

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2025] NZERA 187  
3109492

BETWEEN JOHN McDERMOTT  
Applicant

AND EMPLOYSURE LIMITED  
Respondent

Member of Authority: Peter Fuiava

Representatives: Allan Halse and Adrian Straayer, advocates for the  
Applicant  
Jessie Laphorne, counsel for the Respondent

Investigation Meeting: 21-22 May and 2 August 2024 in Wellington and by  
audio-visual link

Submissions received: Up to and including 2 August 2024 from the Applicant  
Up to and including 2 August 2024 from the Respondent

Determination: 1 April 2025

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**DETERMINATION OF THE AUTHORITY**

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**What is the employment relationship problem?**

[1] John McDermott, a former Business Development Manager (BDM) and Business Development Partner (BDP) for Employsure Limited (Employsure, Employsure New Zealand or the company) has asked the Authority to investigate personal grievances of unjustified disadvantage, discrimination on the grounds of union membership, breach of his employment agreement concerning the payment of his sales commission, and unjustified dismissal. Employsure, which now trades as Peninsula Group NZ Limited but not at the time of this employment problem, denies the claims in their entirety and says that a common theme throughout Mr McDermott's employment was his refusal that he had underperformed.

### **How did the Authority investigate?**

[2] For the Authority's investigation, the applicant's case comprised two written witness statements (26 November 2020 and 15 March 2024) from Mr McDermott. For the respondent, witness statements from former Talent Director, Michael Morris, and previous Talent Manager, Kerri-Ann Allen, were provided. Leave was granted for Mr Morris and Ms Allen to attend the investigation meeting remotely by audio-visual link as neither resided in New Zealand. There were no issues in terms of visual and audio quality. Although EmploySURE had filed with the Authority a written statement from its former Head of Sales, Christopher Pratt, no weight has been given to it as he was no longer available to speak to his written statement at the time of the investigation meeting.

[3] All witnesses answered questions under oath or affirmation and the opportunity for cross-examination was afforded to the parties. At the end of the investigation meeting, Mr Halse and Ms Laphorne made oral closing submissions which they supported with written closing submissions that have been considered.

[4] This determination has not been issued within the three-month period required by s 174C(3) of the Employment Relations Act 2000 (the Act). As permitted by s 174C(4) the Chief of the Authority decided exceptional circumstances existed to allow a written determination of findings at a later date.

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

### **What are the relevant facts?**

[6] EmploySURE is in the business of selling subscription-based services in employment relations, health and safety, compliance, representation and legal protection generally for small to medium-sized businesses in New Zealand. The company was established here in early 2016 and is related to another corporate entity based in Australia, EmploySURE Pty Limited, which has been operating there since around 2010.

[7] Before commencing employment with Employsure New Zealand as a BDM on 13 February 2018, Mr McDermott worked as a part-time sales manager for a hardware and handles business. Prior to that employment, he worked as an account manager in waste management and, together with his wife, operated their own engineering supplies business.

[8] Unlike Mr McDermott's previous sales roles in which a prospective customer had a physical product that they could see, as a BDM for Employsure, Mr McDermott explained that he was selling a service to a prospective customer. He was aware of different sales approaches but his preference was to undersell the service and have Employsure's support team over deliver.

[9] Mr McDermott's individual employment agreement with the company stated that one of his main accountabilities as BDM role was to contact leads and attend prospect meetings with customers with the intent to secure new business and raise their awareness of its products and services. Another main accountability was "[s]elf-lead generation and securing new business opportunities."

[10] Mr McDermott's letter of offer from Employsure (1 February 2018) stated that his base salary was \$60K per annum with an additional guaranteed \$20K payable in the first 12 months of his employment. He was provided with a company vehicle and payment of a "generous commission scheme" that enabled him to earn up to five percent of the net value of all new business he secured. Mr Morris stated that the commission was a significant component to a BDM's total remuneration as those employed early on by the company were able to earn over \$350K per year.

[11] To be eligible to receive commission, Mr McDermott's letter of offer stated that he needed to be still employed by the company and that commission payments (if any) would be made on the last pay period of the month. Further, the company needed to receive a minimum of 25 percent of the fee payable for three year and shorter deals; or 15 percent for deals longer than three years. As a result, this equated to a nine month wait period before commission on any new business secured could be paid to a BDM.

[12] Employsure's commission scheme and how it worked was set out in its "BDM Sales, Commission and Bonus Scheme Rules" (the Commission Rules).

Mr McDermott signed his copy of the Commission Rules on 2 February 2018, confirming his agreement to its terms and conditions.

[13] Supporting the work of BDMs and BDPs are the Business Sales Consultants (BSCs) who are office based and who generally cold called businesses to assist BDMs have more meetings. Previously when a customer was the first to contact EmploySURE, BSCs had the discretion to refer the lead or opportunity to a BDM of their own choosing. Because such leads were expected to more likely than not sign up to one of EmploySURE's services, they were referred to within the business as 'tier one' or 'Prem 1' leads and the goal of the BDM was to convert the lead into a new deal for the business.

[14] As will become clear, this discretion was removed from the BSCs in March 2019 in a new sales process that was Sales Transformation (ST). One of ST's aims was to automate the referral process of tier one customers to the best-performing BDMs who would more likely than not, convert the opportunity into a new deal. In automating the referral process, ST addressed some poor behaviours that had crept in from some BSCs who would assign leads to their favourite BDMs who looked after them. A BSC's on-target remuneration expectation was \$80K per annum which was made up of base salary plus commission.

[15] When Mr McDermott first started working as a BDM, cl 1.6 of the Commission Rules set out the quarterly targets for the first nine months of employment which was: Quarter 1, nine deals to a value of \$100K; Quarter 2, 12 deals to a value of \$200K, and Quarter 3, 15 deals to a value of \$300K. After a BDM completed three sales quarters, it was a condition of entitlement to the full five percent commission that they achieve a minimum of 24 new business deals at \$400K of booked revenue for every subsequent sales quarter. If these targets were not met, commission payments could be reduced by 2.5 to 50 percent.

[16] In the first 12 months of employment, Mr McDermott reported to EmploySURE's then Head of Sales, Stephen McFarland, who advised him in writing on 15 May 2018 that while he had completed his 90-day trial period with the company, there were still areas with his performance that required continued growth in order to have greater

“self-reliance” in the role. Mr McFarland subsequently placed Mr McDermott on probation for a further 12 weeks which was completed without issue.

