

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2025] NZERA 248
3287539

	BETWEEN	TAMMY MAXINE STEVENSON Applicant
	AND	MOUNTAIN CHALETS (2005) LIMITED First Respondent
	AND	KYLE JAMES PURTON Second Respondent
	AND	HAYLEY LAURA CURTIS Third Respondent
Member of Authority:	David G Beck	
Representatives:	Lawrence Anderson, advocate for the Applicant Amy Keir, counsel for the Respondent	
Investigation Meeting:	3 and 4 March 2025 in Twizel	
Submissions Received:	7 and 14 March 2025 from the Applicant 14 March 2025 from the Respondent	
Date of Determination:	5 May 2025	

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Tammy Stevenson worked as a cleaner from August 2018 at various properties owned by Mountain Chalets (2005) Limited (MCL) a family run business in Twizel until the engagement ended in disputed circumstances in early September 2023.

[2] Ms Stevenson's representative raised a personal grievance with MCL by letter of 17 September 2023, alleging Ms Stevenson had had her hours of work unilaterally reduced; had been dismissed on 10 September 2023; and her holiday pay had been wrongly administered throughout the employment period. A request was made for wage, time and leave records.

[3] In a response of 10 October 2023 MCL's representative asserted Ms Stevenson had not been dismissed and that the nature of the employment relationship was casual with no attendant obligations to provide regular working hours. An offer to attend mediation was advanced.

[4] An initial mediation was agreed and arranged for 29 January 2024 but did not proceed and thereafter was not re-convened.

[5] Ms Stevenson made an application to the Authority on 2 April 2024, that without advanced reasoning, sought to join the second and third respondents in a personal capacity to the proceedings.

[6] The parties were directed to mediation on 30 April that took place on 12 June but the matter remained unresolved. A case management conference of 29 July set an investigation meeting for 27 and 28 November 2024 but unfortunately due to an unanticipated matter the Authority postponed the investigation meeting and it was not set down until 3 and 4 March 2025.

The Authority's investigation

[7] At the investigation meeting of a day and a half, Ms Stevenson attended with her daughter Riley and friend Cherie Henare. Kyle Purton and Glenna Purton and their co-managers, Hayley Curtis (Glenna's daughter) and Christopher Cocks (Hayley's partner) attended for MCL. All provided written evidence and made themselves available for questioning. Mr Anderson attended as Ms Stevenson's representative, by agreement utilising an audio-visual link.

[8] Pursuant to s 174E of the Employment Relations Act 2000 ("the Act"), I make findings of fact and law and outline conclusions to resolve the disputed issues and make orders but I do not record all evidence.

Issues

[9] The issues the Authority must decide are:

- (a) Is there any legal basis for joining the second and third respondents to these proceedings?
- (b) A threshold issue of the real nature of Ms Stevenson's employment – was it genuinely casual or permanent part time?
- (c) Was Ms Stevenson unjustifiably dismissed or did she resign?
- (d) If Ms Stevenson is found not to have been a casual worker and/or an unjustified dismissal is found what remedies should be awarded considering Ms Stevenson's claims for:
 - i. Lost wages.
 - ii. Compensation under s 123(1)(c)(i) of the Act of \$23,000 for hurt and humiliation caused by an alleged unjustified dismissal and \$8,000 under the same provision for an unjustified disadvantage.
 - iii. Holiday pay.
 - iv. Penalties
- (e) If Ms Stevenson is successful in all or any elements of her personal grievance claims should the Authority reduce any remedies granted as a result of any contributory conduct?
- (f) If I consider any penalty actions are made out what is an appropriate level of penalty and should any portion of this be awarded to Ms Stevenson?
- (g) An outline of how costs are to be determined.

What caused the employment relationship problem?

[10] MCL is a family run business owned and operated by Kyle Purton. MCL currently runs three accommodation sites, two kilometres apart in Twizel. One is a 25-unit motel and

then there is a lodge with four studio units and a separate attached two-bedroom accommodation. Hayley Curtis and Christopher Cocks normally manage the motel and Kyle Purton and Glenna Purton the other property. However, at the time of this dispute, Hayley and Chris were managing both businesses while the Purtons were working in another town developing a new accommodation project.

[11] Ms Stevenson is a Twizel local and says she has been associated with Kyle Purton throughout her life including his brother being her ex-stepfather and she regarded the family as friends. Mr Purton says he had little to do with Ms Stevenson socially until she commenced working for MCL. He acknowledged that they had a good working relationship.

