

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2025] NZERA Recommendation 3

BETWEEN NEW ZEALAND PUBLIC
SERVICE ASSOCIATION TE
PŪKENGĀ TIKANGA MAHI
Applicant

AND TE ROOPU TAURIMA O
MANUKAU TRUST
Respondent

Member of Authority: Nicola Craig, Facilitator

Recommendation: 13 June 2025

RECOMMENDATION OF THE FACILITATOR

[1] This recommendation was originally issued to the parties on 9 May 2025 and has now been updated to be released publicly. Redactions have been made to deal with sensitivity concerns and final comments deleted as these have been overtaken by subsequent events, including the request that the recommendation is made public.

[2] The New Zealand Public Service Association Te Pūkenga Tikanga Mahi (PSA or the union) and Te Roopu Taurima o Manukau Trust (TRT or the employer) undertook facilitated bargaining on 24 and 25 March and 10 and 11 April 2025. The bargaining concerns a replacement collective agreement for kaitātaki (sometimes translated as leaders).

[3] In the course of this facilitated bargaining the parties discussed the remaining claims which had not been agreed in bargaining and amended wording for clauses were proposed. Perhaps unusually for facilitation both parties made significant requests for information from the other party with multiple documents received.

[4] After exploring various solutions the parties were unable to find a solution that they could agree between them and it was concluded that a written recommendation by the facilitator was required.

[5] Comprehensive written submissions were provided by both parties on 24 April 2025.

[6] The areas covered in this recommendation are:

- (a) pay rate, recognition for the bargaining period and term of the new agreement;
- (b) additional hours;
- (c) 90-day trial and probationary period; and
- (d) secondary employment.

[7] The recommendation is that the parties agree terms of a new collective agreement with changes to the previous agreement they have already agreed and the recommended changes and drafting set out below.

The kaitātaki role

[8] The collective agreement being negotiated is to replace a previous agreement covering kaitātaki. The current version of this role was created by TRT in 2023 after a restructure. It combines leadership, managerial and administrative duties along with some direct involvement with tangata (the people TRT supports).

[9] There was some discordance between the parties about whether the pre-2023 kaitātaki role, managing several whare, warrants higher or lower pay than the 2025 kaitātaki role which is whare based and thus has its own requirements and complexities.

Pay rates

Current rate

[10] The current kaitātaki salary is \$70,500, which applied from 31 August 2023.

PSA

[11] Towards the end of facilitation the PSA's pay rate proposal was an increase to \$75,500 from 1 March 2025 and a further increase to \$77,000 at the start of March 2026.

[12] In submissions it now reverts to what it was seeking at the start of bargaining – a start rate of \$81,075, with steps of \$85,128 (1 year’s experience) and \$89,385 (2 years’ experience). An additional increase is now sought from 1 March 2025, so steps become \$84,318, \$88,533 and \$92,960.

[13] Alternatively if the Authority does not see those rates as appropriate, a minimum salary range of no less than \$78,000 (new employee with limited experience) and no less than \$85,000 (4+ years’ experience) with an additional 4+% on top of those rates from 1 March 2025.

TRT

[14] TRT acknowledges the benefit to employees of getting a pay increase earlier in the term, so that the overall remuneration over the term of the agreement is greater.

[15] Its proposal, as offered at the facilitation meeting, is:

- (a) An immediate increase of \$3,500 on the base rate taking the salary from \$70,500 to \$74,000;
- (b) A ratification bonus of \$300 payable to each employee; and
- (c) A lump sum of \$1,400, payable to current employees on the 12 month anniversary of the new agreement, in recognition of bargaining throughout 2024.

[16] In terms of assessment against comparators, TRT describes kaitātaki as supervisory managers without broader strategic or operational leadership responsibilities.

Data

[17] Assessing an appropriate rate of pay here potentially includes consideration of the nature of the role, external rates for comparable roles, internal relativities with non-union kaitātaki on individual employment agreements and economic data such as Consumer Price Index inflation.