[17] On 23 October 2018, Mr McFarland both telephoned and wrote to Mr McDermott expressing two concerns he had with his performance during the second quarter period of the 2019 financial year (FY19) which covered the period of July to September 2018. The first concern was Mr McDermott’s low rate of converting leads into deals. Whereas the minimum conversion rate was 1 in 5, his overall conversion rate was 1 in 7.8.

[18] Mr McFarland’s second concern related to Mr McDermott’s low activity level. A BDM was expected to sit at least 12 meetings per week but he sat only nine meetings per week on average.

[19] In response to Mr McFarland’s invitation to meet, Mr McDermott emailed that he was both shocked and disappointed with the above concerns when he exceeded his quarterly targets by \$200K or 66 percent and surpassed his deal numbers target by 25 percent. Mr McDermott attributed both his low conversion rate and activity levels to his deal values and deal numbers not being correctly prorated.

[20] Mr McFarland responded by email the following morning stating that Mr McDermott should neither have been shocked nor disappointed by his letter given that the concerns had been discussed with him before Mr McFarland wrote his letter because it was important that these were proactively addressed. Mr McFarland further stated that his purpose in bringing his concerns to Mr McDermott’s attention was because there had been no noticeable improvement with his conversion or activity levels and while he had achieved his quarterly targets in both deal numbers and deal values, that had been done with no change in growth or activity and no strong improvement in conversion.

[21] Mr McFarland and Mr McDermott met on 26 October 2018. A third party was present to take written notes that record Mr McFarland’s concerns around Mr McDermott’s conversion rate and what the driver or cause to that was. Mr McDermott’s response was that when his BSC commenced working with him at the end of Quarter 2 of FY19, this resulted in a fast start to Quarter 3 (September to

December 2018) with prospects being booked into his diary. In response to this, Mr McFarland made the following observation:

Whilst it's good to have a good partnership, leaving too much on the BSC, saying that if they disappear we are not relying too much on them. I always ask the question if we were to remove the BSC team would you be as successful as you are today?

[22] Mr McFarland inquired into how Mr McDermott was “self-sourcing” potential customers because his predecessors had higher numbers than him. Mr McFarland acknowledged the prospects or potential “golden eggs” that Mr McDermott was working on, but he wanted to ensure that he was not missing the “day-to-day basics” and that it was his role to challenge people and to highlight gaps before these became wider and harder to close.

[23] Mr McDermott was advised to watch out for his activity levels which was sitting at nine opportunities per week if he were to have a stronger conversion rate. There was also a need for him to look at “self-reliance”. As for conversion rates, Mr McFarland noted that Mr McDermott's rate of 1 in 7.2 was slightly behind where he needed to be which was 1 in 5 or 1 in 6. When asked what the barriers around his conversion rate were, Mr McDermott had no definite answer and acknowledged that he could come out of a meeting without a deal. He noted that a deal he had recently obtained was one he had been working on since March 2018 and that he had two other leads that were “slow burners”.

[24] While acknowledging that work was starting to come through, Mr McFarland cautioned Mr McDermott that he needed to take into account the slow burning opportunities by creating a larger funnel of work that enabled deals to keep coming through. Mr McFarland stated that the BDM role was a ‘hunter role’ which was not natural for some and that he would be emailing all BDMs their activity numbers for the month. Although a pipeline of work was established, Mr McFarland impressed upon Mr McDermott his theory of the good real estate agent who built up listings and kept finding prospects in order to keep momentum. This was in contrast to the bad real estate agent who built up five listings and stopped prospecting only to “start again from scratch”.

[25] Following the meeting, Mr McFarland wrote to Mr McDermott on 29 October 2018. His letter recorded Mr McDermott's response to the concerns raised about his low conversion rate and activity levels. The letter reiterated the company's minimum expectations and while there was no formal warning made and that the meeting did not form part of any disciplinary procedure, a copy of Mr McFarland's letter would be kept on Mr McDermott's personal file as a reasonable written instruction to him to close the gaps identified.

### *Sales Transformation*

[26] In March 2019, Employsure rolled out ST which automated the distribution of company-generated leads to BDMs. As mentioned above, a BSC could no longer allocate a lead to a BDM of their own choosing. Instead, the allocation was randomised according to a BDM's tier category which was based on their ability to convert a lead into a new deal. For example, a premier 1 or 'prem 1' lead was a prospective customer who had proactively contacted the company about its services. Under ST, such a customer went to those BDMs who had a greater probability of converting the lead into a new deal on account of their high conversion rate as recorded by the company.

[27] ST was applied across Employsure Australia and Employsure New Zealand at a cost of \$10M. Although the intention behind ST was to level the playing field for all BDMs, not everyone was on board with the changes particularly those BDMs who had benefitted financially under the status quo.

[28] In promoting ST across Australia and New Zealand, Employsure Australia invested in a series of information videos that were rolled out from late February to early March 2019. ST was to be go live in New Zealand first on or about 25 March 2019 with a three-month transition period that ended around 25 June 2019. During this period, which occurred at the beginning of the 2020 financial year (FY20), the status quo applied and BSCs were free to allocate "Prem 1" leads to BDMs of their own choosing as they had done in the past. On 29 April 2019, ST was rolled out in Australia.

[29] The Australia/New Zealand Employsure report for Q1 (April to June 2019) of FY20 included the conversion rates for 11 New Zealand BDMs. Mr McDermott was tenth on that list and in comparison to the first ranked BDM who converted 3 out of 7 opportunities into new deals, Mr McDermott received 42 opportunities during the status

quo transition period, of which 7 were converted into new deals. This equated to a conversion rate of only 1 in 6.

[30] After the status quo period was over, ST went live in New Zealand and Employsure gave its best-performing BDMs the 'Prem 1' leads whereas the BDMs with the lower conversion rates such as Mr McDermott were placed on "tier 3" which meant that they needed to be more self-reliant in cold calling customers for themselves and generating their own leads.