The employment agreements

[12] Ms Stevenson commenced employment with MCL as a cleaner in August 2018 after returning to live in Twizel from a period living in Wanaka where she worked in a permanent part-time hospitality role. Initially, Ms Stevenson could not recall being provided with an individual employment agreement until September 2020 and suggested that this was provided on a ‘take it or leave it’ basis with a suggestion from Mr Purton that no further work would be offered if it was not signed. When pushed, Ms Stevenson said she did not have any concerns at the time and that she consequently got no advice – Ms Stevenson summed up her stance as “I needed work so signed it”.

[13] The employment agreement was signed on 21 September 2020 and Ms Stevenson says she was not provided with a copy but she acknowledged she was given the agreement with sufficient time to obtain advice and despite her evidence that Mr Purton had told her he did not do Kiwisaver and liked an informal approach to the employment relationship, Ms Stevenson did not discuss any concerns. The agreement had no job description attached and Ms Stevenson says none was ever provided.

[14] Disclosed text messages confirm on 17 and 28 September 2020 that Mr Purton was asking Ms Stevenson to sign and return her employment agreement but none of the texts suggest pressure to sign it or no work being provided was at issue. The texts are objectively amicable and other than confirming her pay rate, Ms Stevenson did not raise any issues about the format of the employment agreement. The first clause of the agreement describes the employment relationship as “casual” on an “as and when required basis” with no

minimum, fixed or “promised” hours and it states there is “no expectation of ongoing employment”.

[15] Mr Purton says an employment agreement was provided to Ms Stevenson when she commenced employment and he recalled handing it to her but he says she did not return it. Mr Purton suggested in written evidence that Ms Stevenson “along with all other employees, was employed on a casual as and when required basis to conform with the requirements of the industry”.

[16] Mr Purton also said when in September 2021 he had on his lawyer’s advice, decided to update individual employment agreements, he could not locate Ms Stevenson’s original one.

Working hours

[17] Ms Stevenson recalled the job at MCL was not advertised, she approached Mr Purton believing he may have some available work. Ms Stevenson recalled the job being portrayed by Mr Purton as 9am – Noon - Monday to Friday which suited her then circumstances of being a sole-carer of two children under ten who she needed to drop off at school.

[18] Ms Stevenson says her pattern of work was “consistently between 20 to 25 hours per week, working several days a week consistently” and her normal start time was 9am with finish times varying, dependent on completed work. Ms Stevenson recalled filling out a weekly timesheet and provided a screen shot of one but was unable to obtain further copies from MCL. Ms Stevenson says a roster was once utilised for a brief period. Ms Stevenson says her normal workdays were Monday to Thursday with some variation between Friday to Sunday. Ms Stevenson says she worked most days but would have a day off during weekends.

[19] Ms Stevenson says Mr Purton initially worked alongside her and directed her work but after two years MCL engaged a supervisor who Ms Stevenson believed had an agreement to work 35 hours per week. The first supervisor left and was replaced by Mr Purton’s sister - a supervisor, Ms Stevenson says she had a difficult working relationship with and she eventually left around October 2022 and was not replaced. Ms Stevenson says she considered leaving and arranged other work but Mr Purton persuaded her to stay and

informally made her the supervisor. Mr Purton contested the latter part of this recollection but texts (12 October 2022) show MCL expressed a desire to retain Ms Stevenson as an employee and Ms Stevenson indicated she felt happy about that.

[20] Ms Stevenson acknowledged the employment relationship was fairly relaxed and the hours seasonal but says she would have to seek advance permission from Mr Purton or Ms Purton to arrange time off and she had to work around MCL's needs when scheduling personal appointments. Ms Stevenson claimed there were times when she asked for weekends off and this was denied but when pressed could only cite one occasion of this occurring. However, Ms Stevenson contradicted this evidence when asked how she found working with Mr Purton she responded no problem he was flexible and she could not recall being refused time off to attend personal appointments.

[21] Ms Stevenson was paid holiday pay on top of her hourly rate and not provided with separate paid leave. Ms Stevenson did not object to this arrangement during her employment and conceded she knew from her previous job the difference between a 'pay as you go' holiday pay arrangement and being provided paid time off. When I put to her are you aware of this being indicative of a casual arrangement, Ms Stevenson said at the time it was a 'stop gap' job for her and she stayed in it as she enjoyed the job.

