

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2020] NZERA 79  
3049432

BETWEEN

DIANE ANDERSON  
Applicant

AND

PINEHAVEN COTTAGE  
LIMITED  
Respondent

Member of Authority: Nicola Craig

Representatives: Simon Greening, counsel for the applicant  
Jessie Laphorne, counsel for the respondent

Investigation Meeting: 5 August 2019

Submissions and further information received: 9 August 2019 from the applicant  
7 and 16 August and 19 November 2019 from the respondent

Date of Determination: 20 February 2020

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**DETERMINATION OF THE AUTHORITY**

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- A. Diane Anderson was disadvantaged by the refusal of Pinehaven Cottage Limited (Pinehaven) to support her to complete a Level 4 qualification, as provided in a training agreement which the parties had entered into.**
- B. Pinehaven is to pay Ms Anderson \$2,149.00 gross as lost wages as a remedy for that grievance, within 28 days of the date of this determination.**

- C. Ms Anderson was disadvantaged by Pinehaven's failure on occasions to provide her with the minimum weekly hours of work in her employment agreement.**
- D. Pinehaven is to pay Ms Anderson \$598.50 gross as lost wages as a remedy for that grievance, within 28 days of the date of this determination.**
- E. In addition, in relation to both grievances, Pinehaven is to pay Ms Anderson the sum of \$4,000 compensation for non-economic loss.**
- F. Pinehaven was entitled to change Ms Anderson's days of work but only after consultation with her. It did not consult her. Pinehaven is to pay a penalty of \$1,500 for breaching the duty of good faith to Ms Anderson, within 28 days of the date of this determination.**
- G. Costs are reserved and a timetable set in the event that the parties are not able to resolve that matter.**

### **Employment relationship problem**

[1] Diane Anderson works as a caregiver at Pinehaven Cottage<sup>1</sup>, a rest home and dementia unit. Ms Anderson began working there in January 2014 and continued to do so after the current owners took over. The facility is operated by Pinehaven Cottage Ltd (Pinehaven or the company), which is owned by two of the managers, Rose Shackleton and Fiona Mann, along with other family members.

[2] From 2016 Ms Anderson has been studying towards a degree in social work and Pinehaven has allowed her time off to study and undertake practicum components of the course. She saw the degree as relevant to her work at Pinehaven although it was not a qualification required for her role.

[3] Two chains of issues run through Ms Anderson's claims; failure of support with other education and changes to her hours of work.

[4] Put broadly, Ms Anderson objects to Pinehaven's lack of support with a level 4 qualification as referred to in the Care and Support Workers (Pay Equity) Settlement Act (CSW Act) 2017. She also claims that Pinehaven did not meet its obligations about

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<sup>1</sup> Earlier known as Pinehaven Lodge.

the total number of hours of work and her days of work. Pinehaven responds that it has done what is fair and reasonable and what it is entitled to do.

[5] After the claim was filed the parties were directed to attend further mediation. An investigation meeting date was set but due to difficulties with availability for mediation, the investigation meeting date was adjourned.

[6] An investigation meeting was held on 5 August 2019. I heard evidence from Ms Anderson, Ms Shackleton and Ms Mann. Additional information and submissions were subsequently received.

[7] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded everything received but has stated findings, expressed conclusions and specified orders made as a result.

### **Issues**

[8] There were some complications with the claims in this matter. The statement of problem identified the following as the matters which Ms Anderson wished to be resolved:

- (i) unjustified disadvantage, relying on s 15 of the CSW Act regarding Pinehaven not taking all reasonable and practicable steps to ensure Ms Anderson completed a level 4 qualification;
- (ii) breach of the employment agreement (as set out in the training agreement) by not supporting Ms Anderson to complete level 4;
- (iii) unjustified disadvantage in not providing Ms Anderson her minimum guaranteed hours of work;
- (iv) breach of the duty of good faith regarding failure to consult before changing shift patterns; and
- (v) breach of the employment agreement regarding not offering guaranteed hours of work as set out in the agreement.<sup>2</sup>

[9] It is evident that there may be some overlap between those claims.

