

Attention is drawn to the  
order prohibiting publication  
of certain information in this  
determination

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 131/09  
5144289

BETWEEN

MARILYN PEGRAM  
Applicant

AND

WESTPAC NEW ZEALAND  
LIMITED  
Respondent

Member of Authority: Helen Doyle

Representatives: Paul McBride, Counsel for Applicant  
David Gould, Advocate for Respondent

Investigation Meeting: 12 and 13 May 2009 at Nelson

Submissions received: 13 and 27 May 2009 from Applicant  
20 May 2009 from Respondent

Determination: 19 August 2009

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**DETERMINATION OF THE AUTHORITY**

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**Prohibition from publication**

[1] I prohibit from publication the names and details of customers of Westpac contained in the proceedings and other documents and the names of any employees who may have been referred to but from whom I did not hear evidence.

**Employment relationship problem**

[2] Marilyn Pegram has been employed by Westpac New Zealand Limited, or its predecessors, for a period of 25 years and is currently one of two customer consultants in the Motueka branch.

[3] Ms Pegram says that she has been unjustifiably disadvantaged in her employment by her actions of her employer and discriminated against in her

employment including by virtue of her role as Union delegate for FINSEC. Ms Pegram says that these unjustified and discriminatory actions took place over the period of time between late 2006 and 21 January 2009. On 20 January 2009, Ms Pegram took sick leave for medical issues which she says were caused by Westpac's conduct and remains on sick leave.

[4] Ms Pegram seeks a determination that Westpac has disadvantaged and/or discriminated against her and in doing so breached the duties it owes her. She wants reinstatement to the position she would have been in if the personal grievance/breaches had not occurred. Ms Pegram seeks reinstatement of her sick leave entitlement, removal of warnings/disciplinary sanctions from her file, compensation in the sum of \$30,000, reimbursement of medical costs, travel costs, advocacy costs and lost remuneration for being away from work without pay on sick leave together with any lost benefits during that time.

[5] Westpac says that it dealt with Ms Pegram in good faith, followed a fair process to lift her performance and does not accept that there was any failure on its behalf that caused the workplace to be unsafe. Westpac does not accept that there are unjustified actions on its part to cause Ms Pegram disadvantage or that she was discriminated against and, on that basis, does not accept that it should provide the remedies that she seeks.

[6] During the Authority's investigation meeting Mr McBride clarified that the claim for compensation and/or damages was pleaded in the alternative in the statement of problem in the event that there was an argument the personal grievances had not been raised within 90 days. Mr Gould accepted for Westpac that the grievances had been raised within the 90 day timeframe and/or that Westpac would take no issue if they had not been. I have therefore considered the claims as personal grievance claims for unjustified actions causing disadvantage and/or discrimination under sections 103(1)(b) and 103(1)(c) of the Employment Relations Act 2000. In terms of determining whether an action was justifiable the Authority must under s.103A of the Employment Relations Act 2000 determine that on an objective basis and consider whether Westpac's actions were what a fair and reasonable employer would have done in all the circumstances at the time the action occurred.

## **The issues**

[7] Mr McBride provided a brief outline of the issues before the commencement of the investigation meeting. The investigation, in essence, focused on these issues with Mr Gould accepting that they were the matters for determination and they were also the focus for Mr McBride's and Mr Gould's final submissions.

[8] The Authority, in determining this matter, which is an ongoing employment relationship and problems arising therein, has had regard to its role under s.157 of the Employment Relations Act 2000 to resolve employment relationship problems by establishing the facts and making a determination from the substantial merits of the case without regard to technicalities and that, in carrying out its role, it must support successful employment relationships and aim to promote good faith behaviour.

[9] The issues the Authority finds need to be determined are as follows:

- Was the performance rating assigned to Ms Pegram in March 2007 unjustified and/or discriminatory and was Ms Pegram disadvantaged in all the circumstances;
- Was the disciplinary meeting and the outcome of the disciplinary meeting held with Ms Pegram on 15 June 2007 unjustified and, if it was, was Ms Pegram disadvantaged in all the circumstances;
- Was the allegation of bullying by Ms Pegram about her manager, Marie Munro, dealt with in the way a fair and reasonable employer would deal with such an allegation or was Ms Pegram disadvantaged by the way the matter was investigated and/or in terms of her reintegration back into the workplace in early August 2007;
- Was the process leading up to and the issue of a formal warning on 12 October 2007 and the removal of Ms Pegram's credit authorisation limit, given to her as a lender to approve lending up to a particular level without first obtaining approval from a senior credit officer (CAL), for a six month period what a fair and reasonable employer would do in the circumstances;

- Was the performance management of Ms Pegram when her new manager, Fiona Webster, was appointed to the Motueka branch, unjustified, and was Ms Pegram disadvantaged as a result;
- Were the actions of Westpac in and around the sick leave taken by Ms Pegram in late October 2008 the actions of a fair and reasonable employer or were they unjustified and did they cause Ms Pegram disadvantage;
- Was the final written warning issued following the disciplinary meeting on 19 January 2009 what a fair and reasonable employer would have done in all the circumstances that existed at the time;
- If there were unjustified actions that disadvantaged and/or were discriminatory on the part of Westpac, then what remedies is Ms Pegram entitled to and are there issues of contribution?

### **The background against which the issues need to be determined**

[10] The branch manager at Motueka from November 2003 until November 2007 was Marie Munro. Ms Munro had commenced her employment in the banking industry in 1985 and had been a branch manager for 14 years.

[11] The relationship between Ms Munro and Ms Pegram, the focus of several of the employment relationship problems, was satisfactory until mid to late 2006. In December 2006, Ms Pegram complained to the then regional manager for the Tasman area, John Lynn, about Ms Munro and some of her actions.

[12] In or about mid 2006, Westpac introduced a new performance system which changed the way performance was measured. There was an incentive to staff to sell products by assigning each product a point value and performance and incentive payments were made to each employee within a set time on the basis of those points. Part of the performance system was a new model called *Living the Values*. An employee's demonstrated behaviour formed part of their performance appraisal and whatever assessment was received for behaviour could be a factor in determining the bonus payments. The objectives part of the assessment was referred to by Westpac as the *what* and the performance part as the *how*.

[13] Ms Pegram says that she was assessed unfairly in her March 2007 performance appraisal for behaviour. The rating that she received was ND1. The ND related to performance against objectives and the 1 to the *Living the Values* rating.

[14] For behaviour, employees are assigned an overall rating of 3, 2 or 1. They are described below as:

3. *Clearly stands out in the way they live the values. Acknowledged by others as a role model for behaviours appropriate for their role. Often behave in a manner consistent with the next leadership level.*
2. *Consistently meets behavioural standards, behaves in a way that supports the value.*
1. *Does not consistently meet behavioural requirements, acts in a manner that does not support organisational values, below requirements for the role.*

[15] Ms Pegram's behaviour was rated by Ms Munro at the highest level for the end of the year 2005. Ms Pegram says that by late 2006, Ms Munro completely changed her behaviour toward her and seemed to be looking for every opportunity to criticise her. Ms Pegram says that this was at or about the time she became a Union delegate for FINSEC.

[16] Ms Pegram wrote to Ms Munro by letter dated 21 March 2007 and expressed her concern about the grade given to her performance appraisal in March 2007 with *Living the Values*. Ms Pegram asked for the reasons for the assessment because she said she considered it to be unfair and unreasonable and not based on sound grounds. She also set out that the assessment had resulted in financial disadvantage to her, including potential loss of bonus and increase in salary.

[17] Ms Pegram saw her doctor at or about the same time and her doctor diagnosed work-related stress and she had a period of sick leave from 22 March to 30 March 2007. Ms Pegram has suffered during her work career from migraines but she said that condition worsened as she was treated, in her view, badly by Ms Munro and later in her employment relationship by others.

[18] Ms Munro responded to Ms Pegram's letter in a letter dated 30 March 2007.

[19] At or about that time, Megan Casey, a Union organiser from FINSEC, became involved and emailed the then regional manager, David Johnston, on 29 March 2007 and asked that Ms Pegram's intended annual leave from 2-6 April 2007 be by way of

paid leave (special leave) and not annual leave. This was against a background where Ms Pegram had expressed concerns about her relationship with Ms Munro and was also dissatisfied with the performance appraisal. Ms Casey made a retrospective request for the leave for the period 22-30 March 2007 to be special paid leave. Mr Johnston agreed to Ms Pegram having her April annual leave week off as special paid leave in the circumstances, and there was some discussion in the email traffic between Mr Johnston and Ms Casey about a meeting to deal with the matters raised by Ms Pegram about her performance appraisal.

