

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2026] NZERA 36
3244779

BETWEEN	MITCHELL PERRY Applicant
AND	KIWIRAIL LIMITED Respondent

Member of Authority:	Rowan Anderson
Representatives:	Tim Carter, counsel for the Applicant Matthew McGoldrick, counsel for the Respondent
Investigation Meeting:	26 June 2025 in Wellington
Submissions received:	At the investigation meeting
Determination:	23 January 2026

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mitchell Perry was employed by KiwiRail Limited (KiwiRail) as a Cabin Attendant on the Interislander ferry service between 21 October 2022 and 4 February 2023.

[2] Mr Perry has lodged a statement of problem including claims of breach of contract, unjustified disadvantage, and breach of good faith. The claims made relate to the alleged actions and inactions of KiwiRail during the employment but also include issues associated with what Mr Perry contends were pre-contractual misrepresentations made by Madison Recruitment Limited (Madison), he says as agent for KiwiRail, as to the hourly rate of pay that would be applicable to his employment with KiwiRail.

[3] KiwiRail denies the claims made by Mr Perry.

The Authority's investigation

[4] On 10 July 2024 I issued a determination¹ dealing with a preliminary issue, finding that the Authority has jurisdiction to investigate Ms Perry's employment relationship problem noting that the formulation of Mr Perry's claims were not determinative, that the matter related to alleged conduct during the employment relationship and not just the alleged pre-contractual misrepresentation, and that he was claiming unjustified disadvantage and breach of good faith.

[5] A case management conference was held on 5 February 2025 to discuss the Authority's investigation. Written directions were issued on 20 February 2025, and an investigation meeting was set down for 26 June 2025.

[6] At the case management conference counsel for Mr Perry asserted that Mr Perry had been unjustifiably constructively dismissed from his employment. Mr Perry had not previously raised a personal grievance alleging unjustified dismissal and it had not been raised in the statement of problem. The Authority was invited to consider that issue in terms of s 122 of the Employment Relations Act 2000 (the Act) in that the Authority may find the nature of a personal grievance is of a type other than alleged. The written directions of 20 February 2025 included a procedural decision that the application of s 122 of the Act would be dealt with in the context of the Authority's substantive determination.

[7] For the Authority's investigation, affidavits were lodged from Mr Perry and Julie Mills, former KiwiRail employee, in support of Mr Perry's claims. For KiwiRail, written witness statements were lodged from Bianca Ebrahim, Senior HR Business Partner, and Nicholas Tito, Fleet Customer Delivery Manager. A bundle of documents was provided to the Authority, and various other documents were received.

[8] An investigation meeting was held in Wellington on 26 June 2025. Except for Ms Mills, the witnesses attended the investigation meeting and answered questions under oath or affirmation.

[9] 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

¹ *Perry v KiwiRail Limited* [2024] NZERA 412.

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

[10] I summarise the issues for investigation and determination below:

- (a) Is Mr Perry is entitled to any remedies based on the rate of pay advertised and/or disclosed during the recruitment process?
- (b) Was Mr Perry was unjustifiably disadvantaged in his employment having regard to KiwiRail not making payment at the rate that was advertised?
- (c) Is Mr Perry is entitled to any remedies relating to an alleged inadequacy by KiwiRail in responding to the issues raised by Mr Perry during his employment?
- (d) Is there personal grievance of a type other than that alleged (i.e. unjustified constructive dismissal)?
- (e) Should either party be required to contribute to the costs of representation of the other party?

[11] While I note the issues in the above form, I address the issues in two discrete categories. First, I address whether Mr Perry is entitled to any remedies based on the rate of pay advertised and/or disclosed during the recruitment process. That incorporates several grounds on which it was submitted for Mr Perry that KiwiRail breached a promise to pay Mr Perry \$27.80 per hour and issues relating to the alleged misrepresentation. Following that, I address the remaining claim of unjustified disadvantage that was set out in the statement of problem, together with the other personal grievance claims that are now made, and the breach of good faith claim as set out in the statement of problem.

