

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 578
3240599

BETWEEN SUZANNE MARY BUXTON
Applicant

AND TE WHATU ORA (LAKES)
Respondent

Member of Authority: Rowan Anderson

Representatives: Myriam Mitchell, counsel for the Applicant
Mark Beech and Jim Wynyard, counsel for the
Respondent

Investigation Meeting: 19, 20 and 21 December 2023 in Taupo and 30 January
2024 by audio visual link

Submissions and other information received: Up to and including 2 July 2024

Determination: 1 October 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Suzanne Buxton was employed by Te Whatu Ora (Lakes) (TWO) as a midwife, most recently working on a 0.2 FTE basis at the Taupo Maternity Unit. Ms Buxton also contracts to TWO as a lead maternity carer (LMC) via an access agreement (the Access Agreement).

[2] Ms Buxton was dismissed from her employment on 22 June 2023. The letter provided to her confirmed that the termination of her employment was on trust and confidence grounds. The basis for that was that on 13 September 2022 she was alleged to have deliberately misled TWO as to an interaction she had with another midwife, Midwife A, on 22 August 2022. The letter also included a finding that TWO considered

Ms Buxton made comments about Midwife A's role to deliberately undermine Midwife A's reputation.

[3] Ms Buxton claims that she was unjustifiably dismissed from, and unjustifiably disadvantaged in, her employment. She also claims that TWO's actions were in breach of its duty of good faith and the terms of her employment agreement and seeks that penalties be imposed upon TWO. Amongst other remedies, she seeks permanent reinstatement.

[4] TWO contends that Ms Buxton was not unjustifiably disadvantaged in her employment and that the dismissal was justified. It maintains that Ms Buxton lied about what had occurred and that she deliberately misled it resulting in an irreparable loss of trust and confidence in her.

Issues

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

- (a) Was Ms Buxton unjustifiably disadvantaged in her employment?
- (b) Was Ms Buxton unjustifiably dismissed from her employment?
- (c) If TWO's actions were not justified, in relation to dismissal or disadvantage, what remedies should be awarded, considering:
 - (i) is reinstatement reasonable and practicable;
 - (ii) compensation for humiliation, loss of dignity, and injury to feelings; and/or
 - (iii) lost wages?
- (d) Has TWO breached its duty of good faith? If so, should a penalty be imposed upon TWO in terms of s 4A of the Employment Relations Act 2000 (the Act)?
- (e) Did TWO breach the terms of Ms Buxton's employment agreement? If so, should any penalty be imposed and/or should TWO be required to pay general damages?
- (f) Should any order be made for special damages relating to Ms Buxton's legal expenses?
- (g) Should any recommendation be made in terms of s 123(1)(ca) of the Act?
- (h) Should either party contribute to the costs of representation (if any) of the other party?

The Authority's Investigation

[6] Ms Buxton made application for interim reinstatement. That matter was heard on 15 September 2023. On 20 December 2023, I issued a determination declining to reinstate Ms Buxton on an interim basis.¹

[7] In support of Ms Buxton, written witness statements were lodged prior to the investigation meeting from Ms Buxton, David Brown, Ms Buxton's husband, Caroline Conroy, MERAS Co-Leader (Midwifery), Donna Little, midwife and former colleague of Ms Buxton, and Theresa Enright, Clinical Midwife Manager. Jennifer Martelli, Service Manager, and Abigail Corfe, Registered Midwife, provided statements in support of TWO.

[8] Various objections were raised as to the content of witness statements, with some of those objections dealt with by agreement resulting in the exclusion of a limited amount of proposed evidence. Submissions were also received as to other content which I dealt with on the basis that the parties could make any relevant submissions as to what weight, if any, should be given to that evidence. I have taken any submissions into account.

[9] All witnesses attended the investigation meeting and answered questions under oath or affirmation.

[10] Following the investigation meeting and receipt of closing submissions, the Authority was sent further information on behalf of Ms Buxton on two separate occasions. That necessitated, consistent with the principles of natural justice, providing TWO an opportunity to respond to that information. Ultimately, the information provided was limited and I considered providing an opportunity for submissions would be sufficient to deal with the issues in an efficient but fair manner.

[11] 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.

¹ Suzanne Buxton v Te Whatu Ora (Lakes) [2023] NZERA 616.

Background

[12] Ms Buxton was employed on a 0.2 FTE 8 hour a week basis at the Taupo Maternity Unit. She also contracted to TWO as an LMC via the Access Agreement. The Access Agreement was suspended on 19 December 2022. Ms Buxton often worked hours in excess of the 8 provided for in her employment agreement, including prior to the suspension of the Access Agreement. However, her hours of work significantly increased following the suspension.

[13] Ms Buxton had, without detailing all of the background and noting the complaints were not exclusive to her, made complaints regarding Midwife A.² Midwife A had also previously made complaints regarding Ms Buxton, including on 13 March 2021. On at least one occasion³ regarding a complaint of unprofessional behaviour, TWO had concluded that Midwife A and Ms Buxton shared fault and advised them to address their personal issues and work together professionally.

[14] A compliant was raised by a number of midwives, including Ms Buxton, on 23 May 2022. Mediation was arranged in October 2022, and the complaint was ultimately resolved.

[15] On 22 August 2022, Ms Buxton in the context of transfer being arranged, had an exchange with Midwife A. That exchange was, in part, recorded by Midwife A. What is clear from the audio recording is that Midwife A asked Ms Buxton to arrange an incubator, Ms Buxton responded saying “no, that’s your job...”. There was also a further interaction where Midwife A asked if Ms Buxton needed any further handover, with Ms Buxton responding “you’re on call its your job to organise that...”.

[16] Ms Martelli emailed Ms Corfe on 25 August 2022 noting that she was aware Midwife A had been called in by Ms Buxton and had found that no ambulance had been booked. The email stated that Midwife A had asked Ms Buxton to book the ambulance and that Ms Buxton was alleged to have said “no, that’s your job” and provided a similar response when asked about getting an incubator ready. The email relayed that Ms Buxton did not appear to be busy at the time and that she did not complete an on-call form. The email went on to note that Ms Martelli would be disappointed if the matters

² Including a complaint that was made on behalf of Ms Buxton and others by letter dated 23 May 2022.

³ Following a complaint by Ms Buxton on 12 September 2021.

raised were true and concluded by asking Ms Corfe if she would mind asking Ms Buxton about the transfer.

[17] There was then some delay in Ms Corfe raising the transfer issue with Ms Buxton. Ms Buxton says that she was approached informally by Ms Corfe about the issue on 13 September 2022 during the course of her shift. She said she was provided limited background as to why she was being asked about it. Her evidence is that she considered it was Midwife A's role to arrange the ambulance and incubator, and that she described how she felt about the situation. She says that Ms Corfe took from that that she said Midwife A had been "hostile". She said the matter was discussed informally, with the conversations occurring over the course of her shift, and that she was not aware at that time that any complaint had been made by Midwife A.

[18] In response to questioning at the investigation meeting, Ms Corfe said the meeting was not recorded and she was not asked to take notes of the meeting. She said the meeting occurred about 10.00am and she wrote the email straight away afterwards. She maintained that Ms Buxton had used the term "hostile", that the meeting was not formal, and that Ms Buxton was not asked to review the email record before it was sent.

[19] Ms Corfe emailed Ms Martelli on 13 September 2022, at 11.58am, after having discussed the issue with Ms Buxton. That email included the following paragraph:

On arrival Suzanne says [Midwife A] was hostile and demanded she arrange the incubator and arrange ambulance in an authoritarian & demanding manner. She did not feel safe around [Midwife A]. She believes that when she said to [Midwife A] it was her job to arrange she meant that as everything else was done and she was busy that [Midwife A], who was effectively acting as a DHB midwife, could take over the care & arrange of ask [another individual] to arrange.