[20] The leave records I requested from Westpac following the investigation meeting support that the leave from 22-30 March 2007 was taken as sick leave but the leave for April was special leave.

[21] In a letter dated 18 April 2007, Ms Pegram wrote to Mr Johnston and set out what she considered to be problems in her relationship with Ms Munro and asked in the same letter for her recent performance review to be re-evaluated. The ability to request a review of a performance appraisal is contained in the collective employment agreement.

[22] Ms Pegram was on sick leave from 18-20 April 2007.

[23] On 24 May 2007, Mr Johnston met with Ms Pegram at a local café and there was discussion about her six monthly appraisal and the rating for behaviour which she had received of 1. After some discussion, Mr Johnston confirmed that Ms Pegram's rating would stand and he then brought up some concerns about PACT calls which are calls made by employees to customers. He said that a number of customers had been recorded as having been contacted by Ms Pegram but had not. Ms Pegram advised that she did not think that was right and that her honesty was being questioned and she did not appreciate that. Mr Johnston said the bank was just reacting to what customers had said.

[24] On 6 June 2007, Mr Johnston wrote to Ms Pegram inviting her to a formal meeting on 15 June 2007 to discuss concerns about the PACT calls and two other issues about lending with respect to customers.

[25] On 8 June 2007, Ms Pegram was supplied with further information about the PACT calls and Ms Munro recorded four credit authorisation limit breaches in a file note dated 8 June 2007.

[26] Ms Pegram, as an employee of Westpac who engaged in lending, had been given authority to approve lending up to a particular limit without the need to first gain approval from a senior credit officer. That limit is referred to as a CAL. There is policy and procedure around CAL to protect the bank in terms of lending decisions made by its employees.

[27] On 15 June 2007, Ms Pegram attended the meeting with her partner, Paul Troon. Paul Zoubcov from FINSEC attended the meeting via a telephone link. Mr Johnston attended the meeting with Ms Munro. Notes were taken of the meeting by Mr Johnston/Ms Munro and Mr Zoubcov was given permission to tape the meeting.

[28] Between 8 June 2007 and the meeting, Ms Pegram had contacted the customers in terms of the PACT calls and had letters from some of them to confirm that she had telephoned. Mr Troon questioned the new matters that were being raised about breaches of CAL when approving temporary excesses. I accept Westpac's notes that all those in attendance agreed to discuss the new matters about breaches of CAL with the right to return at a later date if Ms Pegram required additional time.

[29] On 18 June 2007, a meeting was held at which an outcome was delivered. There was some confusion about the nature of the outcome, largely as a result of a note provided in the respondent's bundle of documents which no-one could properly identify. I am quite satisfied that the outcome was that there was no warning issued to Ms Pegram and further that Ms Pegram knew that at the time as she set this out in a letter to Mr Johnston dated 20 June 2007 (para.16). Ms Pegram's CAL was, however, revoked for a period of three months from 2 July 2007 and she was asked to provide more detail on her PACT call diary notes and have weekly and monthly coaching.

[30] On 20 June 2007, as set out above, in her letter Ms Pegram raised a personal grievance and advised that until the matters raised in her personal grievance were resolved she was unable to continue to work under Ms Munro as branch manager because the environment was unsafe. She asked that the bank commission an independent investigation of the entire matter as she had had enough of being bullied, humiliated and treated unfairly.

[31] On 20 June 2007, Ms Pegram wrote to Mr Gould, the employee relations manager at Westpac, asking him to investigate bullying by Ms Munro that she and

others had been subjected to and also requesting an investigation of the recent disciplinary meeting and the decision regarding her CAL.

[32] The bank duly undertook an investigation. Rebecca Mead, a People and Performance consultant at Westpac, carried out the investigation. In doing so, she interviewed 22 people and her report was released on 17 July 2007.

[33] From 18 June until 27 July 2007, Ms Pegram was on special paid leave. From 30 July until 3 August 2007, Ms Pegram was on discretionary sick leave.

[34] The investigation report that was released on 17 July 2007 concluded that there was no finding of harassment or bullying but made a number of recommendations in terms of Ms Pegram and Ms Munro. In terms of Ms Munro, there were some recommendations about her management style in terms of tone, style of delivery, appreciating diversity of individual learning and approach within the team. I heard from some other employees Karen and Heather about concerns they had with Ms Munro when she managed them at the Motueka Branch. Both employees spoke to Ms Mead as part of her investigation.

[35] On 23 July 2007 after the investigation report was released, a meeting was held with Ms Pegram, Andrew Campbell from FINSEC, Mr Johnston and Marie Johnston from People and Performance to discuss Ms Pegram returning to work. Ms Pegram read a letter out at the meeting that she had written to Ms Mead on 20 July 2007 in which she had made it clear that she did not accept the report findings.

[36] There was some discussion about options for Ms Pegram which included being transferred to another branch. That was not an available option from Westpac's perspective and there was some discussion about why that could not occur. There had to be a medical clearance for Ms Pegram to return to work at Motueka. It was also agreed that Ms Pegram's CAL would be reinstated provided she sit and pass a credit policy test. Mr Johnston discussed facilitating a meeting to improve the relationship between Ms Munro and Ms Pegram.

[37] On 1 August 2007 Ms Johnston wrote to Ms Pegram's doctor seeking information about Ms Pegram's diagnosis, immediate and long term prognosis and any other information that may assist in supporting Ms Pegram's return to work. Dr Mayer responded by letter dated 7 August 2007 and advised that Ms Pegram's diagnosis was stress and the triggers for her illness related to her work situation in

terms of relationships with superiors. To minimise those Dr Mayer suggested that a clear and transparent method of resolving issues with input and buy in from Ms Pegram be instigated. Dr Mayer stated that the immediate and longer-term prognosis for Ms Pegram's condition was excellent as long as there is evidence of change in the workplace and fairness to all concerned. Dr Mayer did note that ongoing vigilance was required to avoid a repetition of the difficulties experienced by Ms Pegram.

[38] On 3 August 2007, a further meeting took place prior to Ms Pegram's return to work on 6 August 2007. Ms Pegram attended that meeting with her partner, Mr Troon, Mr Campbell from FINSEC and Ms Munro also attended with Mr Johnston. There is a dispute about whether it was discussed that Ms Munro could bring issues in the nature of concerns to Ms Pegram outside of agreed monthly performance review meetings during which Ms Pegram would be represented by FINSEC.

[39] Ms Pegram returned to work on 6 August 2007.

[40] On 28 September 2007 at a monthly performance review meeting, Ms Munro brought some lending issues to Ms Pegram's attention.

[41] On 3 October 2007, the applicant was invited to attend a meeting on 5 October 2007 to discuss four alleged CAL breaches.

[42] On 12 October 2007, Ms Pegram was issued with a written formal warning expressed to be a first warning regarding CAL breaches. Mr Oliver Cristeller from FINSEC raised a difference in the view on CAL policy in terms of the breaches and requested an independent review of the files where it was found there were breaches of CAL policy. A senior consumer credit manager, Irene Page, undertook such a review and provided a report on 3 November 2007.

[43] On 15 November 2007, Ms Munro left the Motueka branch and took up a branch role in Whangarei.

[44] On 10 December 2007, a new manager, Fiona Webster, commenced at the Motueka branch.

[45] On 13 December 2007, there was a meeting between Ms Webster and Ms Pegram and her partner, Mr Troon, to follow up on the formal warning issued on

12 October 2007 and the outcomes of that warning, one of which was the implementation of a performance improvement plan towards the reinstatement of CAL.

[46] It was further agreed that Ms Pegram would provide all information about issues that were the basis of the warning together with the Irene Page findings and talk through those with Ms Webster. There was also a discussion about some minor mistakes that Ms Pegram had made.

[47] The performance improvement plan and coaching continued through the early part of 2008.

[48] CAL was reinstated in April 2008 and there were no particular issues for Ms Pegram until September 2008.

