBNZ, Treasury confirmed to Mr McCormack's representative that Mr McCormack's employment identity had not disclosed to RBNZ by Treasury.

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[9] Protected Disclosures (Protection of Whistleblowers) Act 2022, s 21 and Employment Relations Act 2000, s 110B(3).

[159] Mr McCormack submitted that was in breach of s 17 of the PDA 2022. Mr McCormack never consented to the release of his identifying information, nor was he ever consulted or informed about the disclosure of his identity.

[160] Mr McCormack states that this disclosure combined with General Counsel's disparaging comments referring to Mr McCormack as being a "timewaster" show retaliation by a senior RBNZ employee who was across both the protected disclosure and the disciplinary process.

[161] Mr McCormack submitted that this behaviour done in the context of the termination of Mr McCormack's employment, is a disadvantageous action. Doing so is not a course of action open to a fair and reasonable employer. Personal grievances pursuant to ss 103(1)(b) and (k) of the Act were raised regarding General Counsel's actions on 12 September 2024.

[162] RBNZ says that at no stage did it retaliate, or threaten to retaliate against Mr McCormack because of any concerns he raised, or the protected disclosures he made. It says that performance management had been ongoing for some time, well before Mr McCormack raised concerns or a protected disclosure about the DCS and other matters.

[163] RBNZ says that Mr McCormack was fairly performance managed, and that it acted reasonably and in good faith throughout the process. It denies retaliating against Mr McCormack.

[164] RBNZ submitted that it is difficult to see how the so-called "outing" which occurred in the disciplinary meeting on 11 September 2024 caused an unjustified disadvantage, or how this indicated any predetermination or retaliation against Mr McCormack.

[165] Mr McCormack submitted that in respect of the substance of his protected disclosure, he was proven to be correct, however provided no evidence to substantiate his claim. RBNZ denies Mr McCormack's allegations were correct.

Conclusion

[166] In regard to Mr McCormack's protected disclosures; it is not my role to determine if there was any basis for any of the protected disclosures. Although I

understand the grounds of Mr McCormack's protected disclosures, I cannot comment on the merits or make any findings on the legitimacy of Mr McCormack's complaints.

[167] I have already found at paragraph [151] to [153] that the performance management process itself was justified and it was not an action done in retaliation for the protected disclosure. The performance management process did not cause an unjustified disadvantage to Mr McCormack's employment.

[168] There was no evidence to conclude that RBNZ's decision to instigate the performance management process, was in retaliation for him making a protected disclosure. RBNZ commenced its performance management process prior to the protected disclosures being made. RBNZ has compiled a large amount of documentary evidence which supports RBNZ holding genuine and ongoing concerns over Mr McCormack's performance over a substantial period of time. I also find that RBNZ in continuing with the performance management process was not motivated the disclosure.

[169] Mr McCormack's view was that he was performing, however this view was not shared by RBNZ, and in the latter stages of the of the performance management process. Mr McCormack failed to engage with the process, or even accept that he might be underperforming.

[170] Aside from Mr McCormack's speculation that RBNZ had predetermined his dismissal through a tainted performance management process, there is little evidence to support this position. I find RBNZ has established on the balance of probabilities that its continuation with the PIP from April 2024 and its termination of Mr McCormack in December 2024, was not a result of his protected disclosure.

[171] However, I find General Counsel's "outing" of Mr McCormack regarding his making of a protected disclosure was a breach of the confidentiality provisions of the PDA 2022.[11] This combined with the subsequent disparaging comments unjustifiably disadvantaged Mr McCormack. This occurred in front of other employees.

[172] I find Mr McCormack was unjustifiably disadvantaged by RBNZ's retaliatory action.[12] RBNZ has not on the balance of probabilities, proved that Mr McCormack's

[11] Protected Disclosures (Protection of Whistleblowers) Act, s17
[12] Employment Relations Act s 110B(3).

protected disclosure was not a substantial reason for Mr McCormack's "outing" by General Counsel, and the subsequent disparaging comments.[13]

[173] On this basis Mr McCormack's claim for unjustified action causing him disadvantage for this specific retaliatory action by RBNZ is successful.