[10] On Sunday 4 August 2019, the day before the investigation meeting day, Ms Anderson's representative emailed the Authority and the Pinehaven's representative

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<sup>2</sup> Clause 1 of the statement of problem.

identifying an error. The disadvantage claim (presumably claim (iii) above) was said not relate to the guaranteed hours of work. Instead it was said to relate to Ms Anderson not being consulted regarding the shift changes. The good faith claim regarding consultation was maintained.

[11] I took this to mean that the disadvantage claim (iii) was no longer being pursued; effectively there was no argument that the days of work could not be changed but there was about the consultation in relation to that change. However, at the start of the investigation meeting Ms Anderson's claim was said to include disadvantage and good faith claims regarding a failure to consult about hours changing plus a claim for breach of the employment agreement about not providing work on set afternoon shifts on Monday and Tuesday. The claim about not providing minimum hours of work was also still being pursued.

[12] For the sake of clarity I note that there was an email referring to another personal grievance filed in the common bundle of documents. Ms Anderson raised another grievance claim with Pinehaven by way of email of 5 July 2017 regarding being required to work more than others in the dementia unit but this was not pursued in the current proceeding.

### **Preliminary Issues**

[13] Pinehaven raised some preliminary issues which could affect which claims Ms Anderson is permitted to pursue.

[14] The company objected to the inclusion of a disadvantage claim regarding the change in the days of work. It also challenged whether Ms Anderson had raised in time<sup>3</sup> the disadvantage claim regarding minimum guaranteed hours of work, as Ms Anderson accepted it was not raised prior to filing her statement of problem. Alternatively, Pinehaven claimed the claim had been withdrawn by the email of 4 August 2019.

[15] The Authority is not focused on formalities but natural justice requires that the responding party knows what it is dealing with. In addition section 114 of the Act requires grievances to be raised in time or leave to be sought to raise out of time.

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<sup>3</sup> S 114 of the Act.

[16] I will deal with each of the issues under the headings for the claims themselves.

#### **Level 4 qualification**

##### *Events*

[17] I turn now to the first of Ms Anderson's claims. Before looking at the two claims relating to the qualification, I set out what happened between the parties.

[18] Ms Anderson was keen to undertake the level 4 Certificate in Health and Wellbeing. From her social work study, it is clear that Ms Anderson is both eager to undertake further education and capable of achieving it. The CSW Act requires employers to provide support for care and support workers to attain qualifications.<sup>4</sup> That Act sets out pay rates over the next few years which are based on both length of service and qualifications held, with level 4 being the top qualification on a pay scale.<sup>5</sup>

[19] Ms Anderson approached Ms Shackleton about undertaking level 4. She understood from the website of the relevant industry training organisation (ITO) that level 4 was for senior caregivers who work in dementia or palliative care and thus it covered her. She needed to get her prior learning assessed to know how many credits she had towards the qualification.

[20] Other Pinehaven staff were completing dementia unit standards that were part of a limited credit programme, as well as being part of the level 4 requirements. However, the dementia credits of themselves did not attract additional payment under the CSW Act. Ms Shackleton was already an assessor for dementia credits under the ITO.

[21] Ms Anderson asked Ms Shackleton whether she was able to assess other level 4 units she might need or whether Ms Anderson would need to get an independent assessor for those. Ms Anderson did not get a definite response. Ms Anderson reported phoning a workplace advisor from the ITO who said she knew Ms Shackleton and could train her to assess Ms Anderson for the other units she needed.

[22] On 28 November 2017 Ms Anderson provided the level 4 training agreement to Ms Shackleton, along with identity documentation required to be attached. Ms

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<sup>4</sup> S 4(b) of the CSW Act.

<sup>5</sup> Schedule 2 of the CSW Act.

Shackleton completed and signed the agreement that day. She also told Ms Anderson that the latter had not provided one of the identity documents needed. Ms Anderson signed the agreement. More detail on the training agreement is set out below.

[23] Ms Shackleton confirmed that she had received an email from the ITO workplace advisor. Ms Anderson asked Ms Shackleton in December 2017 and early January 2018 for time for them together to go over the unit standards to begin the work required on the qualification.