[49] In September 2008, at a performance improvement plan review, Ms Webster required Ms Pegram to achieve a sales target goal of 60% and the plan specifically set out that failure to achieve would result in the commencement of formal performance management disciplinary processes.

[50] On 12 September 2008, Mr Troon emailed Ms Webster and said amongst other matters that the threat of disciplinary action if sales targets were not met immediately had directly caused Ms Pegram serious stress resulting in increased frequency of her migraines.

[51] On 15 October 2008 Ms Pegram was written to by Ms Webster and invited to attend a formal disciplinary meeting to discuss continuing performance concerns on 17 October 2008. The letter advised that Mark Hardman, the new area manager for the Tasman region, would also be present at the meeting.

[52] On 16 October 2008, Mr Cristeller wrote to Ms Webster to advise that FINSEC would be representing Ms Pegram at the disciplinary meeting. Mr Cristeller wrote that FINSEC did not agree that Ms Pegram failed to meet the standards required of her and asked for some information, including an outline of what standards had not been met. There did not appear to be any response to that letter.

[53] On 24 October 2008, Mr Troon wrote to Ms Webster and raised a workplace hazard issue and requested a meeting about the hazard by or on Friday, 31 October 2008.

[54] On 29 October 2008, a meeting took place with Ms Pegram, Mr Troon, Ms Munro and Mr Hardman to discuss the workplace hazard. The cause of stress identified as the hazard was expressed as the threat of disciplinary action and the delivery of an invitation to a disciplinary meeting. At least one of the outcomes requested was the removal of the threat of the disciplinary meeting. Westpac did not agree to remove that as it said all staff were measured according to their role.

[55] On 31 October 2008, Ms Pegram attended her doctor and was certified medically unfit from 30 October until 24 November 2008 and after a week's annual leave, returned to work on 1 December 2008. There were issues about the nature of the correspondence between Westpac and Dr Mayer, and Ms Pegram during this time.

[56] In December 2008, there was a mediation meeting but it did not resolve the issues between the parties. Later in December 2008, there was a further performance meeting although there was no disciplinary outcome.

[57] In January 2009, an alleged breach of a CAL came to the attention of Ms Webster and following a disciplinary meeting, Ms Pegram was provided with a final formal warning in relation to a breach of the Westpac code of conduct that she did not follow appropriate procedures in a lending transaction. At the time that that warning was received, Ms Pegram was on sick leave. She did not accept the warning was justified and has remained on sick leave since that time.

**Was the performance rating assigned Ms Pegram in March 2007 unjustified and/or discriminatory and was Ms Pegram disadvantaged in the circumstances?**

[58] Ms Pegram says that until 2006 she had a good relationship with Ms Munro although she felt some disquiet about how Ms Munro, in her view, treated other employees. For her part, Ms Munro said that she was really impressed with Ms Pegram at the start of their working relationship because she had a really good outlook and was positive. She said there were a couple of issues of concern about Ms Pegram in 2005 and some in 2006.

[59] Ms Munro said in her evidence that when she reflected on Ms Pegram's behaviour and overall performance during 2007, she noticed a real decline at that

stage and wondered if it could be because of something going on with her in her personal life. Ms Munro did not accept that she was anti-union, having been a union member herself for many years, or that she obstructed Ms Pegram from conducting union business.

[60] At the centre of this issue about performance ratings is whether Ms Pegram's performance in terms of her behaviour assessed on Westpac's criteria continued at a high standard and the result, therefore, in March 2007 was unjustified and unfair or, whether Ms Munro was justified in her assessment because not all the behaviour requirements had been consistently met.

[61] Where an employee alleges, as Ms Pegram has in this case, that she has been targeted, harassed and bullied resulting, amongst other matters, in low ratings on performance appraisals, a careful analysis of the evidence is required.

[62] I accept Mr McBride's submissions that previous good performance and then a low performance rating can be a factor or part of the bigger picture to bear in mind when determining the justification of an assessment. Equally, however, an employee's performance in terms of meeting objectives and behaviour can change for any number of reasons, including internal and external pressures.

[63] The starting point is to consider the reasons Ms Munro put in her letter of 30 March 2007 about why Ms Pegram was given the rating that she was. The relevant part of that letter is as set out below:

- *For the first quarter, I rated you a 1 as your results decreased and therefore I did not feel you were focusing on customer needs and growing our business as required in the Achievement area of Living the Values. There were also 2 instances where I raised issues with you around my view that your behaviour was not reflecting our values. The first instance was when you were disruptive at a meeting and the other was a breach of CAL. We discussed these issues at the time and again during your monthly review.*
- *Due to my absence, January and February reviews were combined. During this period there was more than one occasion when I had to discuss issues about your behaviour being inconsistent with our values and again we discussed these at your review. These issues related to a lack of teamwork following feedback from your peers and inappropriate behaviour during team meetings. In relation to your not wearing your scarf as part of your uniform, this was one issued (sic) raised with you but was included as part of a*

*number of behaviour related concerns rather than being taken in isolation.*

[64] Was there any basis then to what Ms Munro said in her letter? I have considered a number of diary/file type notes that were produced by Westpac, both as an attachment to its statement of reply and in its bundle of documents. Some of the diary notes relied on by Westpac in terms of the performance rating are done so as an example of issues of concern. Ms Pegram referred in her statement of evidence in reply to not having previously been provided with the diary notes despite making a request on 3 November 2008 under the Privacy Act for all personal information held by Westpac about her. Ms Pegram did respond to the file notes in an appendix to her statement of evidence in reply and so I am satisfied she has had an opportunity to comment on them for the purposes of the investigation meeting.

[65] Some of the matters in the file notes Ms Pegram could recall as having been raised with her and some not. Some Ms Pegram dismissed as petty. Given the passage of time and the obvious impact on memory, I have placed reliance on the notes to the extent that Ms Pegram recalled some discussion about their content.

[66] There were occasions when Ms Munro had to discuss Ms Pegram's behaviour with her. There was an issue documented about an outburst during a staff meeting in front of other staff that Ms Pegram accepted had occurred. Ms Munro went to see Ms Pegram in her office after the meeting and advised that such an outburst was inappropriate. Ms Pegram explained that she was unwell at the time but it could not be said that that was a fabricated concern.

[67] There was also an issue raised by Ms Munro with Ms Pegram about concerns in terms of teamwork. Ms Pegram says she was not told which staff members had complained about her. I do agree that if the staff complaints had been escalated to a more formal level, then Ms Pegram would need to know who had made the complaints in order to be able to properly answer them. In circumstances, however, where the manager simply raised the complaints in an informal setting in the hope that the employee would reflect and change behaviour, then I am not satisfied that disclosure needs to be made.

[68] Ms Pegram, in the absence of knowledge about who had made the complaints, questioned a couple of staff members as to whether they had. Both those staff members said they had not, but I imagine that the type of questioning of staff

members would be uncomfortable for them, not always produce an honest answer, and may justify the decision by a manager not to disclose when concerns are raised at an informal level the staff member or members name.

[69] Following on from that, there is a file note of Ms Munro dated 18 January 2007 that records Ms Pegram returning to her office and advising that the comments staff made about her teamwork were all *a load of rubbish* and along the lines that *it was malicious gossip and a load of crap*. Ms Munro records that she told Ms Pegram that she had no control over whether people repeat what they said to her, but that the comments were definitely made. There is a file note about a scarf. There was an alleged CAL breach earlier. Ms Pegram does not disagree it was discussed with her but does not agree that it was a breach.

[70] I find it unlikely, against the background reflected in the file notes, that there had been no discussion at all at the time of the performance appraisal, about the reasons for the rating. I accept that Ms Munro, as branch manager, did have concerns about Ms Pegram in respect of her behaviour. The documents support some of these were raised with Ms Pegram and she recalls that, even if she does not agree with the matters raised.

[71] Ms Munro had also set out in her response of 30 March 2007 that it would be a good idea to sort out an action plan to move forward and try to increase the performance rating. That was the sort of response a fair and reasonable employer would have given in the circumstances. Ms Pegram did not at that time take Ms Munro up on that suggestion because she had, by March 2007, such a level of distrust in Ms Munro that she viewed with considerable suspicion actions on Ms Munro's part, including bringing concerns to her or raising issues with her.