Mr McCormack's claim for RBNZ's alleged breaches of Mr McCormack's individual employment agreement

[174] Mr McCormack states his individual employment agreement contains the following implied terms:

> (a) That RBNZ would act in a fair and reasonable manner in respect of any matters relating to Mr McCormack's employment; and
>
> (b) That RBNZ would not conduct itself in a manner calculated to, or likely to, destroy the relationship of trust and confidence between itself and Mr McCormack.

[175] Mr McCormack alleges that RBNZ has breached the terms of his employment agreement by breaching these implied term of trust and confidence.

[176] In regard to paragraph (a) the allegations of breaches of Mr McCormack's individual employment agreement are based on the same grounds as Mr McCormack's personal grievance claims, where I found RBNZ did act fair and reasonable manner in respect of matters relating to Mr McCormack's employment. This included the performance management process RBNZ implemented for supporting Mr McCormack. In the circumstances. I find RBNZ did not breach Mr McCormack's employment agreement.

[177] In regard to (b), Mr McCormack's claim of a breach of the implied duty of trust and confidence relates to the finalising of the performance management process, which resulted in his dismissal. His claim therefore relates to dismissal and cannot be brought as a breach of an employment agreement claim.[14]

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[13] *McCormack v Reserve Bank of New Zealand* [2025] NZEmpC 159.

[14] Employment Relations Act, s113.

[178] I find Mr McCormack's breach of his employment agreement claims are not successful, and therefore there can be no claim for a penalty in the circumstances.

Mr McCormack's claim for RBNZ's alleged breaches of good faith obligations owed to Mr McCormack.

[179] Mr McCormack states pursuant to s 4 of the Act, RBNZ was required to comply with its statutory obligations of good faith in its dealing with Mr McCormack. This included the obligations:

(a) To not engage in misleading or deceptive conduct; and

(b) To be active and constructive in establishing and maintaining a productive employment relationship.

[180] In paragraph 124 of his closing submissions Mr McCormack specifically sets out nine alleged breaches of good faith from (a) to (i), the majority of which I have already addressed in findings on his personal grievances, including the imposition of IAP 2, predetermination, ongoing allegations of retaliation and the general lawfulness of the PIP process.

[181] I will however address several of Mr McCormack's good faith claims that have not been raised previously in this determination using his numbering:

(a) RBNZ's denial of Mr McCormack having made a protected disclosure, and its subsequent failure to inform him promptly when it shifted its perspective on that. Ms Rowe being informed that Mr McCormack had made a "protected disclosure" in July 2024, when Mr McCormack was

(i) I find RNBZ was somewhat lax in its understanding of the procedural requirements of the PDA 2022. After initially declining to accept that Mr McCormack had made a protected disclosure, it then failed to abide by the timeline requirements in the PDA to keep the Mr McCormack informed about what RBNZ was doing with the disclosure. RBNZ also failed to advise Mr McCormack of its subsequent acceptance that Mr McCormack had raised a protected disclosure.

(ii) However, even though RBNZ failed to be active and constructive and responsive and communicative with Mr McCormack regarding processing the protected disclosure, I do not find RBNZ is liable for a penalty for a breach of good faith under the Act. The failure was not deliberate nor was intended to undermine the employment relationship.

(d) General Counsel's outing of Mr McCormack as having made a further protected disclosure; and

(e) General Counsel's detailed reference to Mr McCormack as a "huge timewaster".

(i) Mr McCormack submits that General Counsel's decision to expose him as having made a further protected disclosure to the Minister of Finance, is a breach of s 17 of the PDA 2020. Mr McCormack never consented to the release of his identifying information, nor was he ever consulted or informed about the disclosure of his identity. Combined with the negative sentiments expressed about him in paragraph (e) does suggest a pattern of behaviour by a senior employee of RBNZ that does not seem constructive in maintaining a productive employment relationship.

(ii) As I have previously found in paragraph [171] the "outing" of Mr McCormack regarding his making of a protected disclosure, and subsequent disparaging comments unjustifiably disadvantaged Mr McCormack.[15] However, although the "outing" and comments were serious, they seemed more expressions of frustration rather than seeking to undermine the employment relationship. In the circumstances the evidence does not support a finding of a breach of good faith by RBNZ.

