

**Note: This determination contains an order prohibiting publication of certain information at para [11]**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-Ā-TARA ROHE**

[2024] NZERA 79  
3160044

BETWEEN NLC  
Applicant

AND TAINUI HOME TRUST  
BOARD  
Respondent

Member of Authority: Rowan Anderson

Representatives: John Wood, advocate for the Applicant  
Troy Wano, counsel for the Respondent

Investigation Meeting: 30 and 31 August 2022 in New Plymouth and 19  
September 2022 by AVL

Submissions received: 26 September 2022, 6 October 2022, and 20 October  
2022 from Applicant  
14 October 2022 and 17 October 2022 from Respondent

Determination: 12 February 2024

---

**DETERMINATION OF THE AUTHORITY**

---

**Employment Relationship Problem**

[1] NLC was employed by Tainui Home Trust Board (Tainui) as a Clinical Nurse Manager (CNM), having first commenced work for Tainui as a registered nurse in April 2016. They were appointed to the role of CNM on 30 March 2020 after initially declining the role when first offered. NLC said they accepted the CNM role only after having been given a commitment, by Martin Hook, the Chief Executive Officer (CEO) at the time, that two Clinical Coordinators would also be employed. Mr Hook left his

role in October of 2020 and a permanent replacement CEO, John Hudson, commenced in March 2021.

[2] An external audit of Tainui's operations was conducted on 3 and 4 March 2021. The resulting audit report, in Tainui's view, expressed "...a high level of concern" related to NLC's CNM role. Tainui also raised allegations that staff members had been subject to harassment and bullying by NLC.

[3] NLC claims they were suspended from their employment as of 23 April 2021 after returning from a period of leave following a surgical procedure. Tainui's response is that NLC could not perform their role at the time as NLC was restricted to light duties.

[4] NLC was dismissed from their employment on 30 July 2021, with Tainui having concluded that NLC was not capable of continuing in the CNM role, that they had treated staff in a threatening, intimidatory and aggressive manner, and further that they had committed serious misconduct. The correspondence given to NLC provided that the termination would be effective immediately.

[5] NLC claims they were unjustifiably dismissed from, and unjustifiably disadvantaged in, their employment. NLC also claims that they are entitled payment relating to a range of entitlements including overtime payments, payment for on-call work, and payment for holidays. NLC seeks that penalties be imposed upon Tainui for alleged breach of their individual employment agreement (IEA) and the Holidays Act 2003.

[6] Tainui denies all the claims made by NLC.

### **Non-Publication**

[7] An application for non-publication orders in terms of clause 10 of schedule 2 of the Employment Relations Act 2000 (the Act) has been made by NLC. The application is made in relation to the name and identifying details of the applicant.

[8] NLC contends there is minimal public interest in this matter and that publication of NLC's name would be detrimental to their health. Additionally, NLC submitted that the geographical area in which they work has limited opportunities at senior level, and that whilst NLC is in new employment, naming them publicly may impact any promotion and advancement opportunities.

[9] Tainui submitted that there is nothing exceptional in this case warranting a departure from a presumption in favour of publication and that as such a non-publication order should not be granted. Tainui submitted that NLC has not made clear how publicity might impact employment advancement opportunities, and nor have they provided evidence as to the purportedly relevant health issues.

[10] I am satisfied that the making of non-publication orders is appropriate in the particular circumstances of this matter. I consider there is a potential risk of harm arising from the identification of NLC's identity, including as to their current employment, and their future employment prospects. I do not consider there to be any significant wider public interest in the publication of NLC's identify. Noting that other details relating to the proceedings are not subject non-publication order, any public interest as to the subject matter and details of the proceedings, excepting the name and identifying details of NLC, is unaffected.

[11] I order a prohibition on the publication of the name and any identifying details of NLC. This order is made pursuant to clause 10 of schedule 2 of the Act.

[12] A random generator has been used to refer to the applicant in these proceedings. NLC is a randomly generated name and does not resemble the name of the applicant.

### **The Authority's investigation**

[13] The statement of problem included reinstatement in the remedies sought. At an initial case management conference held on 13 May 2022, it was confirmed by NLC's representative that reinstatement was not being sought.

[14] NLC, NLC's spouse, and Manny Down, New Zealand Nurses Organisation Organiser, provided written witness statements and gave evidence in support of NLC's claims. John Hudson (CEO), Antony Burn (Board Member and Acting CEO), a Tainui Team Leader (who I will refer to as the "Team Leader"), a former Quality Assurance and Risk Manager (who I will refer to as the "Quality Assurance Manager"), and an Operations Manager (who I will refer to as the "Operations Manager"), gave evidence for Tainui.

[15] For the Authority's investigation written witness statements were lodged and all witnesses answered questions under oath or affirmation.

[16] 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. The Chief of the Authority has decided that exceptional circumstances exist such as to allow this determination to be issued outside of the three month timeframe required by s 174C(3) of the Act.

### **Issues**

[17] The issues identified for investigation and determination are:

- (a) Was NLC unjustifiably disadvantaged in their employment having regard to a suspension from their employment on or about 23 April 2021?
- (b) Was NLC unjustifiably dismissed?
- (c) If Tainui's actions were not justified (in respect of disadvantage and/or dismissal), what remedies should be awarded, considering:
  - (i) Lost wages (subject to evidence of reasonable endeavours to mitigate loss); and
  - (ii) Compensation under section 123(1)(c)(i) of the Act.
- (d) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by NLC that contributed to the situation giving rise to their grievance?
- (e) Is NLC entitled to payment for claimed entitlements?
- (f) Should interest be paid on any monetary remedy ordered?
- (g) Should any penalties be imposed upon Tainui relating to alleged breaches of NLC's employment agreement and the Holidays Act 2003?

