

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2020] NZERA 35
3027232

BETWEEN JACQUELINE HIGHFIELD
Applicant

AND CANTERBURY DISTRICT
HEALTH BOARD
Respondent

Member of Authority: Eleanor Robinson

Representatives: Amy Keir, Counsel for the Applicant
Penny Shaw, Counsel for the Respondent

Investigation Meeting: 9 & 10 December 2019 at Christchurch

Submissions and/or further evidence: 10 December 2019 from Applicant and from Respondent

Determination: 29 January 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Jacqueline Highfield, claims that she was unjustifiably disadvantaged in her employment with the Respondent, Canterbury District Health Board (CDHB).

[2] CDHB denies that Ms Highfield was unjustifiably disadvantaged during her employment.

The Authority's investigation

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

Issues

[4] The issues requiring investigation are whether or not Ms Highfield was unjustifiably disadvantaged by CDHB:

- a. Mismanaging her return to work from injury on 31 January 2017;
- b. Failing to fully investigate her complaint of bullying;
- c. Unilaterally transferring her to Ward 27 in October 2017;
- d. Unilaterally transferring her from Ward 27 to Outpatients in May 2019.

Background

[5] Ms Highfield commenced employment with CDHB in 2002, initially as a Nursing Aide and subsequently as a Registered Nurse. From March 2003 Ms Highfield worked on Ward 12 which was a cardiology ward and reported to the Charge Nurse Manager (CNM), Ms Margaret Cumming.

[6] On 17 June 2016, Ms Highfield injured her foot in a non-work related injury which required time off work and surgery on 13 November 2016. As a result of the injury Ms Highfield was absent from work in late 2016 and early 2017.

Return to Work plan

[7] On 22 December 2016 Ms Highfield and ACC agreed that ACC would prepare a return to work plan (RTW plan).

[8] On 13 January 2017 there was a meeting between Ms Highfield, Mr Devik Fakir who was Ms Highfield's physiotherapist appointed by ACC, and Ms Cumming. The purpose of the meeting, which was led by Mr Fakir, was to consult with Ms Highfield about a RTW plan.

[9] Ms Cumming said that Mr Fakir subsequently prepared a proposed RTW plan based on information discussed at the meeting. Mr Fakir had emailed a copy of the RTW plan to Ms Cumming on 13 January 2017.

[10] The RTW plan as devised during the meeting covered a period from 30 January 2017 to 13 February 2017. Initially Ms Highfield was to return to work on reduced shifts as per the roster but on normal duties: the first week working five shifts of four hours, the second week working five shifts of six hours, and the third and last week returning to shifts as per the roster on normal hours and normal duties.

[11] Ms Cumming said that Mr Fakir had sought feedback from Ms Highfield and approval from Mr Sharr, Ms Highfield's Orthopaedic Surgeon before the RTW plan was to be put in place.

July 2016 Complaint and Process

[12] In July 2016, Ms Highfield made a complaint about Ms Cumming's behaviour towards her. There was a background of difficulties in the working relationship between Ms Highfield and Ms Cumming. At the date of raising a complaint about Ms Cumming's behaviour towards her in 2016, Ms Highfield had previously made a number of formal complaints about Ms Cumming including having raised four personal grievances in connection with Ms Cumming's management during the previous eight year period. Ms Cumming had also raised some concerns about Ms Highfield in the same period.

[13] Prior to the complaint being made, there had been an incident between a Duty Nurse Manager and Ms Highfield on 22 May 2016 which had given rise to Ms Highfield making a complaint about the Duty Nurse Manager. Mr Mark Crawford, Medical Nursing Director, had asked Ms Cumming as Ms Highfield's CNM to follow up on this incident which was the standard protocol for dealing with such issues.

[14] The complaint by Ms Highfield in July 2016 contained two specific areas of complaint. First that Ms Cumming had stated to the nurses on an afternoon shift that another nurse was to be the nurse in charge of the shift rather than Ms Highfield as intended, because: "we have to keep her away from the duty managers".

[15] The second area of complaint was that Ms Highfield had telephoned Ward 12 to communicate her absence and because Ms Cumming was not available she had left a message with the Ward Clerk. However Ms Cumming had subsequently telephoned her and told her in an angry manner that she had no right to speak to the Ward Clerk.

[16] Mr Crawford said that on 6 July 2016 following receipt of the complaint, he had emailed Ms Highfield acknowledging her complaint, and inviting her to meet with him to discuss her complaint in more detail.

[17] He informed her in the email that the purpose of the meeting was to give her the opportunity to add anything further including the names of key witnesses, and that he did not intend to speak to any employees unless they were mentioned specifically.

[18] Ms Highfield declined the invitation to meet.

[19] On 13 July 2016 Mr Crawford wrote to Ms Cumming to advise her of the complaint and to arrange to meet with her to get her response to the complaint. The meeting with Ms Cumming occurred on 15 July 2016.

[20] During the meeting Ms Cumming admitted in regard to the first area of the complaint to Mr Crawford that she had removed Ms Highfield from being in charge of Ward 12 because she had wanted to keep her away from direct interactions with the Duty Nurse Manager. This was due to the tension arising from the complaint about the Duty Nurse Manager by Ms Highfield.

[21] However as soon as Ms Highfield had told her that she had not been satisfied or happy with her decision Ms Cumming said she had apologised and put Ms Highfield back in charge of Ward 12.

[22] Ms Cumming said that in regard to the second area of complaint that her concern had not been that Ms Highfield had advised the Ward Clerk of her absence but that Ms Highfield had told the Ward Clerk to change the roster and that she as CNM needed to be involved in roster decision making.

[23] During the interview, Mr Crawford said Ms Cumming had told him she felt the complaint by Ms Highfield was unfair and that it had affected her health, specifically her sleeping and given her heartburn.

[24] Ms Cumming said she had subsequently sought guidance from the CDHB Organisation Development department to assist her in the relationship with Ms Highfield which she had always found to be a difficult one.

[25] Mr Crawford said that as a result of his investigation he had reached the view that there had been no bullying. However he noted that there were communication issues between Ms Highfield and Ms Cumming, but because Ms Cumming had voluntarily sought guidance to assist in the relationship with Ms Highfield he had considered this might resolve the communication issues. He had communicated the outcome to Ms Highfield.