[20] Ms Buxton was issued a letter dated 28 November 2022 regarding an "allegation of serious misconduct". The letter contained what were said to be four allegations, which I summarise as follows:

- (a) An allegation that Ms Buxton had inappropriately sent a group email containing baseless negative comments and had refused to withdraw the comments when asked to do so by Ms Martelli;
- (b) An allegation that Ms Buxton had made statements about Midwife A's behaviour/manner which were not correct and asserting that it was Ms Buxton's responsibility to arrange the incubator, ambulance and to complete the on-call form for the transfer; and

(c) Two allegations relating to issues on 14 October 2022 and 26 November 2022.

[21] Ms Buxton, through her counsel at the time, provided an initial response on 16 December 2022. Significantly, it was asserted that only the second issue could be investigated as part of Ms Buxton's employment, the others needing to be dealt with under a separate process having regard to Ms Buxton's separate LMC role. That initial response also recorded that it was unclear what the second allegation was and that an investigation should take place prior to any response. The response noted that, if the allegation were about alleged incorrect statements, that Ms Buxton had not said that Midwife A was not hostile to Ms Corfe during the exchange, but that Ms Buxton had made statements about Midwife A being hostile and having felt unsafe on other occasions. The response asserted the matter was resolved and that the allegation should be withdrawn.

[22] A meeting was held on 20 December 2022. Minutes taken of that meeting reflect there was significant discussion as to the incubator, ambulance and transfer form. Ms Buxton made various acknowledgements at the meeting in relation to those matters to the effect they could have been handled better. Ms Buxton's representative denied that Ms Buxton had misled TWO. Ms Buxton noted at the meeting that there was no intention of misleading her employer.

[23] It was confirmed at the 20 December 2022 meeting by Ms Martelli that she had deliberately held over the allegations until completion of a separate resolution process on the basis that it would have been unfair to Ms Buxton. Ms Martelli confirmed the same in an email to Ms Conroy on 15 December 2022.

[24] Ms Martelli, in an email to Ms Conroy on 14 December 2022 regarding the separate resolution process, said that Midwife A had "raised an individual complaint against Suzanne Buxton which is being appropriately investigated".

[25] On 23 December 2022, Ms Martelli sent an email to Midwife A regarding the Use of DHB Facilities for Filming or Recording Policy. That email referred to a preliminary investigation into allegations made by Midwife A.

[26] On 7 February 2023, counsel for Ms Buxton wrote to TWO as to various matters, including the allegations made against Ms Buxton as to her LMC role. That

letter included a request for further information as to the allegation that it was Ms Buxton's responsibility to book the ambulance and requesting a copy of the preliminary assessment by TWO setting out the basis for its investigation.

[27] A further letter to TWO on 9 February 2023 asserted there were no grounds for the allegation, requested it be withdrawn, and recorded the ongoing impact of the matter being unresolved. Counsel for TWO responded on 13 February 2023 recording that the employment issue was the subject of ongoing investigation.

[28] A statement provided by Ms Buxton to TWO dated 10 February 2023 noted:

My discussion with Gail on 13 September, where I outlined that I felt [Midwife A] had been hostile in our interaction, was an informal discussion in passing, during a busy shift. At no stage was I ever informed that it was a 'preliminary fact-finding meeting' or could lead to a more formal process.

[29] On 13 March 2023 counsel for Ms Buxton wrote again to TWO. That letter recorded that Ms Buxton was raising unjustified disadvantaged grievances and proposed attendance at mediation.

[30] By letter dated 17 April 2023, TWO raised two allegations. The first allegation in effect repeated the second allegation made in the letter dated 28 November 2022. It did, as with the initial allegation, allege that Ms Buxton's statements as to her recollection of the events were "not correct":

...
A recoding (sic) of the conversation (previously provided) indicated that your statements about [Midwife A] and her behaviour / manner were not correct. As you are aware and alluded to in your response to the CNM, arranging the incubator, the ambulance and completing the on-call form for the transfer, is the role of the DHB midwife. In this instance it was your responsibility.

[31] The other previous allegations were not included, at least in part, as some were dealt with in terms of a separate process relating to the LMC role. However, an additional allegation was included that was said to have been a complaint raised by a patient relating to alleged conduct on 7 February 2023. The letter recorded that a meeting was to take place on 1 May 2023 to discuss the allegations.

[32] On 24 April 2023, counsel for TWO emailed counsel for Ms Buxton, the following:

...
Further to your email dated 24 April 2023, I advise that it is a well established custom and practice that it is the responsibility of the Hospital midwife to

arrange the ambulance transfer and incubator. This has been confirmed by Gail Corfe who is the clinical midwife manager....

[33] Counsel for Ms Buxton wrote requesting, amongst other things, a copy of TWO's preliminary investigation on 27 April 2023.

[34] A meeting was held on 1 May 2023. Ms Buxton's feedback for the meeting was provided to the Authority in written form. This included further response as to the issue of responsibility for the transfer arrangements, those allegations having been repeated in the 17 April 2023 letter. Ms Buxton's response included a denial that she had ever said that Midwife A had demanded she arrange the incubator and ambulance and that she had previously advised that that was Ms Corfe's account which Ms Buxton and her lawyer has since clarified, said she didn't feel she had overstated Midwife A's hostility towards her on the day, and that she felt her accounts in relation to the incident had been consistent. Ms Buxton's response said she had not misled the DHB (TWO) and that she certainly never had any intention to mislead anyone.

[35] On 2 May 2023, counsel for TWO advised by email that TWO intended to make some follow up enquiries in relation to matters discussed at the meeting. Counsel for Ms Buxton later that day sought confirmation as to the timeframes that TWO was working to noting that the issues were first raised over six months prior. After a further follow up on 9 May 2023, counsel for TWO advised they would revert once they had instructions as to the timeline and noting that new matters requiring investigation had been raised by Ms Buxton.

[36] Minutes of the Taupo Maternity Staff Meeting held on 11 May 2023 noted the following:

Rebuilding relationship with [Midwife contractors] and [Midwife A] was discussed at length with some midwives displaying reluctance as still feel intimidated. Most are onboard and wish to 'draw a line in the sand', others are not. The question was asked as to what they wish to be done further?

It was agreed that a meeting with Jenny Martelli and Corli Roodt would be the best way forward. To be arranged.

[37] Ms Martelli, on 29 May 2023, requested the names of the staff that "were not prepared to draw a line in the sand". Ms Corfe responded confirming there were two staff, one of whom was Ms Buxton.

[38] On 17 May 2023, TWO issued a preliminary decision in relation to the allegations made on 17 April 2023. The letter advised that no action was to be taken

regarding the complaint relating to 7 February 2024 on the basis that there was insufficient information. The letter appears to have accepted the position put forward by Ms Buxton as to the allegations about the transfer process. However, the letter noted the following findings in relation to the issue of the statements said to have been made:

...

You also disputed that you advised Gail Corfe (Acting CMM) at your meeting on the 13th of September 2022 that “[Midwife A] was hostile and demanded you to arrange the incubator and ambulance in an authoritarian and demanding manner”, you said you believe that Gail Corfe misconstrued your comments.

I have, following our meeting discussed your comments with Gail Corfe who does not accept that she misheard you and stands by her recollection of what you said. It is also noted that in your 10 February statement that “she [Midwife A] demanded that I (you) do these tasks” and that “ I (you) felt threatened and intimidated by [Midwife A] at the time”. You also state “In my view [Midwife A] engaged in the interaction knowing that she was recording me and deliberately keeping her words even toned, but at the same time attempting to bait me for a reaction.”