### **Was NLC unjustifiably disadvantaged in their employment?**

#### *Background*

[18] NLC claims that they were unjustifiably disadvantaged in their employment in that they were suspended from their employment on 23 April 2021.

[19] NLC said that they had surgery on 18 February 2021 and had informed Mr Burn about that and had provided a medical certificate. NLC received a text message from Mr Burn on 31 March 2021 which asked them how they were "getting on" and stated "[i]t is becoming important we get the chance to have a chat about your timing and how

things are going so we can do some planning around your return”. The text also asked about NLC’s availability to meet with him.

[20] NLC responded to the text message advising that they had an appointment on 13 April 2021 for an assessment and suggested they would advise further when they were clear on when they would be able to return to work. Mr Burn then advised again that there was a need for a meeting. The message contained no reference to other potential issues in terms of the audit report, any investigation, or any other concerns regarding NLC’s role.

[21] NLC said that they met with Mr Burn and Mr Hudson on 2 April 2021, and in effect, was questioned about concerns relating to the audit report without notice and in circumstances where NLC thought they were attending a short meeting about the timing of their return to work. NLC’s evidence is that there was no notice that the meeting was disciplinary in nature or that it was about anything other than their return to work. They said they received no written notice and were not afforded an opportunity to have a support person present.

[22] Mr Hudson’s notes reflect that there was discussion about the audit report at the meeting in early April 2021. His notes said “[t]he discussion moved to asking [NLC] what [NLC] wanted as far as the job of CNM” and then “[w]e then moved the discussion to [NLC’s] leadership and management style”. NLC remained off work.

[23] Mr Hudson said that NLC returned to work on light duties on 23 April 2021. He said that Tainui did consider whether NLC would be able to carry out the NLC role in full on light duties and that a decision was made to continue the employment of a temporary clinical manager to support NLC.

[24] NLC claims that they returned to work on 23 April 2021 having been absent for a period of two months after having surgery and that they were advised at a meeting that same day that they were not required to attend work. NLC said at the investigation meeting that they were told that they couldn’t be on the floor and that they were sent home. NLC recorded that meeting.

[25] Mr Hudson said that, at the time of that meeting, Tainui were still developing their responses regarding the audit report and that they had been reminded by the

Taranaki District Health Board that a clinical manager needed to be in place and that there was a risk that statutory management could be imposed.

[26] Tainui submitted that given the nature of the clinical role NLC performed, Mr Hudson reached a justifiable decision that NLC could not perform the full role on light duties. Tainui submitted that concerns were also held about issues relating to the audit and that the suspension was not contested by NLC until they raised a personal grievance on 28 June 2021. It submitted that NLC did not actively pursue the issue until then despite having had the opportunity to challenge it at the time. Tainui also contend that the issue was adequately discussed with NLC on 23 April 2021 and that NLC was not disadvantaged.

[27] NLC's evidence is that they were told at the beginning of a meeting on 23 April 2021 that a temporary CNM had been appointed for a period of 10 weeks. NLC said that the CNM duties were 99 percent office based and that they were able to continue in the role despite being on light duties. NLC said that they were sent home to return in a few days, were not told what their hours would be, were asked to return their work phone, and that they did not return to work after that time. NLC recorded that meeting. Mr Hudson said in his written statement that he considered NLC's suspension to have been justified.

[28] The transcript provided to the Authority reflects that at the meeting on 23 April 2021, in response to NLC saying "so I cannot be on the floor" that Mr Hudson responded, "so I told you right at the beginning, I cannot risk I cannot risk, I have a risk management problem to take care of". NLC then asked whether they would then be working alongside the temporary CNM and later whether they might attend courses during that time. Mr Hudson made the comment "so [NLC] when it comes to this, and I am always going to refer to this report, do you think you are the best person for the job".

[29] NLC asked what their role would be for the 10 weeks during which the temporary CNM would be working. Mr Hudson said that that would be discussed on Tuesday. After some discussion about providing a response to issues in the audit report, Mr Hudson then said "I'll leave it with you now. You take this now and go finish it".

*Was Tainui justified in its decision and actions?*

[30] Section 103A of the Act sets out the relevant test for justification, that being whether the employer's actions, and how the employer acted, were what a reasonable employer could have done in all of the circumstances at the time the dismissal or other action occurred.<sup>1</sup> In applying the test of justification, I must consider the factors listed at s 103A(3) of the Act that, in a non-exhaustive manner, set out procedural considerations.

[31] The question of justification applies in two parts, to the process adopted by the employer and the substantive justification.

[32] NLC gave notice of a personal grievance by letter dated 21 June 2021, including in relation to allegations of bullying by Mr Hudson and the suspension.

[33] Clause 23(c) of the IEA deals with suspension from employment and provides:

In the event that the employee comes under investigation for any form of serious misconduct, workplace bullying or harassment, the parties agree that the employer may, after consultation with the employee, at their discretion either suspend the employee on full pay, (unless the period becomes protracted as a result of undue delay caused by the employee) or temporarily transfer the employee to another area of work until such time as the issue is resolved or a permanent transfer is agreed between the parties.