31 January 2017: First day of return to work

[26] Ms Highfield said she had wanted to ensure she had a safe return to work and contacted her ACC Case Manager who had negotiated with CDHB that Ms Highfield's first day back at work on 31 January 2017 should be on a supernumerary basis for the first eight hours. This was confirmed in a letter to Ms Highfield from the ACC Case Manager dated 18 January 2017.

[27] Ms Highfield said her understanding of being supernumerary was that she would be an additional person on Ward 12 without an allocated patient work load.

[28] Being supernumerary had been her suggestion rather than that of Mr Sharr because there were technological advances that she needed to re-train in to be fully effective upon her return to work. She considered that not being allocated a full patient load would help her achieve this.

[29] Ms Cumming said that an extra nurse had been rostered on Ward 12 for 31 January 2017 in accordance with her understanding of the term 'supernumerary' which was that there would be an extra nurse on Ward 12 to assist Ms Highfield if she needed assistance. Ms Highfield had been allocated a five patient workload which included one discharge and one transfer in who did not arrive until nearly lunch time.

[30] Ms Highfield said supernumerary was usually regarded by CDHB employees as not being solely responsible for patient load, either sharing a work load with another nurse or having no assigned patients.

[31] However, she had been assigned a patient load of four to five, with five being the usual load on Ward 12 and the same number of patients or more than other nurses rostered that day, and had not been aware that another nurse was working on that day until about midday. This was because the additional nurse's name was not on the patient allocation board in the Ward 12 office and she had not seen the additional nurse at handover.

[32] Ms Highfield said that when she had raised with Ms Cumming that she was meant to be supernumerary, Ms Cumming had not told her of the additional nurse's role but informed her that: "The reality of working on Ward 12 means you have a patient load of five". There had been no mention made by Ms Cumming of any extra assistance for her.

[33] Ms Cumming said that in addition to the additional nurse, she had also arranged for a clinical nurse specialist and a clinical nurse educator to visit Ms Highfield on her first day back to check in on her progress.

[34] Ms Highfield said she had also been assigned a bariatric patient on 31 January 2017 and having to operate at full capacity, including the bariatric patient without the necessary lifting equipment to assist that patient to shower, had exacerbated her recovering injury. This was evidenced by her limping at the end of the shift.

[35] Ms Cumming said that she did not notice at any stage during the shift that Ms Highfield was limping, sitting down or requiring a break as she was able to do. Nor did Ms Highfield record any discomfort or aggravation of her foot injury.

March 2017 Complaint and Process

[36] On 8 March 2017 Mr Crawford said he received a further complaint from Ms Highfield about Ms Cumming. The complaint was set out in a letter dated 27 February 2017. The letter stated:

Dear Mark

This letter serves to formalise concerns raised to you on Friday 24 February. It is also a continuation of matters raised last year.

...

Margaret seems overtly frosty and to harbour some unexplained rage about my return to work.

...

I told her that I was most aggrieved that she had been gossiping about my medical condition with another nurse. How dare she try and question the rationale of the medical specialist and ACC. I brought up the patient allocation on my first day back. Her body language was taunt (sic), she was clenching her fist, red in the face, and she jumped up and shouted that that was the way it was on Ward 12.

...

I am tired of this regular, systemic, abuse of her power. She is volatile, unapproachable and inflicts and incites emotional harm on a regular basis and this has to stop.

[37] Mr Crawford said he emailed Ms Highfield on 9 March 2017 to acknowledge receipt of the complaint and to invite her to a meeting.

[38] The meeting with Ms Highfield took place on 17 March 2017, the purpose of which was to clarify details of the complaint, discuss the investigation process and request suggestions for witnesses to interview. Ms Highfield recorded the conversation.

[39] On 21 March 2017 Mr Crawford wrote to Ms Cumming inviting her to attend a formal investigation meeting to respond to the allegations made by Ms Highfield. The meeting with Ms Cumming took place on 23 March and was attended by Mr Crawford, Ms Cumming and a representative from CDHB HR department. A representative from the NZNO was also present and representing Ms Highfield.

[40] Ms Cumming denied the allegations made by Ms Highfield. Mr Crawford said Ms Cumming also told him she did not perceive there was any issue with her behaviour that affected other staff, citing the low staff turnover on Ward 12 and the fact that she did not receive complaints from other employees.

[41] She raised again that she felt the complaint by Ms Highfield was unfair and that it had affected her sleep patterns and given her heartburn.

[42] Following the meetings with Ms Highfield and Ms Cumming, Mr Crawford said he would email Mr Fakir to ask for his thoughts on the RTW plan and the advice that had been

given to Ms Cumming about Ms Highfield's return. He had interviewed Mr Fakir by telephone on 3 April 2017.

[43] Mr Crawford said he had carried out a full investigation during which he had reviewed the patient allocation charge prepared by Ms Highfield and the relevant ACC notes.

[44] He met Ms Highfield on 1 May 2017 with her support person to discuss his findings and to get a response from her before finalising the outcome. However, Ms Highfield did not provide any additional information.

10 May 2017 letter

[45] Mr Crawford wrote to Ms Highfield on 10 May 2017 setting out his findings. Mr Crawford said that whilst he had not found any bullying or harassment during his investigation he had been concerned about the breakdown of the relationship between Ms Highfield and Ms Cumming and that it appeared to be causing them both some distress and was affecting their well-being: "It is clear that there is a lack of trust and communication between the two of you which is causing ongoing tension and stress."

[46] In the letter Mr Crawford repeated his suggestion made during the meeting with Ms Highfield that a facilitated or mediation meeting between her and Ms Cumming would be a "starting point." This would take the form of either a facilitated meeting with workplace support or a mediated session with either Mr Crawford or the mediation service. The outcome would be that formal agreed goals were set.

Personal Grievance 6 June 2017

[47] Ms Highfield did not respond directly to Mr Crawford, however on 6 June 2017 CDHB received a personal grievance claim claiming that she had been unjustifiably disadvantaged during the course of her employment. The letter stated:

Our client does not accept that Mr Crawford's investigation was fair and as such does not accept his findings.

She is concerned that Mr Crawford has found that Ms Cumming did not abuse her position of power in her dealings with her and is deeply concerned about Mr Crawford's finding that she has issues of trust and communication and that this is causing ongoing tension and stress in the relationship.