Background

[12] Mr Perry responded to an advertisement for the position of Cabin Attendant on the Interislander. The advertisement described the role as being “Casual/Vacation”, working “6 days on, [w]orking 10-hour days, followed by a relaxing 3-day weekend!” at the “[g]reat hourly rate of \$27.80”.

[13] Mr Perry was provided a fixed term offer of employment dated 10 October 2022.

[14] The offer, which was accepted by Mr Perry on 17 October 2022 (the individual employment agreement “IEA”) set out that his remuneration would be \$57,828 per annum “...as outlined in the current Kiwirail (Interislander) Limited and Maritime Union of New Zealand Incorporated Collective Agreement 2021-2023 (the “Collective Agreement”). The roster cycle was described in the IEA as being “Walk On Walk Off ‘WOWO’ 6 days on / 3 days off as per the roster and as outlined in the current collective agreement”.

[15] Clause 11.2 of the Collective Agreement provided that the salary for “Cabin Attendant – First Year” was \$55,604 from 1 October 2021 and \$57,828 from 1 October 2022. The relevant roster relating to Mr Perry’s role is described at clause 9.7.2 of the Collective Agreement as being 10 hours per shift, six days on, three days off. Clause 11.2 of the Collective Agreement also refers to Schedule E as to the “definitions for the formula for calculating daily rates of pay”.

[16] In the context of the preliminary issue resolved by the Authority, the parties lodged a statement of agreed facts for the purposes of the preliminary issues. I summarise the relevant facts as follows:

- (a) Madison was engaged by KiwiRail as a recruitment consultant, including for the position of Cabin Attendant, and placed an online advertisement of the role of Cabin Attendant. The advertisement represented that the role would be paid on an hourly basis and at the rate of \$27.80 per hour.
- (b) Mr Perry applied for the role in reliance on the advertisement.
- (c) Mr Perry was offered the role on 10 October 2022.
- (d) Mr Perry signed a fixed term employment agreement on 17 October 2022 prior to commencing work. That agreement provided that Mr Perry would be paid \$57,828 per annum in accordance with the Collective Agreement.
- (e) Mr Perry commenced work on 21 October 2022. Mr Perry was paid based on \$57,828 per annum, that being \$2,218.06 gross per fortnight.
- (f) KiwiRail wrote to Mr Perry on 15 December 2022 stating that an error had been made by Madison in the advertisement in that Madison mistakenly advertised the role at an hourly rate rather than the annual salary.
- (g) Mr Perry resigned from his employment on 4 January 2023 and then wrote to KiwiRail on 12 January 2023 seeking compensation for an alleged underpayment of wages. Mr Perry’s email of 12 January 2023 asserted that

the advertisement said the role would be paid at \$27.80 per hour for a 60-hour week. He said that those who had applied for the role indicated they would not have done so if it were advertised at \$23.50 per hour.

- (h) A letter was sent on 13 March by the Workers' Rights Service on behalf of Mr Perry which referred to the relevant representations as being "a breach of section 12 of the Fair Trading Act 1986".

Is Mr Perry is entitled to any remedies based on the rate of pay advertised and/or disclosed during the recruitment process?

[17] Submissions for Mr Perry proceeded on the basis that he entered the employment relationship based on a breach of promise that he would be paid \$27.80 per hour. Mr Perry's submissions put forward five grounds on which he considered the issue could be analysed and resolved, as follows:

- rectification of misrepresentation under the Contract and Commercial Law Act 2017 s35(1)(a);
- or, in the alternative, rectification of misleading conduct under the Fair Trading Act 1986 s7;
- or, in the alternative, damages for breach of contract;
- or, in the alternative, compensation for unjustified disadvantage;
- or, in the alternative, compensation under Section 69 for Unfair bargaining.