[34] Suspension will only be justifiable where a fair process has been followed. However, suspension "must be looked at in a sensible, flexible, and a reasonable way to ascertain what are the requirements of fairness on the particular occasion and the particular surrounding circumstances".<sup>2</sup>

[35] Where an IEA specifically deals with the issue of suspension, it must be complied with. Compliance here required Tainui to do at least two things. First, the clause provides for suspension in limited circumstances. In the present case, there is no indication that there was any contemporaneous finding that NLC was under investigation for serious misconduct. As NLC pointed out in their evidence, they were not provided formal notice of the meeting on 23 April 2021, nor were they advised that they were able to have a support person or representative present.

[36] Tainui's submissions reveal that the suspension was a matter of mixed motivations as to NLC's capacity and concerns regarding the audit and NLC's role.

---

<sup>1</sup> Employment Relations Act 2000, s 103A(2).

<sup>2</sup> *Graham v Airways Corp of New Zealand* [2005] 1 ERNZ 381 (EmpC) referring to *Tawhiwhirangi v Attorney-General in respect of the Chief Executive, Dept of Justice* [1993] 2 ERNZ 446, at 558.

[37] I am not satisfied that there was a substantive justification for the suspension. While Tainui may have had concerns regarding NLC's role in relation to the audit as at 23 April 2021, I am not satisfied that NLC was suspected of serious misconduct and was under investigation for the same. Additionally, there is no evidence that any meaningful process was conducted, or consideration given, as to assessing NLC's capacity while on light duties. Mr Hudson may have had a view as to that, but that was not an informed view. I am not satisfied there was a substantive justification for the suspension.

[38] The suspension provision in the IEA also required that before acting, Tainui consult with NLC. That required Tainui to consult NLC before reaching the decision to suspend them. They did not. That also required Tainui to provide NLC notification as to the proposed suspension, reasons for it, and an opportunity for NLC to consider that information and to provide an informed response to the proposed decision.

[39] While Tainui submitted that it "appropriately discussed" the issue of suspension with NLC on 23 April 2021, I find that was not the case. Both concerns, as to the audit report and light duties, were discussed at that meeting. However, they were not clearly put as the reasons for suspension. I conclude that Tainui simply did not have regard to the terms of the IEA or its consultation obligations, and that Tainui proceeded with the suspension despite that.

[40] It is no answer to say that the suspension was justified on the basis that NLC did not take issue with it at the time. NLC gave notice of a personal grievance, and further, NLC was not given clear notice of the reasons for the suspension and exclusion nor its proposed duration. In any event, I find that assertion incorrect. NLC was not obligated to contest the suspension and Tainui had a positive obligation to consult with NLC which it failed to comply with.

[41] I find that Tainui's actions in suspending NLC from their employment were substantively and procedurally unjustified and that NLC was unjustifiably disadvantaged in their employment.

### **Was NLC unjustifiably dismissed?**

#### *Background and evidence*

[42] NLC was first employed as a Registered Nurse with Tainui on 28 April 2016, later being offered a fixed term position as CNM commencing on 27 March 2020. The CNM role then, following a performance appraisal on 25 August 2020, became permanent in August 2020 with a variation to NLC's IEA was signed on 31 August 2020. Mr Hook was the CEO at that time.

[43] NLC claims that when they accepted the CNM role, they did so somewhat reluctantly. One of NLC's concerns was the high workload of the CNM role in the absence of Clinical Coordinators being employed. NLC contends that they accepted the role on the condition that two Clinical Coordinators would also be appointed. A short time after being appointed to the role of CNM, COVID-19 resulted in the first lockdown. NLC said that as a result the two Clinical Coordinators that had been committed to were not appointed.

[44] NLC said that Mr Hook, while being CEO, kept his Registered Nurse and medication competencies and acted as a mentor in the CNM role. NLC said Mr Hook would help on the floor when needed and that NLC and he would take alternate weeks being on call.

[45] In late 2020 and early 2021 there were some changes in Tainui's management personnel. Mr Hook left his employment with Tainui. He was replaced on an interim basis by the then Chairman, Mr Burn. Mr Hudson was then appointed to the CEO role on 1 March 2021.

[46] NLC had surgery on 18 February 2021. On 3 and 4 March 2021 an external audit was carried out at Tainui. NLC was off work at the time after having surgery and was not in attendance at the time of the audit.

[47] NLC said they received a text message from Mr Burn on 31 March 2021 seeking to meet with NLC to discuss the timing of their return to work. NLC subsequently met with Mr Burn, and Mr Hudson, on 2 April 2021, in what NLC said turned about to be a two-hour meeting. NLC said that the meeting on 2 April 2021 was disciplinary in nature, with Mr Hudson asking he if NLC wanted to continue their job, asking NLC to explain issues with the audit report, and telling NLC to stop swearing at other staff in Russian.

[48] After attending the meeting on 23 April 2021, noted elsewhere in relation to the issue of the suspension, NLC attended a further meeting on 29 April 2021. NLC said that they were not given written notice of the meeting and not invited to take a support person to the meeting.

[49] At that meeting, Mr Hudson was critical of the responses provided by NLC as to the audit report. NLC asked whether Mr Hudson thought NLC was not right for the position. Mr Hudson responded “to be frank with you, no I don’t think you are the right person for this role, I’m going to support that up by, right now I don’t believe right person for this role, right now the staff don’t respect you”. NLC then asked for evidence of that, Mr Hudson declined to provide any detail.

[50] During the meeting on 29 April 2021, NLC said that if the intention was to have meetings as to whether they were right for the role or not, that they were entitled to a support person. Mr Hudson said NLC could bring a support person when they had another meeting. NLC asked what the meeting would be about, Mr Hudson responded “[t]he topic is going to be if you like, will be this organisation, and the best for this organisation, that’s the topic we are going to discuss”. NLC suggested that what was actually being discussed was whether NLC was right for the role.