Our client is particularly concerned that Mr Crawford's statement in respect to trust and communication is indicative of a "victim blaming" approach by him and considers it to be both inappropriate in the circumstances, unfair to her and deeply offensive.

[48] The letter dated 6 June 2017 sought financial compensation on behalf of Ms Highfield and advised that she was keen to have the matter resolved quickly and was prepared to attend a mediation facilitated by the mediation service.

Ms Gray's investigation into the 6 June 2017 Personal Grievance

[49] Ms Heather Gray, Director of Nursing, was appointed to investigate the personal grievance issues. Ms Gray said that in response to the personal grievance she had considered the issues raised in the letter and reviewed all the documentation relating to the investigation Mr Crawford had undertaken.

[50] In her response to the personal grievance in a letter dated 3 July 2017 sent to Ms Highfield's lawyer Ms Gray stated:

I am satisfied with the outcome of the investigation based on the information submitted during the process. I support Mark's findings that Margaret followed a typical return to work process in relation to Jackie's situation, and I understand that Jackie did not raise any major concerns at the time of her return to work to either Margaret or other senior staff involved.

Margaret did have an additional nurse available to support Jackie during her return to work process, if needed, however Jackie did not utilise that resource. I do not believe that Margaret intentionally treated Jackie any differently to any other nurse. Overall I am comfortable that Mark took into account other matters such as Margaret's intentions towards Jackie, which do not appear to have involved isolating behaviour on her part or intentional unfair treatment. I share Mark's view that communication and trust are major contributors to the ongoing conflict between Margaret and Jackie.

[51] Ms Gray said that it had been clear to her during her review of the investigation process that there was an issue in the relationship between Ms Cumming and Ms Highfield which had been ongoing for some time.

[52] She noted that Ms Highfield had made six formal complaints and personal grievances relating to Ms Cumming's management of her over the length of her employment on Ward 12. Whilst various interactions had occurred to try and support a better working relationship, the issues between the two of them had reoccurred.

[53] Ms Gray said it was a major concern to her that CDHB had two senior staff working in a patient care setting who were clearly tense in each other's presence and subsequently uncomfortable communicating to each other professionally.

[54] Ms Gray said that she had been concerned that the issues would not be resolved unless Ms Highfield and Ms Cumming gained some distance from each other, so she had suggested that one of the options to be considered was moving Ms Highfield to another

Christchurch Hospital ward and in the 3 July 2017 letter she suggested four other wards as potential options for Ms Highfield to consider.

[55] The parties attended mediation on 18 August 2017 in relation to the personal grievance which had been raised but this did not resolve the issues.

[56] Ms Highfield said that she had been concerned that Ms Gray was personally involved in the issues she had raised because she (Ms Highfield) had objected to a policy Ms Gray had approved for bedside handovers in 2014 and in relation to which she (Ms Highfield) had sought HDC (Health and Disability Commissioner) advice.

[57] Ms Gray said she did recall the Nursing Council contacting her to discuss the policy proposal and realised that that must have been on the basis a complaint had been made. However she had never known who had made the complaint and had not therefore been adversely influenced by it towards Ms Highfield.

7 September 2017 Meeting

[58] On 7 September 2017, Ms Highfield and Ms Gray met to talk about a possible secondment for Ms Highfield to another ward. Ms Gray said that the option that Ms Highfield work within different Christchurch hospital wards and departments was to give both Ms Highfield and Ms Cumming a break from the ongoing issues and in order that Ms Highfield could explore alternative options to Ward 12.

[59] During the meeting Ms Gray said Ms Highfield had declined the various options put to her and stated that she did not want any changes in her current hours. During the meeting Ms Highfield produced a patient complaint. The complaint concerned Ms Cumming.

[60] Ms Highfield said that when she had been given the patient complaint she had not been sure how to deal with it because for reasons associated with other previous matters, she did not have confidence in the CDHB Complaints Officer. Therefore she had sought Ms Gray's advice. However, Ms Gray had responded by becoming angry and telling her that she had been unprofessional.

[61] Ms Gray said as she read the letter she had realised it was a complaint that implied behaviour which posed a potential safety issue for the patient. She had been shocked and offended by Ms Highfield's action in retaining the patient complaint which had been made some time earlier until the meeting, thereby delaying it being addressed in a timely manner. Whilst the letter was not dated there was a fax print on it which read: "22 Aug 2017 20.29".

[62] Ms Gray felt it was inappropriate for Ms Highfield to raise it within the context of a personal employment matter. In her opinion Ms Highfield should have followed the CDHB policy process for such complaints, and forwarded it to the Customer Service team to address it promptly. However, it appeared to her that Ms Highfield's motivation in retaining the complaint until that point had been to use it as evidence in support of her grievance about Ms Cumming. She considered that Ms Highfield had overstepped professional boundaries.

[63] Ms Gray said that following the meeting she had taken the patient complaint to the Customer Services Manager and asked her to investigate it. The complaint was then addressed and resolved according to CDHB policy.

[64] As a result of this incident Ms Gray said she had been very concerned that Ms Highfield's behaviour in respect of the patient complaint had occurred because of the ongoing issues she had with Ms Cumming. Her view was that the situation needed to be resolved before either Ms Highfield or Ms Cumming did anything to jeopardise themselves professionally.

Move to Ward 27

[65] Accordingly, on 3 October 2017, Ms Gray wrote to Ms Highfield informing her that she would be moved to Ward 27.

[66] Ms Gray said Ward 27 seemed the best fit for Ms Highfield's work conditions. Importantly Ward 27 had a CNM who had shown great fairness and support for her team and whom Ms Gray believed would be able to establish a good working relationship with Ms Highfield.

[67] The decision to move Ms Highfield was confirmed by Ms Gray in a letter dated 3 October 2017 in which Ms Gray stated:

I met with you on 7 September 2017 to discuss a possible three-month secondment ...

This option was to give both you and Margaret a break from the ongoing issues ... You did not want to work in CCU, Ward 14, Ward 10, any surgical ward area or anywhere that required you to work additional rostered night duty. You were also doubtful about working regular hours and asked for car parking, a request it is not possible for me to meet.

I reiterate that it is a major concern for the CHDH to have two senior staff working in a patient care setting who are clearly tense in each other's presence as this may impact on professional communication and potentially patient care.