The misrepresentation, misleading conduct, and breach of contract claims

[18] The Authority's preliminary determination concluded that the claim under s 35 of the Contract and Commercial Law Act 2017 (CCL Act) was one that the Authority could deal with on the basis that while the alleged misrepresentation occurred prior to the offer of employment, the claim was inextricably linked to the terms and conditions of employment and the employment agreement. Section 35 of the CCL provides as follows:

35 Damages for misrepresentation

If a party to a contract (**A**) has been induced to enter into the contract by a misrepresentation, whether innocent or fraudulent, made to A by or on behalf of another party to that contract (**B**)-

- (a) A is entitled to damages from B in the same manner and to the same extent as if the representation were a term of the contract that has been breached; and
- (b) A is not, in the case of a fraudulent misrepresentation, or of an innocent misrepresentation made negligently, entitled to damages from B for deceit or negligence in respect of the misrepresentation.

...

[19] The advertisement correctly advised that the roster was to involve six ten-hour days on, followed by three days off. However, the advertised hourly rate was

inconsistent with the salary provided for in both the IEA and Collective Agreement and what was ultimately paid to Mr Perry.

[20] The hourly rate calculation included in the advertisement appears to have been based on a calculation dividing the annual salary over a 52-week year and 40 hours per week. I accept that the reference to the hourly rate as advertised was a mistake rather than deliberate, although little turns on the intention. I also find it was an error attributable to KiwiRail with Madison having been acting as its agent.

[21] The fixed term offer of employment dated 10 October 2022 specified an annual salary of \$57,828 and referred to the terms contained in the Collective Agreement. The offer also set out the hours of work as being six days on, three days off by reference to the Collective Agreement. The interpretation provisions in Schedule E of the Collective Agreement includes the calculation of an “Appropriate Raily rate”, that being \$158.43.

[22] During the Authority’s investigation, an erroneous collective agreement was provided with the bundle of documents lodged. That error was identified by counsel and corrected, and I do not consider it in any way suggests that Mr Perry was provided the incorrect version at the time the offer of employment was made. The IEA refers to the Collective Agreement as being provided with the IEA, Mr Perry did not raise any issue as to the Collective Agreement having not been provided at the time. I am satisfied that it is more likely than not that Mr Perry was provided a copy of the Collective Agreement at the time of being provided the proposed IEA.

[23] Mr Perry, in accordance with the Collective Agreement, was also entitled to, and was paid, sums due on account of late sailings at the rate of \$35.70 per hour, being time and a half of an hourly rate calculated at \$23.80 per hour. The calculation of that rate is based on the Appropriate Daily rate provided for in the Collective Agreement. The total paid during the employment on account of late sailings was \$392.66. In one example, a fortnight involving 5.75 hours of payment for late sailings would result in an hourly rate of approximately \$26 per hour over the full period. Mr Perry does not make any claim in relation to overtime, saying that was paid separately and is not in dispute.

[24] While the advertisement contained an hourly rate that was incorrect, the information provided to Mr Perry prior to accepting employment was correct. I find that any reliance on the advertised hourly rate could only have remained until the offer

of employment was made based on a specified salary. This was not a case where, for example, the employer made misleading statements about critical elements of the employment that were not addressed in the employment agreement. Here, the IEA and Collective Agreement clearly set out the remuneration that would be payable.

[25] The situation here can be contrasted with one where an employer simply represents that it will pay an employee a certain wage but then on commencement decides to pay a lower rate, with the employee having entered into the employment agreement because of the earlier information. Here, the basis for payment was specified in the letter of offer, IEA, and Collective Agreement, and any reliance on the advertised hourly rate could only survive up to the point the offer was made.

[26] I accept Mr Perry's evidence to the effect that he was given the impression that he would be paid \$27.80 per hour from the advertisement and that that initiated his interest in, and ultimately application for, the role. There is no doubt that the advertised rate was a significant reason for his applying for the role. While that is the case, I also find that offer made by KiwiRail clearly provided that a salary would be paid, and the amount of that salary. That occurred in the negotiations, such as they were, with Mr Perry relating to his proposed employment and prior to any agreement that Mr Perry would be employed.