(iii) In addition the factual matrix is the same as the personal grievance for unjustified disadvantage, which the remedies have been awarded in Mr McCormack's favour.

[15] Employment Relations Act, s 4.

(f) Human resources (HR) advisors view of Mr McCormack as expressed in his email to other RBNZ HR members.

(i) The HR advisor view was Mr McCormack's behaviours and responses to the PIP process could be deliberate to provoke a response from RBNZ that would bolster his claims of unreasonable treatment by RBNZ towards him. This was an HR advisor's assessment of Mr McCormack's motives. RBNZ did not act on this assessment and the evidence does not support a finding of a breach of good faith.

(e) RBNZ, and in particular Mr Hargreave's active seeking out of matters it could use to institute disciplinary action against Mr McCormack.

(i) The evidence does not support Mr McCormack's claim that RBNZ was actively seeking out matters to institute disciplinary action against Mr McCormack and I find there was no breach of good faith.

[182] After reviewing the evidence I am satisfied that RBNZ has met its obligations of good faith in its interactions with Mr McCormack.

Mr McCormack's personal grievance for unjustified dismissal under s 103(1)(a) and unlawful retaliation under s 103(1)(k) of the Act in relation to the dismissal

[183] RBNZ's obligations as an employer are to be assessed against both the s 103A test of justification and its statutory obligations to be a good employer under the Reserve Bank of New Zealand Act 2021 (the RBNZ Act). The RBNZ Act definition of a good employer includes operation of a personnel policy providing for fair and proper treatment of employees.

[184] Mr McCormack submitted that his dismissal was unjustified on a number of grounds, the majority of which I have already addressed in findings of his personal grievances, including the imposition of IAP 2, ongoing allegations of retaliation, predetermination and the general lawfulness of the PIP process. I will now assess the further grounds Mr McCormack relies on.

Insider threat pathway (ITP)

[185] Mr McCormack submitted RBNZ withheld relevant information, including information that Mr McCormack was on an "insider threat pathway".

[186] Ms Rowe stated that her team handles sensitive material, and she is trained to raise any concerns about unusual or highly negative behaviour from staff with RBNZ's security team. In her evidence and at the investigation meeting Ms Rowe said this was in accordance with RBNZ ITP training which advised managers to raise concerns with the security team about any unusual or highly negative behaviour. This is what she did following Mr McCormack's behaviour in December 2023.

[187] Mr McCormack submitted that Ms Rowe's view that he had animosity towards RBNZ is relevant to her decision making in terminating his employment.

[188] RBNZ submitted that Ms Rowe did not form a view that Mr McCormack was an insider threat and rejected that the ITP was relevant to Mr McCormack's termination of employment under the PIP process. No action was taken by RBNZ resulting from the ITP.

[189] Having heard from Ms Rowe I am satisfied that placing Mr McCormack the ITP was due to concerns about his behaviour and had no bearing on the outcome of the performance management process.

Information not provided in breach of s 4 of the Act

[190] Mr McCormack submitted that RBNZ was obstructive with the provision of relevant documents during his employment and he is unsure whether RBNZ met its obligations under s 4(1A) of the Act to provide all relevant information to Mr McCormack, and afforded him an opportunity to comment on that information.

[191] RBNZ submitted that it made a considerable effort to ensure that Mr McCormack had all information related to its proposed decision to terminate him for poor performance. It has provided significant tranches of documents to Mr McCormack both pre and post termination. Ms Rowe maintains that RBNZ spent 340 hours collating all the requested information (including 2,968 pages of documents) relevant to her decision to dismiss has been provided to Mr McCormack in accordance with RBNZ's legal obligations. I have no reason to doubt that.

[192] In the circumstances I am satisfied Mr McCormack had the necessary information to conduct his case.

Talent mapping

[193] Mr McCormack submitted that RBNZ had been using the talent mapping as a substantive assessment of his ability to perform. The assumption being that RBNZ had made an early assessment of his ability to perform and therefore his dismissal was predetermined.