As advised in my letter dated 17th April 2023, a recording of the conversation indicated that your statements about [Midwife A] and her behaviour/manner are not correct.

I find that you did make those comments about [Midwife A’s] behaviour towards you. In this regard I believe you attempted to deliberately mislead the DHB in your account of [Midwife A’s] behaviour towards you to cast her in bad light. I find that you did so as part of your ongoing and well documented issues you have with [Midwife A].

Your behaviour in this regard, has significantly undermined the DHB’s trust and confidence in you as an employee.

As a result of my findings, I am proposing to terminate your employment on trust and confidence grounds. The proposed termination will be on notice, but I intend to pay you in lieu....

[39] The letter included a proposal that Ms Buxton’s employment be terminated and invited feedback on “...this preliminary finding and any aspect of these findings”.

[40] On 17 May 2023, counsel for Ms Buxton emailed seeking, amongst other things, what comments were being referred to in the statement “I find that you did make those comments about [Midwife A’s] behaviour”. The response to that question from counsel for TWO was “...Ms Martelli is referring to the comments made by your client to Gail Corfe when describing [Midwife A’s] alleged behaviour to her on the 13th of September as discussed at our last meeting....

[41] On 23 May 2023, counsel wrote following up a request for information sent on 17 and 18 May 2023, recording that the lack of response was causing ongoing stress

and humiliation to Ms Buxton. The email from counsel for TWO later that day said the information sought was attached to that email.

[42] Correspondence that was provided to Ms Buxton shows that Ms Martelli emailed Ms Corfe on 1 May 2023, stating:

....
Can I please ask you to confirm that the statements you have made in the emails attached and as highlighted by me are true and correct....

[43] And that Ms Corfe responded on 3 May 2023 stating:

...
In response to your email 01/05/2023 I can confirm my statements were true and correct as at the time they were written.
...
13/09/2023 This was a report to you of the conversation that I had with SB, and not of my own opinion....

[44] The further information sought by Ms Buxton on 23 May 2023 included a list of witnesses and their statements, and a list of all information relied on by TWO in finding that Midwife A was not hostile or demanding. On 25 May 2023, counsel for TWO responded to the request for information, including by noting that given the recording, a more expansive investigation was not required and that the recording did not support the “serious allegations” made by Ms Buxton against Midwife A.

[45] On 26 May 2023, counsel for Ms Buxton wrote seeking further relevant information, including a copy of the Midwife A’s original complaint and associated records and the date on which the audio recording was provided to TWO. A response was received on 29 May 2023 noting agreement to extend the timeframe for response to 6 June 2023, stating that Ms Martelli had first received a complaint in relation to the 22 August 2022 incident on 24 August 2023, and that Ms Martelli received the recording from Midwife A on 6 September 2023 by email.

[46] Ms Buxton met with TWO on 7 June 2023, that being followed by the provision of her written response and other supporting materials on 8 June 2023. The written response included comment on the recording and transcript. It noted that in Ms Buxton’s view Midwife A had given her an instruction or made a demand immediately after Ms Buxton had handed over and asserted, that TWO had failed to take into account the background to the relevant exchange, and that Ms Buxton did not believe her actions were inappropriate. She also asserted that hostility could come across in ways other than in tone of voice and that another employee had provided a statement including

recording that Midwife A's demeanour towards Ms Buxton had come across as cold and harsh. TWO were provided a statement from that individual.

[47] Ms Buxton's written response noted she perceived Ms Martelli to be biased towards her given disparate treatment in relation to Midwife A and asserted that she had deliberately delayed informing Ms Buxton of Midwife A's complaint until the complaint about Midwife A had been withdrawn.

[48] Ms Buxton was dismissed from her employment by letter dated 22 June 2023. The letter included comment that Ms Buxton, at a recent team meeting on 11 May 2023, had stated a reluctance to work with Midwife A as she felt intimidated. This was described in the letter as part of a "constant theme" with Ms Martelli noting that she did not accept Ms Buxton's commitment to maintain a good working relationship with Midwife A.

[49] The dismissal letter noted that Ms Buxton's feedback had been considered and confirmed Ms Martelli's preliminary decision. It went on to note the following:

...

I believe you deliberately mislead Te Whatu Ora in your conversation with Gail Corfe on 13 September 2022 as to the nature of your interaction with [Midwife A], which has undermined your employer trust and confidence in you as an employee.

Despite your denial, I believe that you made those comments to deliberately undermine [Midwife A's] reputation with Te Whatu Ora, It is a matter of record that you have had adverse relationship issues with Midwife A since 2021, and despite that you have stated that you "appreciate that it is important that I (you) have a good working relationship with [Midwife A]...and I (you) have made it clear that I (you) commit to this", I note that at a recent team meeting on 11 May 2023, you stated that you had a reluctance to work with [Midwife A] as you felt intimidated. This is a constant theme in how you describe your relationship with [Midwife A], and I do not accept that your commitment to maintain a good working relationship with [Midwife A] is genuine. There is a lack of insight by you as to how your behaviour impacts upon the service.

You have also placed great emphasis that you made no allegation against [Midwife A], however given the language used to describe the interaction, the employer could not ignore what you said to Gail Corfe, and hence the reason to investigate your comments....

[50] A letter dated 2024 sent to counsel for TWO notified it of Ms Buxton's personal grievances, including as to unjustified dismissal.

Was Ms Buxton unjustifiably disadvantaged in her employment?

[51] 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.⁴ 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. The question of justification applies in two parts, to the process adopted by the employer and the substantive justification.

[52] Ms Buxton's unjustified disadvantage claims, broadly speaking, allege disadvantage caused by TWO's actions relating to the investigation and disciplinary process followed by TWO, its treatment of health and safety issues said to have been raised by Ms Buxton, disparate treatment as compared to Midwife A and another employee, TWO's treatment of other allegations, and TWO's reliance on the recording made by Midwife A.

[53] Ms Buxton claims that she was unjustifiably disadvantaged by TWO's failure to advise her that the meeting with Ms Corfe on 13 September 2022 might be used in a disciplinary context. Ms Martelli had emailed Ms Corfe, initially on 25 August 2022, requesting that she discuss the events of 22 August 2022 with her. That email included, in effect, allegations that Ms Buxton had been uncooperative and had not acted in accordance with expectations during the incident. Ms Martelli expressed the view that if the matter she raised was true, that she would be very disappointed.

[54] I find that Ms Buxton was unjustifiably disadvantaged by TWO's failure to put her on notice about the basis for the meeting on 13 September 2022. In effect, Ms Buxton was informally asked about the relevant events despite that conversation then being treated as a formal basis from which disciplinary action then flowed. Serious allegations were made about Ms Buxton's clinical responsibilities, albeit they were ultimately not the basis for the termination. Ms Martelli clearly had concerns with Ms Buxton's conduct, and I find a fair and reasonable employer could not have approached the matter as TWO did.

⁴ Employment Relations Act 2000, s 103A(2).

[55] What is also evident from the approach taken by TWO and Ms Martelli's email of 25 August 2022 is that Ms Buxton did not initiate the conversation with Ms Corfe on 13 September 2022 and was not going out of her way to make allegations or raise concerns about Midwife A in a vacuum. There had very clearly been concerns raised about Ms Buxton's actions on 22 August 2022 and she was not put on notice of those concerns.

