

**This determination includes an order prohibiting publication of certain information.**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2022] NZERA 586  
3144304

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| BETWEEN | EMMA KENT<br>Applicant                                |
| AND     | CENTRAL OTAGO LIVING OPTIONS<br>LIMITED<br>Respondent |

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|------------------------|---|
| Member of Authority:   | Peter van Keulen  |
| Representatives:       | Kevin Murray and Roshanah Masilamani, advocates for the Applicant<br>Dale Lloyd, counsel for the Respondent |
| Investigation Meeting: | 29 June 2022 at Queenstown  |
| Submissions Received:  | 15 July 2022 and 9 August 2022 from the Applicant<br>1 August 2022 from the Respondent                      |
| Date of Determination: | 10 November 2022  |

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**DETERMINATION OF THE AUTHORITY**

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**Non-publication orders**

[1] Central Otago Living Options Limited (COLO) is an operating entity for a registered charity, Living Options, which is a member of the New Zealand Disability Support Network. Living Options, through COLO, provides support services in Central Otago for people with intellectual, physical and sensory disabilities enabling them to live independently in their own community.

[2] In the course of investigating Emma Kent's claims against COLO I heard evidence about some of the people that COLO provides support services to. The identity of these people and their actions are of no material significance to Ms Kent's claims – Ms Kent's claims are informed by complaints about COLO and its managers, not the people it provides support services to. In these circumstances, I am satisfied that non-publication orders should be made to protect the names and identities of any persons to whom COLO provides support services, who are referred to in the evidence I heard in my investigation of Ms Kent's claims.

[3] So pursuant to Clause 10 of schedule 2 of the Employment Relations Act 2000 (the Act), I grant non-publication orders prohibiting the publication of the name and identity of any of the people COLO provides support services to who have been referred to in the evidence I heard in my investigation. To the extent any of these people need to be referenced in this determination their names will be anonymised.

### **Employment relationship problem**

[4] Ms Kent was employed as a Support Tutor; her role was to assist in providing support services to some of the people that COLO supported in the community.

[5] Ms Kent had various complaints about events that she claims occurred during her employment with COLO and the way in which she says she was treated. These complaints are said to give rise to personal grievances for unjustifiable dismissal and unjustified actions causing disadvantage to Ms Kent's employment.

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

[6] The parties were unable to resolve Ms Kent's personal grievances and these grievances formed the basis of the claims I investigated. I investigated these claims by receiving written evidence and documents, holding an investigation meeting on 15 July 2022 and assessing the submissions of the parties' representatives.

[7] As permitted by 174E of the Act I have not recorded all the evidence and submissions received, in this determination; I have set out my findings of fact and law, then based on this I have expressed conclusions on issues as necessary to dispose of the matter, and then I have specified the orders made as a result.

## **The claims**

[8] The various complaints that Ms Kent has inform her claims for personal grievances. These personal grievances are unjustifiable dismissal and unjustified action causing disadvantage.

### *Unjustifiable dismissal*

[9] The first point to note about Ms Kent's unjustifiable dismissal personal grievance claim is that Ms Kent resigned. Ms Kent says her resignation is an unjustifiable dismissal because she resigned in response to a breach of duty by COLO, i.e., a constructive dismissal.

[10] Ms Kent says the breach of duty which caused her to resign was the way she was treated by Alison Wildey, the Chief Executive Officer of COLO.

[11] The relevant case law shows that in order to determine if Ms Kent was constructively dismissed, I must consider: <sup>1</sup>

- (a) Was there a breach of duty by COLO – in this case did Ms Wildey act as alleged and was this a breach by her?
- (b) If there was a breach of duty was that breach sufficiently serious such that it was reasonably foreseeable that there was a substantial risk that Ms Kent might resign in response to that?
- (c) Did Ms Kent resign in response to that breach of duty?

[12] If I determine that COLO did constructively dismiss Ms Kent (because of the steps outlined above) I must then consider whether the dismissal was justified; with justification being assessed pursuant to the test for justification and the duty of good faith set out in the Act.

[13] There is however an additional element that impacts on Ms Kent's personal grievance, that is the status of her employment. COLO says Ms Kent was a casual employee and Ms Kent says she was a permanent part-time employee. It is important that I resolve this aspect first as the outcome impacts on whether Ms Kent may have a personal grievance for

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<sup>1</sup> *Auckland Shop Employees Union v. Woolworths (NZ) Ltd* [1985] 2 NZLR 372 (CA); *Wellington etc Clerical Workers etc IUOW v Greenwich* [1983] ACJ 965; and *Auckland Electric Power Board v. Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 2 NZLR 415 (CA).

unjustifiable dismissal; casual employees have no ongoing expectation of work and are not employees between rostered shifts, so in most cases cannot be dismissed unjustifiably.