[24] On 30 January 2018 Ms Anderson asked for a third time and was told that another one of the owners was checking on Pinehaven's obligations regarding the training with an ITO representative.

[25] On 9 February Ms Shackleton met with two ITO representatives. It was not clear that any notes were taken of this meeting.

[26] At a meeting on 22 February 2018 Ms Shackleton advised Ms Anderson that Pinehaven had decided not to support her to attain the qualification. This was on the basis of the company not needing caregivers to have level 4.

[27] Ms Anderson has not completed the level 4 qualification. Pinehaven offered her (and other staff) the prospect of completing the level 3 qualification. Ms Anderson chose not to do so.

[28] Since the investigation meeting Pinehaven has decided to change its education provider to assist its caregivers to obtain level 3 and 4 qualifications.

#### *Disadvantage claim regarding the CSW Act*

[29] Ms Anderson's grievance as claimed is focused on Pinehaven's obligations under the CSW Act with an additional claim that the company breached the training agreement. However, I see the two as intertwined with Pinehaven having obligations under the CSW Act as well as under the training agreement,

[30] The CSW Act implements the settlement of pay equity claims for care and support workers, establishing minimum pay rates for certain periods. Employers are obliged to assist workers and receive additional funding for that. Section 12 of that Act specifies:

- (1) An employer must take all reasonably practicable steps to ensure that a care and support worker is able to attain:
  - (a) A level 2 qualification within the first 12 months of the worker's continuous employment with the employer; and
  - (b) A level 3 qualification within the first 36 months of the worker's continuous employment with the employer; and
  - (c) A level 4 qualification within the first 72 months of the worker's continuous employment with the employer. (*emphasis added*)
- (2) If a care and support worker is not able to attain a qualification within the time required by subsection (1), the employer must take all reasonably practicable steps to ensure that the worker is able to attain the qualification as soon as is reasonably practicable.

[31] The employer's declaration and signature provision in the training agreement includes the following confirmation:

You have read and agree to the terms listed in this training agreement and the responsibilities listed below.

I am responsible for providing support to the trainee and agree that:

...I will provide workplace support to the trainee of a type and level appropriate to the nature and scope of this training.

[32] Ms Shackleton says that she signed the agreement as part of an exploration process as to whether she could extend her scope as an assessor to cover people undertaking the level 4 qualification. Ms Shackleton also wrote her name in the training agreement as the assessor<sup>6</sup>. She now says this was an error. At that point she could only assist the dementia units in level 4.

[33] I found the exploratory suggestion to be an unusual approach, particularly for someone who described herself as very familiar with training agreements. The training agreement is a seven page document with numerous parts to make entries in as well as advisory boxes. It has almost a page for the declarations and signatures. This is not on its face a light commitment. Why any exploration could not be done before signing the agreement was not clear.

[34] In addition, any exploratory aspect was not emphasised to Ms Anderson who not surprisingly understood that signing the training agreement meant that Pinehaven had committed to her undertaking the training.

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<sup>6</sup> Section J of the training agreement.

[35] It is agreed that Pinehaven did not offer Ms Anderson support towards the level 4 qualification. That was disadvantageous to her financially as she was unable to achieve the higher pay rates set out in the CSW Act. The question is whether Pinehaven's action was unjustified.

[36] Pinehaven suggests that it did not need people with level 4 in its workplace. I am not satisfied that that explanation of itself justified the failure to assist Ms Anderson. The intention of Parliament was clearly for care and support workers to gain additional education. There is no provision in the Act specifically for only some types of education to be made available at some types or sizes of facilities.

[37] What there is, is a requirement on employers to take all reasonably practicable steps to assist. I accept Pinehaven's submission that something being available does not make that step necessarily reasonably practicable. Availability and cost are factors.<sup>7</sup>

[38] The state of the evidence regarding the practicality of supporting Ms Anderson was somewhat unsatisfactory.