[56] I am also satisfied that Ms Buxton was unjustifiably disadvantaged by TWO's delay in raising the relevant allegations with her. This included a delay in raising the allegation that Ms Buxton's account of the 22 August 2022 incident, when discussing the matter with Ms Corfe on 13 September 2022, was not correct. That allegation was first raised on 28 November 2022 and, even at that point, it was not alleged that Ms Buxton had deliberately misled TWO. The focus of TWO's correspondence dated 28 November 2022, so far as it concerned the events of 22 August 2022, was very much on the issue of the responsibilities for arranging the incubator and ambulance.

[57] The delay in raising the allegation was intentional and inconsistent with TWO's Performance Management and Disciplinary Policy (Disciplinary Policy) that required it to commence an investigation as soon as practicable and to raise conduct concerns in a timely manner. Such as it might be suggested an investigation commenced when enquiries were made of Midwife A, I do not consider that to be the case. In any event, Ms Buxton should have been advised of that at the time if that were the case.

[58] Ms Martelli's motivations in delaying the matter, on the purported basis that it would be unfair to Ms Buxton, do not account for its departure from its obligations. I also find that the steps taken to withhold the allegations were motivated by a desire to bring to conclusion the complaint that had been made about Midwife A. Regardless, I do not accept that there was a legitimate basis on which to delay raising the issues with Ms Buxton and I find that the delay was prejudicial to her. This is particularly so where the allegations effectively related to words being attributed to Ms Buxton that were not contemporaneously recorded, where not directly recorded by Ms Buxton, and in relation to which Ms Buxton could not have been said to have been making any formal complaint regarding Midwife A. I am not satisfied that TWO's actions were justified, they were not actions that a fair and reasonable employer could have taken in all of the circumstances at the time.

[59] As to the alleged protracted nature of the investigation and disciplinary processes, TWO referred to Ms Buxton's questioning as to the basis of Ms Martelli's authority, delays requested by Ms Buxton, and leave and availability issues that cannot be attributed to TWO alone. While I accept there were delays caused by many factors, including those that are perfectly understandable in terms of availability, consideration of responses, and information requests, the process was unduly protracted. The allegation in question was that Ms Buxton had misled TWO on a single occasion. Ms Martelli says she was advised of the initial complaint on 24 August 2022, yet preliminary findings were not made until 17 May 2023. I accept that the delays were primarily at TWO's end and the delays had a significant impact on Ms Buxton.

[60] I am not satisfied that TWO failed to ensure Ms Buxton's health and safety at work such as would give rise to a claim of unjustified disadvantage. I do not accept that this was a situation in which TWO failed to address health and safety concerns raised by Ms Buxton.

[61] I am not satisfied that Ms Buxton was unjustifiably disadvantaged on the basis of the alleged disparity of treatment regarding Midwife A and the audio recording made. What is clear is that the relevant policy, very sensibly in my view given the location and sensitivity of medical and personal information, prohibited the recording from being made. However, there are two issues which I consider of significance. First, Midwife A was not an employee. While I do not necessarily consider that ends the suggestion of disparity or at least unreasonable action being taken against Ms Buxton, it does mean that there may be an explanation for any disparate treatment based on the relevant contracting arrangements. Second, the alleged conduct was of a significantly different nature to that which was alleged of Ms Buxton.

[62] On balance, I also consider the claim of unjustified disadvantage relating to the respective treatment of another employee who expressed a reluctance to work with Midwife A is made out. First, on the limited evidence available to me, I am not satisfied that the full circumstances relating to the other employee are directly comparable. While there is clearly some commonality in terms of the views expressed at the meeting of 11 May 2023, the allegations initially made against Ms Buxton were in no way limited to that issue. It was also apparent from the evidence given by Ms Martelli that while the employee did not face disciplinary consequence, there were other relevant circumstances relating to the nature of their employment.

[63] Ms Buxton claims that she was unjustifiably disadvantaged in relation to TWO's conduct relating to two other allegations raised. First, its approach to the incubator and ambulance allegations, and second, as to its approach in not completing an initial investigation concerning a complaint from a mother. I am satisfied that Ms Buxton was unjustifiably disadvantaged in relation to both matters. Dealing with the second issue first, TWO did not complete any initial investigation and instead simply raised the allegation in the context of the ongoing investigatory and disciplinary processes. Ms Buxton was disadvantaged by that approach and as a consequence had to deal with responding to accusations that should not have been made in the context they were. The actions of TWO were not consistent with what a fair and reasonable employer could have done in the circumstances.

[64] As to the first of the issues concerning allegations, I also find that Ms Buxton was unjustifiably disadvantaged in her employment. TWO persisted with allegations relating to the incubator and ambulance over a period of approximately eight months. It did so without adequate explanation or response to enquiries made on Ms Buxton's behalf to clarify the allegations. This inevitably resulted in a need to provide additional responses and communications regarding the allegations, no doubt at considerable expense. While Ms Martelli's evidence suggests that she was not concerned about these the allegations, I have found that those concerns were in fact the initial concerns raised. They morphed into an allegation that Ms Buxton had misled her employer. Despite that, the allegations continued to be made, apparently unnecessarily. TWO's persistence with the allegations and its failure to clarify the allegations resulted in Ms Buxton being disadvantaged in her employment and its actions were not those of a fair and reasonable employer.

[65] I conclude that Ms Buxton was unjustifiably disadvantaged in her employment and her claim is successful.

Was Ms Buxton unjustifiably dismissed?

[66] Ms Buxton claims that the dismissal was both procedurally and substantively unjustified. She maintains that she did not deliberately mislead TWO and that she explained that through the course of TWO's investigation. Ms Buxton points to a number of alleged procedural defects, including as to non-compliance by TWO with its Disciplinary Policy.

[67] TWO contends that the dismissal was justified and that, as such, no further enquiry is required into Ms Buxton's other claims. It submits that Ms Buxton deliberately misled TWO as to the interaction on 22 August 2022 irrevocably destroying the relationship of trust and confidence necessary in the employment relationship.

Procedural justification

[68] TWO submitted that it conducted a fair and reasonable investigation. In doing so, it referred in submissions to conducting a preliminary assessment, engaging in extensive correspondence, and accommodating requests for information and "last minute" scheduling arrangements. It says Ms Buxton was offered every opportunity to respond and to put her case. TWO submits that all of the relevant information was considered, that it reasonably concluded that Ms Buxton's employment should be terminated, and that its decision was one that it could have come to as a fair and reasonable employer.

[69] I find that the process leading to the dismissal was seriously deficient having regard to the Disciplinary Policy and the considerations at s 103A(3) of the Act. TWO did not raise the primary allegation with Ms Buxton in a timely manner. The primary allegation, in its original form, was not raised with Ms Buxton until 29 November 2022. The initial interaction with Midwife A occurred on 22 August 2022 and conversation with Ms Corfe on 13 September 2022. The delay was not insignificant having regard to the nature of the allegation.

[70] I find that Ms Martelli withheld the allegations in order to ensure that that separate process was not impacted, in other words so that the separate complaint about Midwife A could be resolved before progressing allegations against Ms Buxton. Regardless of whether that was for what Ms Martelli considered a good reason, it was not a proper basis on which TWO could fail to comply with its self-imposed obligations under the Disciplinary Policy.

[71] Having regard to my other findings, I also conclude that TWO failed to appropriately investigate the matter by seeking to speak with other relevant persons. Significantly, it in my view unreasonably relied solely on the audio recording provided by Midwife A rather than taking an open-minded approach to the issue. In doing so, I

find it discounted the possibility that there may have been factors leading Ms Buxton to express her perception of the exchange to Ms Corfe. That included failing to ascertain whether there were any other relevant witnesses to any behaviour by either Ms Buxton or Midwife A.