*Unjustifiable action causing disadvantage*

[14] Section 103(1)(b) of the Act sets out that an employee may have a personal grievance where the employee's employment or any condition of employment is or was affected to the employee's disadvantage by some unjustifiable action by their employer.

[15] Based on section 103(1)(b) of the Act, the questions to be addressed in respect of an unjustifiable action causing disadvantage personal grievance are:

- (a) What does the employee complain of in terms of the employer's actions and did the employer act as alleged?
- (b) If so, did the employer's actions cause any disadvantage to the employee's employment or a condition of employment?
- (c) If so, were the employer's actions justifiable?

[16] Ms Kent's claim for unjustifiable action causing disadvantage to her employment covered a number of allegations about actions that occurred during her employment with COLO. However, due to the timing of Ms Kent's personal grievance, the extent of her complaints that could inform the claims in the Authority were limited.<sup>2</sup> Essentially Ms Kent had three sets of complaints that I could investigate:

- (a) COLO failed to pay her for, and/or even inform her of her right to receive, travel expenses for some of the work she undertook.
- (b) COLO disclosed personal information about Ms Kent to one of the people COLO supports and whom Ms Kent assisted.
- (c) COLO stopped giving Ms Kent regular work and/or reduced her hours of work in response to her raising a personal grievance about the disclosure of personal information.

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<sup>2</sup> Ms Kent first raised a personal grievance on 26 February 2021 which covers alleged events or actions complained of that occurred from 28 November 2020.

[17] So, for each of these sets of actions I will consider if the action occurred, then if they did whether it caused a disadvantage to Ms Kent's employment and then if they did whether COLO was justified in acting as it did.

### **What was Ms Kent's employment status?**

[18] Ms Kent was employed by COLO from July 2020. The employment agreement between Ms Kent and COLO recorded that Ms Kent's employment was casual and her hours of work were recorded as being "as and when required". Ms Kent says despite this label and reference to no set hours she in fact worked set shifts and had regular work such that she considered herself to be a permanent part-time employee.

[19] COLO says Ms Kent was employed as a casual employee and it operated her employment this way, offering shifts on a weekly basis that varied over time depending on need. It says it tried to give Ms Kent as much work as it could and as she wanted and whilst this included some repetition in shifts, such as sleep over shifts, this was not such as to establish permanent hours.

[20] In deciding whether Ms Kent was a casual employee or a permanent part-time employee I must assess the real nature of the relationship, noting that the description of their relationship not being determinative; that is, just because Ms Kent's employment was labelled as being casual this does not mean it was casual based on how it operated.<sup>3</sup>

[21] A number of characteristics have been identified as assisting with the assessment of the real nature of an employment relationship but the key factor is seen as being whether there is an obligation on the employer to provide work to the employee and an obligation on the employee to accept it.<sup>4</sup>

[22] The characteristics of the relationship often referred to are merely elements that inform this key factor – so for example if the employer requires notice before an employee takes leave that is a factor that indicates the employee has an obligation to accept work or if the employee works a regular shift pattern then that is a factor that indicates the employer has

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<sup>3</sup> *Baker v St John Central Regional Trust Board* [2013] NZEmpC 34 at [20]; and *Jinkinson v Oceana Gold (NZ) Ltd* [2009] ERNZ 225 at [37].

<sup>4</sup> *Baker v St John Central Regional Trust Board*, above n 2 at [23]; and *Jinkinson v Oceana Gold (NZ) Ltd*, above n 2 at [41].

an obligation to offer work, because there is an expectation created by the regularity of the work.

[23] So what I must do in establishing whether Ms Kent was employed on a casual or permanent basis is assess how the relationship operated. How the relationship operated will reveal a number of factors that inform whether there was an obligation on the employer to offer work and an obligation on the employee to accept work.

[24] Based on the evidence in my investigation meeting I conclude the following:

- (a) Whilst there was some regularity in Ms Kent's work this was not sufficiently regular to create a pattern of work that was permanent. The evidence shows she worked varying rosters with different shifts and differing hours each week.
- (b) Ms Kent's work was set by a weekly roster and she could refuse to accept any rostered shift. The short point is she was not expected to work – and she did refuse shifts offered.
- (c) Ms Kent could also work elsewhere, including undertaking private work directly for people who required support.
- (d) Ms Kent's employment agreement recorded that she was employed on a casual "as required" basis. And the employment had provisions consistent with a casual arrangement, so for example Ms Kent received her holiday pay rolled up into the hourly wage.