[51] At the same meeting, Mr Hudson said “hang on let me finish, look, I accept, that Tainui probably, definitely made an error of judgement in appointing you as clinical nurse manager”. Mr Hudson further asked whether NLC wanted to continue in the role, and he also said:

...I guess whatever the outcome of this is, um, having laid my cards on the line, I don’t see a future for you and me working together, so what I want to impress upon you [NLC], is I want you to be able to maintain your dignity and your reputation, should we depart company one way or another.

...

Yes I am saying you are not the right person for this job

...

I’m saying it right now

...based on that you do not have the respect of your staff....

[52] NLC asked for details as to the allegations being made, Mr Hudson did not provide them. NLC also asked for a letter relating to the next proposed meeting, Mr Hudson initially said he would not provide one and said the meeting would be about “...your relationship or your ability to do your job”.

[53] Mr Hudson ultimately did provide a letter to NLC dated 30 April 2021 requesting NLC attend a formal meeting. The letter proposed a meeting on 4 May 2021, and contained the following statements as to the purpose of the meeting:

At the meeting, you will be asked to respond to the following concerns we have about your suitability to remain in the CNM role at Tainui, namely:-

- Findings revealed in the audit report are cause for Tainui to have a high level of concern that you have and will continue to fail in meeting the requirements of the CNM role.
- Tainui understand you do not have the respect of your staff.
- Tainui do not have confidence that you can consistently demonstrate the attributes required to be successful in this role.
- Tainui believes that it was a mistake appointing you into the CNM role.
- Tainui needs to discuss “where to from here” for Tainui and yourself.

...This meeting is an opportunity for Tainui to explain and you to respond and convince us otherwise, that you are not well suited for this critical senior leadership at Tainui.

...We must advise you that an outcome of this meeting could be that we reach agreement that a suitable exit for you is facilitated....

[54] A further letter from Tainui dated 30 April 2021 did explicitly not mention the possibility of disciplinary outcomes or termination of employment, nor did it refer to NLC’s ongoing suspension or exclusion from the workplace.

[55] A further meeting was held on 11 May 2021. NLC’s spouse attended and both Mr Hudson and Mr Burn also attended. NLC raised issues as to the lack of detail provided relevant to the allegations and asserted that information should have been provided. The meeting appears to have proceeded in a less than cordial manner, which I consider was primarily attributable to a presumptive, predetermined approach taken by Tainui together with an astonishing absence of detail as to the allegations. Mr Hudson at one point then said:

Yip, so we don’t think this is going to work for you to be our clinical services manager. So what’s the best way to deal with it for the benefit of you and the benefit of Tainui.

[56] Mr Hudson’s evidence was that his perception was that NLC was looking for a way to end the employment relationship at that meeting, including by NLC asking “where to from here for Tainui and myself”. NLC did not end the employment relationship, and I do not accept that NLC’s statements were at all inappropriate. Indeed, if Mr Hudson were correct, I would express no surprise given the clear indications already given to NLC at that time that indicated predetermination.

[57] The meeting ended shortly afterwards. Mr Down then wrote to Mr Hudson on 21 May 2021 requesting relevant information and made clear that NLC had not agreed to end the employment relationship. A response was provided on behalf of Tainui on 26 May 2021, including various suggestions that NLC had sought a proposal relating to the ending of the employment relationship.

[58] On 3 June 2021, Tainui wrote to NLC requesting their attendance at a further formal meeting on 8 June 2021. The letter referred to the subject matter in the 30 April letter and the two additional points:

- Findings revealed in the audit report, and the high level of concern related to your CNM role; and
- Concerns expressed to Tainui from a number of staff as to them believing that they have been subjected to harassment and bullying by you, that you are unsupportive, dismissive and have breached privacy of other staff. Other staff members have complained that staff morale is non-existent, that you are unapproachable and do not listen to staff concerns. Further, a number of staff have complained that you yell at staff, in front of residents and their families....

[59] The letter went on to note the possibility of a finding of serious misconduct and the possibility NLC's employment be terminated immediately. Mr Down advised Mr Hudson that the meeting would need to be delayed on 8 June 2021 due to an urgent matter and additionally requested the information previously sought.

[60] A further meeting was held on 16 June 2021. Mr Down also attended that meeting. Mr Hudson's evidence was that NLC sought detail at that meeting about the alleged comments made by other staff. He also said that NLC made it clear they did not want to address the underlying allegations made by staff at that meeting.

[61] On 25 June 2021 Tainui wrote to NLC again requesting a further meeting. The letter advised that Tainui had obtained further statements that supported allegations of bullying and other allegedly inappropriate behaviours. The statements were provided to NLC. Tainui claims that the statements were obtained in response to NLC requesting further detail, and comments made about the lack of detail, about the allegations. The statements from other staff primarily related to issues said to have arisen approximately one year prior.

[62] Mr Down wrote to Tainui again on 6 July 2021 again requesting relevant information, taking issue in terms of compliance with the complaints/concerns policy, taking issue with NLC's exclusion from the workplace, and taking issue with a failure

to provide an opportunity for NLC to improve in response to performance concerns being raised.

[63] On 13 July 2021, Tainui responded to the 6 July 2021 letter. Tainui responded to the concerns about the complaints/concerns policy by asserting the investigation was justified by the number of complaints received and NLC's denials in relation to the concerns raised. That letter proposed a further meeting on 15 July 2021.