I am conscious of the potential impact of this on your and Margaret's health. I have therefore reached a decision that you need to be relocated away from Ward 12. As we have not been able to reach agreement as to a suitable ward, I have made a decision about this.

The reason we have chosen to move you rather than Margaret is that it is more disruptive to other staff and has a greater impact on ward operations to move the Manager. It is also a lot harder to find another role to move her into.

[68] Ms Highfield said that she felt that the move to Ward 27 was punitive due to her having raised the patient complaint in the meeting on 7 September 2017 because Ward 27 was a medical ward with the shortest stay and highest patient turnover.

[69] The CNM of Ward 27, Ms Donna Galloway, explained that Ward 27 is a 30 bed general medical ward. Patients on Ward 27 have a multitude of different medical diagnoses generally requiring a lot of assistance and are bedridden. In order to cope with this Ward 27 has increased nursing staff and two hospital aides. It is also well equipped with all the equipment required to assist with lifting and moving the patients, this included the equipment needed to assist with bariatric patients.

[70] Ms Galloway said she had been informed by Mr Crawford in October 2017 that Ms Highfield would be rostered to Ward 27. He had explained that there had been a situation that developed between herself and Ms Cumming but provided no details of this and explained that Ms Highfield needed a temporary allocation.

[71] Ms Galloway said she was very happy to have Ms Highfield on Ward 27 because she was a senior nurse with cardiac experience.

[72] Ms Galloway said that when she first met Ms Highfield, she had told her about her injury and that it was still causing problems for her. She and Ms Highfield established a positive working relationship which Ms Highfield confirmed during the Investigation Meeting. She said Ms Highfield settled in quickly and worked well.

[73] Ms Galloway said that when Ms Highfield joined Ward 27 her medical certificate provided no barriers to any type of work that she could do with her foot injury, and she did not notice her struggling to carry out any tasks. Ms Galloway commented that there were a number of nurses on Ward 27 with bad hips and bad knees who managed any physicality required quite well. She had observed Ms Highfield closely to see how she was coping when she joined and occasionally saw her limping.

[74] Ms Galloway said she received a medical certificate on 7 December 2017 that reduced Ms Highfield's hours to three days a week. However, there was no indication either from Ms Highfield herself, from the medical certificate, or otherwise that this was due to the work on the Ward 27. Ms Galloway said she believed it to have been a natural progression of the injury which Ms Highfield had told her was creating ongoing issues for her.

[75] In particular, Ms Galloway noted that at no stage had Ms Highfield told her that the particular nature of the work on Ward 27 had aggravated her injury. Whilst Ms Highfield had told her that the actions of raising up on her toes and unlatching the bed with her foot seemed to be causing her problems, Ms Galloway said these are actions common on any ward and which can be avoided simply by using a footstool and using the other foot to unlatch the bed.

Proposed Meeting November 2017

[76] On 16 November 2017 Ms Gray wrote to Ms Highfield advising her of a meeting to be held on 29 November 2017 to discuss two issues: (i) Ms Highfield having discussed matters raised at mediation with other people; and (ii) her management of the patient complaint.

[77] Ms Highfield did not attend the proposed meeting and Ms Gray said she had decided not to pursue the matter at that stage.

Meeting January 2018

[78] Ms Gray wrote to Ms Highfield in January 2018 inviting her to attend a meeting to discuss her perspective on the placement in Ward 27 and her goals going forward.

[79] The meeting took place on 31 January 2018 and Ms Highfield was accompanied by a friend. During the meeting Ms Gray raised again the two matters referred to in the 16 November 2017 letter and said she had discussed the ethical and professional challenges of Ms Highfield's behaviour when dealing with the patient complaint. Ms Gray had also apologised to Ms Highfield for her initial reaction when Ms Highfield had given her the complaint.

[80] Ms Gray said Ms Highfield had not raised any issues about the workload on Ward 27, her manager or the team. However Ms Highfield had told her that her injury was still bothering her and she was now working three days a week. Ms Gray said that Ms Highfield had not given any indication at that time that this had been due to the work on Ward 27, but rather that there were ongoing issues with her injury and she said that she wished to stay on Ward 27.

[81] During cross examination at the Investigation Meeting Ms Highfield accepted that CDHB had not made any connection between her injury and the work on Ward 27 until the Authority Investigation Meeting held in March 2019 (the March 2019 Investigation Meeting).

[82] Following their meeting Ms Gray wrote to Ms Highfield by letter dated 7 February 2018 confirming what had been discussed at the meeting and summarising what had been agreed:

- You will remain working on Ward 27 in the short term.
- We will meet again after your appointment with the Orthopaedic Surgeon to discuss long term options.
- You will continue to look out for suitable opportunities.

[83] Ms Gray also requested that Ms Highfield forward any relevant information following her appointment with the Orthopaedic Surgeon.

March 2019 Investigation Meeting and events since

[84] The March 2019 Investigation Meeting in relation to the personal grievance claim raised by Ms Highfield was adjourned to allow the parties a further opportunity to resolve matters, but this was not successful.

[85] During the March 2019 Investigation Meeting Ms Highfield had given evidence that the work on Ward 27 had aggravated her injury. As a result following it CDHB tried to arrange a meeting with Ms Highfield to discuss suitable alternative placements for her.

[86] Mr Crawford said a request was also made in April 2019 to obtain information from Mr Sharr in relation to the aggravation of Ms Highfield's foot injury and the implications for placing her in alternative wards.

[87] An emailed response was received from Ms Highfield's lawyer on 30 May 2019 at which time a report from Mr Sharr addressed to Ms Highfield and which was dated two weeks earlier was provided. In the report dated 14 May 2019, Mr Sharr stated:

In my previous documentation, I had implied that the return to any ward was possible but in retrospect the nature of your tasks on ward 27 and those of ward 12 are quite different. ... I am led to believe that you are still working in this heavier nursing role and this may well be contributing to the ongoing difficulties returning to full time employment.

[88] The email response further advised that Ms Highfield did not wish to meet to discuss an alternative placement.

[89] Mr Crawford said given the information from the Orthopaedic Surgeon Mr Sharr, he was concerned about the risk to Ms Highfield if she remained on Ward 27. On 31 May 2019 he had made the decision that she should temporarily move off Ward 27 until further information could be obtained.

[90] Mr Crawford said he contacted Ms Highfield by telephone on 31 May 2019, advised her of his concerns and his decision that she was not required to work over the weekend as rostered, but confirmed that she would receive payment for the weekend as if it had been worked.