[72] From a procedural perspective the investigation was also deficient in my view having regard to what appears to have been an informal approach by TWO to the “complaint” made by Midwife A and Ms Martelli’s communications with her. There was effectively no record of those exchanges and some considerable lack of detail about their timing and nature.

[73] In terms of the alleged comments by Ms Buxton on 13 September 2022, TWO’s approach to confirming Ms Corfe’s recollection were inadequate. When following up, significantly several months later, Ms Martelli effectively just asked her whether she maintained the notes made were correct. There was no critical assessment of Ms Corfe’s recall, nor were the accounts provided by Ms Buxton during the investigation put to Ms Corfe in an appropriate manner to test them.

[74] Any fair reading of the allegation repeated on 17 April 2023 indicates that the issue of concern on the part of TWO was the transfer issue rather than any allegedly misleading conduct. At best for TWO, the allegation made vague reference to incorrect statements being made in the context of an allegation that the transfer responsibilities were Ms Buxton’s. I accept, as was asserted on Ms Buxton’s behalf, that the allegations against Ms Buxton morphed considerably over time. This occurred in the context of other allegations not being progressed, at least in the employment context, and of others being included without apparent preliminary investigation.

[75] When asked by counsel for Ms Buxton about any preliminary assessment required by the Disciplinary Policy, Ms Martelli’s response was that she discussed the matter with Ms Corfe and that that was it. I find that TWO failed to conduct an appropriate preliminary assessment of the matter prior to making the allegations. I consider this, along with the changing nature of the allegation relating to the events of 22 August 2022 indicate that there was an element of predetermination in the decision to dismiss.

[76] Ms Buxton took issue with TWO’s reliance on the audio recording. TWO contends that it had no option but to refer to the recording made by Midwife A once it

was disclosed and says that there was no prejudice to Ms Buxton. TWO noted that the discussion on 13 September 2022 came about from an operational concern raised by Midwife A and in the context of Ms Corfe seeking clarity from Ms Buxton as to what had happened in that context. TWO submitted that Ms Martelli then followed up Midwife A given Ms Buxton's account that Midwife A had been demanding, authoritarian, and hostile. I am not satisfied that the use of the recording in of itself was an issue. However, the undue weight given to the recording was in my view problematic. I am also not satisfied that the disclosure of the recording occurred in a timely manner, nor that the sequence of the initial investigation was as suggested given evidence from Ms Martelli that a complaint from Midwife A was received on 24 August 2022.

[77] I also conclude that the dismissal was occasioned by significant procedural error in terms of s 103A(3)(b) and (c) of the Act in that there were concerns not put to Ms Buxton that were relied upon in dismissing her. Ms Martelli's concerns as to the alleged statements at the team meeting were not put to Ms Buxton prior to their inclusion in the termination letter. I find that the failure to provide Ms Buxton notice of Ms Martelli's concerns as to statements made at the team meeting was significant. The obvious consequence is that Ms Buxton was not afforded an opportunity to respond to those concerns. Despite any suggestion that the matter may merely have been background, I do not accept that is the case. Ms Martelli confirmed in questioning that the 11 May 2023 minutes were taken into account in reaching the decision to dismiss. The termination letter plainly uses the incident as a direct response to Ms Buxton's assertion that she could have a good working relationship with Midwife A and was a basis for concluding that Ms Buxton's assertion was not genuine. It was therefore critical to TWO's findings as to the purported loss of trust and confidence.

[78] The context was also such that it was taken into account in reaching the decision that Ms Buxton's comments were made "deliberately" to undermine Midwife A's reputation with TWO. That, I find, was also the case in relation to the findings that Ms Buxton's conduct was "deliberately misleading". I consider it clear that Ms Martelli took the matter into account, in addition to other unspecified historical matters said to indicate a "constant theme" in reaching the decision to dismiss. These were significant procedural failings in terms of the considerations at s 103A(3)(b)-(d) of the Act.

[79] In addition to the above factors, I have made findings as to Ms Buxton's unjustified disadvantage claims. Such as they relate to the process relating to the investigation and disciplinary process, they are also relevant to Ms Buxton's unjustified dismissal claim.

[80] I find that the dismissal was procedurally unjustified.

Substantive justification

[81] Ms Buxton's employment was terminated on "trust and confidence grounds", the primary allegation being that she deliberately misled TWO during the conversation she had with Ms Corfe on 13 September 2022 as to her interaction with Midwife A on 22 August 2022.

[82] Ms Buxton's evidence is that the discussions on 13 September 2022 were of an informal nature. There is no suggestion that Ms Buxton was making any formal complaint about Midwife A's behaviour and Ms Buxton was not advised that her comments were being treated as such. I find that, having regard to the circumstances and the delay in raising the issues with Ms Buxton, that it was unreasonable and unsafe for TWO simply to rely on Ms Corfe's notes of what she said Ms Buxton had said. If there was a concern, particularly one that might have such serious consequences, steps should have been taken to have Ms Buxton, at the earliest reasonable opportunity, provide a direct account of what occurred.

[83] Ultimately, on 13 September 2022, Ms Buxton was asked to recall the exchange that had occurred on 25 August 2022. The investigation, and ultimately termination, proceeded on the basis that Ms Buxton had misled TWO in her recall of the incident that occurred approximately three weeks prior to her being asked about it. The allegedly misleading statements used in reaching that conclusion were Ms Corfe's notes as to her recollection of what Ms Buxton had recalled on the incident. Ms Buxton was not asked to provide a statement, nor was she provided a draft of Ms Corfe's notes.

[84] Such as Ms Martelli and TWO rely on Ms Buxton having provided conflicting accounts of the 22 August 2022 exchange, in particular as to whether Ms Buxton considered Midwife A to have been "hostile", I do not consider a fair and reasonable employer could have drawn a conclusion from those statements that Ms Buxton had lied. The responses were provided over a significant period of time having regard to

TWO's process, there had been a deliberate delay in raising the relevant allegation with Ms Buxton, and ultimately Ms Buxton maintained throughout that she had not intentionally misled TWO. Notably, it would have been clear throughout that Ms Buxton had not made any complaint against Midwife A and nor did she seek out Ms Corfe to raise allegations with her.

[85] There is also a marked difference between suggesting someone is incorrect about their recollection of events and that they have deliberately misrepresented events. TWO ultimately concluded that Ms Buxton had deliberately misled TWO and that she did so to deliberately to undermine Midwife A. Having considered all of the evidence, including the nature of the informal exchange between Ms Buxton and Ms Corfe, I find that TWO could not have reasonably concluded that that was the case. They were not conclusions that a fair and reasonable employer could have reached in all the circumstances at the time.

[86] A substantial issue arises in my view from the background to this matter. I have no doubt, based on the evidence before the Authority, that there were relationship issues in the workplace and that those issues took a toll on all involved. What should not have been ignored in my view is that Ms Buxton's recollection of the 22 August 2022 events, obtained approximately three weeks after that event in an, at best, informal meeting that was not initiated by Ms Buxton, may have been coloured by her feelings and impression of the exchange and/or the relationship more generally with Midwife A.

[87] TWO also failed to appropriately consider the relevant background and Ms Buxton's perceptions of the incident, instead relying on what was a partial audio recording. While I accept a fair and reasonable employer could have used the audio recording, I find that an unreasonable approach was taken in relying on the recording a single course of truth without considering that Ms Buxton's comments may have been coloured by her past experiences and her impression of the exchange. I do not agree that the Authority could reasonably draw an inference that the recording was made for the purposes of protection due to Ms Buxton's behaviours.