[22] When asked about wintertime hours Ms Stevenson says the work was slower but she still worked five days per week tending to have Fridays and weekends free of work. MCL witnesses confirmed this to be accurate.

[23] Ms Stevenson says the allocation of her hours became an issue in mid-2023 after another staff member had left and Ms Stevenson was allocated an additional task of checking rooms after they had been cleaned and laundering linen. The additional hours according to Ms Stevenson were one and a half to two hours a day. Ms Stevenson says this meant her working hours at this point in time were "approximately 20-25 per week".

[24] In early August 2023 Ms Stevenson recalled Ms Curtis and Mr Cocks took over running both MCL sites as the Purtons were temporarily relocated setting up an accommodation business in another town. Ms Stevenson says Ms Curtis took the room checks task away from her and this reduced her weekly hours by "8+". Ms Stevenson says she approached Ms Curtis for an explanation and was told her view was she had assumed the room checks tasks because standards of cleaning were slipping. A text exchange of 11

August 2023 shows Ms Curtis was dissatisfied with Ms Stevenson's room checks that day (and she explained why) and Ms Curtis said she would henceforth assume this responsibility. There was no evidence of Ms Stevenson immediately contesting this change.

[25] Ms Stevenson says she then did extra cleaning work and if she had retained the checks, it could have increased her hours up to 35 per week. Ms Stevenson says she also became concerned that MCL was intending to hire new cleaners for the busy summer season and that may mean her hours would drop to an unsustainable level.

[26] In contrast, MCL witnesses said Ms Stevenson was afforded significant flexibility in the setting of her hours of work and the majority of communication with her was to ask about her availability that she would work around her family responsibilities. In broad terms Mr Purton described the nature of the hospitality industry and seasonal nature of the work suiting a casual engagement. Mr Purton confirmed that his business utilised other casual cleaners during busy period that tended to be transient workers but Ms Stevenson was a 'main stay' employee.

Analysis of texts

[27] Ms Stevenson says for the majority of the employment period Mr Purton would call or text her posing the question "work tomorrow". An analysis of a significant number of texts provided (July 2019 – September 2023) show a relaxed and accommodating attitude from MCL to Ms Stevenson's availability to work that would not be normally consistent with a permanent relationship with attendant obligations (a fact Ms Stevenson acknowledged in giving evidence). This mostly consisted of Ms Stevenson signalling her availability however, several times she would seek permission for days off in advance or at short notice state reasons for her lack of availability.

[28] Mr Purton suggested the texts were evidence of distinct offers of employment that Ms Stevenson could choose to reject. I am overall not persuaded by this contention but observe Mr Purton would regularly briefly text Ms Stevenson asking her if she would "work tomorrow". The texts equally evidence a regular pattern of work that was latterly the subject of a roster and different approaches in exchanges from Ms Purton and Ms Curtis, and MCL's ongoing expectation of Ms Stevenson's availability to suit their needs.

[29] There was one exchange of texts of 17 January 2022 which departed from the ostensibly casual ‘pay as you go’ holiday pay arrangement, where Mr Purton offered Ms Stevenson three paid days off if she worked the next day (presumably a peak demand period). There was also some limited evidence of Ms Stevenson being provided ‘alternative’ days off for working on public holidays.

Was the employment casual?

[30] I examine whether the employment relationship was genuinely casual or otherwise from both the onset of the relationship and at the time of dismissal. This involves assessing how the working relationship functioned in practice aided by extrinsic materials (predominantly the text exchanges) and an assessment of the parties’ evidence.

[31] In the absence of a job advert and initial employment agreement at the onset of the relationship or notes of any interview, I am satisfied that the relationship was intended by MCL as casual. Given the informal nature of the engagement I do not think Ms Stevenson turned her mind to the nature of the employment. Ms Stevenson, however, was aware of being paid holiday pay in her hourly rate and objectively would know this denoted a casual arrangement but she contended the job involved the provision of regular hours.

[32] Further, the arrangement of hours of work being allocated on a daily basis by text message instead of a roster also points to a casual relationship but Mr Purton did not explain why this was so and I note latterly there were attempts to introduce a roster. Mr Purton’s evidence was he ran his staffing on a somewhat informal basis consistent with the business being small. Mr Purton also alluded to the fluctuating pattern of tourism in the Twizel district but noted of late significant year-round demand. Twizel is not just a peak summer holiday destination.