#### *Promotion to BDP*

[31] On 14 October 2019, Mr McDermott was promoted to Business Development Partner (BDP) and his employment agreement was varied accordingly. The BDP position was a second-in-charge role to the Field Services Manager (FSM) to whom Mr McDermott reported as BDM. When the FSM was absent or away on leave, Mr McDermott as BDP provided cover. While the role came with it a salary increase of \$10K, it was not a position that was sought after by other BDMs who saw the additional responsibilities as an impediment to potentially earning more commission. During Mr McDermott's employment, he was the only BDP for his region of the Lower North Island.

[32] The job description for the BDP role (effective August 2019) stated that its purpose was to support the greater sales team's success by owning and delivering allocated accountabilities. The key accountability in terms of sales targets remained the same which was achieving 24 deals per quarter, a total deal value of \$400K in each quarter, a conversion rate of one in five opportunities, a combined deal rate of 35 percent, and at least five referral deals per quarter.

[33] In or about October 2019, Employsure lowered its quarterly deal numbers target for BDMs and BDPs from 24 to 20 deals. However, the quarterly target for deal values remained the same at \$400K per quarter.

[34] Mr McDermott met his quarterly targets both in deal numbers and deal values for the first and second quarters of FY20. However, he missed the next two quarterly targets for that financial year which covered the period from 1 October 2019 to 31 March 2020.

### *Return to Form*

[35] In October 2019, Employsure had a sales conference in Australia in which it was announced that the company would implement a new system of performance management called Return to Form (RTF). Mr Morris who had designed RTF stated that it was to support and enable a BDM to bounce back to peak performance after a drop in form. Mr Morris further stated that it was in the company's interests to support BDMs when they had a momentary dip in form because it took a new BDM approximately nine months to realise their full potential in the role.

[36] Mr Morris explained that RTF comprised five stages and at stage 1 or 2, an out-of-form BDM was provided with additional coaching, online training, workshops and informal training to assist their return to form as soon as possible. However, at the upper stages of RTF – stage 3 to stage 5 – the process aligned with the company's formal performance improvement process which included, among other things, dismissal. BDMs who fell out of form and underwent an RTF were given the opportunity to explain their circumstances that may have resulted in their drop in form.

[37] Concurrent with the implementation of RTF were new monthly minimum expectations that came with the quarterly targets. For a BDM whose quarterly targets were 20 deals and a total deal value of \$400K per quarter, the monthly expectation was for the BDM to secure seven deals every month at a contract value of \$140K per month. In effect, the quarterly targets were prorated on a monthly basis. Missing either one of the monthly or quarterly targets was noted as a 'single miss'. Missing both the monthly or quarterly target was considered a 'double miss'. Stages 1 or 2 of RTF could commence on either a single or double miss. Stages 3, 4 or 5 could only commence or conclude at the start or end of a sales quarter.

[38] Mr Morris stated that, given the size of Employsure's total sales workforce across Australia and New Zealand (over 200 BSCs and over 110 BDMs at the time), RTF collected key performance information across the company which was processed automatically.

### *Drop in form*

[39] On 18 November 2019, a letter from then Head of Sales of Employsure New Zealand, Chris Pratt, to Mr McDermott records that he had missed his minimum

targets for the month of October 2019, achieving only four new deals at a contract value of \$83,982. Mr Pratt's letter reminded Mr McDermott that his quarterly targets of 20 deals at a total deal value of \$400K should be achieved at an ideal rhythm of seven deals per month for a monthly deal value of \$140K at months one and two and six deals at \$120K in month three.

[40] Mr Pratt's letter encouraged Mr McDermott to improve his performance which would be monitored for the remainder of the quarter and if he missed his minimum expectations again, further action could result under RTF. In order to assist him with "closing the gaps" he was reminded of the additional resources available comprising live and recorded workshops, online training, opportunities to shadow high performing team members in his area, and ongoing coaching conversations with Mr Pratt.

[41] On 20 November 2019, Dale Hinton, a New Zealand-based BDM and colleague of Mr McDermott wrote an email to other BDMs in New Zealand inviting them to join the Aotearoa Legal Workers' Union (the union). Mr Hinton stated that recent changes in the company had resulted in some of his peers walking away from nine months of sales commissions because the burden had become too much. Mr Hinton stated that New Zealand was not a state of Australia and that Employsure Australia needed to treat its New Zealand-based workers with dignity and in accordance with its laws.

[42] Mr Hinton further claimed that ST was not a success and that staff needed to stand united, undaunted and true to their conviction. At the time of drafting his email, only five BDMs including Mr McDermott had joined the union.

[43] Because of the resistance the then managing director of Employsure Australia and Employsure New Zealand, Edward Mallet, had received from some staff regarding ST, he posted on the company's intranet page that if anyone did not like the direction the business was taking, they were free to leave and to take their commissions with them as a one-time payment. The union wrote to Mr Morris expressing its concern that Mr Mallet's post amounted to a constructive dismissal. Mr Morris responded stating that Mr Mallet's post needed to be put into context as a sign of frustration rather than the company seeking anyone's resignation.

*Personal grievance raised*

[44] On 10 December 2019, the union raised a personal grievance in writing with EmploySURE stating that its (now) 14 members, including Mr McDermott, had found that ST had removed their BSCs from them which had the effect of degrading the quality of their opportunities and made the process of carrying out their work considerably more difficult. In particular, the tier system defined how they would each be given sales opportunities. The grievance alleged that within 30 days of ST's commencement, the diaries of those BDMs affected by the changes "dried up" and they were told to cold call customers for themselves with no extra remuneration for doing so. This led to many of the affected BDMs missing their quarterly targets which affected their incomes and resulted in disciplinary action by their employer.

[45] In early March 2020, the parties attended mediation in relation to the personal grievance but matters did not resolve there.

[46] By letter dated 28 February 2020, EmploySURE's counsel, Ms Lapthorne, responded to the union's personal grievance letter. In brief, counsel stated that the role of the BDM involved sourcing meetings with potential client businesses from various channels. While the company supplemented those efforts, it had been explained to BDMs that, from the point of recruitment onwards, they could not rely on that support and that it was their job to source meetings with the aim of signing up new clients.