[88] Ms Corfe's email of 13 September 2022 did not provide a verbatim account of what Ms Buxton had said. So far as the email seeks to attribute statements to Ms Buxton, they are not plainly recorded in a manner that identified the precise words used by Ms Buxton. Further, it is clear that many of the statements relate to Ms Buxton's

impressions of the incident and/or her feelings as opposed to an account of what exactly Midwife A was said to have said or done. It could not reasonably be concluded from that email account that Ms Buxton had deliberately attempted to mislead TWO.

[89] TWO raises many historical issues relating to the relationship between Ms Buxton and Midwife A in support of its case against reinstatement, but that is not the basis on which Ms Buxton was dismissed. If TWO considered there was a pattern of behaviour regarding the communications and interactions between them, it was in my view obligated to deal with the matter in that way. Instead, I find that TWO stretched too far the allegations relating to the incubator and ambulance, morphing them into an allegation that Ms Buxton had deliberately misled it. While some other allegations made were ultimately not pressed, I find the approach taken indicative of there being some predetermination as to the dismissal.

[90] Having carefully consider the audio recording of the exchange on 22 August 2022, I also find that the matter was simply not as straightforward as TWO have suggested. I do not consider a fair and reasonable employer could have concluded that Ms Buxton had simply lied and that the recording was clear evidence of that. The audio recording is not conclusive of their being or not being any hostility. The words and tone of voice are not conclusive of that.

[91] Ultimately, I do not consider on the basis of the information held by TWO at the time, that there was a sufficient basis on which it could reasonably have concluded that Ms Buxton had deliberately misled it and that it had irrevocably lost trust and confidence in Ms Buxton. Even had the conclusion reasonably been available that Ms Buxton had exaggerated Midwife A's role in the exchange when discussing the same with Ms Corfe, I do not consider having regard to the background issues in the workplace that the behaviour was such, based on statements said to have been made during an informal exchange, that the trust and confidence in the employment relationship had been destroyed.

[92] I find that the dismissal was unjustified.

[93] The dismissal was both procedurally and substantively unjustified. Ms Buxton's claim that she was unjustifiably dismissed is successful.

Personal grievance remedies?

Is reinstatement practicable and reasonable?

[94] Ms Buxton seeks permanent reinstatement. Reinstatement is the primary remedy and the Authority must provide for reinstatement wherever reasonable and practicable.⁵ As to what reasonable and practicable, counsel referred to the following passage of the Employment Court in *Christieson c Fonterra Co-operative Group Ltd*⁶ which helpfully summarises the two considerations:

Practicality and reasonableness are two separate considerations. For reinstatement to be practicable, it must be capable of being carried out in action, be feasible and have the potential for the re-imposition of the employment relationship to be achieved successfully. There may be considerations separate from the reasons for the dismissal that are germane to this question. In looking at reasonableness, the Court needs to consider the respective effects of an order, not only on the individual employer and employee in the case, but also on other affected employees of the same employer and, in some cases, perhaps third parties who would be affected by the reinstatement.

[95] As to the question of practicality, I do not consider any significant grounds have been put forward by TWO suggesting that reinstatement would not be practicable, with their submissions largely focusing on issues relevant to the reasonableness of the same. It was submitted for Ms Buxton that reinstatement is practicable, including by reference to staff shortages and vacancies. I am satisfied that reinstatement is practicable.

[96] TWO raised a number of factors it is seeking to oppose reinstatement, significantly those included that it has lost trust and confidence in Ms Buxton. Ms Buxton's claim of unjustified dismissal is successful, and I have found the dismissal was both substantively and procedurally unjustified. Consequentially, I am not satisfied that TWO had a proper basis on which it could have, acting as a fair and reasonable employer, dismissed Ms Buxton on trust and confidence grounds. In that context, I am not satisfied the grounds relevant to the dismissal amount to an objectively verifiable⁷ basis for the claimed loss of trust and confidence.

[97] Counsel for TWO relied significantly on a report produced relating to various issues said to have arisen in relation to Ms Buxton and her Access Agreement (the McKeachie Report). I am not satisfied that the McKeachie Report provides a sound basis on which the Authority could consider reinstatement not to be reasonable. The

⁵ Employment Relations Act 2000, s 125.

⁶ [2021] NZEmpC 142 at [39].

⁷ *Harris v The Warehouse Limited* [2014] NZEmpC 188 at [162].

McKechie Report deals with an array of allegations relating to Ms Buxton, many of which were not upheld. While the report has been provided, many of the findings made therein have not been the subject of direct evidence in the Authority.

[98] Further, whilst TWO took issue with Ms Buxton's advice post investigation meeting that her Access Agreement had been reinstated, I do consider that a relevant matter in considering any reliance on the McKechie Report. TWO noted that there are conditions and relevant background as to the Access Agreement that are not before the Authority. I also take that into account. However, I accept that the reinstatement of the Access Agreement at least nullifies many of the issues raised by TWO as to the reasonableness of reinstatement based on the McKechie Report.

[99] I am also not satisfied that Ms Buxton's conduct in either the course of the employer's investigation and disciplinary processes, or in pursuing her claims in the Authority, are a barrier to reinstatement. Frankly, it is unsurprising that Ms Buxton took a somewhat defensive approach during the drawn-out investigation process.

[100] I do not consider Ms Buxton's approach to those issues a barrier to reinstatement. Ms Buxton was entitled to take issue with TWO's investigations, the way it was conducting the investigation, and the basis for any relevant delegated authority. It is unsurprising that she did so given the context in which clarification of allegations was delayed, allegations morphed during the investigation, and given the protracted nature of the process.

[101] I am satisfied that Ms Buxton has the vast support of her colleagues in returning to work. Ms Buxton has in my view demonstrated, both in the course of the employer's investigation and in evidence before the Authority, a willingness to engage in relationships at work in a constructive and forward-looking manner. There is no doubt that there have been issues in the workplace resulting in some level of disruption and disharmony in the workplace. However, I do not accept that the evidence before the Authority clearly demonstrates that Ms Buxton's actions or behaviours were the sole or primary cause of the same.

[102] TWO appears to accept that Ms Buxton is a competent Midwife. I do not accept that Ms Buxton's reinstatement would result in any significant risk in a clinical sense. To the extent that TWO assert Ms Buxton's reinstatement presents medicolegal risks and may distract from patient wellbeing, I do not accept that is the case.

[103] There is an obvious problem with the approach taken by TWO in my view. That is that Ms Buxton not only continued to work for a period of approximately nine months after the relevant allegations were first raised, but she worked on a significantly more frequent basis for longer hours. While I don't consider the making of the allegations against Ms Buxton were entirely baseless, in that there was some foundation at least for enquiries to be made, I consider it implausible that TWO would have a midwife work on an increased basis over a period of approximately nine months if they had considered there to be a serious issue such as would pose concerns as to safety or welfare that might have significant adverse consequences.

[104] If reinstated, Ms Buxton will have to undertake her work in a productive and collegial manner having regard to the purpose of that work and the need for a harmonious workplace. There is a not insignificant history of communication issues in the workplace for which Ms Buxton has some responsibility. I am satisfied that Ms Buxton has an understanding that such issues should be left in the past and that they do not present an insurmountable obstacle to her reinstatement. TWO will of course have the ability to appropriately manage any issue if they arise, not that I consider that likely, and Ms Buxton should be conscious of that.

[105] Having seriously considered all of the evidence and submissions, I conclude that reinstatement is practicable and reasonable. I order that TWO reinstate Ms Buxton to the role in which she was employment prior to the dismissal.