[72] I have considered whether the concerns raised with Ms Pegram which impacted on her performance appraisal were unreasonable, unjust, harassment, discriminatory or even fabricated. I have had careful regard to the evidence and also to the file notes. I conclude that there was a basis for the performance rating of 1

[73] In reaching that conclusion I have gone back to the description of a 1 rating to consider that against what was said in Ms Munro's letter and the file notes. I am not satisfied that Ms Pegram was discriminated against. Taking the matter one step further there was no evidence of a loss to Ms Pegram in terms of a disadvantage

because it appeared that the requirement for performance against objectives had to be met and it was not to enable a bonus or increase in the salary step.

[74] Mr McBride then submits that the review process entered into by Ms Pegram in terms of the performance appraisal was flawed. Ms Pegram is a member of FINSEC and her work was covered at the material time in March 2007 by the pre-management collective employment agreement (the agreement) from 10 February 2006 until 20 April 2007. Clause 22.3 of that agreement provides:

*If the disagreement remains unresolved, you may seek a meeting with the appraiser's reporting manager or People & Performance as appropriate. Nothing prevents you, at any stage of the review process, from applying the employment problem resolution process detailed in clause 43 (Employment Problem Resolution Process) of this agreement to resolve your concern.*

[75] Ms Pegram asked the area manager, Mr Johnston, to review the decision in accordance with the employment agreement in a letter dated 18 April 2007.

[76] There were two parts as I understand it to Mr McBride's criticism about the informal meeting that took place in terms of the review. The first was that there was an element of predetermination when Mr Johnston said he had first discussed the matter with Ms Munro and then confirmed the original appraisal rating would stand. The second complaint was that the meeting was used to raise a concern about PACT calls.

[77] In terms of the first matter, it would have been preferable for Mr Johnston to have approached the review by listening first to Ms Pegram, considering the performance appraisal, and then talking to Ms Munro. That said, there is no set process in the collective agreement aside from the ability to have a meeting with the appraiser's reporting manager or someone from People and Performance. I did not hear any evidence from Mr Johnston as he is no longer with Westpac and that did present some difficulties in terms of my investigation.

[78] I accept that it may have appeared to Ms Pegram that Mr Johnston approached the review with the view that the appraisal was the correct one, but I cannot be satisfied that he closed his mind absolutely to the matter because he did listen to Ms Pegram and her concerns. Even if the review process in 2007 had been other than ideal, I am not satisfied that Ms Pegram was financially disadvantaged as a result. I also note that clause 22 in the collective agreement provides that the bank agrees to

encourage employees to use the review process to ensure any disagreement is dealt with as quickly and openly as possible. I have been asked to consider a performance rating after a considerable passage of time. Mr Johnston did offer at the meeting to facilitate a meeting between Ms Pegram and Ms Munro to clear the air and get an action plan moving forward. I am not satisfied that Mr Johnston's actions in terms of the review were unjustified. If they were then I am not satisfied there was disadvantage.

[79] In terms of the second complaint, I am satisfied that FINSEC knew that the PACT call issues was to be discussed with Ms Pegram and in those circumstances I am not satisfied that it was unjustified to raise that verbally with Ms Pegram. She could not be expected to respond specifically of course because she did not have the information until later, but she was given an opportunity to do that.

[80] The first employment relationship problem is not resolved in Ms Pegram's favour.

**Was the disciplinary meeting and the outcome of the disciplinary meeting held with Ms Pegram on 15 June 2007 unjustified and, if it was, then was Ms Pegram disadvantaged in the circumstances?**

[81] On 6 June 2007, Ms Pegram was invited to attend a disciplinary meeting to discuss issues relating to PACT calls and two issues regarding loans. Another issue was raised on the day about temporary excesses.

[82] Mr McBride submits that there is a link between Ms Pegram seeking a review of her performance appraisal with Mr Johnston and the complaint being made in this regard. Ms Pegram makes the point in her written explanation which was read to the meeting on 15 June 2007 to address these issues at para.47 that:

*I would like to know why this checking process was only commenced after I requested a review of my performance appraisal. Both the claim and supporting evidence against me should have been presented at my performance appraisal and I should have been given an opportunity to demonstrate my innocence prior to the decision being made that my performance was inadequate.*

[83] To satisfy a link between these matters there would need to be evidence to support this. The issues regarding one of the loans had occurred quite some time previously, but had re-surfaced after a complaint from the customer and the bank had made a compensatory payment to the customer (letter 23 April 2007). The second

matter had occurred after the performance appraisal so could not have been said to have been justification for that or a matter that should have been raised at the time.

[84] Ms Pegram acknowledged a mistake in her first written brief of evidence with one of the loans but she then stated in her written evidence in reply, paragraph 11, that she did not agree with Ms Munro's evidence that she acknowledged errors with the loans. This appears to be on the basis that the bank accepted her explanations. The reality was that notwithstanding a mistake was made on at least one of the loans by Ms Pegram, her explanation was accepted by Westpac. There seemed to be a dispute at least from the meeting notes about the amount of compensation the bank had to pay the customer presumably in relation to the mistake. To the extent that there seems to be a suggestion that Westpac encouraged the compensation claim from its customer, I find that is a serious allegation and not made out on the evidence. I am satisfied that both loan matters could be raised with Ms Pegram. The evidence is not such to enable a conclusion to be drawn that they were done so in a discriminatory way and/or to belatedly bolster a performance appraisal rating.

[85] Ms Munro gave evidence about the background to the PACT calls and that, as part of normal checking that is undertaken for all staff, she had rung one of the numbers recorded by Ms Pegram and found it was disconnected. Ms Munro asked the team leader at that material time, Jennie Giles, to place some follow up calls in terms of other recorded calls and I accept that this was done using a carefully constructed script to avoid creating the impression that there were concerns about Ms Pegram's performance.

[86] In sharp contrast to that, Ms Pegram contacted customers and, at least on the basis of one letter, made it clear that her integrity has been called into question about whether or not a call was made. I accept that these calls did cause some concern to Ms Munro but she balanced, in my view quite fairly and reasonably, that concern with the fact that the allegations about the PACT calls were serious and that Ms Pegram was entitled to put a defence forward.

[87] The evidentiary threshold is not reached that satisfies me that the PACT call issue was raised with Ms Pegram for unjustified or malicious purposes. If the allegations, in my view, had been raised for unjustified or malicious purposes, then I consider it most unlikely that, in the main, Ms Pegram's explanations would have

been accepted. Ms Pegram wanted or was disappointed there was no apology for the PACT call allegations being made and as I understand her evidence, for the matters concerning the loans being raised. It is enough, in my view, that Ms Pegram's explanation was accepted on those matters and she was able to express her views during the meeting

[88] The main issue for me was whether there was any disciplinary outcome to the meeting that disadvantaged Ms Pegram and was unjustified.

[89] Mr Gould submits that the removal of CAL by the credit manager, which was the outcome on this occasion, for a period of three months was not a disciplinary outcome but was management prerogative. Mr Gould explained in his submissions that an employee who has breached CAL policy may well have their CAL authority removed and one breach may suffice.

[90] I agree that there may be a need for the bank to move swiftly to remove CAL from an employee and that removal of CAL is part of the management of the banks risk. Different circumstances arise and I need to look at the particular circumstances of this case.

[91] I conclude that the removal of CAL following the disciplinary meeting on 15 July 2007 can be seen as a disciplinary outcome and not simply management prerogative. I find that for the following reasons:

- It was not in dispute that CAL was a fundamental part of Ms Pegram's role because without it she needed to check her lending transactions with her manager;
- The matters of concern were discussed at the disciplinary meeting on 15 June 2007 and these included the issue of temporary excesses;
- CAL was an outcome that was discussed at a subsequent meeting on 18 June 2007 together with supervision and training.

[92] Mr McBride said that the decision to remove CAL was made by a credit manager to whom Ms Pegram did not have an opportunity to talk face-to-face. In this situation, however, the decision was made on the basis of information discussed at a meeting with Ms Pegram and her support person. Information no doubt would have

been provided by Mr Johnston to the Credit Manager on the basis that he had concluded there was a CAL breach or breaches.

[93] I am not persuaded by Mr McBride's submissions, in all the circumstances, that it was unfair or unreasonable that Ms Pegram was not heard by the credit manager. I am not satisfied on this particular occasion that I can conclude that the removal of CAL was unjustified and not what a fair and reasonable employer would do.