[47] Counsel further stated that the BDM role was by and large field based which involved extensive driving and variable hours of work as EmploySURE had little control over who was willing to meet with one of its BDM about its services and when they wished to meet. Minimum expectations in deal numbers and deal values were mentioned. In addition to addressing other concerns raised by the union, Ms Lapthorne discussed the consultation process behind ST, its implementation and roll out, and its underlying rationale which was to improve the way in which meetings were sourced and sat by BDMs to improve the likelihood of securing new clients for the business.

*Subsequent drop in form*

[48] On 6 December 2019, Mr Pratt wrote to Mr McDermott of a second drop in form stating that for the month of November 2019, his minimum monthly expectation was seven deals at a total deal value of \$140K. However, Mr McDermott had achieved

8 deals at a total value of \$125,820. He was referred to the same resources for additional support in closing the gaps. Mr McDermott says that he never received this letter from Mr Pratt which he only became aware of when a copy of it was provided during discovery.

[49] On 8 January 2020, Mr Pratt wrote to Mr McDermott and invited him to an RTF meeting because Employsure had seen another form drop in Quarter 3 of FY20 (1 October to 31 December 2019) in which he had made 17 deals at a value of \$333,473. Mr Pratt reiterated the minimum expectation for a BDM of 20 deals at a value of \$400K per quarter which was to be achieved at the ideal rhythm of seven deals per month at \$140K in months one and two and six deals at \$120K in month three.

[50] On 13 January 2020, there was a meeting involving Mr Pratt, Mr Morris, Mr McDermott and his support person Mr Hilton. Minutes of that meeting record that its purpose was to discuss Mr McDermott's performance and to hear from him about how his last month had gone and what had contributed to him missing his quarterly sales targets.

[51] Mr McDermott explained that there were two deals missing which would have taken him to 19 deals at a value of \$390K for the quarter. When asked what he could do differently to meet his next quarterly expectations, Mr McDermott considered that ST had changed the business in that BDMs had lost control over their diaries which created difficulties in getting to meetings and with travel. Mr McDermott further stated that he was hindered by not having a one-on-one relationship with BSCs in order to build rapport.

[52] Mr Pratt queried whether there was enough coaching and systems in place for him. Mr McDermott's response was that the company had not supported BDMs in the right way to empower them to achieve their targets. He further commented that he was quite baffled and confused and that his "mind was blown" by being placed on an RTF when he was sitting sixth in the country for sales.

[53] On 15 January 2020, Mr Pratt wrote to Mr McDermott and summarised what was discussed during their 13 January meeting. Mr Pratt's letter recorded that after taking into account all the relevant information that was provided, he considered Mr

McDermott to be “out of form” as he was not meeting the required performance standards of his role. The letter stated that this was the third time in the last 12 months that concerns around his performance had been discussed and that stage 3 of RTF would ordinarily have been entered into. However, taking into account Mr McDermott’s annual value achievement and that he had only missed his quarterly deal numbers target by one sale, an exception was made in his case and he would remain at stage 2. Mr McDermott would continue to be offered the same coaching available to others on the same stage. While he was offered the opportunity for further comment regarding what was proposed, no further comment was provided.

[54] On 9 March 2020, Mr McDermott became a union delegate for the ALWU and he stated that during a telephone call with Mr Pratt on 17 March 2020, he (Mr Pratt) allegedly said that he was ‘surprised’ by McDermott’s decision to become a union delegate and asked why he had done so. Mr McDermott stated that he felt his decision did not have Mr Pratt’s approval and emailed his union president shortly afterwards stating that he felt quite pressured to answer Mr Pratt’s questions and to justify why he had accepted the role.

[55] On 18 March 2020, Mr McDermott received a further drop-in-form letter but from his FSM, Kirsty Randell, to whom he reported. Ms Randell’s letter summarised an earlier telephone discussion she had with Mr McDermott regarding missing his prorated minimum targets for February 2020 of seven deals at a value of \$140K. He achieved only six deals at a value of \$72,957 which was a “double miss” of both his deal numbers and deal value targets. Ms Randell’s letter further recorded Mr McDermott’s comment that he was not doing anything different in February as opposed to previous months. He stated that he was building a pipeline of work most of which was now on hold due to the COVID-19 pandemic.

[56] On 28 March 2020, Mr Mallet stated in an intranet post to staff that the business was in a privileged position because unlike others, it was not holding any debt, revenue streams continued despite the crisis, and new business was being received. However, Mr Mallet further stated that this did not mean it would all be plain sailing and that there were challenges ahead including the loss of clients who were going out of business and a slowing down of new business.

[57] From 24 March to 1 April 2020, Mr McDermott was on sick leave for seven days as a result of stress and chest pains. On 30 March 2020, Ms Randell emailed to see how he was doing and wished him a speedy recovery.

#### *Restructure proposal*

[58] On 20 April 2020, Employsure proposed a restructure which involved the disestablishment of various BDM and BDP positions because of the impact the pandemic was having on the business with customers cancelling agreements at a much higher rate than had been seen before and a dramatic decrease in client numbers at that time. Employsure's consultation document to staff advised that its business model was built on the assumption that clients would remain for the full term of their contracts while new clients were brought in at an acceptable rate. Because of the pandemic, both of these measures had come under pressure and were moving rapidly in unsustainable directions.

[59] Employsure forecasted a significant reduction in receipts from clients over the coming months which would deplete its cash reserves significantly over the next six to 12 months if an "immediate" correction to spending was not made. It was proposed that the number of BDMs/BDPs in the Upper North Island (Auckland, Waikato, Bay of Plenty) be reduced from 19 to 17 (a loss of two roles), the Lower North Island (Gisborne, Hawkes Bay, Taranaki, Palmerston North, and Wellington) be reduced from six to two (a loss of four roles) and for the South Island from eight to six (a loss of two roles). Staff were invited to provide further feedback on the proposal.

[60] On 21 April 2020, Ms Randell, on behalf of Employsure New Zealand wrote to Mr McDermott to invite him to a further meeting to discuss ongoing performance concerns as a result of his continued lack of success in reaching his Quarter 4 FY20 targets. The letter outlined that while his minimum quarterly target was 20 deals at a value of \$400K, he had achieved only 13 deals at a value of \$218,432, which was his second double miss of both his deal numbers and deal value targets.