Compensation for humiliation, loss of dignity and injury to feelings

[106] Ms Buxton gave evidence as to the impact on her resulting from the actions and decisions of TWO, including as to her health. I accept that Ms Buxton suffered considerably and that the actions of TWO took a toll on her mental, physical and emotional health. Mr Brown also gave evidence, which I accept, as to the impacts on Ms Buxton, including that she avoided social interaction for a period of approximately six months.

[107] I consider it clear that Ms Buxton's employment as a midwife is of significant importance to her and that in many ways it is more than just work. The decision to dismiss Ms Buxton brought about, in effect at least, the end of her career as an employed midwife and left her with no realistic employment options in the region.

[108] The events relevant to Ms Buxton's claims and the employment investigation process spanned a significant period of time. I have made findings in relation to the reasons for that and the unsatisfactory nature of the delays. I have little doubt that the protracted nature of the employer's process compounded the impacts on Ms Buxton. I find that contributed significantly to Ms Buxton's feelings of humiliation and insecurity. The process itself, including the need to respond to allegations that were effectively repeated after several months, also no doubt impacted Ms Buxton.

[109] The impacts on Buxton have been ongoing since November 2022 when the allegations were first raised.

[110] Counsel for Ms Buxton submitted that a fair and just award of compensation for humiliation, loss of dignity and injury to feelings would be in the range of over \$50,000. Having considered all of the evidence and having had regard to awards made in comparable situations, I conclude that an appropriate total sum, having regard to both Ms Buxton's unjustified dismissal and disadvantage claims, to compensate Ms Buxton for the humiliation, loss of dignity and injury to feelings she has suffered, is \$28,500.

[111] I order that TWO make payment to Ms Buxton, within 28 days, of \$28,500 in compensation for humiliation, loss of dignity and injury to feelings.

Lost wages

[112] I am satisfied that Ms Buxton has lost wages as a result of her personal grievances. I am also satisfied that an award of lost wages covering the period between the dismissal and her reinstatement is appropriate in the circumstances. Ms Buxton is entitled to payment of the wages she lost as a result of her personal grievances, that being for the period from 23 June 2024 to the date on which she is reinstated, that date being the date of this determination.

[113] Ms Buxton claims that an order compensating her for lost wages should be made based on her average earnings for the three-month period prior to the dismissal. Section 128 of the Act provides for payment of lost wages of a sum equal to the lost remuneration or 3 months' ordinary time remuneration. In this matter, reimbursement must be made on the basis of Ms Buxton's lost remuneration.

[114] In terms of the amount of income lost, I am satisfied that Ms Buxton had been undertaking work well beyond her ordinary contracted hours. I am also satisfied that that arrangement would have continued for a period and that Ms Buxton should be reimbursed on a basis that accounts for that loss.

[115] Ms Martelli gave evidence as to arrangements made from 1 July 2023 which involved the engagement of staff through a recruitment agency because having staff pick up extra work was not a long-term solution. Ms Martelli also said that Ms Buxton picked up a lot of additional shifts between the time her Access Agreement was suspended, that being 19 December 2022, and the date of her dismissal, that being 23 June 2023.

[116] After carefully considering the evidence, I find that Ms Buxton would have continued to perform work on the basis that she was prior to the dismissal were it not for the personal grievance. While I accept contractual arrangements were made as described by Ms Martelli, I am unable to conclude that those arrangements would have been made at the time they were if it were not for the dismissal. However, I am also not satisfied that Ms Buxton necessarily would have continued to work the hours she had been in the three-month period prior to the dismissal as opposed to those worked over a longer period, nor that the contracting arrangement would not have been implemented at a later date.

[117] On balance, I find that Ms Buxton lost income equivalent to the average of the remuneration she received for the period 13 February 2023 to 18 June 2023 for a period of three months, that being the time at which I consider it likely to contracting arrangement would have been implemented had it not been for the dismissal.

[118] The total remuneration received during that period, that period being 18 weeks, was \$54,076.93. On that basis, I calculate the weekly loss at \$3,004.27. For a period of 13 weeks, I find that MS Buxton lost income in the total amount of \$39,055.51. For the remainder of the period to the date of this determination, a period of 53 weeks and 5 days, I find that Ms Buxton lost wages in the amount of \$19,882.88. I calculate that at a rate of \$46.27 per hour for the 8 hours a week she was contracted to work.

[119] I order that TWO make payment to Ms Buxton, within 28 days, of a total of \$58,938.39 as reimbursement for lost wages.

[120] TWO is also ordered to make payment of any relevant employer KiwiSaver contribution and payments or benefits that Ms Buxton would have received in accordance with the DHB/MERAS collective Agreement, including back pay for relevant increases, retirement benefits, and accumulated sick leave entitlements.

Contribution

[121] Section 124 of the Act requires that I consider the extent to which Ms Buxton's actions contributed towards the situation that gave rise to the personal grievance, and if those actions so require, that I reduce the remedies that would otherwise have been awarded accordingly.⁸

[122] I accept that there were some background issues relating to Ms Buxton's communications with other staff, primarily Midwife A. However, I do not consider those actions could be said to have contributed to the situation giving rise to her personal grievances.

Did TWO breach its duty of good faith in terms of s 4A of the Act? If so, should any penalty be imposed?

[123] Ms Buxton contends that TWO breached its duty of good faith by:

- (a) Failing to advise her that a compliant had been raised in August 2022 and deliberately withholding the complaint until 28 November 2022; and
- (b) By not providing her the opportunity to provide feedback on its finding that she was reluctant to work with Midwife A and that Midwife A felt intimidated.

[124] Counsel for Ms Buxton submitted that TWO's failures were deliberate, serious and sustained, and that they were intended to undermine the employment relationship. It was submitted that the failures occurred over a period of nine months, that it was left to Ms Buxton to seek information in relation to the allegations from TWO, and that TWO declined early requests for mediation.

[125] Counsel for TWO submitted that the threshold for awarding penalties is high and that Ms Buxton has not met that threshold. TWO contends that it remained active and constructive, responsive and communicative, and that the process involved significant consultation and extensive opportunities to respond.

⁸ Employment Relations Act 2000, s 124.

[126] I find that TWO breached the duty of good faith it owed Ms Buxton on both grounds claimed. In both cases, the actions amounted to a breach of, at least, s 4(1A)(c) of the Act. While I conclude that TWO failed to act in accordance with the duty of good faith it owed Ms Buxton, I am not satisfied that the relevant rises to the level for which a penalty should be imposed.

[127] The submissions made on Ms Buxton's behalf go to two distinct alleged breaches of duty. In relation to the first, that being a delay in raising the allegations with Ms Buxton, I am not satisfied that that action was taken with the intention of undermining the employment relationship. Instead, I find that the allegation was delayed out of good, albeit misconceived, intentions. The delay amounted to a significant procedural defect. However, I consider the relevant action was absent the element of intention required by s 4A(b)(iii) of the Act.

[128] The second of the claimed breaches, as to not affording Ms Buxton an opportunity to respond to assertions made in the final decision letter, also amounted to a significant procedural defect. However, I do not consider that failure was intended to undermine the employment relationship.

[129] I conclude that the failures were not deliberate, serious, and sustained in terms of s 4A(a) of the Act. Additionally, had I found that a penalty was warranted, I would have declined to order that any portion of that penalty be paid to Ms Buxton given the compensation I have ordered to be paid having regard to the considerable overlap of the factual matrix and conduct concerned as between the respective claims.

[130] I find that TWO did breach its duty of good faith. However, I do not consider the relevant conduct rises to the level required for the imposition of penalties in terms of s 4A of the Act.

Did TWO breach the terms of Ms Buxton's employment agreement? Is so, should any penalty be imposed or should TWO be required to pay general damages?