[27] In effect, the representation being relied upon is that the salary of \$57,828 was equivalent to \$27.80 per hour. However, Mr Perry was aware at the time of entering into the employment relationship of the roster that would be worked and the remuneration by way of salary that would be received for working that roster. While Mr Perry had an understanding that, based on the advertisement, the hourly rate was \$27.80, he was ultimately not paid any less than the salary clearly specified in the IEA and Collective Agreement. Put another way, while he had a view as to the hourly calculation, I find it was clear that he would receive no more than \$57,828 per annum in remuneration for the regular hours of work that were specified.

[28] While there was some evidence that KiwiRail had been on notice about the incorrect references in the past, I do not consider the evidence points to any deliberate attempt to advertise an incorrect hourly rate. Regardless of any intention that might be attributable to KiwiRail, it is true that Mr Perry made application for employment based on the incorrect advertised rate. Despite that, I am not satisfied that the employment

was entered into because of the hourly rate being misrepresented. Mr Perry ultimately entered the employment having received an offer that set out the salary that would be applicable to the employment. A submission made for Mr Perry that the rates in the Collective Agreement were not clear so as to make evident the relevant difference in the calculations is no answer to that.

[29] Mr Perry knew the hours of work and the total remuneration that would be received. What he did not know, through no fault of his own, was what a correct hourly calculation of that salary was. Despite that, the full remuneration to be received was known and on that basis, even had I found that Mr Perry had been induced to enter the employment agreement in terms of s 35 of the CCL Act, I would have found there was no loss. Such as there could be said to have been an expectation of payment at a particular rate, the total expected could not have exceeded the known and agreed salary.

[30] It cannot be correct to say that Mr Perry received less income than he had expected given he was offered a specified salary and the hours to be worked in the form of the roster. To the extent there was any difference, it related only to the calculation of the amount Mr Perry would be paid each hour, and not to the amount he would be paid in total. Given the absence of any discrepancy in the total sum to be paid as compared with the total actually paid, no damages could have been made out.

[31] Mr Perry's claim in terms of s 35 of the CCL Act is unsuccessful.

[32] While raised in submissions, the claim under the Fair Trading Act 1986 was not included in the statement of problem and nor was it expressly subject to consideration in terms of the Authority's preliminary determination. Further, I do not consider the claim goes directly to the employment agreement that was ultimately agreed but exclusively to remedies sought in relation to actions preceding the employment relationship.

[33] I find that Mr Perry's claim, made in the alternative, that he was induced into entering the employment agreement by misleading conduct in terms of s 12 of the Fair Trading Act 1986 wholly concerns matters arising prior to Mr Perry's acceptance of the offer of employment. I do not consider the Authority has jurisdiction to determine that claim. I decline to deal further with the claim on that basis.

[34] As to the breach of contract or contractual interpretation claim, reference was made to the evidence of Mr Tito as to the calculation of hourly rates in the Collective Agreement in submissions for Mr Perry. It was submitted that, regardless of whether the relevant Collective Agreement or relevant schedule was provided to Mr Perry, the Collective Agreement was "...so verbose & obtuse as to not clearly or unambiguously contradict said \$27.80 ph promise...".

[35] I do not agree. The method of calculation is not unclear and significantly the salary and hours of work were set out clearly in the offer. The remuneration to be paid was clear by reference to the salary agreed. Such as the calculation of an hourly rate is concerned, that could only be said to be relevant to the calculation of the time and a half late running payments, in relation to which Mr Perry makes no claim.

[36] Having regard the findings above, I also conclude that Mr Perry is not entitled to any remedy based on breach of contract. The salary to be paid was clearly set out in the IEA and Collective Agreement unambiguously. Even if I were incorrect, any assumption that the salary codified an hourly rate of \$27.80 would not give rise to damages given the total remuneration in the form of the salary was specified, known, and paid.