Transfer to Outpatients

[91] Mr Crawford telephoned Ms Highfield on 31 May 2019 and advised her that she was being moved to Outpatients as a supernumerary from the start of the following week, 3 June 2019, pending further information about her medical situation. He also confirmed the decision in a letter to Ms Highfield.

[92] Mr Crawford further proposed that Ms Highfield be referred to the CDHB Internal Occupational Health team to help determine her capability in relation to a suitable role and placement.

[93] Ms Highfield said that the transfer to Outpatients had resulted in her clinical skills having declined and the self-learning she had completed not being recognised, and she missed patient contact. She had been denied the opportunity to complete working towards a PDRP and had lost the role of mentor to a hospital aide which had been an enjoyable part of her role on Ward 27.

[94] She had also been denied the opportunity to earn additional income on public holidays and weekends. In addition, gossip and innuendo regarding the reason why she had been suddenly moved to Outpatients had caused her further humiliation and distress.

[95] Mr Crawford said that Outpatients had been chosen as a suitable ward for Ms Highfield because it has the lightest physical load of any area in the hospital and therefore was the least likely to cause any aggravation to Ms Highfield's ankle injury until CDHB was able to obtain further medical information.

[96] Whilst working in Outpatients Ms Highfield was officially still assigned to Ward 27 and was being rostered and paid as if she was still working on Ward 27. This was to ensure that Ms Highfield was not financially disadvantaged by her move.

[97] Mr Crawford said he had met with Ms Highfield and her lawyer on 21 June 2019. At the meeting he had been accompanied by the People and Capability Adviser for CDHB. During the meeting Ms Highfield had provided him with her latest ACC report and indicated that she was managing well in Outpatients. Mr Crawford said he had asked Ms Highfield to advise him if it was too difficult for her and she needed to reduce her hours.

[98] Mr Crawford said on subsequently reviewing the ACC report provided to him, he had noted that:

- a. a plan to have Ms Highfield fully fit had been extended each month since December 2018;
- b. the last rehab appointment Ms Highfield attended was 14 May 2019;
- c. the case manager had been unable to contact Ms Highfield by telephone;
- d. Ms Highfield had declined a referral to the pain management service; and
- e. Ms Highfield had been referred to Occupational Health Canterbury on 21 May 2019 but they had been unable to contact her and had closed her file “due to non-compliance”.

[99] On 27 June 2019 CDHB received a complaint from Ms Highfield raising a personal grievance in relation to her move to Outpatients.

[100] Mr Crawford wrote to Ms Highfield on 28 June 2019 as a follow-up to the meeting on 21 June 2019, stating:

In the meeting you expressed dissatisfaction at how the transfer from Ward 27 to the outpatients department had taken place. I acknowledged the swift manner in which this had occurred, but reiterated that we had a legal obligation to move you from Ward 27 based on your specialist’s letter and it was decided that a temporary and supernumerary placement in Outpatients would be best to ensure that you are able to do your job safely until we could gain a better understanding of your injury.

[101] He received a response from Ms Highfield on 2 July 2019 in which she advised that ACC and Motus (a physiotherapy clinic) were seeking a second opinion which was booked for 30 July 2019.

[102] On 6 August 2019 the CDHB’s Chief Executive wrote to Ms Highfield’s lawyer and confirmed it had been agreed to have a joint approach to her workplace assessment.

[103] Mr Crawford explained that the CDHB Occupational Health team usually dealt with workplace injuries and ACC with non-work related injuries however, the CDHB Occupational Health team had experience in supporting CDHB employees back into the CDHB work environment. Accordingly, whilst Ms Highfield’s injury was non-work related, this could be a suitable approach for her. The letter outlined that consent was required for the occupational health team to request and receive medical information from ACC.

Meeting 12 August 2019

[104] Mr Crawford and Ms Highfield met on 12 August 2019 and during that meeting he had agreed to a variation to the plan where Ms Highfield worked in Outpatients three days a

week and on the remaining day she could work from home one day a week as “self-directed learning”. During the meeting, Mr Crawford said Ms Highfield mentioned that at the direction of ACC she had a “fit for work” assessment completed by a specialist Occupational Physician, Dr Lyons, on 30 July 2019.

[105] Dr Lyons contacted Mr Crawford on 14 August 2019 in the course of preparing her report. Mr Crawford said he indicated his desire to have Ms Highfield return to full duties and in response Dr Lyons had informed him that she would recommend that Ms Highfield needed a functional capacity assessment and a workplace assessment before this could occur.

[106] On 16 August 2019 Mr Crawford emailed to Ms Highfield the amended plan for her interim placement in Outpatients as discussed and agreed at the 12 August 2019 meeting. He had also informed her that once the report was received from Dr Lyons this would be shared with the CDHB Occupational Health team.

Dr Lyons' Report

[107] On 21 August 2019, Ms Highfield sent Mr Crawford a copy of the report from Dr Lyons dated 19 August 2019 which contained a number of recommendations, in particular, a referral for a pain management assessment, further participation in physiotherapy, and once Ms Highfield had better pain management, a functional capacity evaluation and a worksite assessment.

[108] Ms Highfield emailed Mr Crawford on 18 September 2019 and raised a concern that she was not being credited professional development hours for completing some packages. Mr Crawford said he had investigated this issue and the outcome was that CDHB did not credit professional development hours for repeating self-learning packages because there was no requirement to repeat the self-learning. Mr Crawford offered to credit Ms Highfield with one hour and to provide extra input from a nurse educator to support her professional development.

[109] Mr Crawford said that whilst Ms Highfield currently continued to work in Outpatients at the present time, CDHB was working through a process of obtaining more detailed medical information about her fitness to work in order that they could determine a suitable placement for her. The position in Outpatients is currently temporary and supernumerary until a proper assessment of Ms Highfield's injury and her capability for work is completed and she can either be returned to Ward 27 or allocated to another area.

[110] Mr Crawford said he did not accept that Ms Highfield's clinical skills would have declined as a result of her placement in Outpatients because the placement offered more patient diversity and the opportunity to explore new avenues of nursing practice.