[33] The employment agreement of September 2020 is explicit that the relationship is designated or labelled casual and Mr Purton’s evidence was he wanted that to be made clear in instructions to his lawyers who drafted the document. Although Ms Stevenson did not raise any issues of the categorisation, I note a significant power imbalance between the parties is at issue.

[34] Ms Stevenson says she had an expectation of regular hours and at times sought extra hours and made it clear she was available to do more. Texts showed at times Ms Stevenson

could not be provided extra work as it was allocated to other more transient workers. While no timesheets were kept, disclosed payslips showed Ms Stevenson's pattern of work was regular.

[35] The relationship was thus not operationally clear cut. One typical feature suggesting an explicit casual relationship would be if Ms Stevenson had been temporarily "on call" to provide relief cover for an occasionally absent cleaner – this was not the case, Ms Stevenson appeared to be the first-choice reliable cleaner over a significant period of time and MCL conceded in submissions that it was common ground that Ms Stevenson "regularly worked five days per week".

[36] The Act has no definition of 'casual employment' but useful guidance on determining what is or is not a genuine casual employment relationship is found in one of the Employment Court decisions *Jinkinson v Oceania Gold (NZ) Ltd*¹ identifying the following relevant factors:

- a) The number of hours worked each week.
- b) Whether work is allocated in advance by a roster.
- c) Whether there is a regular pattern of work.
- d) Whether there is a mutual expectation of continuity of employment.
- e) Whether the employer requires notice before an employee is absent or on leave.
- f) Whether the employee works to consistent starting and finish times.

[37] Looking at it broadly, it would appear that MCL's needs flowed from available visitor demand and in setting staffing levels they had to balance such demand with the allocation of hours to workers but the work organisation was relatively informal. I appreciate this is a very difficult exercise in the hospitality sector but could not comprehend why Ms Stevenson could not be provided some core minimum hours based on Ms Stevenson's pattern of work. The relationship was better described as permanent part-time and the employment agreement in the way it was operated should have had an agreed set floor of guaranteed hours or an availability provision. MCL says that at times they had a pool of up to six casual cleaners.

¹ *Jinkinson v Oceania Gold (NZ) Ltd* [2009] ERNZ 225 at [47].

[38] I consider that as the relationship evolved over time and Ms Stevenson proved to be reliable and available for more hours as her children grew up, the relationship operated differently to the casual 'label'. How the work was allocated over time created a reasonable expectation of ongoing regular employment and at the time it ended a dispute ensued about the volume of regular hours with Ms Stevenson pressing for more hours that confirmed her availability and ongoing commitment to MCL.

[39] I also find the engagement of Ms Stevenson as casual as evidenced by how her holiday pay was treated, did not accurately describe the real nature of the employment relationship under s6 of the Act.²

[40] I find the relationship by its duration and nature, became permanent part-time and the attempt by MCL to reiterate their view it was a casual employment relationship by presenting an employment agreement with such a label, was an opportunistic attempt to impose what amounted to a flexible 'zero hours' agreement unconnected to the nature of Ms Stevenson's pattern of work. As the Employment Court found in *Rush Security Services Ltd v Samoa* in some circumstances a casual employment relationship can be implicitly varied over time and morph into a permanent one.³

How the employment relationship ended

[41] How the employment relationship ended is a different issue and difficult to resolve, where one party considers there was no obligation to offer ongoing employment. However, the circumstances of the employment ending need scrutiny to determine on who's initiative it ended.

[42] The events that led to the breakdown of the employment relationship commenced on 5 September 2023 when Ms Stevenson rang Mr Purton to discuss her emerging concerns about the regularity of her hours of work. Ms Stevenson says her uncertainty had been created when Ms Curtis assumed room checking tasks that had previously been assigned to her and provided potential to gain more hours. Mr Purton rebuffed Ms Stevenson's request to meet and discuss her concerns advising her to approach Ms Curtis.

² An approach taken in *Jinkinson* above note 1, with Couch J indicating that an assessment of employment status (whether 'casual' or not) needs to examine the real nature of the relationship under s 6 Employment Relations Act 2000 with the parties' description of the relationship in an employment agreement not being determinative.

³ *Rush Security Services Ltd (T/A Darien Rush Security) v Samoa* [2011] NZEmpC 76 at [24].

[43] On the morning of Thursday 7 September Ms Stevenson arrived at work at the Chalets site laundry and met Mr Cocks who directed her to clean at another worksite nearby (Twizel Central) by herself. Ms Stevenson says she then discussed her concerns about the room checks task being removed and the impact on her income. Mr Cocks' recollection was this was not discussed and after he tried to direct Ms Stevenson to work at another location she unusually refused, seemed upset and then proceeded to start work at the Chalets.