[94] Even if I am wrong in that matter and the removal of CAL can be said, on this occasion, to have been unjustified, then I am not satisfied that Ms Pegram established any disadvantage. Ms Pegram was away after the meeting on 18 June on either special leave or discretionary sick leave until she returned to work on 6 August 2008 on which date she sat a test and had her CAL reinstated. The test itself could not be seen as a disadvantage and when I look at the matter in the round, it seems to me that Ms Pegram asked for and got her CAL reinstated before she had suffered any disadvantage in terms of its removal. She has, in effect, received her remedy.

[95] The second employment relationship problem is not resolved in Ms Pegram's favour.

**Was the allegation of bullying by Ms Pegram about her manager, Marie Munro, dealt with in the way a fair and reasonable employer would deal with such an allegation or was Ms Pegram disadvantaged by the way the matter was investigated and/or in terms of her reintegration back into the workplace in early August 2007?**

[96] I am not satisfied that Ms Mead's investigation into the allegation of bullying was unfair or unreasonable or not the type of investigation a fair and reasonable employer would undertake given Ms Pegram's allegations.

[97] Ms Pegram contacted some of the witnesses who were interviewed prior to Ms Mead talking to them. Ms Pegram explained that she did this on the advice of FINSEC although she did contact one non-union staff member.

[98] Objectively assessed, I find there was a possibility that such behaviour could have impacted on the ability of Ms Mead to investigate the matter as impartially as possible and it was also unfair to Ms Munro. I am quite sure had Ms Munro telephoned staff in the same manner Ms Pegram would have been far from happy and justifiably so.

[99] Mr McBride submitted that the recommendations with respect to Ms Munro were not shown to Ms Pegram. Objectively assessed, I am not satisfied that it was necessary for Ms Pegram to see recommendations about Ms Munro. I do not find any concerns in that regard can be levelled at Westpac.

[100] I am satisfied the actions of Westpac in undertaking the investigation and preparing a report were fair and reasonable and that no criticism can be directed towards Westpac in terms of that report and/or the recommendations.

[101] The recommendations that came out of the review for Ms Pegram were as follows:

- *Work with People and Performance and David Johnston to discuss options going forward including;*
- *Return to current role with support and coaching;*
- *Explore possible redeployment opportunities within the Bank;*
- *Referral to a doctor identified and paid for by Westpac to assess current diagnosis, and long term prognosis. A report will be written and seen by David Johnston, Marie Johnston in P&P and Marilyn (optional) and a return to work programme agreed on;*
- *Formal referral to EAP.*

[102] Ms Pegram was not happy and did not agree attending a medical practitioner of Westpac's choice [fourth bullet point].

[103] I have set out the two meetings that were held after the report was delivered, on 27 July and 3 August 2007, in the background to this issue. There is a difference in the evidence that I need to resolve as to the outcome in terms of how Ms Munro and Ms Pegram were to communicate and raise issues. I find that Ms Munro's genuinely held view was that there were to be training meetings but that any issues would only be raised at the monthly or quarterly performance appraisal meetings to be held with Ms Munro and Mr Johnston at which Ms Pegram had the option of a support person until further notice.

[104] I accept Mr McBride's submission that there was a difficulty around Ms Pegram's attendance at a staff meeting before she resumed her employment and most likely that was as a result of miscommunication on the part of the bank. Little more turns on that it was a mistake of the nature that happens from time to time in every workplace. Aside from that, however, the evidence does not satisfy me that there were any major difficulties in Ms Pegram's relationship with Ms Munro until the time of the first monthly meeting on 28 September 2007 at which time issues were raised that formed the basis for the first formal warning that was issued on 12 October 2007.

[105] I am not satisfied that Ms Pegram has a personal grievance in terms of the investigation of her allegations of bullying or her reintegration back into the workplace after the release of the report. Westpac in my view did their best to be supportive to Ms Pegram and put considerable resource into investigating Ms Pegram's concerns about Ms Munro which I accept were concerns that some other employees shared.

**Was the process leading up to and the issue of a formal warning on 12 October 2007 and the removal of Ms Pegram's CAL for a six month period what a fair and reasonable employer would do in all the circumstances?**

[106] The first matter to be considered under this issue is whether raising concerns at the performance review meeting on 28 September 2007 was unreasonable and unfair and whether these should have been raised earlier.

[107] I have sympathy for Ms Pegram that these matters were raised in the performance meeting. I accept that she was not prepared for the allegations and they came as a shock. Nevertheless, for reasons I have set out earlier I have formed the firm view that raising them at the meeting was not an unjustified action because Ms Munro genuinely believed that it was the right forum to raise them and that there had been agreement on that.

[108] I am not satisfied that group coaching would have been the right time for these sorts of matters to have been raised. I do accept that raising the issues at the performance review meeting was not ideal, but Ms Pegram had support at the meeting and time after the meeting to prepare and answer the concerns.

[109] Mr McBride then submits that the warning that was issued to Ms Pegram was unjustified for the following reasons:

- Credit card complaints were about a longstanding practice instigated, approved and followed by Ms Munro and that there was no identification of what Ms Pegram had done wrong. Her explanation was simply not accepted.
- There was an allegation of disparity of treatment of other staff and that the formal warning was issued despite an ongoing absence of information.
- There was change in PACT calls effective from 1 October 2007.

[110] Ms Pegram was supported at the disciplinary meeting that preceded the issuing of the formal warning by Mr Troon, and Mr Cristeller from FINSEC attended the meeting by telephone. I heard considerable and detailed evidence from Ms Pegram about why she considered there was no substance to a conclusion that she had breached CAL. I am satisfied, in terms of the process, that Ms Pegram was able to give a full explanation to the claims with respect to the breaches of CAL. The nature of the concerns, as I see them, was about the extent of the investigation.

[111] Ms Pegram's explanation about PACT calls was that the policy in relation to a follow up call not being counted as a PACT call only came in after 1 October 2007 and that it had been common practice to claim the calls referred to as PACT calls and prior to that had never been questioned. This was specifically put at the meeting. Ms Munro did not accept it was common practice and was questioned about it by Ms Pegram's representatives. Ms Munro said in answer to why she knew that other staff were not recording such calls as PACT calls that she would see details of staff calls that were handed in with their statistics. I am not satisfied from the evidence that there was a change in the policy.

[112] Ms Pegram then advised that she did not accept that she had breached CAL. It seems likely that Mr Cristeller may have identified that there was a difference in both parties' views. There was then an adjournment for about 20 minutes and Mr Johnston delivered his decision that there was to be a formal warning and this was based on breach of bank policy and behaviours and concerns about Ms Pegram's decision-making.

[113] A formal written warning letter was sent to Ms Pegram on 12 October 2007 which provided that the areas for concern which were not being currently met to the required standards were:

- *Submitting inaccurate information (lending and PACT calls)*
- *Not following Bank lending policy and & making sound decisions;*
- *History of Credit Authorisation Limit (CAL) breaches.*

[114] It was set out in the letter that there was to be a performance improvement plan put in place to assist Ms Pegram improve her level of performance to the required standard. Ms Pegram's CAL had been revoked effective immediately from the date of the meeting on 12 October 2007.

[115] Mr Cristeller then emailed Mr Johnston on 16 October 2007 and advised that Ms Pegram did not accept the formal warning. Mr Cristeller summarised the two different positions in terms of the CAL breaches and asked for a copy of the policy and for the matter to be referred to a third party.

[116] Mr Johnston agreed that the matter could be referred to Senior Credit Manager Irene Page. Ms Page did not talk directly to Ms Pegram although she could have if she had wanted to. Ms Page then provided a report dated 3 November 2007 and her findings were different, in the main, to those made by Mr Johnston.

[117] The first issue raised by Ms Pegram is that she was not able to talk to Ms Page prior to her submitting her report. I find that Mr Johnston was the decision-maker and that I do not find that there is a justifiable concern on that basis.

[118] I find what was unfair with this process was that Westpac, having issued a formal warning on 12 October 2008 then, as a result of disquiet and a disagreement about policy put by Mr Cristeller, agreed to review the files on which it was alleged the CAL breaches occurred. Ms Page provided a report which found, in some situations, there were not breaches where Mr Johnston had concluded there were, but also found other matters of concern that Mr Johnston had not found. That review, having been agreed to, was not implemented or acted on in any way whatsoever.