[18] I do not attempt in this recommendation to set out in detail all the data and other material provided by the parties in the course of the facilitation.

External comparators

[19] Information regarding other organisations was provided by the PSA. There are limitations on the use of such information when it is agreed that other disability support organisations do not operate their structure in a manner which includes a direct equivalent to TRT's kaitātaki role.

[20] TRT's position is that a fair rate of pay from external relativities is in the range from \$72,250 and \$77,765.

[21] During facilitation the PSA asserted that the kaitātaki role in the context of TRT's Tikanga-centric operations required an enhanced level of cultural competency which should be reflected in remuneration. TRT acknowledges that it values cultural competency highly and this is reflected in its rates for all kaimahi.

Strategic Pay

[22] Strategic Pay assessed the kaitātaki role around the time of its establishment - concluding it was a Grade 16 role. The union questions whether that assessment incorporated a cultural competency element.

[23] The PSA now provides Strategic Pay's 2024 Not for Profit Remuneration Report. The union presents the figures for Grade 16 across the whole sector. However, the social services and health categories are more specifically relevant. There is no disability sector category in this report.

[24] It should be noted that Strategic Pay's assessment places the kaitātaki role at the lowest number of the Grade 16 range.

Internal comparators

[25] The PSA is concerned that kaitātaki who are not union members are getting more than members. TRT described and has provided some detail regarding what are effectively lesser conditions (to those in the collective agreement) applying to at least some of this non-member group. Comparisons are not straightforward as there are some differentiations between those on individual agreements. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[27] Importantly however, there is the prospect of non-union kaitātaki getting further increases in both the 2025 and 2026 pay reviews. Those reviews are provided for in the employer's remuneration policy but do not guarantee an increase.

Inflation

[28] Annual CPI inflation for the December 2024 quarter (2023-2024) was 2.2%. If added, that would take the current kaitātaki salary up to \$72,051. TRT argues that the \$3,500 increase it proposes is a 4.96% increase. However, if that is seen as an increase covering two years, the annual figure is less.

Backpay

[29] The reasons bargaining has taken this long are in dispute.

[30] While there has been no guarantee of backpay, TRT has had the advantage of not having to make any pay increase to kaitātaki union members since the collective agreement expired in May 2024. On the other hand, the impact of it having to pay approximately 40 employees what is now effectively a year's backpay would be significant.

Term

[31] Earlier discussions focused on a 24 month term but the position diverged over various offers. In facilitation the PSA moved towards a shorter term. TRT seeks the certainty of a longer agreement, currently seeking expiry on 31 December 2026.

Poutātaki

[32] In its final submissions the PSA seeks a salary of \$5,000 on top of the kaitātaki rate for the poutātaki who manages TRT's only mental health unit.

[33] This role is currently on the same pay rate as the kaitātaki. There was little or no discussion at facilitation about this role and it received no focus in TRT's submissions. No recommendation of additional payment for a separate role is appropriate in these circumstances.

Conclusion on pay, recognition of the bargaining period and term

[34] The Authority's role in facilitation is to assist the parties to resolve their difficulties in concluding a collective agreement.¹

[35] The current kaitātaki salary of \$70,500 has now been in place for heading towards two years. Both parties agree that an increase is warranted. In considering what to recommend, the reality of the parties reaching an agreement needs to be focused on.

[36] TRT appears to be influenced by its view that the kaitātaki cohort are generally not, to use my words, living up to its vision for the role when the 2023 restructuring occurred. If the organisation has individual concerns it is open to it to take performance/disciplinary measures. However, the concern seems applicable across a wider portion of the cohort. I note there may well be some who are seen as living up to the vision. In the absence of written material, which would need to be shared with the union, I am unwilling to effectively assess the role as downgraded, in terms of, for example, the Strategic Pay grade assessment.

[37] All agree it is difficult if not impossible to find a direct comparator to the kaitātaki role. Without wishing to denigrate the breadth and importance of the kaitātaki's responsibilities within the whare, on the basis of what is before me, it is challenging to see that a role which manages a number of whare and has wider strategic responsibilities should be lower paid than kaitātaki.