[64] Mr Down emailed Tainui's representative on 26 July 2021 providing transcripts of the meetings on 29 April and 11 May 2021. The email also referred to the comments made by Mr Hudson at those meetings and expressed concerns as to predetermination. Counsel for Tainui, by email response on 27 July 2021, sought to assure Mr Down that no decisions had been made.

[65] A further meeting was held on 27 July 2021 at which NLC provided responses to the statements from staff.

[66] One of the letters provided to NLC was a resignation letter from August 2020 from another employee. It referred to harassment, bullying and intimidation and asserted that management allowed and fostered that culture. It did not directly criticise NLC. Another referred to hours of work being reduced by NLC in response to an employee declining to take on a particular role, another complained that NLC had made the comment "...I am not your friend, I am your boss, that is just the way it is". The complaints otherwise suggested NLC was unapproachable, asserted a lack of compassion, was unhelpful in relation to the preparation for the audit, and raised issues with management decisions made by NLC.

[67] NLC provided a response to each of the letters. NLC's response noted areas where there was a lack of detail, provided relevant explanations, made appropriate admissions about allegations such as always having the office door closed, provided justifications for NLC's management decisions, and denied aspects of the complaints. NLC also referred to the Tainui complaints/concerns process, including in that it provides that complaints must be submitted within three months of the relevant event.

[68] The Operations Manager's evidence at the investigation meeting was that they were asked to provide a statement and was not informed of what purpose it would be used for. They were asked, along with another employee, to provide the statement by

another staff member. They were not provided NLC's responses, assumed the statement would be confidential and accepted that the relevant events had already been dealt with.

[69] The Quality Assurance Manager said they raised issues relevant to the letter they provided with Mr Hook at the time. Such as they complained about NLC having the office door shut, they accepted in cross-examination that they did not know why that was the case. They also accepted that the audit resulted in a significant pass.

*Procedural justification?*

[70] I have set out the test of justification above in relation to NLC's unjustified disadvantage claim.

[71] The termination letter provided as follows:

...

That you do not have what appears to be insight into the way your practice is perceived by other staff members, leaving aside the fact that you may have threatened staff members, in an intimidating and aggressive manner, suggests also that you are not capable, as illustrated in the audit report, of continuing on in the CNM role, given in particular, as I have emphasised to you, is a critical one for the business.

I therefore take the view that all trust and confidence in you continuing on this role has gone. I consider on balance that you are not capable for continuing on in the CNM role, that you have treated staff in a threatening, intimidatory and aggressive manner, such that I make the finding of serious misconduct, and further, that your employment should be terminated immediately. This letter serves as notice that your employment will terminate as of today....

[72] On 30 July 2021, Tainui wrote to NLC advising of the outcome, that being termination of employment for serious misconduct. The letter relied on concerns relating to the CNM role and sought to justify Tainui's decision based on alleged admissions about the time it would take for NLC to get up to the required level. Tainui detailed that they had found the bullying allegations sustainable given a consistency between the relevant statements.

[73] In dismissing NLC Tainui relied on, in part, a complaint regarding the reduction in hours of an employee after that employee had declined to perform a certain role. Tainui asserted, in effect, that NLC's actions were blameworthy despite NLC's assertion that their actions were taken based on a direction given to NLC by the CEO at the time. The issue of whether NLC was given the direction did not seem to have been resolved at all by Tainui aside from suggesting it didn't matter.

[74] Rather than establishing facts in an impartial and appropriate manner, and then considering those facts in terms of NLC's employment, I find that Tainui's approach was to make conclusive findings against NLC based on inadequate information. Allegations as to NLC's competence and experience to perform the CNM role, without putting NLC on notice first and without obtaining the necessary information that might justify such a finding, were made from the beginning. Tainui in effect started the process by asking NLC to justify their ongoing employment, as opposed to genuinely raising concerns for NLC's response. I find that Tainui's decisions from that point were hopelessly clouded by what I find was a determined approach to end NLC's employment.

[75] No fair and reasonable employer could have taken the approach that Tainui did. It did not sufficiently investigate the allegations. It also cannot, in circumstances where it had predetermined its conclusions as to NLC's competence and the outcome, be said to have provided NLC a reasonable opportunity to respond to the allegations before taking action against NLC, nor to have genuinely considered NLC's response.

[76] Tainui's approach was also inadequate in that conclusions from the audit report were simply adopted as criticisms of NLC without Tainui conducting its own inquiries or investigation. This was despite NLC not being at work at the time of the audit and not having been provided opportunity to comment on any matters that might appear critical of NLC prior to the audit report being finalised. Tainui's apparent reliance on verbal statements alleged to have been made by the audit staff was also procedurally inadequate and unfair.

[77] The complaints regarding alleged bullying by NLC were unreasonably accepted in their entirety by Tainui. Such as any investigation was conducted, there was a significant absence of documentary evidence. The relevant complainants were either not interviewed or such engagement with them was not recorded. The complaints were not only historic and, for the large part, lacking in detail, but were also produced at the initiative of Tainui. This occurred after NLC and their representative raised concerns with the lack of information given in relation to allegations made.

[78] Mr Hudson said in cross-examination, when asked how he decided who was right in relation to the staff statements and NLC's responses, that he didn't judge one against the other and that it was "just the weight of numbers". That approach

unreasonably disregarded NLC's responses and the findings made by Mr Hudson were not open to Tainui. The actions were not such as would be open to a fair and reasonable employer.