[119] I am not able to say what would have happened if it had been. It may well have been that the warning remained on Ms Pegram's file but for different or amended reasons. The disciplinary outcome could have been modified. The purpose of a warning is to enable an employee to be clear about particular behaviours that are not suitable or be clear on performance standards that must be met and are expected to be met in the future. In light of the difference between the Page report and some of the conclusions reached at the meeting on 12 October, the behaviours or performance of Ms Pegram of concern is not clear. Ms Pegram did not have an opportunity to give an explanation to some of the new matters identified by Ms Page. I find that a failure to take the review report into consideration and implement its conclusion after hearing from Ms Pegram was unfair and unjustified. I am not satisfied though that there was discrimination against Ms Pegram by virtue of the issue brought to her attention and I do not find a personal grievance in that regard.

[120] In conclusion it was the failure to implement the agreed review, that was unjustified and it disadvantaged Ms Pegram because she did not have an opportunity to give an explanation to the new concerns identified by Ms Page and was not able to properly understand the behaviours or performance that had caused concern to the bank. Ms Pegram could not, and has not, let this warning go. Employment relationships are ongoing relationships and parties should be communicative and responsive and properly follow an agreed process through to a logical conclusion.

[121] I do not find that the actions of Westpac in terms of the review of its warning were what a fair and reasonable employer would have done in all the circumstances.

[122] Ms Pegram has a personal grievance that she was disadvantaged by the unjustified action of Westpac as set out above. I will deal with any remedies in terms of this matter at the end of my determination.

**Was the performance management of Ms Pegram, when Ms Webster was appointed to the branch, unjustified and was Ms Pegram disadvantaged as a result?**

[123] Ms Webster commenced in the role of branch manager at Motueka in December 2007. Because nothing had been implemented in terms of the October 2007 warning by way of performance improvement plan, there was a meeting between Ms Webster, Ms Pegram and Mr Troon to discuss that. Ms Pegram made it clear that she did not accept the examples in the warning were any different from

everyone else in the branch did and there was some discussion at the meeting about the benefit of moving on from that matter.

[124] Although it was submitted by Mr McBride consideration should have been given to the benefit of a clean slate rather than implementing the formal warning, I am not satisfied Ms Webster's actions in terms of meeting to discuss and implement the performance improvement plan were unjustified.

[125] On 17 April 2008, following implementation of the performance improvement plan, Ms Pegram's CAL was reinstated. I am not satisfied that there were any major concerns or difficulties until September 2008 between Ms Pegram and Ms Webster. Ms Pegram was concerned that she was continuing with the performance improvement plan but Ms Webster did not consider they would go on for ever but was concerned that Ms Pegram's performance did not show significant improvement.

[126] Ms Webster said in her written evidence that by September 2008, after a period of performance coaching from January 2008, Ms Pegram was the lowest achiever against sales targets in the Tasman region. At that point, Ms Webster said that she changed the performance improvement plan to show that if the discussed target of 60% of sales target was not achieved, then that failure would result in the commencement of a formal disciplinary process.

[127] Ms Pegram was not prepared to sign the performance improvement plan on that basis, and expressed some concern about that directly and by way of email from her partner, Mr Troon. Ms Webster said that before discussing that matter with Ms Pegram, she had obtained approval from the new area manager, Mark Hardman, who had only recently been appointed to the Tasman region. That approval is required before a more formal process is moved to in terms of performance (respondent document Z12).

[128] On 15 October 2008, Ms Pegram was asked to attend a formal disciplinary meeting because she had not achieved the required standard set out in her performance improvement plan. Ms Pegram disagreed with the fact that she had not achieved the standards required.

[129] The formal disciplinary meeting was to be held on 17 October 2008 but in fact did not take place. Mr Cristeller also emailed Ms Webster on 16 October 2008 and expressed his view that Ms Pegram had achieved a total of 62% of targets against a

performance target for September of 60% in terms of sales. Mr Cristeller asked that Westpac provide him with the following information:

*1) Target statistics for all other Customer Consultants in New Zealand over the last 12 months broken down by*

*(a region*

*(b Individual branch;*

*2) An outline of which of the Key competencies for the Westpac Customer Consultant role the bank believed that Wendy (sic) is not performing competently in and examples of how she is not achieving competently.*

[130] On 24 October 2008, before a meeting actually took place Ms Pegram advised of a workplace hazard and requested a meeting to discuss that hazard. A meeting was held on 29 October 2008 attended by Ms Pegram and her partner Mr Troon and Mr Hardman and Ms Webster. There were two separate records of that meeting provided in a letter from Paul Troon Consultancy dated 29 October 2008 and a written statement from Westpac. I have read both documents.

[131] Ultimately, the outcome proposed by Mr Troon on Ms Pegram's behalf was that the proposed disciplinary action be withdrawn and that reasonable performance measures be put in place to determine whether or not Ms Pegram was performing as a competent employee. Westpac described the outcome in its statement as the removal of a formal meeting for performance.

[132] It is common ground that there was no agreement by Westpac to put the performance management process and/or escalation of that to a formal performance management process, on hold.

[133] Ms Pegram said in her evidence that Westpac's view about the workplace hazard was dismissive. Ms Webster, in her written evidence, said that it was clear to her that Ms Pegram was attempting to avoid or delay an approach to move forward with a formal management process. Ms Webster said that given she was only ever going to continue with coaching and support but with consequences for failure to improve, she did not see how this could be hazardous to Ms Pegram's health.

[134] Ms Pegram was then placed on certified sick leave from 30 October to 21 November 2008, and at or about the same time, Mr McBride was instructed.

[135] I have considered whether the threat of formal performance management and the possibility of a disciplinary outcome is a workplace hazard and whether Westpac's actions in terms of the hazard meeting were those of a fair and reasonable employer.

[136] I do not find that advising an employee that they are not meeting performance standards and that failure to meet performance standards in the future may result in a disciplinary outcome is a workplace hazard per se or a breach of an employer's duty. Indeed many employers face criticism because they have not made it clear to their staff what the performance concerns are and that continued non-performance puts an employee's employment at risk. A performance management process has elements of stress and pressure for an employee but Westpac is entitled to manage its own business and its staff and their performance.

[137] An employer should take care though to ensure that the employee does not suffer in terms of health and wellbeing unnecessarily beyond the usual stress that arises under performance management but an employee cannot be cocooned from the requirement to achieve reasonable performance standards as required by an employer. A balance is required.

[138] As it turned out there was no meeting about performance until after mediation had taken place and Ms Pegram was back at work after sick leave and a week's annual leave in December 2008. It was clear that that meeting (18 December 2008) was not going to have a disciplinary outcome but was to put a performance improvement plan in place for the following four weeks. As at the time of determining this matter there has never been a formal warning issued for sales performance.

[139] There was confusion about Ms Pegram's performance. I find that this in all likelihood arose because the targets for sales for Ms Pegram had been set below those of other customer consultants for a period of time. The issue for Ms Webster became, after a period of coaching, that she wanted to move Ms Pegram's sales performance up to a higher consistent result. Whether or not the requirement to achieve a higher standard was unreasonable is not one that I am able to determine at this stage. I do not know whether or not Ms Pegram could meet the targets and/or what a reasonable

target would have been. I did hear evidence from FINSEC about the pressures faced by those working in the bank. There has been some correspondence that I have read between FINSEC and Mr Hardman about those issues. I accept that the work undertaken by many Bank employees is pressured and has changed over time. Westpac is entitled to set performance standards but the performance standards set may well have to stand up to later scrutiny as to reasonableness on an objective analysis.

[140] I am not satisfied that the actions of Mr Hardman were unjustified in the hazard meeting and I am further not satisfied that Ms Pegram was disadvantaged by the advice in terms of lifting performance because the matter did not move into a formal management process whereby there was a formal warning imposed.

[141] I am concerned that Westpac failed to respond to Mr Cristeller's letter in which he requested information. It did seem to me, in reflecting on matters, that perhaps other events overtook this and the request was overlooked.

[142] Another concern that Mr McBride raised was whether there could/should ever be formal performance management where an employee had not agreed to the objectives that they were required to achieve. Mr Gould says that Ms Pegram's role was, in essence, a sales role and it was the role against which the performance in terms of sales was measured as set out in the position description.