[39] Ms Shackleton says she understood the ITO to be saying that the level 4 qualification could not be obtained at Pinehaven because there was a minimum of 15 credits to demonstrate leadership and there was no formally allocated senior caregiver role. However, at another point in her evidence Ms Shackleton indicated that the ITO representative advised her that it would be "tricky" or "very difficult" for Ms Anderson to achieve the qualification in the Pinehaven workplace environment. Further, whether Pinehaven could provide the workplace environment was "not conclusive".

[40] Later attempts by Pinehaven to get confirmation from the ITO regarding its position or the advice it gave evidence to Pinehaven regarding level 4 were unsuccessful. My conclusion is that the ITO was not categorically saying that level 4 could not be undertaken at Pinehaven.

[41] The problems appeared to be whether Ms Anderson could complete the necessary leadership components in the workplace and who would be her assessor.

[42] The ITO's credit sheet for the qualification suggests that Ms Anderson could have undertaken a theory component regarding leadership, peer mentoring (theory and

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<sup>7</sup> *Asure New Zealand Ltd v New Zealand Public Service Association* [2005] ERNZ 789.

practice) and self-reflection (theory and practice) to earn enough credits to complete the qualification. She would not have then needed components of ‘demonstrate leadership’ and ‘lead a team’, which were more problematic as there were no senior caregiver roles at Pinehaven.

[43] Ms Shackleton accepted that Ms Anderson could have undertaken informal mentoring and buddying, information provision and possibly contributed to organisational improvement. Although there was no formal peer mentoring process in place at Pinehaven it was not evident that one could not be put in place without much difficulty.

[44] As regards who would be Ms Anderson’s assessor, there was the prospect of Ms Shackleton becoming trained by the ITO to be a level 4 assessor, extending her dementia assessment skills. There was little evidence available regarding the time or any cost involved in that. Alternatively an external assessor could have been brought in, either at Pinehaven’s or Ms Anderson’s expense, to assess those aspects which Ms Shackleton was not already able to assess. Again the cost of this was not evident.

[45] The evidence is finely balanced but ultimately I am not satisfied that Pinehaven has established that it was not reasonably practicable for Ms Anderson to undertake the Level 4 qualification whilst an employee there.

[46] Pinehaven emphasised that its obligation under the CSW Act is to support the attaining of the qualification within six years<sup>8</sup>. However, having signed the training agreement Pinehaven had committed to supporting Ms Anderson and to turn around over the next few months and decide not to do so was unjustified.

[47] Although Ms Shackleton indicated that she saw signing the training agreement as supporting Ms Anderson to “explore options”, I am not satisfied that options were sufficiently explored. Rather the company had a discussion with ITO representatives without Ms Anderson present and made a decision that it did not need level 4 staff and Ms Anderson would not be supported. Rather it told her that she should do level 3.

[48] Under s 15 of the CSW Act an employer’s failure to comply with its obligations under s 12 of that Act constitutes grounds for a personal grievance of disadvantage due to unjustified action.

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<sup>8</sup> S 12(1)(c) of the CSW Act.

[49] Pinehaven acted unjustifiably by refusing to undertake its obligations under the training agreement and failing to take all reasonably practicable steps to ensure that Ms Anderson could attain the level 4 qualification.

*Remedies regarding that grievance*

[50] Ms Anderson seeks the sum of \$3,313.38 being the difference between the minimum hourly wage for a level 4 qualified worker as per Schedule 2 of the CSW Act and what she was actually paid for the relevant time.

[51] This relies on Ms Anderson completing the qualification by March 2018. Had Ms Shackleton been able in late 2017 to be the assessor that appears a reasonable timeframe. However, she was not and either she had to be trained as an assessor at that level or an external assessor would have been needed. There was little evidence on how long either of those things would have taken. I take into account the likely difficulties of either occurring over the holiday period.

[52] I consider that a fair approach would be allow three extra months for Ms Anderson to be trained or an external assessor to be identified and then either to undertake the requirements. I will therefore consider Ms Anderson's claim from the start of June 2018. Ms Anderson claims for some months after the investigation meeting as future lost wages. Her claim finishes at 19 January 2020 as that is when she should be advised of her completion of her social work qualification. That qualification will entitled her to the level 4 pay rate.