#### *A further RTF meeting*

[61] On or about 23 April 2020, Employsure met with Mr McDermott to discuss its concerns around his performance. The meeting was by teleconference and was attended by Mr McDermott, his union representative, Mr Pratt, and a member of Employsure's

Talent team as notetaker. The notes record the union representative's concern as to why Mr McDermott had been invited to an RTF meeting when it was agreed at mediation (in March 2020) that if he met his sales results for the year, he could relax for Quarter 4.

[62] Mr Pratt's response was that the RTF invite may have been about the number of deals Mr McDermott had achieved as opposed to the value of deals. However, Mr McDermott stated that his last two RTF letters both claimed that he had double missed his deal numbers and deal values targets which Mr Pratt confirmed was the case. Mr Pratt stated that he was unaware of any agreement made by Mr Morris at mediation and would look into it and provide Mr McDermott with a response as to whether a further RTF meeting was required.

[63] On 30 April 2020, Mr McDermott provided a written response to the Employsure's most recent concerns with his performance. In brief, he stated that he was a proven performer over a sustained period and that he was continually troubled by the way the company had insisted on performance managing him which was having a detrimental effect on his performance and wellbeing. He believed its methods were unreasonable and rather than encourage high performance, hindered it instead.

[64] Mr McDermott alleged that the company fostered a culture of fear and lack of trust rather than one of empowerment and team spirit. He did not believe it had his interests at heart but was conducting a 'box ticking exercise' to allow dismissal of any employee at its convenience. Mr McDermott stated that any other employer would be very happy with the results he had achieved or was close to achieving with a whole quarter of the financial year remaining. He was critical of ST stating that management was not willing to consider that it had been "a colossal failure" which had hurt the business and disadvantaged BSCs, BDMs and BDPs like himself.

[65] On 1 May 2020, Mr McDermott's then counsel raised a personal grievance in writing with Employsure on the grounds of unjustified disadvantage (unfair performance management) and discrimination (unfair treatment due to union membership). The personal grievance reiterated that ST had hindered Mr McDermott's ability to meet his deals' target by removing a significant amount of his administrative and sales support notably the support of a dedicated BSC who had previously handled

cold calling and booked meetings. Consequently, an additional administrative load had been placed on BDMs with no adjustment by the company to their sales targets.

[66] On 6 May 2020, Mr Pratt wrote to Mr McDermott advising that based on the feedback he received, the current COVID-19 situation and the consultation process currently underway with the New Zealand sales team, the status quo would remain and no further action would be taken. Mr McDermott would remain at stage 2 of RTF and he would continue to be provided with access to ongoing training and support including live and recorded workshops, online training, opportunities for him to shadow either Mr Pratt or a high performing team member in his local area, and ongoing coaching conversations with his manager.

#### *Selection process for redundancy*

[67] From 20 to 29 April 2020, Employsure received feedback from affected employees on its change proposal. On 5 May 2020, the company met with affected staff to confirm that after considering the feedback that was received (discussed below), it was proceeding with its change proposal.

[68] On or around 6 May 2020, Employsure's Talent team commenced a selection process and scored all potentially affected employees on seven selection criteria that comprised role specific skills and knowledge (scored out of 20), behaviours (scored out of 10), customer relationship skills (scored out of 10), communication skills (scored out of 10), quality of work (scored out of 20), efficiency and commercial output (scored out of 30), and disciplinary record (scored out of 20).

[69] Mr McDermott was scored 77.5 out of a maximum of 120 points which placed him in the bottom five of potentially selected candidates for his region of the Lower North Island.

[70] On 8 May 2020, Mr Morris wrote to Mr McDermott to notify him that the selection process was undertaken and that he was identified as a provisionally displaced candidate. In line with the company's process as outlined in its consultation document, Mr McDermott was offered the opportunity to provide any feedback on the provisional outcome. Mr Morris's letter further stated that if the outcome of selection remained the same, he would be consulted regarding any suitable redeployment opportunities or

other ways of avoiding redundancy. While Mr McDermott was offered the opportunity to respond, no further comment from him was received by the due date of 11 May 2020.

[71] On 14 May 2020, Mr Morris wrote to Mr McDermott confirming Employsure's decision to disestablish his position of BDP by reason of redundancy. No viable redeployment opportunities were identified by the company. Mr McDermott's last day of employment was 14 May 2020 and he was provided payment of salary in lieu of working his four-week notice period. His final payment included outstanding remuneration, annual leave, and his commission entitlement for that month.

[72] On 2 June 2020, Mr McDermott's counsel raised a second personal grievance with Employsure for unjustified dismissal and unjustified disadvantage for non-payment of all of his commission on the grounds that cl 1.4.2 of the Commission Rules (see [12] above) created an exception where an employee's dismissal from employment was by way of redundancy.

### **Whether Mr McDermott was unjustifiably disadvantaged?**

[73] The question of whether an employer's action was justified must be determined on an objective basis by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred.<sup>1</sup>

#### *Whether Employsure abdicated its obligations as employer*

[74] One of the actions complained of by Mr McDermott's representatives during the investigation meeting was the alleged abdication of Employsure New Zealand of its statutory obligations as the employer by allowing officers of Employsure Australia, notably Mr Morris and Mr Pratt, to interfere with Mr McDermott's employment when he was an employee of Employsure New Zealand.

[75] This claim had not previously been pleaded by Mr McDermott and was only raised at the investigation meeting at the eleventh hour. It is a technical argument and as a first-instance tribunal, the Authority must go about its task of resolving employment relationship problems by establishing the facts and making a

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<sup>1</sup> The Act, s 103A(2).

determination according to the substantial merits of the case, without regard to technicalities.<sup>2</sup>

[76] Former managing director and founder Edward Mallet established EmploySURE Australia in 2010 six years before the respondent was incorporated in New Zealand in 2016. It is acknowledged that the two businesses are separate legal entities but even so, the business model and the services each provide are substantially the same if not identical. This is demonstrated by the roll out of ST and RTF across the group of companies during FY20. In establishing the respondent in New Zealand, it made commercial sense for Mr Mallet to operate a shared services model across the two businesses. This enabled the respondent to access skills and expertise from across the Tasman for the benefit of its day-to-day operations. There was no abdication of responsibility by EmploySURE New Zealand as Mr McDermott's employer.