[37] It was submitted for Mr Perry in the further alternative that the Authority should infer a contract incorporating the advertised hourly rate, having regard to s 62 of the Act and Mr Perry advising KiwiRail he was declining to join the union, to apply after the first 30 days of employment. Regardless of the other merits of the submission, the salary to be paid was clearly set out in the offer made and that salary was paid. For the same reasons as recorded above, I do not consider any damages could be said to arise in any event. That claim is also unsuccessful.

Unfair bargaining

[38] It was submitted for Mr Perry that KiwiRail engaged in unfair bargaining in terms of s 68 of the Act. He claims that Madison repeatedly stated the incorrect rate in three interviews, that he reasonably relied upon that advice, and that he was not provided a reasonable opportunity to seek independent advice.

[39] I am not satisfied that the claim has been made out. While the hourly rate of pay advertised was not correct, Mr Perry was provided with the proposed salary and hours of work in the offer made. The hourly rate advertised and mentioned during interviews

with Madison preceded the offer of employment being made and any bargaining for the IEA. I find that in those circumstances, s 68(2)(b) of the Act has no application.

[40] I also find that there is no evidence suggesting that Mr Perry was not afforded a reasonable opportunity to consider the offer made and the proposed terms and conditions of employment. Mr Perry confirmed at the investigation meeting that he had been provided time to consider the offer, that being at least one week, and it was signed by him on 17 October 2022. Mr Perry's claim of unfair bargaining is not made out.

[41] In relation to the claims more generally, I also consider that, such as Mr Perry might be said to have been induced by the statements made by Madison, the disclosure of the salary and roster effectively resolved any such misrepresentation from the point when the offer was made.

[42] Mr Perry's claims as to an alleged breach of promise are unsuccessful.

Mr Perry's personal grievance claims and breach of good faith

[43] The statement of problem lodged by Mr Perry proceeds on the basis that he was unjustifiably disadvantaged on the same basis as the claimed breach of contract and a refusal by KiwiRail to pay at the advertised hourly rate. The statement of problem also sets out a claim that KiwiRail had breached its good faith duties by failing to make payment at the advertised hourly rate and by not genuinely engaging with Mr Perry when he made attempts to resolve the issue.

[44] The written closing submissions lodged for Mr Perry indicated a claimed unjustified disadvantage as an alternative claim to what was said to be the breach of promise. That was not otherwise addressed in the written submissions and the basis on which oral submissions were made was that there was a claimed unjustified disadvantage based on a failure by KiwiRail to respond to Mr Perry's attempts at resolving the payment issue in the alternative to a claim that Mr Perry was unjustifiably constructively dismissed.

[45] It was submitted for Mr Perry that he was forced to resign on account of a failure by KiwiRail to respond to settlement negotiations. In the alternative, he claims he was unjustifiably disadvantaged for the same reasons.

[46] Mr Perry did not raise a personal grievance with KiwiRail relating to what he now terms a constructive dismissal within the relevant statutory 90-day period. Mr Perry instead sought to have the Authority deal with the constructive dismissal claim based on s 122 of the Act by asking it to find that the personal grievance is of a type other than alleged.

[47] The personal grievance recorded in the statement of problem was said to have arisen from a failure to pay the agreed hourly rate. The disadvantage was clearly said to have arisen from the same facts that were said to have established a breach of contract and the failure to pay at the advertised rate. The grievance was not said to arise from any failure to respond to attempts at resolution of a dispute, nor to the issue of termination of employment by way of constructive dismissal or otherwise.

[48] The only relevant reference in the statement of problem to an alleged failure by KiwiRail to engage about the pay issue was in the context of the breach of good faith claim. That is not a personal grievance claim. Consequently, it is not a type of personal grievance which could be treated as a type other than alleged by the Authority.