[143] The clause that Mr McBride relies on is that in the material collective employment agreement 1 August 2008 – 31 July 2009, clause 39. Clause 39 is concerned with termination due to poor performance. Clause 39.1.1 sets out following a statement that an employee can expect to be formally counselled and formally warned:

*That your current performance is below the competent standards required by the Bank; such an assessment will be made by evaluation of the employee's performance against previously agreed, written performance objectives.*

[144] As I understand Mr McBride's submission it is that an employee can never be disciplined for poor performance unless they agree to the performance objectives. Obviously from Westpac's perspective this is a very serious issue. For the purposes of this case matters did not proceed to the point where it is necessary to finally determine this issue as Ms Pegram was not formally warned about her performance in

the sales area. All I would say on the matter is that I do not necessarily agree with Mr McBride's submission about clause 39.1.1. The assessment on the face of clause 39.1.1 to be made is whether or not an employee's current performance is below the competency standards of the bank and before September 2008 there were written performance objectives agreed to by Ms Pegram.

[145] The employment relationship problem about Ms Webster's process for performance management of Ms Pegram and Westpac's conduct in terms of the hazard raised is not resolved in Ms Pegram's favour.

**Were the actions of Westpac in and around the medical certificate issued by Dr Mayer in October 2007 the actions of a fair and reasonable employer or were they unjustified and did they cause Ms Pegram disadvantage?**

[146] The actions complained of by Ms Pegram are those of Mr Gould in writing to Ms Pegram's doctor on 6 November 2008 and Mr Hardman in writing to Ms Pegram on 12 November 2008.

[147] Westpac received a medical certificate from Ms Pegram dated 31 October 2008. Mr Gould wrote to Dr Mayer on 6 November 2008 and said in his letter, amongst other matters:

*We are of the view that Marilyn has procured a medical certificate from you in order to avoid proper management of her performance at work. If you know of any reason why we should not reject the certificate you have issued to Marilyn, we would appreciate hearing from you at once. In particular we would appreciate your commentary as to the compliance of your medical certificate (or otherwise) with paragraphs 2, 3, 4, 6, 8, 10 and 12 of the Medical Council of New Zealand's guidelines for medical certification. If we do not hear from you by 3.00 pm Monday 10 November 2008, we will be contacting Marilyn directly to request her presence at work from Tuesday 11 November 2008.*

[148] Dr Mayer did not respond within the time stipulated by Mr Gould. Mr McBride is very critical of the letter sent by Mr Gould. Mr Gould submits that a bare medical certificate, as I accept, was given for this period of sickness provides an employer with no guidance for a return to work plan, suggestions or accommodation for better engagement and, in effect, achieves nothing. Ms Mayer's certificate had a ticked box that she had seen Ms Pegram on 31 October 2008 and Ms Pegram had been medically unfit for work from 30 October 2008 and should be fit to resume work on 24 November 2008. Mr Gould suggests in his submission that some guidance from the Authority would be useful.

[149] I agree with Mr Gould that it is in the best interests of both the employee and the employer for the employer to know what, if indeed any, workplace issues are impacting on the health and wellbeing of an employee. An employee, or if given consent, an employee's doctor should be encouraged to be responsive and communicative about these matters with the employer.

[150] In the first instance, however, Mr Gould's inquiry about the medical certificate and conditions therein should have been made to Ms Pegram as a request for additional information. Dr Mayer would have had to seek Ms Pegram's permission to provide anything further than that contained in the medical statement and a statement to the effect that the certificate was compliant with Medical Council guidelines would not have advanced matters, particularly in the circumstances of this case.

[151] I find that regardless of the rights and wrongs as expressed by Mr McBride, there was no response to that letter and the letter itself cannot have been seen to have disadvantaged Ms Pegram in those circumstances.

[152] The next criticism is that, having had no response from Dr Mayer, Mr Hardman, acting as he says in his evidence under the advice of Mr Gould, wrote to Ms Pegram by letter dated 12 November 2008 and said amongst other matters:

*We have not had a response from Dr Mayer. In the absence of any further information from your doctor, we have decided to reject your medical certificate. In August 2007 you were excused from work for six weeks under similar circumstances and we are of the view that this latest absence is a repeat of the same avoidance behaviour.*

*I expect you to return to work tomorrow Thursday 13 November 2008 at the usual start time.*

[153] This letter crossed with one from Mr McBride of the same date advising that he had been instructed by Ms Pegram in relation to her employment situation and existing personal grievances. Mr McBride raised a grievance in relation to the sales performance issue and suggested mediation. I accept that these letters crossed with each other and it cannot be said Mr Hardman wrote to Ms Pegram with knowledge that Mr McBride had been instructed.

[154] Ms Pegram, I accept, was very upset to receive Mr Hardman's letter and promptly talked to Mr McBride about it. Mr McBride wrote firmly back to Mr Hardman by letter dated 13 November 2008 and noted, amongst other matters:

*It is fair to say that if your letter reflects the approach that Westpac has taken to our client to date, it is scarcely surprising that her medical practitioner has certified her unfit for work.*

[155] Mr McBride made it quite clear that Ms Pegram would not be returning to work on 13 November 2008 but on the date set out in her medical certificate.

[156] Mr McBride did suggest that questions from Ms Pegram's doctor could be provided and they would be forwarded on by him.

[157] Mr Gould duly wrote to Mr McBride in accordance with his letter asking that questions be submitted to Dr Mayer and Dr Mayer did respond to some of those questions, although was specifically instructed not to respond to others.

[158] I find that the letter from Mr Hardman requesting Ms Pegram return to work on 13 November 2008 when there was a medical certificate excusing her until 24 November 2008 was unjustified. Ms Pegram, on certified sick leave at the time, gave evidence that she felt very stressed and had to, as a matter of urgency, contact her solicitor, Mr McBride, so that he could deal with the matter. I do note that the matter appeared to have been taken as a serious request by Mr McBride because he suggested that such an instruction was neither lawful nor reasonable and raised a dispute about it. Fortunately for Ms Pegram, her stress was short lived and she was able to return to work in accordance with her medical certificate because Westpac did not pursue the matter any further.

[159] I conclude that Ms Pegram has a personal grievance that she was unjustifiably disadvantaged by the letter from Westpac rejecting her medical certificate and demanding her return to work. I shall address remedies in terms of this matter at the end of my determination.

### **Final written warning**

[160] On 21 January 2009, Ms Pegram was given a final formal warning in relation to a breach of Westpac's code of conduct in that she did not follow appropriate procedures in a lending transaction. Westpac concluded that Ms Pegram approved a loan that was clearly managed by a relationship manager to whom she should have referred the loan, failed to enter accurate information to NZLO and failed to bring the matter to her branch manager, Ms Webster's attention.

[161] The specific areas of the code of conduct set out in the warning were that Ms Pegram was required to comply with Westpac Group's internal standards, to meet ethical, legal and regulatory obligations and minimise risks to the branch and the Westpac Group and that she understood and acted within her authority.

[162] Mr McBride submits that the final warning was unjustified for several reasons. One of the reasons was that Ms Pegram maintained she had in fact brought the matter to Ms Webster's attention on the day that it occurred. He submitted that it was not appropriate for her to be the sole decision-maker or indeed a participant in the disciplinary process. Secondly, Mr McBride submits that after the investigation meeting on 19 January 2009, Ms Webster and Mr Hardman who also attended the meeting indicated they would be undertaking further investigations and that the outcome of those investigations were not disclosed to Ms Pegram. Finally, Mr McBride submits that the breach, relying on some other employees' evidence, was an every day matter on which it is unlikely a warning, let alone a final warning, would be given.

[163] On 20 January 2009, after the disciplinary meeting, Ms Pegram was placed on medical leave and the final warning, when issued, was sent by letter to her home. Ms Pegram did not return to work following the receipt of that final warning.

[164] At the investigation meeting, I was handed a copy of an electronic printout concerning this particular loan and details that were entered onto the computer at the time. Of particular significance was that it appeared on the face of the documents that the particular transaction was submitted at 2.16pm which appeared to be inconsistent with Ms Pegram's evidence that she discussed her error with Mr Troon during her lunch break and was to talk to Ms Webster after lunch. That would also seem inconsistent with the written explanation dated 19 January 2009 which suggested there was a meeting with the customer in the morning and then an immediate realisation, as the customer left the branch, that the customer was relationship managed and should have been referred to that relationship manager.