[131] Ms Buxton seeks the imposition of a penalties against TWO for breach of the DHBs/MERAS Multi-Employer Collective Agreement 2021 - 2023. She submitted that any penalties should be paid to her.

[132] The claims initially raised as to breach, while noted in the statement of problem as arising from various clauses of the collective agreement, are instead aspects of TWO's Disciplinary Policy, said to form part of Ms Buxton's terms and conditions of employment:

- (a) Clause 1, which provides that TWO, as a good employer, will comply with relevant legislation including the obligation to act in good faith;
- (b) Clause 4.3, which details managers' responsibilities, including informing employees in a timely manner where their conduct does not meet the required standards and expectations.
- (c) Clause 4.3, which also sets out human resources' responsibilities including to ensure fair and consistent treatment and to ensure TWO's processes for managing discipline are applied consistently; and
- (d) Clause 4.7 which sets out principles applying to investigations, including that investigations should commence as soon as practicable after an alleged action occurs.

[133] I find that TWO were obligated to comply with its Disciplinary Policy. I also find that it failed to do so in relation to each of the claimed grounds noted above. I outline the basis for my findings below:

- (a) Clause 1 required TWO to comply with its good faith obligations. It failed to do so, including by failing to provide Ms Buxton with access to information, and an opportunity to comment on that information that was relevant to the continuation of her employment in terms of s 4(1A)(c) of the Act. That information included Ms Martelli's views as to the team meeting on 11 May 2023;
- (b) Clauses 4.3 and 4.7 were breached by TWO's approach to the investigation and intentional delay in raising its concerns with Ms Buxton; and
- (c) I am not satisfied that a breach of clause 4.3 has been made out in relation to consistent treatment.

[134] The basis on which the relevant breach occurred in each case is directly related to, and for the same reasons, as set out elsewhere in relation to the unjustified disadvantage and dismissal claims. I do not consider that in any case the breaches were egregious, nor do I consider they were deliberate in any meaningful and relevant way such as would warrant the imposition of penalties. On that basis, I decline to impose any penalties upon TWO. Even had I considered the imposition of penalties appropriate,

I would have declined to make any order requiring any part of any penalty to Ms Buxton having regard to the compensatory awards made in respect of her other claims.

[135] In submissions, counsel for Ms Buxton claimed a breach of clause 34 of the collective agreement which deals with compliance with health and safety requirements. The submissions raise various matters including the absence of a risk assessment, a failure to put in place controls and an absence of support provided to Ms Buxton by TWO. These matters were not the subject of any extensive or reasonable consideration in the course of the Authority's investigation. The allegations were not raised in the statement of problem lodged and nor was TWO in a position to meaningfully respond to such allegations in the course of the proceedings. I do not consider the claim has been made out.

Should any general damages be awarded?

[136] Ms Buxton claims general damages arising from TWO's actions in dismissing her from her employment and which are said to arise from breach of the collective agreement. Ms Buxton claims that an award of general damages of at least \$60,000 would be appropriate.

[137] Ms Buxton's amended statement of problem, lodged on 25 October 2023, included a claim to general and special damages on the following basis:

Compensation by way of general and special damages to the Applicant which have arisen as a direct result of the Respondent's actions in unfairly dismissing the Applicant which includes damages for a breach of the express and implied terms of employment and legal costs.

[138] Section 113 of the Act provides as follows:

113 Personal grievance provisions only way to challenge dismissal

(1) If an employee who has been dismissed wishes to challenge that dismissal or any aspect of it, for any reason, in any court, that challenge may be brought only in the Authority under this Part as a personal grievance....

[139] I find that s 113 of the Act operates such as to preclude Ms Buxton's claim in relation to general damages in relation to each of the claims relating to the Disciplinary Policy, the general damages claimed, said to have arisen as a direct result of the dismissal. Such as any of the alleged breaches could be said not to fall within the scope of s 113 of the Act, I would not have been satisfied that the causal link between those breaches and any impacts warranting general damages had been established.

[140] Ms Buxton has been awarded compensatory remedies in relation to her personal grievance claims. I am not satisfied that there is a basis for an award of general damages relating to the breach of agreement claims that would have exceeded the compensatory awards otherwise made. I decline to make any award of general damages.

Should any special damages be awarded?

[141] Ms Buxton claims special damages relating to recovery of the legal costs she incurred in responding to the disciplinary process initiated against her.

[142] The letter of 28 November 2022 included an allegation that Ms Buxton was responsible for arranging an incubator, ambulance, and for completing an on-call form for the relevant transfer. Despite subsequent attempts by Ms Buxton to have that allegation disposed of, it is apparent that the issue was not resolved until Ms Martelli issued her preliminary findings on 17 May 2023. Ms Buxton was, in the interim, in a position whereby she reasonably needed to seek assistance in dealing with that allegation.

[143] Having regard to Ms Martelli's other answers, and the relevant correspondence during the investigatory and disciplinary processes, I am not satisfied that special damages are warranted in relation to the allegation and responses to provided to it. I do not consider the raising of the issue was baseless. The correspondence reflects there was concern as to the relevant responsibilities. Indeed, Ms Buxton in her statement dated 10 February 2023 noted she considered the relevant responsibilities were shared. Additionally, the preliminary decision letter dated 17 May 2023 dealt with the allegation, albeit in a somewhat unsatisfactory manner and much later than reasonably should have been the case, by noting Ms Martelli's acceptance "...that there will be occasions when a DHB midwife cannot attend to these responsibilities...".

[144] Counsel for Ms Buxton submitted that Ms Martelli accepted in cross examination that there were no allegations regarding the arranging of the ambulance and incubator in the letter dated 28 November 2022. I do not consider that assists in any way and find it is clear there were both concerns and allegations raised in relation to those matters. Noting the correspondence sent to TWO over a significant period of time, I find the allegations should have been disposed of at a much earlier time. I consider that to be an issue going to Ms Buxton's unjustified disadvantage and dismissal claims.

However, I do not consider the raising of the allegations or the process that followed meet the threshold for an award of special damages.

[145] While there were faults in the investigation and disciplinary processes, I ultimately accept TWO's submissions that this is not a matter where those processes were baseless, disingenuous, or otherwise designed simply to secure Ms Buxton's departure.

[146] I decline to make any award of special damages.

Section 123(1)(ca) recommendation?

[147] I decline to make any recommendation for the purposes of s 123(1)(ca) of the Act. Such as TWO have failed in any duties owed to Ms Buxton, those failures have been addressed in the context of Ms Buxton's personal grievance claims including as to the application of TWO's own policies and procedures, the relevant issues will be apparent to it from this determination.

Summary of orders

[148] TWO is ordered to reinstate Ms Buxton to the role she was employed in immediately prior to the dismissal. They are ordered to reinstate Ms Buxton with immediate effect. The parties should engage constructively to facilitate Ms Buxton's return to the workplace, which is to occur within no more than 14 working days.

[149] Te Whatu Ora is ordered, within 28 days of the date of this determination, to make payment to Suzanne Buxton of:

- (a) \$28,500 as compensation for humiliation, loss of dignity, and injury to feelings relating to her unjustified dismissal claim;
- (b) \$58,938.39 as reimbursement for lost wages; and
- (c) TWO is to calculate and make payment of any relevant employer KiwiSaver contribution and payments or benefits that Ms Buxton would have received in accordance with the DHB/MERAS collective Agreement, including back pay for relevant increases, retirement benefits, and accumulated sick leave entitlements.

Costs

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

[151] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Ms Buxton 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 TWO 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.

[152] 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.⁹

Rowan Anderson
Member of the Employment Relations Authority

⁹ For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1