[53] I am satisfied that Ms Anderson has lost wages and was likely to continue to do so until January 2020. However, I have taken into account Ms Anderson's decision not to proceed to level 3, which was offered to her by Pinehaven. This could be seen as a matter of failure to mitigate or of contribution by Ms Anderson. My impression is that she was annoyed at the company's refusal to proceed with level 4 so decided not to undertake level 3 even though this would have provided her with a pay increase under the CSW Act.

[54] I have therefore calculated the lost wages as follows:

$$\text{Paydays between 10.6.18 and 8.7.18} - 54 \text{ hours at } \$2.50^9 = \$135$$

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<sup>9</sup> \$23.50 - \$21.00

Paydays to 7.7.19 – 667 hours at \$2<sup>10</sup> = \$1,334

Paydays to 21.7.19 – 24 hours at \$2.50<sup>11</sup> = \$60

Paydays to 19.1.20 - 248 hours at \$2.50<sup>12</sup> = \$620

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TOTAL \$2,149.00

[55] I order Pinehaven to pay Ms Anderson the sum of \$2,149.00 gross as lost wages within 28 days of the date of this determination.

[56] Ms Anderson seeks compensation under s 123(1)(c)(i) of the Act. However, her evidence regarding the effects of various personal grievances is somewhat intermingled, so I consider it appropriate to globalise this compensation as discussed below.

*Breach of training agreement*

[57] The training agreement refers to s 3 of the Industry Training Act 1992 and clearly states that:

It forms part of the employment ... agreement between the employer and the trainee...  
valid if you remain in employment ... with your employer.

[58] For Ms Anderson a \$2,000 penalty is sought for breach of the training agreement and thus her employment agreement. Penalties are discretionary and I must assess whether this is an appropriate case for a penalty. I have already taken the training agreement into account in my consideration of whether Ms Anderson has a personal grievance claim. Having found that she has, I awarded her remedies for that. The CSW Act is relatively new legislation. Pinehaven attempted to seek advice before making its decision.

[59] Taking all those things into account I conclude that this is not an appropriate case for a penalty.

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<sup>10</sup> \$24.30 - \$22.50

<sup>11</sup> \$22.50 - \$23.00

<sup>12</sup> \$25.50 – \$23.00

### **Minimum guaranteed hours**

[60] Ms Anderson's employment agreement provides in clause 7.2 for her to work 16 hours per week. I accept the submissions for Ms Anderson that the employee being required to work 16 hours means the employer is required to provide 16 hours' work.

[61] Pinehaven did not provide Ms Anderson 16 hours of work on several occasions from September 2018 onwards. This is a breach of Ms Anderson's employment agreement with the company.

[62] Ms Shackleton admitted that it was an oversight that the roster on occasions did not provide for the 16 hours mentioned in the agreement. Once Pinehaven became aware of the issue when the statement of problem was filed, it made arrangements to ensure it gave Ms Anderson 16 hours of work a week.

### *Raising of the grievance*

[63] The claim is that Ms Anderson was disadvantaged by not being offered the minimum hours relates to a period from 28 September to 24 November 2018. Pinehaven submits that that grievance was not raised within 90 days as required by s 114 of the Act.

[64] Ms Anderson's grievance letter of 17 September 2018 concerns changes to her shift days and predates the period covered in this claim, so it cannot raise the minimum hours' grievance. However, the statement of problem was received by the Authority on 19 December 2018 and by Pinehaven on 21 December 2018.

[65] The grievance was therefore raised, via the statement of problem being served on Pinehaven, within 90 days of the day it began occurring. In any event, there are other grounds to allow this grievance to be pursued. The statement in reply responds substantively to this grievance and does not mention a 90-day issue. Pinehaven subsequently went to mediation regarding Ms Anderson's claims without noting any 90 day objection. It consented to this grievance being raised out of time.<sup>13</sup>

[66] Although I accept it appeared this claim had been withdrawn the day before the investigation meeting, it was clearly established at the start of the meeting that that Ms Anderson wished to pursue the claim. Witness statements and documents had

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<sup>13</sup> S 114(1) of the Act.

previously been filed on the basis that it was a live claim. In those circumstances Ms Anderson is able to pursue this grievance.