[49] Section 122 of the Act does not in my view does not provide a cure to a failure to raise a personal grievance within the relevant statutory period. What the section does is provide the Authority scope to treat a grievance that was raised as being of another type. Here, no type of personal grievance relating to the dismissal was raised within the relevant statutory timeframe for doing so, nor has Mr Perry applied for leave to raise such a grievance out of time. The statement of problem does not include any claim of a personal grievance based on any failure by KiwiRail to respond to Mr Perry's attempts to resolve the issue of payment. I do not consider s 122 of the Act to have application in the present circumstances.

[50] I note I otherwise would have found that there were insurmountable impediments to a claim of constructive dismissal, including both as to causation and as to the issue of foreseeability in relation to the resignation.

[51] For any unjustified disadvantage claim to be made out, Mr Perry would need to establish that his employment, or one or more conditions of his employment have been affected to his disadvantage.² If Mr Perry was disadvantaged, the issue of justification

² Employment Relations Act 2000, s 103(1)(b).

would need to be considered. Section 103A of the Act sets out the test for justification. If disadvantaged, the Authority must consider, on an objective basis, whether KiwiRail's actions, and how KiwiRail acted, were what a fair and reasonable employer could have done in all of the circumstances at the time the action occurred.³

[52] Mr Perry was not disadvantaged in relation to any term or condition of his employment and that he was paid in accordance with the IEA. The letter of offer and Collective Agreement both specified the relevant salary to be paid, and Mr Perry entered the employment based on those agreed terms and conditions.

[53] Mr Perry's statement of problem included a claim that KiwiRail breached its duty of good faith under s 4 of the Act. The claim relates to the alleged actions and inactions of KiwiRail in terms of its response to Mr Perry raising the issue of alleged misrepresentation regarding the rate of pay. The breach of good faith claim was not pressed in submissions and instead reliance was made on the constructive dismissal and unjustified disadvantage claims.

[54] While I consider the advertising of the erroneous hourly rate was ultimately attributable to KiwiRail, I am not satisfied that KiwiRail's subsequent actions amounted to a breach of their good faith duties. KiwiRail were not obligated to engage in settlement discussions with Mr Perry, any settlement proposal was deferred to Madison, and it was otherwise entitled to take a position on the matter. Its position was communicated to Mr Perry.

[55] KiwiRail was not obligated to make the payments sought by Mr Perry and that KiwiRail's response to the raising of the issue was not such that gave rise to any disadvantage to Mr Perry. Factually, including having regard to the evidence of Ms Ebrahim and to Mr Perry's own evidence, it is also clear that while Mr Perry did not agree with the way in which the issue was dealt with, it is not the case that KiwiRail simply ignored the issue. KiwiRail's position on the matter was communicated to Mr Perry albeit he was not satisfied with the position communicated.

[56] Having regard to the findings I have otherwise made, I am not satisfied that KiwiRail breached its duty of good faith, nor am I satisfied that Mr Perry was disadvantaged in his employment. I consider KiwiRail's approach to the issues being

³ Employment Relations Act 2000, s 103A.

raised were not inconsistent with what was open to a fair and reasonable employer in the circumstances and its actions were not in breach of its good faith obligations.

[57] Mr Perry's claims that he was unjustifiably dismissed and unjustifiably disadvantaged, and that KiwiRail breach its duty of good faith, are unsuccessful.

Conclusion

[58] For the above reasons, Mr Perry's claims are unsuccessful.

Costs

[59] Costs are reserved. Having regard to the totality of the proceedings my preliminary view is that costs should lie where they fall. However, the parties are encouraged to resolve any issue of costs between themselves.

[60] On 25 February 2025, the Authority was advised by counsel for Mr Perry that he was legally aided, and it was noted that KiwiRail had been advised of that at some earlier date.

[61] If the parties are unable to resolve costs, and an Authority determination on costs is needed, KiwiRail may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum Mr Perry will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[62] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual "daily tariff" basis unless circumstances or factors, require an adjustment upwards or downwards.⁴

Rowan Anderson
Member of the Employment Relations Authority

⁴ For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1