[38] The average 2024 Strategic Pay rate in the social services sector is \$77,523 for combined grade 15 and 16. That is less than the average health sector rate. Consideration is also given to the inflation rate over the relevant period, the pay rates for non-union kaitātaki and the upcoming pay reviews for them.

[39] Recognising that \$77,600 is a not inconsiderable jump from what TRT is currently paying and its wish to have a longer term agreement, I recommend as follows:

- (a) Salary increase to \$74,000 from 31 May 2025²
- (b) Salary increase to \$77,600 from 31 May 2026

¹ The Act, s 50A(1).

² Date reflects a period for ratification.

(c) Expiry of agreement on 31 October 2026.

[40] Towards the end of the facilitation meeting, the parties were at the point of being very close to agreement about the total amount of a lump sum to recognise the bargaining period (in lieu of backpay) - \$1,700 or \$1,750 with some difference on when paid. The PSA said all should be paid in July 2025, TRT said \$300 now, \$1,400 in 1 year. Submissions for the PSA now move back to wanting a pay increase from the day after expiry of the previous collective agreement.

[41] I recommend that the lump sum payments to reflect the bargaining period are as follows:

(a) \$500 paid by 31 May 2025

(b) \$1,200 paid by 31 May 2026.

[42] During facilitation there were moments of concurrence about working towards a pay scale with more than one step, with service based and performance based proposals in contention. Rather than recommend pay steps, I recommend that the new collective agreement establishes a Working Party to develop a stepped pay scale, to be completed by 31 May 2026.

Additional hours

[43] These hours are described in clause 5.5 of the previous collective agreement as voluntary and to fill “whare roster needs”. The others working in the whare are kaiāwhina, who are paid at lower rates. Where kaitātaki undertake kaiāwhina work the previous wording refers to additional hours being paid at an hourly rate “equivalent to Pay Equity Level four (4) Kaiāwhina rate”. Some difficulty has arisen between the parties about this wording.

[44] Specifying a dollar rate might seem desirable but has the potential to be impacted by changes in other collective agreements or other arrangements.

[45] During facilitation wording changes to the additional hours clause were discussed with the parties seemingly agreeing, albeit as part of package offers made at facilitation. The principle agreed was that the highest rate applicable to kaiāwhina at the time the work is done should be paid to the kaitātaki when they cover for kaiāwhina. Expressing concerns about TRT’s good faith in light of previous events, the PSA has

now reverted to its position at the start of bargaining that the kaitātaki rate should be paid.

[46] The parties had reached an understanding towards the end of facilitation and this should be reflected in the new agreement. It is therefore recommended that the clause is amended as follows:

5.5 Additional Hours

An employee may undertake additional hours of work to assist in filling where roster need, if the Employer offers such additional hours to that employee. Additional hours of work will be paid at an hourly rate equivalent to the highest kaiāwhina rate paid by the Employer at the time the work is done.

90-day trial and probationary period

Trial period

[47] TRT put forward a claim for inclusion of a 90-day trial period clause in the collective agreement. Its position on that has not changed.

[48] The initial wording specified that the (collective) “agreement is subject to a 90-day trial period” plus the parties acknowledging and agreeing that the “terms of this clause constitute a trial period within the meaning of s 67A” of the Employment Relations Act 2000 (the Act).

[49] The PSA raised concerns including that a collective agreement could not lawfully be subject to a trial period. During facilitation, TRT provided amended wording.

[50] Both parties refer to *New Zealand Meat Workers & Related Trades Union Inc v Affco New Zealand Ltd*.³ This case is about inclusion of a probationary period in a collective agreement, rather than a trial period.

Probationary period

[51] During bargaining the PSA moved from its initial position of simply opposing TRT’s trial period clause to proposing a probationary arrangement instead. This would

³ *New Zealand Meat Workers & Related Trades Union Inc v Affco New Zealand Ltd* [2010] NZEmpC 62.

permit the employer to enter into such an arrangement with new employees, if they agreed to it.