[165] I accept this matter was not put to Ms Pegram at the disciplinary meeting on 19 January 2009 and that the documents were produced to the Authority when Ms Webster was giving her evidence. Ms Pegram, through Mr McBride in final submissions, states that in essence the time of 2.16pm relied on does not indicate initial entry into the computer system but completion of the loading process, part of

which includes verification from the Credit Centre. I accept that the document does not necessarily support when the transaction was first undertaken.

[166] I turn to the first issue as to whether it was appropriate for Ms Webster to be the decision-maker. There are occasions where it is inappropriate for a person with actual knowledge of the events to be a decision maker in a disciplinary process. There are also occasions when it is simply not practical for somebody with actual knowledge of the events to stand aside. That cannot be said to have been the situation here because Mr Hardman was also present at the disciplinary meeting. Ms Webster was the obvious person with the knowledge as to whether or not Ms Pegram raised with her that she had approved lending for a relationship managed client on the day the lending took place. Ms Webster says that she is 100% certain that this did not happen and that she learned about it when she received a call from the relationship manager the following day who was very concerned. Ms Webster said that was when she raised the matter with Ms Pegram, the day after it happened. That is, Ms Pegram did not raise it with her first.

[167] Ms Pegram does recall Ms Webster talking to her about that after she had received a call from the relationship manager. Having considered the sequence of events I consider it less likely had Ms Pegram advised Ms Webster the day she met with the customer that Ms Webster would have needed to talk to her again after receiving a call from the relationship manager the following day. Mr Hardman said in his evidence that as a participant in the disciplinary meeting he accepted Ms Webster's version of events and I am not persuaded in all the circumstances that having Ms Webster as a decision maker was unfair or unreasonable and not what a fair and reasonable employer would have done.

[168] The next issue is whether or not there were further investigations as a result of which required further information was required to be put to Ms Pegram. I accept that Ms Pegram understood there were to be some further investigations. I am not satisfied that they produced any further information in the circumstances of this case that was required to be put to Ms Pegram. It seemed to me that, on the face of the matter, Ms Pegram accepted that she had omitted to notice that the customer had a relationship manager and that there were some mitigating circumstances that she had had an opportunity to put forward. I accept that Ms Webster took those matters into consideration. Finally, having heard all the evidence, I am not satisfied that the

breach was an everyday matter to staff. In fact it seemed to me that in the ordinary course of events Westpac was entitled to have confidence that Ms Pegram, an experienced staff member would pick up from the screen that this was a client managed by a relationship manager otherwise what would the point be of having the details on screen.

[169] I now consider the disciplinary outcome and whether a fair and reasonable employer would have imposed a final formal warning. Ms Webster said that she took into account that Ms Pegram had previously dealt with the customers when they were not relationship managed and that she felt she was providing a good customer experience by completing the loan application promptly. She said though that someone of Ms Pegram's experience should not have missed the notes in red on the screen that the customer was relationship managed. Ms Webster also felt that Ms Pegram minimised her behaviour by saying that she had quickly acted to remedy her mistake by talking to Ms Webster but that she had not done so. Ms Webster also said that Ms Pegram had had her CAL removed for breaching lending protocol. Westpac has a formal disciplinary process policy for managers to follow.

[170] Whether or not there has been a previous warning for similar misconduct is a relevant consideration within that formal disciplinary process document. I accept that Ms Webster could take into account that there had been one because at the time that Ms Webster made her decision the warning was still in place. A fair and reasonable employer would also consider the period that had elapsed since that warning which was about 15 months. Ms Pegram had not had any CAL breaches dealt with since that time requiring to be dealt with in a formal disciplinary manner. Ms Pegram did advise the relationship manager on the day that she saw the customer about her error. I accept that a fair and reasonable employer would have imposed a warning. Taking into account the period of time since the earlier warning and the requirement in the disciplinary process to consider whether a lesser disciplinary action would suffice I find that a fair and reasonable employer would have imposed a formal warning and not a final warning.

[171] I find in conclusion that the final formal warning was unjustified and that a fair and reasonable employer would have imposed a formal warning. The imposition of a final warning did disadvantage Ms Pegram because it made her employment less secure. In terms of a remedy I have found that a warning would still have been given

by a fair and reasonable employer but not a final warning. The remedy I find appropriate is that the final warning is to be replaced by a formal warning. In all the circumstances I am not minded to make a compensatory award.

[172] For completeness I am not satisfied that a personal grievance arises by virtue of the delivery of the final warning to Ms Pegram by post whilst she was on sick leave.

### **Remedies**

[173] I have found three personal grievances. I have determined a remedy in terms of the final warning which leaves the grievance in term of the review of the first formal warning and the grievance in terms of correspondence to Ms Pegram whilst she was on sick leave.

[174] I am not satisfied in terms of the grievances I have found that there were breaches on the part of Westpac so that Ms Pegram should be compensated for lost remuneration whilst away from work for reason of sickness. I am further not satisfied from the evidence that if the personal grievance had not arisen Ms Pegram would have been entitled to any benefits that she has not received by way of loss of bonus/performance payments or that she should be reimbursed for medical or travel costs.

[175] I am not satisfied that Ms Pegram should be reinstated with her sick leave entitlement because I do not find that but for the personal grievances Ms Pegram would still have sick leave. I would ask Westpac however to consider whether the discretionary sick leave taken from 30 July 2007 to 3 August 2007 of five days should have been special leave. Ms Pegram will have her usual sick leave entitlement on her anniversary date. I do record that Westpac granted Ms Pegram special paid leave for several weeks whilst the Mead investigation was undertaken and paid for a number of EAP sessions.

[176] The first warning dated 12 October 2007 is to be removed from Ms Pegram's file and the final warning dated 21 January 2009 is to be changed to a first formal warning.

[177] I am required to consider whether Ms Pegram contributed to her personal grievances by virtue of her conduct. Mr Gould relies on Ms Pegram's behaviour in

contacting customers directly in terms of the PACT calls, contacting various interviewees on the evening before their interviews with Ms Mead and after becoming aware in a brief of evidence that Ms Webster said another employee had also had a performance improvement plan telephoning that employee to confirm the accuracy of the evidence.

[178] I am not satisfied that those behaviours contributed to the personal grievances I have found being the failure to implement an agreed to review report in terms of the first formal warning and the letter to Ms Pegram whilst she was on sick leave demanding her return to work. I have already dealt with the remedy in terms of the grievance with respect to the final written warning. My view is that Ms Pegram should take care in involving customers in issues she has with her employer in the future. The evidence supports that Ms Pegram has very good relationship with customers. That is one of her strengths. Customers however are unaware of the banks policies and processes and their views on customer service are not relevant to whether or not there had been a breach of bank policy. That is a matter between Ms Pegram and her employer.

[179] I accept that Ms Pegram felt that the situation involving her first written warning was unfair. In my view a process to deal with the Page report would have dealt with some of the issues and have give Ms Pegram a proper opportunity to give her explanation to the new matter raised by Ms Page. I am not satisfied that the warning would still not have been imposed but at least Ms Pegram would have seen the process properly followed through. I accept that Ms Pegram was distressed to receive a letter from Mr Hardman whilst on sick leave demanding that she return to work and not accepting the her sickness was genuine. I take into account that Ms Pegram did not act on the letter and remained on sick leave and any stress given Mr McBride's intervention was short lived. I intend to make a global award for these grievances in terms of compensation and am of the view that a fair and reasonable global award for compensation is the sum of \$4000.

I order Westpac New Zealand Limited to pay to Marilyn Pegram the sum of \$4000 without deduction under section 123 (1)(c)(i) of the Employment Relations Act 2000.

The parties should consider involving a third party such as a mediator to discuss return to work issues for Ms Pegram. Ms Webster has made it clear in her written

evidence that she remains committed to assisting Ms Pegram to achieve. She says though that Ms Pegram needs to buy into the process.

**Costs**

I reserve the issue of costs. Mr McBride has until 15 September to lodge and serve submissions and Mr Gould has until 6 October to lodge and serve submissions in reply.

Helen Doyle  
Member of the Employment Relations Authority