[194] Ms Rowe in evidence explained the issue further and made the point that this is a standard public sector document that is used for planning purposes. She was very clear that this was not an assessment that Mr McCormack could not or would not perform.

[195] There is insufficient basis to uphold Mr McCormack's argument on this issue, as his location on the talent map had no bearing on the performance management process or his dismissal.

Neurodiversity

[196] Mr McCormack submitted that RBNZ is bound by the Public Service Act 2020 (PSA 2020), and as such, is bound by the 'good employer' obligations contained in s 73 of the PSA 2020. This is also reflected in the RBNZ Act.[16] The section requires that RBNZ operate an employment policy for the fair and proper treatment of employees in all aspects of their employment, including for recognition of the employment requirements of people with disabilities.

[197] On a file note regarding Mr McCormack's performance management process, a handwritten note alluded to the possibility that Mr McCormack may have been neurodiverse. Mr McCormack submitted that RBNZ should have explored that possibility, including seeking that he had an assessment and tailoring any support around anything that emerged from the assessment.

[198] RBNZ submitted that although Ms Rowe did see the file note she had already enquired of Mr McCormack as to whether he had any information about his health and wellbeing he wished to share. Mr McCormack provided no further information.

[199] During his employment Mr McCormack never raised the issue with RBNZ despite having every opportunity to do so. Ms Rowe in her email of 9 April 2024 to Mr

[16] Reserve Bank of New Zealand Act 2021, ss177 and 178.

McCormack offered him a medical examination at RBNZ's expense; however Mr McCormack did not accept the offer.

[200] There is insufficient basis to uphold Mr McCormack's argument on this issue.

Analysis

[201] Mr McCormack submitted that he was targeted because he had put his head above the parapet and raised issues of risk in disagreement with views his manager or "group think" operative within RBNZ.

[202] Mr McCormack submitted he was then subjected to a contentious performance management process which was predetermined to end with his dismissal. He was placed on the "unlawful IAP 2." There is a logical progression and escalation from the IAP to the PIP. Without the PIP process Mr McCormack stated he would not have been dismissed.

[203] Mr McCormack submitted RBNZ did not genuinely seek to lift his performance and help him improve. Rather it utilised the performance process to drive him out of his employment.

[204] Mr McCormack submitted that a number of unjustified actions and ultimately his dismissal, were in retaliation for him making a protected disclosure on 13 January 2024.

[205] Mr McCormack has alleged that as RBNZ's implementation of the performance management process was in retaliation for him making a protected disclosure, the onus shifts under the PDA 2022 to RBNZ to prove on the balance of probabilities that the protected disclosure was not the substantial reason for the dismissal.[17] Mr McCormack states RBNZ has on the balance of probabilities, failed to prove that Mr McCormack's protected disclosure was not a substantial reason for his dismissal.

[206] RBNZ submitted it had substantial and reasonable grounds to be concerned about Mr McCormack's sustained lack of performance, and that after lengthy, detailed and well documented processes, and without noticeable improvement or significant engagement by Mr McCormack, it was justifiable to bring his employment to an end.

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[17] Protected Disclosures (Protection of Whistleblowers) Act, s 21 and Employment Relations Act, s 110B(3).

Conclusion on unjustified dismissal

[207] I have considered Mr McCormack's arguments about the genuineness and procedural fairness of RBNZ's performance process, culminating in the PIP process and resulting dismissal. Although Mr McCormack believes he was targeted because of his views and disagreement with views his manager held this was not substantiated by the evidence.

[208] RBNZ has accepted the 13 January 2024 disclosure was a protected disclosure. In regard to Mr McCormack's protected disclosures, the Authority is not an appropriate authority under the PDA 2022, and as I have already stated, I cannot comment on the merits make or any finding regarding the legitimacy of Mr McCormack's complaints.

[209] I have already found at paragraphs [171] to [173] that General Counsel's disclosure of Mr McCormack as having made a protected disclosure to the Minister of Finance, combined with the negative sentiments expressed about him, were evidence of retaliation for his protected disclosure and Mr McCormack succeeded in his claim for an unjustified disadvantage in that regard. However, this issue did not impact on Ms Rowes decision making.