[79] Additionally, I find Tainui did not take a constructive approach to the concerns they said were held about NLC's capacity and experience to perform the CNM role. Tainui had a Staff Performance and Management Policy that included provision for annual appraisals, monitoring of conduct if there were concerns about inappropriate behaviour, and annual competency assessments. The policy also provided for performance improvement plans and reviews where necessary. That policy was not utilised at all, and I find Tainui's actions in failing to do so were not the actions of a fair and reasonable employer.

[80] Tainui, instead of conducting a fair and reasonable investigation, reached conclusions, and put allegations without having a sound foundation to do so. It then clumsily attempted to justify the allegations by obtaining statements containing minimal detail of events said to have occurred, in many cases, more than 12 months prior. NLC's responses to the allegations made were not put to the employees concerned, nor was any reasonable assessment of the complaints made. Despite that, Tainui dismissed NLC's responses in a wholesale manner.

[81] I find that the statements made by Mr Hudson at the meeting on 29 April 2021 were not only conclusive evidence of predetermination but were seriously unfair and unreasonable. I do not accept that the comments were merely an expression of a preliminary view, nor that the comments were simply responses to questions raised by NLC. Absent an express statement to the effect of "I am going to sack you" it is difficult to envisage a clearer case of predetermination.

[82] Having considered each of the factors at s 130A(3) of the Act, I conclude that the dismissal was procedurally unjustified.

*Was the dismissal substantially justified?*

[83] Tainui submitted that it had a proper basis on which to conclude that there were "deficits" in NLC practice. In doing so, it referred to evidence given by NLC seemingly accepting that that was the case. No fair minded and independent assessment was conducted as to those accusations. Further, Tainui's apparent justification for the

dismissal, both from the initial conclusory statements made by Mr Hudson and right through to the termination letter, focused on NLC allegedly lacking the experience to perform the CNM role. Tainui made no attempt to address such matters in the context of performance management, did not seek to provide training to NLC, did not adhere to its commitments regarding the employment of two clinical coordinators, and issued no warnings as to any performance concerns.

[84] Tainui's reliance on the audit report absent a complete and thorough assessment of NLC's ability to perform the role, noting that Tainui had appointed NLC to the role, was wholly unreasonable. The excerpts of the audit report provided to the Authority are far from damning of NLC, and otherwise do not provide anything close to a conclusive assessment of NLC's ability to perform the role appropriately.

[85] The audit report noted that areas requiring improvement included clinical governance, orientation documentation, ongoing staff training, and staffing levels. It is far from the case that NLC was solely responsible for all of those matters. The audit report does not establish grounds for a finding that CNM was incapable of performing the role, nor of serious misconduct. To the extent Tainui rely on alleged verbal statements made by the auditor or staff, I do not accept that evidence as being an accurate reflection of the audit report. Regardless, placing reliance on such statements was in my view seriously procedurally deficient and unfair to NLC.

[86] The audit report raised an issue as to NLC's experience in terms of the CNM role, but that was far from the only issue identified. Tainui's reliance on the audit report as a basis for dismissing NLC was seriously problematic. Instead of dealing with the issues actually presented by the audit report and seeking to engage with NLC in good faith in maintaining a productive employment relationship, Tainui seemingly ignored issues indicative of organisational failure and blamed NLC.

[87] Tainui also relied on NLC's alleged bullying actions as a justification for the dismissal. Tainui's approach was to deal with the matter by making generalised allegations and then concluding that serious misconduct had occurred. I find that there was no basis on which a fair and reasonable employer could have made a finding of serious misconduct in all the circumstances. There were multiple procedural failings on Tainui's part. I find that those failings infected the process to such a degree that there

could be no reasonable finding that there was a substantive justification for the dismissal.

[88] I find that NLC was unjustifiably dismissed from their employment.

### **Is NLC entitled to remedies?**

#### *Lost wages*

[89] I am satisfied that NLC lost wages as a result of the dismissal and that they appropriately sought to mitigate their loss by seeking alternative employment. NLC is entitled to be compensated for that loss, and I consider an award of lost wages of 3 months' ordinary time remuneration to be appropriate. I calculate that on the basis of 13 weeks, at the rate \$2,328.50 per week including overtime and on-call allowance. That weekly sum is reflective of what I have found in relation to other payments due to NLC.

[90] NLC provided calculations relevant to what they said was a reduction in income for a further 3-month period. I am not satisfied that there is an appropriate basis on which to exercise discretion in terms of s 128(3) of the Act and I decline to make any further award.

[91] I order that Tainui Home Trust Board make payment to NLC, within 28 days of this determination, of \$30,270.50 for lost wages.

#### *Compensation for humiliation, loss of dignity, and injury to feelings*

[92] Tainui accepted that the potential consequences for a health professional in a dismissal case are high but said that needed to be balanced with the concerns that had been raised in the audit and by staff in relation to NLC's alleged behaviour. The difficulty with that submission is that Tainui did not take sufficient steps to investigate the matters, nor did it make reasonable findings as part of a genuine and impartial process. It was not required to ignore concerns; it was simply required to deal with them in a fair manner.

[93] The matters for which NLC was blamed were not "properly made out" as submitted by Tainui. That is evident from the predetermined approach taken and both the suspension and dismissal occurring in the context of significant procedural failures.

In effect, NLC was blamed for the audit report results, alleged bullying, and a lack of professional competence, all without any fair investigation or consideration.