*Disadvantage by unjustified action*

[67] The employment agreement required Pinehaven to offer 16 hours of work a week. When it did not do so this was to Ms Anderson's disadvantage as she was without wages she would otherwise have earned.

[68] I have considered whether what had been a somewhat relaxed arrangement regarding hours might have justified Pinehaven's actions. However, by this point in time, according to text evidence, Pinehaven was requiring Ms Anderson to apply for leave without pay or annual leave if she was unable to undertake one of the shifts she was rostered for. I am not satisfied that Pinehaven's failure to offer the 16 hours was justified at this time. Ms Anderson has thus established her disadvantage grievance.

[69] The lost wages claim for this grievance totalled 28.5 hours. At the then pay rate of \$21.00 per hour gross, this totals \$598.50 gross.

[70] I have considered whether Ms Anderson contributed to the situation giving rise to her grievance. Pinehaven suggested that Ms Anderson contributed by failing to bring her concerns to the company earlier. I am not satisfied that Ms Anderson was aware that she was being offered less than her minimum hours until around the timing of the statement of problem being filed. Ms Anderson raised other grievances with Pinehaven and I can see no reason why she would not have raised this issue had she been aware of it.

[71] Pinehaven also referred to Ms Anderson's insistence on working two consecutive days when that was not a condition of employment. This issue was not much explored at the investigation meeting. The staff member who undertook rostering messaged Ms Anderson in July 2018 noting that according to Ms Anderson's contract she had been promised two consecutive days. The basis for that belief is not clear. I do not have sufficient basis to conclude that Ms Anderson's behaviour in this regard was blameworthy.

[72] I order Pinehaven to pay Ms Anderson within 21 days of the date of this determination the sum of \$598.50 gross as lost wages.

[73] As regards compensation for the emotional effects of this grievance, it is difficult to distinguish this from other events, so I globalise the compensation award.

#### *Breach of employment agreement*

[74] This issue was also pursued as a breach of employment agreement claim. I have already found there was a breach but that is captured in the disadvantage grievance so I do not consider it necessary to consider this separately as another claim. Ordering a penalty be paid would amount to double dipping, which is to be avoided.<sup>14</sup>

#### **Days of work**

##### *Factual background*

[75] Ms Anderson claims that she was entitled to work set shifts on Monday and Tuesday afternoons. Pinehaven says she is not entitled to fixed shifts and also objects to the claim on the basis of s 69AAK of the Act.

[76] In 2014 the job advertisement specified three days a week, without mentioning particular days. Ms Anderson's work patterns have varied somewhat over time. When first employed she agreed to work Friday, Saturday and Sunday afternoon shifts. After about six weeks she was asked if she wanted to work on Monday afternoons as well, which she agreed to.

[77] In 2015 Ms Anderson agreed to work Monday to Thursday afternoons. In order to undertake study in 2016 Ms Anderson sought to reduce her hours. Pinehaven decided to hire another staff member who would effectively job share Ms Anderson's previous total shifts with her. Ms Anderson picked Monday and Tuesday to work. The discussions regarding hours at point had occurred with a manager who no longer works at Pinehaven.

[78] By way of letter dated 18 July 2016 Pinehaven offered Ms Anderson part time employment and a new employment agreement. Although not entirely clear this may have been as a result of the dementia unit being opened.

[79] From early May 2018 Ms Anderson went on extended study leave for eight weeks. By letter of 21 June 2018 Ms Shackleton informed Ms Anderson that shifts had

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<sup>14</sup> *Xu v McIntosh* [2004] ERNZ 448

been moved to accommodate her absence, other staff requirements and new staff. From Ms Anderson's return to work from leave on 2 July, she was to work Friday and Saturday afternoons.