[210] In regard to RBNZ's performance management process, this spanned 18 months, during which it set expected standards and put Mr McCormack clearly on notice of the possible consequences if he failed to improve his performance. Aside from Mr McCormack's speculation that RBNZ had predetermined his dismissal through a tainted performance management process, there is little evidence to support his view.

[211] I have found that RBNZ had reasonable grounds to be concerned about Mr McCormack's lack of performance and at paragraph [151] to [153] that the performance management process itself was justified and was not an action done in retaliation for the making of the protected disclosure. The performance management process did not cause an unjustified disadvantage to Mr McCormack's employment.

[212] The timing and consistency of the performance concerns from IAP 1 in April 2023 plan through to the concerns raised in PIP 3 in May 2024, which resulted in the preliminary view to terminate Mr McCormack's employment, do not support his claims

of retaliation. RBNZ has, on the balance of probabilities, proven that Mr McCormack's protected disclosure was not a substantial reason for his dismissal.[18]

[213] In conclusion I find RBNZ implemented a protracted, in depth and well documented process, including intensive coaching and feedback from management, and noting Mr McCormack's failure to engage with the process, I find that dismissal was an outcome a fair and reasonable employer could have concluded was appropriate. I find based on the evidence, that Mr McCormack's dismissal was both procedurally and substantively justified

[214] I conclude that Mr McCormack's personal grievance relating to the alleged unjustified dismissal is not supported by the evidence and his claim based on the grievance is unsuccessful.

Special damages

[215] Mr McCormack has made a claim for special damages for legal costs incurred in relation to the December 2023 disciplinary process and the PIP and non-litigation related matters.[19]

[216] Mr McCormack was entitled to engage legal advisors and representatives, but RBNZ is not obliged to pay for the cost of his doing so. Mr McCormack has been unsuccessful in claims for unjustified dismissal and the majority of his unjustified disadvantage claims, and in his breach of good faith and breach of contract claims. As such I decline to make an order for special damages.

Outcome

[217] Mr Mcormick was partially successful with his unjustified disadvantage claim for retaliation following the making a protected disclosure under the PDA 2020 and as such he is entitled to remedies.

[218] Mr McCormack was not successful in his other claims of unjustified disadvantage, breach of good faith, and breach of employment agreement. I found Mr McCormack's dismissal was both substantively and procedurally justified.

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[18] Employment Relations Act, s110B and *McCormack v Reserve Bank of New Zealand* [2025] NZEmpC 159.
[19] *Stomont v Peddle Thorp Aiken Ltd* [2017] NZEmpC 71

Remedies

[219] Having determined Mr Mcormick was unjustifiably disadvantaged he is entitled to an award for compensation for the humiliation, loss of dignity and injury to feelings that he suffered because of RBNZ's unjustified actions.[20]

Compensation award under s 123(1)(c)(i)

[220] Mr McCormack sought compensation in the region of $30,000 for hurt and humiliation under s 123(1)(c)(i) of the Act. He has given limited evidence of the emotional and the financial impact the case has had on him.

[221] This grievance specifically concerned the effects that the "outing" and disparaging comments made by a senior employee of RBNZ. In the circumstances Mr McCormack's conduct in this context, cannot be considered culpable, so he has not contributed to his personal grievance.[21]

[222] I am satisfied Mr McCormack experienced hurt and humiliation under section 123(1)(c)(i) of the Act. Having regard to the particular circumstances of this matter Mr McCormack is entitled to an award to compensate the hurt and humiliation suffered consequent to the established personal grievance.

[223] I find in the circumstances outlined above RBNZ is to pay Mr McCormack compensation of $10,000.

Summary of orders

[224] RBNZ is ordered, within 28 days of the date of this determination, to make payment to Mr McCormack $10,000 as compensation for hurt, humiliation and injury to feelings.[22]

Costs

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

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[20] Employment Relations Act, s 123(1)(c).
[21] Employment Relations Act, s 124.
[22] Employment Relations Act, s 123(1)(c).

[226] If the parties are unable to resolve costs, and an Authority determination on costs is needed, a 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.

Andrew Gane
Member of the Employment Relations Authority