*Whether the company's approach to performance management was unjustified?*

[77] Mr McDermott takes issue with EmploySURE's approach to performance management on two main grounds. First, he does not accept that he underperformed and says that the company's concerns about his performance was a form of bullying with the aim of making sales staff feel confused, vulnerable and insecure. Second, Mr McDermott takes issue with the frequency of EmploySURE's approach to performance management. While he accepts being performance reviewed on a quarterly basis, the company's approach to monitoring performance every month hindered rather than encouraged high performance.

[78] The information and evidence before me indicates that there were periods where Mr McDermott performed very well as a BDM but there were periods where he did not. Concerning the periods of underperformance, there were early warning signs of this. A letter from 23 October 2018 from Mr McDermott's then sales manager, Mr McFarland (see above at [17] to [25]) foreshadowed that if BSCs were taken away, would he still be successful in what was a 'hunter role'? Put differently, to enjoy long term success in the role, Mr McDermott needed to depend less on BSCs and more on himself in self-sourcing sales as was required from him by his position description (see above at [9]).

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<sup>2</sup> The Act, s 157(1).

[79] Before joining EmploySure, Mr McDermott had previously contacted customers to secure sales and was successful. However, he had the benefit of a physical and tangible object that a prospective customer could see and touch for themselves. EmploySure on the other hand is a subscription-based service which requires a prospective customer to be persuaded to sign-up to a service essentially on the BDM's word that delivery of the service would meet their expectations.

[80] Although Mr McDermott enjoyed periods of success as a BDM, Mr McFarland's concerns about his reliance on BSCs were realised eight months later when ST went live in New Zealand in June 2019. From that point on, Mr McDermott's performance waned until his employment ended on 14 May 2020.

[81] Mr McDermott's success as a BDM could not have been possible without the support of BSCs who referred him a disproportionate number of 'Prem 1' leads until ST was fully implemented in New Zealand on or about 25 June 2019. Prior to the implementation, it was historically the case that BSCs and BDMs were paired in a one-to-one relationship and the allocation of Prem 1 leads was done in different ways, including assigning leads to BDMs with whom BSCs had formed a close working relationship.

[82] However, after ST was implemented, groups of BSCs booked for groups of BDMs, on the basis that Prem 1 leads went to the best-performing BDMs who had the best chance of converting opportunities into new deals for the business.

[83] When ST was implemented, Mr McDermott lost the support of a dedicated BSC with whom he had a rapport and who could funnel him Prem 1 leads. This is evident from an EmploySure Sales Report (see [29] above) for the first quarter of FY20 (April to June 2019) that covered the status quo period before ST went live in New Zealand. During this three-month period, Mr McDermott received 42 Prem 1 leads which was significantly more than any other BDM had received for the same period.

[84] I find that Mr McDermott did find it more challenging to sell an intangible service as opposed to a physical product because despite being given 42 Prem 1 leads, he secured only seven new deals for EmploySure but not after burning through 35 other Prem 1 leads. Mr McDermott's rate of conversion was low at 1 in 6 which placed him

10<sup>th</sup> on a list of 12 other BDMs. Of note, is that Mr McDermott was outperformed by nine other BDMs who had received far fewer leads than he did.

[85] Employsure had before it information that showed that Mr McDermott had a lower conversion rate in relation to other BDMs and that this concern had been raised with him by his former sales manager, Mr McFarland, in October 2018. With the sales information it had before it, I find that Employsure was correct to allocate its Prem 1 leads to those BDMs who had the best chance of converting those opportunities into new deals. Mr McDermott was no longer part of that cohort because ST had levelled the playing field for the benefit of both the company and other BDMs.

[86] While Mr McDermott denies that he underperformed, this has been a constant theme throughout his employment at Employsure. Where he has succeeded, it has occurred during periods of time that predate ST. Although Mr McDermott is critical of ST and calls it a colossal failure, that is no more than his opinion that ignores the reality that ST continued to operate long after his departure and was still in operation when Mr Morris finished working for Employsure Australia in December 2021.

[87] Mr McDermott claimed that he did not underperform in FY20 because he had reached his annual target of \$1.6M with a quarter to go. However, this too ignores two key points. First, the Commission Rules make clear that there was no annual target. BDMs were paid commission for meeting quarterly targets and not an annual target. Second, the claim ignores the disproportionate assistance Mr McDermott received from his BSC during FY20 when ST was yet to go live in New Zealand. As soon as ST was rolled out in June 2019, Mr McDermott's missed his deals and values target for the remainder of FY20 including Quarter 3 which occurred well before New Zealand went into COVID-19 Alert Level 4 on 25 March 2020.

[88] Mr McDermott's comment that he was sixth in the country for sales at the time (see above at [52]) must be considered in context because the sales list to which he refers recorded accumulated sales as from 1 April 2019. As the list does not take into account the date a BDM may have joined the company, it ought not come as any surprise that Mr McDermott, who had been working for the company since February 2018, would out perform a BDM who joined the business sometime after 1 April 2019. He simply had more time to make his sales compared to a new starter.

[89] Mr McDermott considers EmploySURE's monthly minimum expectations of his quarterly targets a 'box ticking' exercise that allowed the company to dismiss a BDM at its convenience. This is a mischaracterisation of RTF. Although dismissal is possible from stages three to five of RTF, Mr McDermott never went beyond stage 2 which provides for informal discussions and coaching. At stage 2, there was never a risk of disciplinary action or dismissal.

[90] Although Mr McDermott has no issue with having his performance reviewed on a quarterly basis, the monthly minimum expectations were the quarterly deal and value targets prorated on a per month basis which enabled BDMs to adopt an ideal monthly rhythm in achieving their quarterly goals.

[91] A BDM could not be dismissed for missing a monthly expectation, but doing so could result in the BDM being placed on RTF. Given that it took approximately nine months for a newly-employed BDM to realise their potential, the assertion of a 'churn and burn' approach to BDMs as contended by Mr McDermott makes no commercial sense.

[92] If ST and RTF were not in place, EmploySURE would have had to wait until the end of a sales quarter before it could have a conversation with a BDM whose form had dropped over the intervening three-month period. However, to wait until then to have that conversation was unfair for both the business and the BDM because the gaps would be that much harder to close by that late stage. The monthly expectations was the mechanism by which EmploySURE could proactively monitor performance and intervene earlier if required to assist an out-of-form BDM return to form as soon as possible.