Raising of a Personal Grievance

[111] Ms Highfield has raised unjustifiable disadvantage personal grievances. Section 103 (1)(b) of the Act is applicable to disadvantage grievances and states:

That the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer;

[112] The elements of s103 (1) (b) are twofold:

- a. An unjustifiable action by the employer, which
- b. Affected the employee's terms and conditions of employment, and this was to the employee's disadvantage.

[113] Ms Highfield must therefore establish that there was some unjustifiable action by CDHB which affected her terms and conditions of employment to her disadvantage.

Did CDHB unjustifiably disadvantage Ms Highfield by mismanaging her return to work from injury?

[114] Ms Highfield raised a complaint that CDHB had mismanaged her return to work.

[115] The RTW plan discussed at the meeting held on 13 January 2017 between Ms Highfield, Ms Cumming and Mr Fakir had been subsequently drawn up by Mr Fakir, the physiotherapist appointed by ACC, as a result of the agreement between Ms Highfield and ACC that ACC would do so.

[116] In doing so Mr Fakir had sought input from Mr Sharr, the Orthopaedic Specialist with responsibility for Ms Highfield's injury management.

[117] I find no evidence that Ms Cumming had devised the RTW provided by Mr Fakir to her on 13 January 2017 in which Mr Fakir states that he is hoping to receive approval for it from Mr Sharr. As confirmed in the letter from Mr Sharr dated 14 February 2017, he had approved the RTW drawn up by Mr Fakir.

[118] Ms Highfield provided feedback on the RTW, including that she work a full shift on 31 January 2017. That was duly noted and actioned. Ms Highfield also requested that she be treated as supernumerary on her first day back at work. I note that this was not a medical requirement but CDHB nonetheless agreed to it.

[119] The difficulties appear to have arisen as a result of what the parties understood by the term 'supernumerary'. Ms Highfield understood the term as meaning that she would be an extra resource on Ward 12 with no patients assigned to her, Ms Cumming appears to have understood the term as meaning there would be an additional nurse allocated to Ward 12 who would assist Ms Highfield with her work load.

[120] The evidence of Ms Highfield is that she was not informed there was an additional nurse allocated to Ward 12 to assist her, and that she was not aware that the nurse was available to assist her as she had not seen her at the commencement of the day, nor was her name on the patient allocation roster.

[121] It is not clear on the Staff/Patient Allocation Ward 12 document provided in evidence that there was an additional nurse on Ward 12 on 13 January 2017 because the nurse referred to as being additional on Ward 12 is not mentioned until patient allocation for the afternoon shift. However it is possible as claimed by CDHB that the nurse was present throughout the day.

[122] Supernumerary is defined in the Oxford Dictionary online as: "That is beyond or in excess of a usual, regular, stated, or prescribed number or amount; additional, extra, or left over".¹

[123] Ms Highfield said she had raised her understanding that she would be supernumerary in the sense of not being allocated patients with Ms Cumming, but Ms Cumming had responded in a dismissive manner, and not mentioned to her that there was an additional nurse available to assist her during the shift.

[124] I find that in respect of the RTW there is no evidence Ms Cumming interfered in the RTW plan drawn up by Mr Fakir and approved by Mr Sharr. CDHB also acted reasonably in agreeing to Ms Highfield's amendment of that plan and by agreeing that Ms Highfield be treated as supernumerary on her first day.

[125] However I find that whilst some confusion as to the application of the meaning of 'supernumerary' was unfortunate but not maliciously intended, once Ms Highfield drew her attention to their different understanding, Ms Cumming did not act reasonably by not discussing the issue, advising her that there was an additional nurse available to assist her, and attempting to find a resolution.

¹ <https://www.oed.com/view/Entry/194438?redirectedFrom>

[126] Ms Highfield also claimed that operating at full capacity exacerbated her recovering injury. CDHB had relied upon the advice of Mr Fakir, who had been appointed by ACC, when preparing the RTW and he in turn had consulted Mr Sharr when preparing it. It was Ms Highfield who suggested she be supernumerary on the first day rather than being as a result of medical advice, however CDHB agreed to her suggestion.

[127] I find no medical evidence supporting Ms Highfield's claim that working on Ward 12 on 31 January 2017 exacerbated her injury, rather in the letter to Ms Highfield's GP dated 14 February 2017 Mr Sharr notes that Ms Highfield: "is doing relatively well".

[128] Further in the same letter Mr Sharr continues to note that Ms Highfield had done a full day shift the previous day and found: "her foot was very swollen at the end of the shift. I have reassured her that swelling is not outside the norm for three months post an arthrodesis."

[129] On that basis I find no disadvantage as a result of an exacerbation to Ms Highfield's foot injury arising from the work carried out by her on 31 January 2017.

[130] However I do find that there was confusion resulting from the understanding of the word 'supernumerary' between Ms Cumming and Ms Highfield and that when Ms Highfield raised the issue with Ms Cumming, her response failed to adequately address Ms Highfield's concern.

[131] This caused Ms Highfield distress and anxiety increased by the fact that she did not have the time she had wanted to retrain in the technological advances on Ward 12, and adversely affected her relationship with her Manager.

[132] I determine that CDHB unjustifiably disadvantaged Ms Highfield by mismanaging her return to work from injury in respect of the mismanagement of the supernumerary nurse situation.

Did CDHB unjustifiably disadvantage Ms Highfield by failing to fully investigate a complaint of bullying?

[133] Ms Highfield had made a number of complaints about Ms Cumming during her time working on Ward 12. The two principal complaints were those made in 2016 and in 2017.

[134] Ms Highfield claimed that CDHB had not followed the CDHB Harassment Policy during the investigation process.

[135] The CDHB Harassment Policy sets out the following Employer Responsibilities procedure:

Employer Responsibilities

Any investigation must respect the principles of natural justice and generally follow the procedures set out in the disciplinary investigation flow chart. This includes but is not limited to:

- Advising the respondent of the complaint, including copies of the formal written complaint and a record of interview notes with the complainant.
- Providing the respondent with the opportunity to provide an explanation and to make representations including having any witnesses heard.
- To be represented and or supported by the person of their choice.
- An unbiased consideration of the respondent's explanation in that consideration must be free from predetermination and influenced by irrelevant considerations.
- An explanation if a complainant is discovered to be unfounded or vexatious.