*Contractual claim*

[80] Ms Anderson's claim is that she is contractually entitled to work Mondays and Tuesdays. Her basis for claiming this was not entirely straightforward. She accepted that there was no entitlement in her employment agreement document nor had there been any correspondence setting out that entitlement. At one point she described this as a verbal agreement, at another as custom and practice. However, she also accepted that legally Pinehaven had the ability to vary her shifts.

[81] Ms Anderson faces the difficulty with asserting a verbal agreement, or a custom and practice claim that clause 7.2 specifies:

Your hours and days of work shall be set by the Employer in advance in accordance with a roster. You will be required to work 16 hours per week within the business' normal hours of operation, plus any additional hours which are reasonable necessary to fulfil the requirements of your duties, or as reasonably necessary to fulfil the requirements of your duties, or as reasonably required by the Employer.

[82] The agreement also provided at clause 27 that the contents constitute the entire agreement between the employee and the employer, with previous agreements, understanding and negotiations ceasing to have effect.

[83] In addition, Ms Anderson's behaviour afterwards was not consistent with her believing that she had an entitlement to work those days. At around the time the new shifts were being introduced, Ms Anderson was in discussion with Pinehaven's representatives about a personal grievance claim regarding the level 4 issue. On 5 June 2018 that representative had notified Ms Anderson that Pinehaven agreed to attend mediation. Despite this there is no indication of Ms Anderson raising a personal grievance regarding the changes to her days of work. Rather there is an indication to the rostering person later in July of an objection to different days to the Friday and Saturday afternoons specified in the 21 June letter.

[84] Ms Anderson said at the investigation meeting that she had arranged to do the shifts (as required by Pinehaven) until such time as she questioned it, or followed up.

[85] Ms Anderson's request on 14 September 2018, to reinstate the Monday and Tuesday afternoons is made within a letter she refers to as a request under Part 6AA of the Act regarding flexible working hours. The request was to reinstate the Monday and Tuesday afternoon shifts, but with a change to Friday and Saturday afternoon shifts from April to August 2019 to cover time when she is on practicums for her social work study.

[86] A disadvantage personal grievance is subsequently raised by the 17 September 2018 letter which identifies Pinehaven as having changed the terms of her employment without her agreement.

[87] Taking all the above into account, Ms Anderson has not established that there is a contractual basis for an entitlement to work set shifts.

#### *Good faith*

[88] For Ms Anderson it is submitted that there was a failure to consult before changing a term of her employment. Although I have found that Pinehaven was able to change the shifts without agreement, it should have first consulted Ms Anderson regarding the possible change. Ms Anderson had been working one of the shifts since her employment began in in 2014. This was not a workplace where staff were on rotating shifts and could expect them to change each roster.

[89] Pinehaven failed to consult Ms Anderson when it decided to change her shifts in June 2018. She was on leave at that time but I am not satisfied that the company was unable to at least attempt to contact her for some discussion. There was a further failure to consult regarding the change to morning shifts on Friday and Saturday.

[90] Ms Shackleton said that generally Pinehaven did consult about changes in shifts. She said that she thought her letter of 21 June was the start of that. However, I do not consider that the letter was worded in that way:

Accordingly, we have had to make some adjustments to your allocated shifts.

...your shifts have been moved to Friday and Saturday afternoons, to accommodate our current staffing needs. Accordingly, your first day back at work will now be Friday 6<sup>th</sup> July, instead of Monday 2<sup>nd</sup> July”.

[91] There is no mention of any discussion, feedback or any response being sought from Ms Anderson.

[92] I consider that this breach of good faith was deliberate, serious and sustained. Good faith requires the parties to be communicative. Pinehaven should have discussed with Ms Anderson the possibility of her shifts being changed and the reasons it was considering such a change. It did not do so. Ms Shackleton recognised in her evidence that shuffling people's shifts around is "really destabilising" to them. This is a serious breach. Ms Anderson had worked one of those days since she began employment in 2014. Pinehaven was aware that she had children and that she was managing her family obligations along with undertaking study. Potentially Ms Anderson may have been completely unable to work the shifts allocated by Pinehaven.