[93] Critics to EmploySURE's approach to performance management claim that RTF was rigid and inflexible. However, such criticism ignores that it was a part of RTF for all known relevant information to be taken into account by the company and that the opportunity existed for BDMs to explain their extenuating circumstances that contributed to their drop in form. In Mr McDermott's case, during a meeting with Mr Pratt on 13 January 2020, he advised that the company had missed two deals from its calculus which would have brought his deal numbers for Q3 of FY20 to 19 for a total deals value of \$390K. He was therefore close to meeting his deal numbers and deal value targets for the quarter (20 deals for a total contract value of \$400K).

[94] It was submitted that this error showed that Employsure relied on inaccurate sales data that painted an adverse picture of Mr McDermott's actual performance. The submission is misconceived because Employsure did take into account Mr McDermott's feedback and kept him at stage 2 of RTF when arguably he could have been moved up to stage 3 for a 'double miss.'

[95] I find Employsure's approach to performance management did not disadvantage Mr McDermott. When the company's written communications are considered objectively, there was validity to its concerns that he had underperformed which put him on the path of an RTF process in November 2019. Mr McDermott subsequently missed his Quarter 3 targets for FY20 but remained at stage 2 in any event resulting in no disciplinary action. The claim of unjustified disadvantage is not made out on the information and evidence before the Authority.

#### *Alleged discrimination*

[96] Mr McDermott alleges that he was discriminated against by Mr Pratt for being a union delegate. The evidence for this is scant with Mr McDermott alleging that on 17 March 2020, approximately a week after he had become a union delegate, he had a telephone conversation with Mr Pratt who said he was "surprised" by his decision to undertake the role.

[97] As an applicant, the responsibility is on Mr McDermott to prove his case that there is a causative link between his union involvement and his dismissal.<sup>3</sup> In Mr McDermott's first written statement to the Authority (26 November 2020) he stated at [17] that Mr Pratt had "quite a dig" at him around being a union delegate. There is no contemporaneous note of the telephone call apart from an email that Mr McDermott sent to the union president in which he made no reference to Mr Pratt making a dig at him.

[98] Further, Employsure's performance concerns with Mr McDermott from at least November 2019 onwards precedes the alleged comment by Mr Pratt in March 2020. It has not been shown on the balance of probabilities that Mr Pratt discriminated against Mr McDermott on account of his union involvement as a member or as a delegate. The claim cannot be taken any further.

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<sup>3</sup> *Idea Services Ltd v Crozier* [2017] NZEmpC 77 at [225].

### *Alleged breach of the Commission Rules*

[99] It was submitted that Mr McDermott is owed commission on the basis that his employment ended by way of redundancy. The parties provided the Authority with two different versions of the Commission Rules. I have relied on the version signed by Mr McDermott on 2 February 2018 which relevantly states the following at cl 1.4.2:

Commission payments on new business and or/bonus or incentive payments are only paid if the Business Development Manager is in the employment of the company at the end of the calendar month when the commission payment would normally become payable. This does not apply in circumstances where the termination is by the company by reason of redundancy or retirement ...

[100] Mr McDermott submits that the last sentence above means that he is entitled to commission payments that become payable post-termination because his employment ended by reason of redundancy. The outstanding commission in question amounts to \$25K approximately.

[101] The answer to this issue lies in the general proposition regarding the nature of employment policies namely that unless it is incorporated in the employment agreement, the policy is not expressly binding.<sup>4</sup>

[102] The Commission Rules was not incorporated into Mr McDermott's letter of offer from Employsure (1 February 2018) with which it is at odds because the letter of offer states that he needed to still be employed by the company to be eligible to receive a commission. The letter of offer makes clear that where there is an inconsistency, the letter of offer prevails. It follows that Mr McDermott needed to be still employed by Employsure to be eligible to receive the remainder of his commission. The claim is unsuccessful.

### **Whether Mr McDermott was unjustifiably dismissed**

[103] The test for whether a dismissal is justified is set out in s 103A of the Act. It is based on whether, objectively, the employer's actions were what a fair and reasonable employer could have done in the circumstances at the time. In relation to a dismissal for redundancy the Court of Appeal has described the test of justification in this way:<sup>5</sup>

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<sup>4</sup> *Cuttriss v Carter Holt Harvey Ltd* [2007] ERNZ 233 at [40].

<sup>5</sup> *Grace Team Accounting v Brake* [2014] NZCA 541 at [85].

... If the decision to make an employee redundant is shown not to be genuine (where genuine means the decision is based on business requirements and not used as a pretext for dismissing a disliked employee), it is hard to see how it could be found to be what a fair and reasonable employer would or could do. The converse does not necessarily apply. But, if an employer can show the redundancy is genuine and that the notice and consultation requirements of s 4 of the Act have been duly complied with, that could be expected to go a long way towards satisfying the s 103A test.

*Restructure was for genuine business reasons*

[104] Mr McDermott submits that the restructure was not necessary because publicly available financial statements sourced from the New Zealand Companies Office show that Employsure was in a financially healthy position at the time of the restructure. I disagree. Although the company's annual financial report for the year ending 31 March 2021 records net assets of approximately \$6.82M for that year and \$3.27M for FY20, the financial report was signed on 30 July 2021. Employsure had first proposed its restructuring of various BDM and BDP positions in New Zealand on or about 20 April 2020 some fifteen-and-a-half months earlier. At the time of the dismissal, which is the period the Authority must have regard to, neither Mr Morris nor Employsure could have reasonably anticipated the company's financial position that far ahead into the future.

[105] However, the publicly-available financial records support what Mr Morris stated at paragraph six of his written statement to the Authority (26 April 2024) that Employsure New Zealand owed a significant debt to Employsure Australia and that the company did not hit profitability until early 2020. Employsure New Zealand's FY20 financial report records that it owed its Australian counterpart approximately \$10.47M as at FY19 and that it still owed Employsure Australia \$8.90M in FY20. Further, while Employsure New Zealand recorded total assets of \$3.27M as at 31 March 2020, this was only possible because Employsure Australia agreed to extend a shareholder loan facility of \$14M to the company of which \$5.83M had been drawn while a remaining \$8.16M remained undrawn but committed to the company.