[94] NLC's spouse said that NLC was "almost happy" that they were dismissed given the events of the 14 weeks prior in relation to the allegations made and treatment by Tainui. They said that they could see, however, that NLC was "hurting inside", and that NLC continued to be stressed by the matter including in relation to the preparation required for the Authority's investigation. NLC's spouse's evidence was also that NLC went through a period where they kept to themselves and didn't talk much.

[95] I find that \$22,500 is an appropriate sum, subject to any reduction on account of contribution, in compensation for humiliation, loss of dignity, and injury to feelings relating to the impacts of the unjustified dismissal. I find a further sum of \$5,000 is appropriate in relation to the impacts of the unjustified disadvantage.

#### *Contribution*

[96] Section 124 of the Act requires that the Authority consider the extent to which NLC's actions contributed towards the situation that gave rise to the personal grievances, and if those actions so require, that the Authority reduce the remedies that would otherwise have been awarded accordingly.<sup>3</sup>

[97] I do not consider there is any basis on which NLC's actions could be said to have contributed to the situation that gave rise to their personal grievances. I decline to make any reduction on account of contribution.

[98] I order that Tainui Home Trust Board make payment to NLC, within 28 days, of \$27,500 as compensation for humiliation, loss of dignity, and injury to feelings

#### **Is NLC entitled to payment of claimed entitlements?**

##### *Overtime*

[99] NLC claims that Mr Hook approved overtime work when NLC became CNM and that he signed all of the timesheets. NLC said that instead of being paid for overtime worked, they were, without NLC's consent, credited time in lieu. NLC said that when they took the time in lieu they were paid at their ordinary hourly rate and not at the rate of time and a half. NLC contends that the practice continued following the appointment

---

<sup>3</sup> Employment Relations Act 2000, s 124.

of Mr Burn as Acting CEO and that, because the overtime was credited as hours in lieu, that impacted the calculations relating to NLC's annual leave, sick leave, and public holidays.

[100] Clause 9(d)<sup>4</sup> of NLC's IEA provides that overtime shall be paid at the rate of time and a half of the employee's ordinary rate of pay.

[101] At the investigation meeting, NLC said that they had discussed the issue of overtime with Mr Burn who told NLC that Tainui could not afford to pay for overtime. NLC also said that it was clear to Tainui that NLC was performing overtime. NLC said it was only later, after seeking advice, that they realised they should have been receiving time and a half.

[102] The payslips provided from the periods ending 12 April 2020 through to 2 August 2021 show an accrual of time in lieu on the payslips representing the overtime performed. The amount of overtime worked, and time in lieu credited, varied considerably.

[103] The overtime issue was subject to an exchange of correspondence between NLC and Mr Burn, with NLC requesting clarification as to whether overtime should be worked in emails on 16 and 17 December 2020. Mr Burn responded on 21 December 2020 seeking to meet to discuss the issue. In that email he noted subjects for conversation, including a view that senior staff should be paid salaries rather than compensation for hours worked, although he also acknowledged that there was a specified overtime rate in NLC's IEA.

[104] I find that NLC was entitled to payment for the overtime worked in accordance with the terms of the IEA. I am not satisfied, despite the practice for a period of time, that there was agreement that overtime would be paid in a different manner. If that were the case, then it should have been recorded by a variation to the IEA.

[105] I conclude from the payslips that 212.5 hours in lieu were credited and paid to NLC at their ordinary rate of \$45.00 per hour. I find that NLC was entitled to payment of those hours at the rate of time and a half, that being \$67.50 for each hour. As such, I

---

<sup>4</sup> The IEA contains a numbering error with there being two "9(c)" clauses.

find that NLC is entitled to payment of an outstanding sum of \$4,781.25<sup>5</sup> gross in relation to overtime worked.

[106] I find that NLC is entitled to \$4,781.25 as payment due for overtime worked.

*Payment relating to being on-call on Public Holidays*

[107] NCL claims that they were on call during public holidays but were not credited with alternative holidays. NLC submitted that they were entitled to be credited those annual holidays based on s 59 of the Holidays Act 2003.

[108] NLC's evidence is that Tainui's TDHB contract requires that a clinical person be on call after hours and that that person must be able to reach the facility within 20 minutes. NLC said that they were on call 24/7 and in NLC's written statement provided an example of being required at short notice to work nightshift over Christmas due to three registered nurses having had a chest infection. NLC said they were restricted on their days off, could not go away for weekends, and had to remain within phone coverage and 20 minutes' drive from the facility.

[109] NCL said at the investigation meeting that when Mr Hook was in the CEO that NLC would be on call every second week, and that from 2 October they were on call all the time.

[110] Mr Burn responded to NCL's claims by asserting that there were "numerous occasions when I heard from staff that they could not contact [NLC] when [NLC] was away from work. For whatever reason [NLC's] cell phone could not be reached, and [NLC] is well aware of this." I am not satisfied by Mr Burn's evidence that NLC was not on call at the relevant times.

[111] On balance, and having regard to the records provided, I am satisfied that there were times when NLC was on-call on public holidays that would otherwise have been working days, was not called into work, and was restricted in terms of s 59(3) of the Holidays Act. I am not satisfied, based on the evidence received, that NLC is entitled to any payment for the period prior to Mr Burn's appointment as temporary CEO or after their suspension from work.

---

<sup>5</sup> 212.5 hours multiplied by the addition 0.5 hourly rate (\$22.50) that was not paid.

[112] I find that NLC was entitled to a day in lieu for each of 26 October 2020, 25 and 26 December 2020, 1 and 2 January 2021, and 6 February 2021. That is a total of 6 days at the rate of \$45.00 per hour for 8 hours each day. I am not satisfied that overtime would have been performed on any of those days.