[25] Reflecting on these various factors and assessing overall how the employment relationship between Ms Kent and COLO operated, I conclude there was no obligation on COLO to offer work to Ms Kent and there was no requirement imposed on Ms Kent to accept work.

[26] I conclude that the employment relationship between Ms Kent and COLO was a casual one.

[27] As Ms Kent's employment with COLO was casual the circumstances in which her employment stopped cannot give rise to an unjustified dismissal grievance. The hallmark of a casual employment relationship is that the employee is effectively only employed for the

shifts offered and accepted and in between, where there is no ongoing work obligations, the employee is not employed. So, in effect Ms Kent did not resign, she simply stopped accepting shifts and this cannot amount to a constructive dismissal.

### **Unjustified action causing disadvantage**

#### *Payment for travel expenses*

[28] Ms Kent never claimed petrol expenses in the course of her work with COLO and as a result was never paid any petrol expenses by COLO.

[29] Ms Kent says she was expected to use her own car to travel to work locations and was not paid any travel expenses by COLO. Ms Kent says on one occasion in March 2021 she was told she could claim her travel expenses in relation to dropping off food and clothes to a person that COLO supported when that person was admitted to the hospital; but this was described as a one-off situation and Ms Kent says she had never been told that she could claim petrol costs in other situations.

[30] Ms Wildey gave comprehensive evidence about the nature of the services provided by COLO to people. She described the way in which the work is defined or categorised which impacts the funding COLO receives; this funding generally does not include payment for travel expenses, however, in some cases employees can be paid for travel expenses. An example of this is travel between COLO operated sites. This was explained to all employees as part of their induction. Ms Wildey said, the end result is employees can claim travel costs if they believe they are entitled to them when they complete their weekly timesheets.

[31] Ms Wildey says Ms Kent would have been told about the travel expenses and claiming costs in her induction and she recalls on at least one occasion telling Ms Kent she could claim travel expenses.

[32] Andrew Moore, a Support Co-Ordinator at COLO, says that he had a discussion with Ms Kent in January 2021 about claiming travel costs, reminding her that she should be claiming travel costs in some situations.

[33] When I asked Ms Kent about Mr Moore's evidence she responded by saying the discussion did not take place in January 2021 but there was a conversation about travel in which she was told she could claim travel costs when travelling between COLO sites.

[34] Based on my assessment of the evidence I conclude:

- (a) In certain circumstances COLO employees will be paid travel expenses, such as petrol for using their own car to travel between COLO sites. However, this is only payable if an employee claims for the expenses when they submit their weekly time sheet.
- (b) COLO would have advised, and did advise, Ms Kent of her right to claim her travel expenses and how to do this. This occurred as part of the induction and subsequently by way of reminders from both Ms Wildey and Mr Moore.
- (c) For whatever reason, Ms Kent did not make claims for travel expenses – she may have been confused about when she could make claims or misunderstood how to make claims or perhaps, she decided it was not worth her time to make the claims.
- (d) Ms Kent did not make any claims for travel expenses that were subsequently not paid by COLO; COLO did not fail to pay travel expenses for any claims that Ms Kent made.

[35] Based on this I conclude there is no breach by COLO in terms of Ms Kent's rights to claim travel expenses and therefore there is no basis for an unjustified action causing disadvantage in connection with this.

*Disclosure of personal information*

[36] Ms Kent says that Ms Wildey disclosed information about her that was personal and confidential to one of the people COLO supported in the community, with whom she worked - I will refer to this individual as XJP. Ms Kent says this breach of her privacy is a breach of duty by COLO.

[37] Ms Kent did not hear Ms Wildey disclose her personal information to XJP. Rather Ms Kent says XJP told her that Ms Wildey had disclosed her personal information to him.

[38] Ms Wildey denies telling XJP the personal information about Ms Kent. Ms Wildey says she did not know the detail of the personal information that she is alleged to have disclosed so could not have done this. Further she says she takes COLO's obligations to

support its employees seriously and is very careful about any employee's personal information that is provided to the people that COLO supports. In this particular case she says, that if she had known the personal information about Ms Kent she would not have disclosed the information to XJP as there was no reason for him to know that particular information.