[52] During facilitation, TRT raised concerns that the proposed clause, to use my words, did not strictly align, with the specifications of s 67 of the Act. The PSA consider those comments and provided an amended version which TRT accepted was a probationary period clause.

Conclusion

[53] Trial periods under collective agreements have been largely unfamiliar in the New Zealand landscape and appear not to have been directly considered by the Authority or Employment Court previously. The parties could seek confirmation of legal status before incorporating such a provision in their collective agreement.

[54] There was little or no specific rationale provided by TRT for the inclusion of a trial period provision in the collective agreement. No instances of situations where the organisation had had a need to summarily terminate without fear of litigation were provided. During facilitation TRT acknowledged that a bona fide probationary period fulfilled all the requirements it was looking for except the ability to terminate employment without having to justify it through a personal grievance process.

[55] Arguments made opposing the trial period included that in the disability sector it is important employees feel comfortable reporting incidents with the tangata they support and the employee's own training needs. It was suggested that if staff are on a trial period they may thus not feel comfortable reporting, in case this precipitates use of the period against them, thus impacting the health and welfare of tangata. Neither party mentioned awareness of particular disability sector providers utilising trial periods.

[56] The previous collective agreement has no trial or probationary period in it. I am not persuaded that there is justification at this stage to recommend the inclusion of either in a new collective agreement.

Secondary employment

[57] TRT raised a claim to put restrictions on secondary employment. There was no such clause in the previous collective agreement. The clause proposed is:

1 Secondary employment

- 1.1 The Employer may withhold approval for secondary employment if it genuinely considers that this is necessary to:
 - 1.1.1 Prevent an adverse impact on the performance of employee duties under this Agreement;
 - 1.1.2 Ensure health and safety and/or the health and safety of others at work.
- 1.2 Employer consent shall not be unreasonably withheld.
- 1.3 To avoid doubt, the employee must notify and seek approval from the employer prior to commencing any secondary employment.

[58] The PSA objects to that clause as being too broad and unlawful under s 67H of the Act. It proposes the following alternative wording:

Secondary employment

The employer is not opposed to secondary employment and restrictions on secondary employment will not be unreasonably enforced.

The employer may prohibit or restrict secondary employment where there are genuine and reasonable grounds that additional hours of work will have an adverse impact on the performance of an employee's duties under this Agreement due to fatigue.

Where the employer intends to prohibit secondary employment it must be necessary having regard to the reason above.

Where the employer intends to restrict secondary employment it must not do so to a greater extent than is necessary having regard to the reason above.

[59] TRT considers the PSA's proposal unduly narrow and not adequately meeting its needs.

[60] Under s 67H of the Act restriction on employees having other employment must not be included in employment agreements unless certain conditions are met.

[61] None of the proposed reasons for allowing restrictions, "adverse impact on the performance", "health and safety" or "fatigue", are defined in the clauses provided. They are not identified as example genuine reasons in s 67H(3) of the Act. Health and safety is a broad concept and the implications for its inclusion here perhaps not fully explored. Fatigue is a concept utilised by Worksafe.

[62] The Authority recommends a clause combining elements of both proposals, reflecting the language of the Act, as follows:

1. Secondary employment

- 1.1 Employees shall notify and seek approval of the employer prior to the commencement of any secondary employment entered into after commencement of this agreement. The employer shall not unreasonably withhold approval.
- 1.2 Approval may only be withheld where:
 - 1.2.1 there are genuine reasons based on reasonable grounds to conclude that additional hours of work may have an adverse impact on the employee's performance of their duties under this agreement due to fatigue;
 - 1.2.2 restrictions are necessary for that reason; and
 - 1.2.3 restrictions do not restrict other work to a greater extent than is necessary for that reason.
- 1.3 Any employee in secondary employment at the time of commencement of this agreement shall raise it with the employer for discussion.

Nicola Craig
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