[106] The publicly available financial records before the Authority do not support Mr McDermott's claim that Employsure's restructure in April 2020, one month into the first COVID-19 lockdown in New Zealand, was premature. It is noted that Mr Mallet had expressed confidence in the company's financial position at the time (see [56] above) but with the caveat that it was not all plain sailing and challenges remained with clients going out of business.

[107] As noted above, Employsure's FY20 financial records show that at the time of the first COVID-19 Alert Level 4 lockdown in New Zealand in late March 2020, the business was not financially sustainable but relied on significant borrowings from Employsure Australia for support. That support came under pressure as a result of COVID-19 which not only impacted Employsure's ability to acquire new business but also Mr McDermott's ability to make sales as his Q4 FY20 sales results demonstrate (see above at [60]).

[108] The same drop in sales is reflected across the entire group of Employsure companies. Included in Mr McDermott's bundle of documents to the Authority is an "April [2020] Wrap up" sales document which shows that in April 2020, Employsure Australia had a value budget of \$14.29M but achieved sales of \$8.47M only. Employsure New Zealand had similarly underperformed during the initial lockdown period having achieved sales of only \$1.93M for the same month against a \$3.49M budget. The reduction in earnings across the two companies are consistent with the underlying rationale for the respondent's proposed restructure that was conveyed to New Zealand-based staff in April 2020 namely:

- The business's commercial position was rapidly worsening in the current crisis.
- Its sales model had been forced to change with the restrictions around travel.
- The ability to acquire new business at the rate once achievable had significantly changed.
- There was an expected reduction in the future growth of the New Zealand economy.
- There was an expected change to the regional shape of the business in a post COVID-19 economy.

[109] Mr McDermott's alleges that Employsure's redundancy was not genuine because it placed advertisements for BDM roles in the Lower North Island in late 2020. It may be noted that Employsure was not advertising job vacancies as such but were seeking expressions of interest for BDM roles in the region. The test of justification at s 103A of the Act requires the Authority to consider the employer's actions at the time the dismissal or action occurred. The advertisement in question was from 23 November 2020 some six months after Mr McDermott's ended on 14 May 2020. Because the advertisement post-dates the termination of his employment, no weight can be given to the advertisement.

*Whether the process was fair and reasonable?*

[110] Mr McDermott submits that the company's restructure was a sham because Employsure targeted the Lower North Island for job cuts with the region losing 71 percent of its sales roles compared to 10 to 15 percent reductions in other regions. Instead, historical attrition and a freeze on recruiting were viable alternatives to making staff redundant. However, I accept Mr Morris' evidence that at the time of the first COVID-19 lockdown, the company could not rely on historical attrition which had 'fallen off a cliff' as no one was resigning at that time.

[111] It is noted that, on 29 April 2020, one feedback received during the consultation period was how the numbers per team and per region were decided because it seemed that one region was disproportionately affected when compared to others. Mr Morris's response to that query was that the split was based on expected demand for sales within each region based off input from the sales team. Mr Morris further replied that there were roughly three times as many prospect leads in the North Island compared to the South Island and, within the North Island, the upper North Island, in particular Auckland, had always been the region with the highest amount of prospect leads.

[112] Evidence of the lead counts per BDM region from 29 April 2020 was provided to the Authority which showed that the total number of lead counts were overwhelmingly from the North Island (136,936) compared to the South Island (44,177). Of the lead counts from the North Island, 96,035 came from the Waikato (17,027), Bay of Plenty (14,031), Northland (61) and Auckland (64,916). The number of lead counts for the Lower North Island was 40,901 which reinforces Mr Morris's point that the decision around reduction of staff per region was based on objective sales data. Given the high number of prospect leads in the Auckland region, it made commercial sense for the company to retain a higher sales team presence there than the Lower North Island.

[113] Mr McDermott submits that the scoring methodology was unfairly weighted in favour of new employees with no sales history. However to select staff on a last on, first off basis disadvantages those who were performing but happened to be employed by the company at a later stage.

[114] The rationale for using a selection criteria was to make the decision-making process objective and less prone to subjective opinion. It was not the case that the selection criteria favoured 'new starters' as it was the evidence of former talent manager Ms Allen that five people in Mr McDermott's team got a score of five out of 10 for their Behaviours score. Of those people, only two were new to the business and therefore received the default five points. These same two people received final scores of 105 and 115 which were 27.5 and 37.5 points above Mr McDermott who was provisionally scored 77.5 out of 120. Even if these two individuals received zero points on account of their being new to business, they would still have been on scores of 100 and 110 and still well above Mr McDermott in any event.

[115] After the selection criteria was applied to Mr McDermott, Employsure notified him in writing that he had been provisionally displaced and he was given the opportunity to respond but provided no further comment. At the investigation meeting and in his evidence, Mr McDermott was critical of the selection criteria because it placed too much weight on performance. However this was feedback he never gave to the company and under cross-examination, Mr McDermott accepted that it was reasonable for the respondent to take into account performance when undertaking selection for redundancy.

### **Outcome**

[116] Although the decision to disestablish Mr McDermott from his role would have come as a disappointment to him, I find no evidence of bad faith or ulterior motive from Employsure which commenced a redundancy process for genuine business reasons. It adopted a seven-point selection criteria that it applied equally to affected staff and the opportunity was afforded to provisionally displaced staff, including Mr McDermott, to respond but he failed to do so.

[117] I am satisfied that, under s 103A of Act, the process the respondent followed was one that gave Mr McDermott access to relevant information concerning the continuation of his employment and an opportunity for him to comment on the proposal before a decision was made. I find that the decision to dismiss him as BDM/BDP on the grounds of redundancy was substantively justifiable in terms of the test of justification under the Act. The application is unsuccessful and is declined.

### **What about costs?**

[118] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed Employsure may lodge, and then should serve, a memorandum on costs within 21 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Mr McDermott 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.

[119] 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. For more information as to how costs are awarded in the Authority the parties are referred to the Practice Direction of the Employment Relations Authority, Te Ratonga Ahumana Taimahi, effective 1 February 2024.<sup>6</sup>

Peter Fuiava  
Member of the Employment Relations Authority

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<sup>6</sup><https://www.era.govt.nz/assets/Uploads/practice-direction-of-the-employment-relations-authority.pdf>