[39] I also heard evidence from an individual who supports XJP in a private capacity, i.e., not a carer employed through COLO or some other entity. This individual explained her close relationship with XJP and told me about the conversations she would have with him and the types of things he would tell her on a regular basis. This individual had three main points to make about the alleged disclosure of personal information by Ms Wildey to XJP:

- (a) If Ms Wildey had told XJP personal information about Ms Kent then XJP would have told her about this at the time. And XJP did not tell her at any time that Ms Wildey had told her personal information about Ms Kent.
- (b) When she discussed Ms Kent's claim with XJP he told her that Ms Widley had not told him the personal information about Ms Kent as was alleged and he had not told Ms Kent that Ms Widley had done this.
- (c) XJP told her he already knew about Ms Kent's particular personal information – he did not explain how he knew this but the carer believes Ms Kent probably told XJP directly in personal conversations in line with XJP's approach to helping people in a counselling type of environment.

[40] In assessing this evidence to determine what occurred I note the following:

- (a) I have no direct evidence from XJP about what he was told by Ms Widley and what he said to Ms Kent.
- (b) I have two individuals who say XJP told them about the alleged disclosure of Ms Kent's personal information by Ms Widley. Ms Kent says XJP told her that Ms Wildey disclosed her personal information to him and the carer says XJP told her that Ms Wildey did not disclose Ms Kent's personal information to him.

(c) That XJP may have known Ms Kent's personal information from her directly is a credible assertion based on what the carer says XJP told her and based on the accepted evidence about Ms Kent's care relationship and friendship with XJP.

(d) Ms Wildey denies disclosing the personal information and this is supported by her views on COLO's obligations to its employees, that she says she did not know the personal information about Ms Kent and generally her evidence of supporting Ms Kent including going out of her way to meet Ms Kent and support her with a particular incident Ms Kent had.

[41] Based on this I am not persuaded that Ms Wildey did disclose Ms Kent's personal information to XJP and I conclude there was no breach of duty by COLO. And, therefore, there is no basis for an unjustified action causing disadvantage in connection with this allegation.

*Reducing rostered hours of work*

[42] Ms Kent raised a personal grievance in connection with the alleged disclosure of her personal information to XJP by Ms Widley, on 26 February 2021.

[43] Ms Kent says that after she raised her personal grievance COLO reduced the shifts it rostered her on thereby reducing the hours she worked each week.

[44] I have reviewed the evidence regarding the hours worked by Ms Kent, including the time sheets and contemporaneous correspondence about her work. This evidence shows three main things:

- (a) In early March 2021 Ms Kent told COLO she was no longer able to do sleepovers.
- (b) In late March 2021 Ms Kent told COLO she no longer wished to be involved in the care provided to XJP.
- (c) Any reduction in shifts and therefore hours of work, offered to Ms Kent by COLO in March 2021 reflected these two instructions from Ms Kent – that she

was not going to do sleepover work and that she was no longer going to be involved in supporting XJP.

[45] Based on this I conclude there was a reduction in hours of work given to Ms Kent after she raised her personal grievance on 26 February 2021. However, this was in response to Ms Kent's instructions about the shifts she wanted to work and not a reaction by COLO to her personal grievance.

*Did COLO's action of offering less shifts and hours of work to Ms Kent cause a disadvantage to Ms Kent's employment or a condition of her employment?*

[46] A reduction in shifts offered and therefore available hours of work for Ms Kent did cause a disadvantage to Ms Kent's employment.

*Was COLO's action of offering less shifts and hours of work to Ms Kent justified?*

[47] The reduction in shifts offered to Ms Kent by COLO was justified for two reasons:

- (a) This was in response to Ms Kent's instruction about the work she wished to accept from COLO.
- (b) Ms Kent was employed on a casual basis and there was no obligation on COLO to offer any set number, or even minimum number, of hours of work to Ms Kent each week.

[48] Therefore, as COLO's actions were justified there is no basis for an unjustified action causing disadvantage in connection with this allegation.

### *Conclusion*

[49] The actions Ms Kent complained of for her personal grievance did not occur except for a reduction in hours of work offered to Ms Kent by COLO. However, the reduction in hours offered to Ms Kent was justified. So, there is no basis for Ms Kent's personal grievances for unjustifiable action causing disadvantage.

### **Summary**

[50] Ms Kent's claims for personal grievances do not succeed.

## **Costs**

[51] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, COLO may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum Ms Kent would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[52] If the Authority is asked to determine costs, the parties can expect the Authority to apply its usual daily rate unless particular circumstances or factors require an upward or downward adjustment of that tariff.<sup>5</sup>

Peter van Keulen  
Member of the Employment Relations Authority

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<sup>5</sup> For further information about the factors considered in assessing costs, see:  
[www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1).