[136] During the 2016 complaint Mr Crawford who was conducting the investigation:

- (a) invited Ms Highfield to meet with him to provide more details of her complaint, including the opportunity to provide the names of key witnesses, however Ms Highfield declined the invitation to meet;
- (b) advised Ms Cumming of the complaint made by Ms Highfield;
- (c) met with Ms Cumming and heard her explanation;
- (d) gave unbiased consideration to that explanation; and
- (e) met with Ms Highfield to explain the outcome of his investigation into the complaint.

[137] In regard to 'unbiased consideration' I find that although Mr Crawford had previously worked as colleagues, and Ms Cumming as CNM reported to him as Medical Nursing Director this would be a normal working circumstance of nursing staff in a hospital. Mr Crawford did not have a personal or social relationship with Ms Cumming and I find there is no evidence that he would be biased in her favour.

[138] In reaching his view on the complaint at that time, Mr Crawford's evidence was that he had taken into consideration the fact that Ms Cumming had taken it upon herself to seek guidance from the CDHB Organisational Development Department in light of the difficulties

she was having in her communications with Ms Highfield. I find that this was a relevant consideration.

[139] Mr Crawford had met with Ms Highfield on 2 August 2016 to explain the outcome of his investigation. I accept Mr Crawford did not write to Ms Highfield recording his outcome findings, however whilst this might have been best practice, I observe that Ms Highfield had recorded the meeting with Mr Crawford and therefore had a record of the outcome and was not disadvantaged by not having a written record. I further observe that when Ms Highfield raised this issue subsequently, the notes were emailed to her by Mr Crawford with an apology.

[140] I find that CDHB did adhere to its own policy in regard to the 2016 complaint and I note as significant that Ms Highfield raised no objection as to how her complaint was handled at that time.

[141] In early 2017 Ms Highfield made another complaint about Ms Cumming and her management of Ms Highfield's return to work. I find that Mr Crawford adhered to the CDHB policy in respect of this complaint also.

[142] In respect of the investigation carried out by Mr Crawford I find that in regard to witnesses and other evidence Mr Crawford:

- a. interviewed Mr Fakir, in regard to the RTW plan and the advice given to Ms Cumming about it. I find that Mr Fakir was a relevant witness and it was appropriate that Mr Crawford interviewed him;
- b. did not interview the nurse to whom Ms Highfield alleged Ms Cumming had spoken regarding her foot, nor to the supernumerary nurse because he did not consider they could add anything to his investigation findings. I find this was a decision based on reasonable grounds and therefore open to Mr Crawford as a fair and reasonable investigator to make; and
- c. he reviewed the patient allocation chart prepared by Ms Highfield and her relevant ACC notes. Mr Crawford's evidence was that he had a good understanding of the patient allocation chart because prior to his appointment as Medical Nursing Director Mr Crawford had worked for six years as a CNM. I find that Mr Crawford would be familiar with such documents and able to form a decision on them.

[143] I find that Mr Crawford followed a fair and reasonable investigation process in which he adhered to the CDHB Harassment Policy by carrying out relevant interviews and reviewing the documentation available to him.

[144] Mr Crawford had reached the outcome that there had been no bullying or harassment of Ms Highfield by Ms Cumming, but that there were serious issues in their communication and relationship which were affecting their health and well-being.

[145] I find it was a conclusion which could have been reached by a fair and reasonable investigator in the circumstances.

[146] In that context the detrimental impact the relationship between Ms Highfield and Ms Cumming was having on both the professional communications between a CNM and a nurse under her management, and on the well-being of both women, I find to be relevant to the outcome reached by Mr Crawford that a facilitated meeting with Workplace Support or a mediation would assist in resolving the issues. However Ms Highfield declined the suggestion.

[147] I find that Mr Crawford did fully investigate the complaints raised with him by Ms Highfield in 2016 and 2017.

[148] Mr Crawford's investigation was subsequently reviewed by Ms Gray who found that it had been thorough. There is no evidence to support Ms Gray having been biased against Ms Highfield, whom she had not met prior to 2017, by a complaint made about her bedside transfer policy since she had been unaware it had been Ms Highfield who had made it.

[149] I determine that CDHB did not unjustifiably disadvantage Ms Highfield by failing to fully investigate a complaint of bullying.

Did CDHB unjustifiably disadvantage Ms Highfield by unilaterally transferring her to Ward 27 in October 2017?

[150] Following the conclusion of Mr Crawford's investigation Ms Gray had consulted with Ms Highfield about the possibility of her being transferred to another ward. The reason for this transfer option was also set out in the letter dated 3 July 2017 as being based upon the concern that two senior staff were working: "in a patient care setting who are clearly tense in each other's presence and subsequently both are uncomfortable communicating to each other professionally".

[151] The reason for Ms Highfield being transferred rather than Ms Cumming was explained in the letter dated 3 October 2017 as being based upon the disruption and difficulty of reassigning a CNM which I find to have been a view a fair and reasonable employer could reach.

[152] Various options to consider were suggested to Ms Highfield with the aim of reaching a mutual outcome on an alternative ward, but Ms Highfield had rejected the options put to her. There was therefore no agreement reached between Ms Gray and Ms Highfield and therefore Ms Gray reached a decision which was to transfer Ms Highfield to Ward 27.

[153] In the circumstances in which Ms Highfield had been consulted, but consensus had not reached I find a fair and reasonable employer could make the decision to transfer Ms Highfield.

[154] Ms Highfield claimed that this action was punitive and based upon her raising of a patient complaint about Ms Cumming during the meeting held on 7 September 2017.

[155] I accept that Ms Gray considered it to have been highly inappropriate of Ms Highfield to delay taking any action in connection with the patient complaint and that she made her displeasure known during the meeting held on 7 September 2017.

[156] In considering whether this incident influenced Ms Gray into making a punitive decision to transfer Ms Highfield to Ward 27 I note that Ms Gray had taken into consideration the fact that whilst Ward 27 is a general medical ward which has patients who need a lot of assistance and are bedridden, it is also well equipped to handle the demands of that environment with increased nursing and specialised equipment for lifting and moving patients, including bariatric patients, which Ward 12 does not have and which Ms Highfield had specifically cited as having aggravated her foot injury.

[157] In addition Ms Gray had been influenced in making the decision by the personality and staff management of the CNM. Her evidence was that in making the decision to transfer Ms Highfield to Ward 27 she had taken into consideration the staffing model on Ward 27 and the fact that the CNM of Ward 27 had shown both fairness and support for her team, and believed she and Ms Highfield would work together well. This proved to be the case.