[113] I find that NLC's relevant daily pay was \$360.00 per day and that NLC is entitled to \$2,160.00 as payment for being on-call on the six public holidays identified above.

*Sick leave, public holidays, and alternative holidays*

[114] NLC contends that sick leave, alternative holidays, and public holidays were paid incorrectly in that they were paid at a flat rate rather than based on relevant daily pay. I am not satisfied based on the information provided that NLC would have received additional payment for overtime if NLC had worked on the relevant days. As such, I am not satisfied that NLC was paid incorrectly in relation to sick leave, public holidays, and alternative holidays. NLC's claim has not been made out.

*Payment during suspension*

[115] NLC claims that for a 14-week period, between 23 April 2021 and 30 July 2021, they were not paid their allowances and regular overtime. Clause 23(c) of the IEA provides for the payment of "full pay" during any period of suspension. The payslips provided to the Authority reflect that NLC was paid for their 80 ordinary hours during the suspension period.

[116] NLC should also have been paid for the on-call allowances they would otherwise have received had NLC not been suspended, that being 98 days at \$35.00 per day. The total of the unpaid on-call allowance is \$3,430.00.

[117] I also find that NLC would have performed overtime during the period of suspension. I accept the average of that overtime as provided by NLC as being 4.2 hours per week. Payment for those hours is at the rate of time and a half, with the applicable hourly rate being \$67.50. NLC should also have been paid an additional \$283.50 per week in relation to overtime, being a total of \$3,969.00 for the 14-week period of suspension.

[118] For the full 14-week period, I find that NLC is entitled to an additional \$7,399.00 in relation to payments not made during the period of suspension.

*Annual holidays*

[119] NLC claims that their weekly pay, for the purposes of annual holidays, are to be calculated on the following basis:

- (a) 40 ordinary hours worked each week (\$1,800);
- (b) An average of 4.2 hours of overtime each week (at time and a half) (\$283.50); and
- (c) 7 days of the on call payment of \$35 (\$245).

[120] NLC's calculations result in a weekly sum of \$2,328.50. I accept the basis for the calculations as provided by NLC.

[121] NLC was paid for annual holidays at the conclusion of their employment. Having regard to my findings above in relation to sums not paid during NLC's employment, I conclude the gross outstanding sum to be \$14,340.25<sup>6</sup>. NLC is entitled to payment of an additional 8 percent on that sum, being \$1,147.22 in relation to unpaid annual holidays.

*KiwiSaver*

[122] The total sum NLC is entitled to relating to their unpaid earnings is \$15,487.47. NLC is entitled to payment of the KiwiSaver employer contribution of 3 percent on that sum, that being \$464.62.

*Orders in relation to the claimed entitlements*

[123] Tainui Home Trust Board are ordered to make payment to NLC, within 28 days, of the following:

- (a) \$4,781.25 as payment due for overtime worked;
- (b) \$2,160.00 as payment for being on-call on public holidays;
- (c) \$7,399.00 as arrears of wages relating to the period of suspension;
- (d) \$1,147.22 in relation to unpaid annual holidays; and
- (e) \$464.62 as employer KiwiSaver contributions not paid.

---

<sup>6</sup> Including the outstanding sums for unpaid overtime, being on-call on public holidays, and unpaid wages during the suspension.

### *Interest*

[124] The total of the relevant payments due to NLC is \$15,952.09. Tainui are ordered to pay NLC, in accordance with the Interest on Money Claims Act 2016<sup>7</sup> and within 28 days of this determination, on that sum from the date the employment relationship ended until the date on which payment in full is made. This is to be calculated using the Civil Debt Interest Calculator.<sup>8</sup>

### **Penalty claims**

[125] NLC claims that Tainui has breached clause 9(c) of their IEA and that a penalty should be imposed in terms of s 134 of the Act. NLC also claims that Tainui breached ss 21, 49, 60 and 71 of the Holidays Act 2003. I have found that NLC is entitled to corrective payments in relation to the payment of overtime, public holidays, and annual holidays. I have also concluded that it is appropriate that interest be paid on the outstanding sums.

[126] I am not satisfied that penalties are appropriate having regard to the nature of the alleged breaches and the relevant conduct. I do not consider the alleged breaches arise from deliberate or reckless actions on the part of Tainui, nor do I consider there a justifiable need for deterrence.

[127] I decline to impose any penalties upon Tainui.

### **Summary of orders**

[128] Tainui Home Trust Board are ordered to make payment to NLC, within 28 days, of the following:

- (a) \$27,500 as compensation for humiliation, loss of dignity, and injury to feelings in relation to NLC's personal grievances;
- (b) \$30,270.50 for lost wages as compensation for lost wages relating to the dismissal;
- (c) \$4,781.25 as payment due for overtime worked;
- (d) \$2,160.00 as payment for being on-call on public holidays;
- (e) \$7,399.00 as arrears of wages relating to the period of suspension;
- (f) \$1,147.22 in relation to unpaid annual holidays; and
- (g) \$464.62 as employer KiwiSaver contributions not paid.

---

<sup>7</sup> Interest on Money Claims Act 2016, s 10.

<sup>8</sup> Interest on Money Claims Act 2016, s 12 and 13.

## **Costs**

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

[130] If they are not able to do so and an Authority determination on costs is needed NLC 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 Tainui 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.

[131] 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.<sup>9</sup>

Rowan Anderson  
Member of the Employment Relations Authority

---

<sup>9</sup> For further information about the factors considered in assessing costs, see [www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1).