### *Penalty*

[93] For the reasons outlined above I consider this an appropriate case for a penalty. Ms Anderson seeks \$2,000. In considering the amount of the appropriate penalty I have regard to the factors set out in s 133A of the Act, as well as the Employment Court's approach in recent decisions *Nicholson v Ford*<sup>15</sup> and *A Labour Inspector v Daleson Investment Ltd*<sup>16</sup>.

[94] The maximum penalty against a company is \$20,000. Recognition of the requirement of good faith behaviour in the employment relationship is one of the objects of the Act.<sup>17</sup> That makes this an important matter. However, I do not regard it as being at the most serious end of the spectrum of breaches.

[95] I take into account the effect on Ms Anderson of her days of work being changed without discussion with her first.

[96] The breach was intentional in the sense that Pinehaven informed Ms Anderson of the change without seeking her views before making its decision.

[97] In terms of ability to pay, there was no financial evidence suggesting that Pinehaven is unable to pay a penalty.

[98] There is some need for deterrence regarding Pinehaven. There is also a need for deterrence of other employers, who should recognise the need to consult staff before making changes in the workplace which affect their jobs.

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<sup>15</sup> *Nicholson v Ford* d [2018] NZEmpC 132.

<sup>16</sup> *A Labour Inspector v Daleson Investment Ltd* [2019] NZEmpC 12.

<sup>17</sup> S 3(a)(i) of the Act.

[99] I have considered these matters as well as other cases concerning breaches of employment agreements. Penalties for breaches of the duty of good faith tend to be lower than those for breaches of minimum employment standards matters. I conclude that a penalty of \$1,500.00 is appropriate. Ms Anderson should receive that penalty. I order Pinehaven Cottage Limited, within 28 days of the date of this determination, to pay a penalty of \$1,500.00 to Ms Anderson.

*Disadvantage grievance*

[100] Having dealt with the lack of consultation by way of a good faith penalty, I do not intend to deal with it as a grievance as well. There was no financial loss resulting from the lack of consultation and the effect on Ms Anderson has been taken into account. Any compensation awarded would be double-dipping with the penalty ordered. I therefore do not need to address Pinehaven's submission that Ms Anderson was prevented by s 69AAK of the Act from bringing this claim as she had made a request for flexible working hours.

**Compensation for grievances**

[101] Ms Anderson has established grievances regarding undertaking the Level 4 training and not offering her the minimum guaranteed hours of work. The sum of \$15,000 is sought on Ms Anderson's behalf.

[102] Ms Anderson has not established an entitlement to retain her Monday and Tuesday shifts. My impression is that the removal of those and some resulting complications with hours of work, were a significant factor in her dissatisfaction with Pinehaven. I cannot make allowance for that in the compensation ordered as the claims were unsuccessful.

[103] The evidence from Ms Anderson was that she felt belittled by having to endure this process for so long and suffering the stress entailed. She felt like a fool about expressing her enthusiasm for the level 4 qualification and completing the application form in her own time, only to have Pinehaven say it did not need the qualification. She felt undervalued as an employee and that Pinehaven had no empathy for her perspective. Ms Anderson felt that Pinehaven was implying she was undertaking the qualification solely for her own benefit. I accept that she is someone who regards education highly.

[104] I have taken into account Ms Anderson's decision not to undertake the level 3 training in the loss wages calculation. I do not need to make a further deduction for that. I do not consider that Ms Anderson contributed to the situation regarding not offering her minimum hours of work.

[105] I order Pinehaven to pay Ms Anderson the sum of \$4,000 within 28 days of the date of this determination as remedy for her personal grievances.

### **Costs**

[106] Costs are reserved and the parties invited to resolve the matter.

[107] In the event that they are unable to agree to do so Ms Anderson shall have 28 days from the date of this determination to file a memorandum on costs. Pinehaven shall have a further 14 days in which to file a memorandum in reply. Submissions claiming costs must include a breakdown of the costs and be accompanied by supporting evidence.

[108] The Authority anticipates taking into account the mixed success of the parties, when assessing costs.

**Nicola Craig**

**Member of the Employment Relations Authority**