[158] There is no evidence that Ms Highfield had raised any concern during her meeting with Ms Gray on 7 September 2017 that a: “heavier” nursing work ward might adversely impact her foot injury. There was also no medical information available to CDHB at that time to support that view. On the contrary in the letter dated 14 May 2019 Mr Sharr states: “In my previous documentation, I had implied that the return to any Ward was possible”.

[159] I do not find the decision to transfer Ms Highfield to Ward 27 to have been a punitive or unjustifiable action by CDHB.

[160] In terms of the transfer Ms Highfield claimed that she found the move to be humiliating and professionally less stimulating than her work on Ward 12.

[161] I accept from evidence given at the Investigation Meeting that the general perception in Christchurch Hospital is that Ward 12, being a cardiology ward, is a 'glamorous' ward to work on, and that once a nurse worked there they rarely moved to another ward.

[162] However as observed in *Chief Executive of Department of Corrections v Harris*:

.. A transfer may amount to a disadvantage even if unaccompanied by any demotion, reduction in pay or additional travelling or other costs. However, whether it does must always be a question of fact to be decided, like every other question of fact, objectively. It is not enough that the employee objects on the basis of a subjective view that the transfer is unattractive. To be disadvantageous the transfer or other impugned action must be detrimental or harmful²

[163] Ms Highfield may have preferred to work on Ward 12 but I find no evidence that the move to Ward 27 disadvantaged her in terms of her hours of work or remuneration, or her skill set, and importantly from the aspect of her general well-being, she enjoyed a positive relationship with the CNM.

[164] I determine that CDHB did not unjustifiably disadvantage Ms Highfield by unilaterally transferring her to Ward 27 in October 2017.

Did CDHB unjustifiably disadvantage Ms Highfield by unilaterally transferring her from Ward 27 to Outpatients in May 2019?

[165] During the March 2019 Investigation Meeting CDHB had been made aware as a result of the evidence given by Ms Highfield that she believed her transfer to Ward 27 had aggravated her foot injury.

[166] As a result in the adjournment following that investigation meeting CDHB had sought to obtain specialist opinion in relation to the aggravation of Ms Highfield's foot injury.

[167] It also requested a meeting with Ms Highfield to discuss her claim that her foot injury had been aggravated by her time on Ward 27 and to discuss potential alternative ward placements.

² *Chief Executive of Department of Corrections v Harris* [2001] ERNZ 426 at [43]

[168] I find that this was a reasonable course of action for CDHB to pursue in the circumstances.

[169] In the letter dated 14 May 2019 written by Mr Sharr and provided to CDHB Mr Sharr stated: "I am led to believe that you are still working in this heavier nursing role and this may well be contributing to the ongoing difficulties of returning to full time employment".

[170] In that letter Mr Sharr also referred to Ms Highfield's transfer to Ward 27 and the: "resultant increase in swelling and pain from the heavier demand of activities".

[171] Once he had been made aware of this opinion from her Orthopaedic Specialist, Mr Crawford acting on this advice made the decision to transfer Ms Highfield from Ward 27 to Outpatients, a ward which had the lightest physical work load of any area within the hospital and in his view therefore the least likely to cause any further aggravation of Ms Highfield's foot injury.

[172] I note that Ms Highfield had been provided with an opportunity to meet before this decision was made but had not chosen to do so.

[173] An employer has a statutory obligation to provide its employees with a safe working environment. Once CDHB became aware of Ms Highfield's view that the work on Ward 27 was causing an aggravation of her foot injury I find it acted appropriately in seeking to obtain medical advice and offering to meet with her.

[174] Following receipt of that medical advice and being made aware that the work on Ward 27 might be responsible for aggravating the foot injury I find that CDHB acted appropriately in removing Ms Highfield from that work environment in a timely manner and thereby trying to ensure she had a safe working environment which would not cause any exacerbation of her foot injury.

[175] The transfer to Outpatients was made taking into consideration its suitability in providing a safe working environment for Ms Highfield.

[176] Ms Highfield's evidence is that the transfer was abrupt and made without consultation. I accept that the transfer to Outpatients was made abruptly, but this was a decision I find a fair and reasonable employer could have made in light of the medical evidence.

[177] I also note that Ms Highfield had been provided with an opportunity to meet with CDHB but had confirmed via the email dated 30 May 2019 that she chose not to do so. In the

circumstances I find that the decision to transfer Ms Highfield occurred after she had been provided with an opportunity for consultation which she rejected.

[178] I find that the transfer was a justifiable action for CDHB to take in the circumstances.

[179] Ms Highfield claimed that the transfer to Outpatients has resulted in an adverse impact on her clinical skills and job satisfaction, and that there is some impact on her income.

[180] I find that the evidence supports that there has been no financial disadvantage to Ms Highfield as a result of the move to Outpatients. She remains officially attached to Ward 27 and as confirmed by Ms Galloway, fully rostered as if she were still working there. As such she has suffered no financial disadvantage.

[181] Whilst Ms Highfield's assertion as to the deterioration of her clinical skills is not accepted by the CDHB I observe that CDHB has tried to address Ms Highfield's concern by allowing Ms Highfield to use work hours to do self-guided study.

[182] I also find that Dr Lyons' report makes it clear that before Ms Highfield can return to full duties on any ward she will need a functional capacity and workplace assessment.

[183] I find that CDHB did not unjustifiably disadvantage Ms Highfield by unilaterally transferring her from Ward 27 to Outpatients in May 2019.

Remedies

[184] I have found that Ms Highfield was disadvantaged in regard to the management of her return on 31 January 2016.

Compensation

[185] I find that Ms Highfield suffered hurt and humiliation in respect of the failure to appropriately address her return to work on 31 January 2017.

[186] **CDHB is ordered to pay Ms Highfield the sum of \$6,000.00 as compensation pursuant to s 123(1)(c)(i) of the Act.**

Contribution

[187] I am required under s. 124 of the Act to consider the issue of any contribution that may influence the remedies awarded.

[188] I find no contribution on the part of Ms Highfield which would affect the level of remedies awarded.

Costs

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

[190] If they are not able to do so and an Authority determination on costs is needed the respondent may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum the applicant would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[191] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[192] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.³

Eleanor Robinson
Member of the Employment Relations Authority

³ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].