[44] Mr Cocks says he immediately left the laundry and went to talk to Ms Curtis who was working in the Chalets office. They resolved that Ms Curtis would meet with Ms Stevenson and Mr Cocks went to fetch her for that purpose. Ms Stevenson and Ms Curtis then met in the office at around 9:30 am – Mr Cocks remained in an adjacent room to mind their young child.

[45] The accounts of the subsequent meeting differ. Ms Stevenson in her written evidence portrayed it as a very brief exchange. Ms Stevenson said as she was approaching the office Ms Curtis came outside and angrily told her to go home as there was no more work for her to do. Further, she said Ms Curtis directed her to go and speak to Mr Purton about her allocation of hours and was then asked to leave the premises. Ms Stevenson later asserted in a personal grievance letter this was the point she had been dismissed. However, during the investigation meeting she said she had taken the exchange to be go home and not work that day and she hoped it was just a cooling off period and it did not occur to her to ask if she had been sacked. Ms Stevenson acknowledged she had asked Ms Curtis that she be provided with six days work a week.

[46] Ms Curtis agreed with Ms Stevenson that up until this exchange she had a good working relationship with Ms Stevenson. Ms Curtis says the meeting took place in the office and Ms Stevenson was standing over her and very agitated. Ms Curtis says Ms Stevenson was pressing to be allocated six days a week work and five hours per day and she responded by suggesting this was impractical for MCL except during the summer holidays and had only been tried once before and did not work out. Ms Curtis says she told Ms Stevenson she would likely get more hours as the business got busier and that she would be given first priority over other casuals. Ms Curtis says Ms Stevenson then began yelling at her and criticised how her parents ran the business. Ms Curtis denied sending Ms Stevenson away pointing out that was illogical as she was needed to clean that day as no other cleaners were available.

[47] Mr Cocks says he did hear Ms Stevenson raising her voice in a meeting with Ms Curtis but could not hear what was being said and he did not intervene.

[48] Ms Curtis says she does not like conflict (an observation Ms Stevenson supported and included Mr Cocks in the same assessment) and found the interaction distressing so she rang Mr Purton straight after the exchange to seek his intervention. Glenna Purton says she took the call and Ms Curtis seemed distressed and related what had happened so she then relayed this to Kyle Purton and she texted Ms Stevenson asking her to call her (Ms Purton)

[49] Ms Stevenson says she ignored the text to call Ms Purton as she wanted to meet and talk to Mr Purton and feared Ms Purton would just get emotional with her.

[50] It was not until around noon on 10 September that Ms Stevenson texted Ms Curtis and after asking to be paid her alternative holiday out (as she was not paid for the previous Thursday and did not work on the Friday or Saturday) she asked “when am I coming back to work? Tomorrow works fine for me”.

[51] As a further contextual factor, Ms Stevenson says she saw an internet posting of 10 September of MCL seeking a motel cleaner. The advert provided to the Authority notes: “We are coming up to our busy season and are looking for more people to join our team immediately”. The advert did not mention the status of the job offered but under a heading “What we offer” it stated: “20-25 hours a week – Willing to work longer if required” and free accommodation being available until 12 December. Mr Cocks for MCL says the advert was an ongoing one and they frequently recruited this way. However, objectively viewed Ms Stevenson at this juncture, was understandably entitled to perceive the ongoing employment relationship was in jeopardy.

[52] Ms Curtis responded directing Ms Stevenson to initiate contact with the Purtons and immediately thereafter Ms Purton called her.

The 10 September phone call

[53] No contemporaneous notes were made by either party of Mr Purton’s call to Ms Stevenson of 10 September around 1pm but Ms Purton says it was on speakerphone and she overheard it.

[54] Ms Stevenson's recollection of the call was Mr Purton was curt and made it clear she would not be provided with any guaranteed hours and if she wanted this type of arrangement she should look to work elsewhere. She says Mr Purton was dismissive of her, saying when she indicated she was coming back to work that she was not to, as she had acted like a 'muppet' (impliedly referring to her refusal to clean at the Chalets and the subsequent interchange with Ms Curtis). Ms Stevenson says she asked are you firing me and Mr Purton said - yes.

[55] Mr Purton says he was not condescending in tone and that Ms Stevenson demanded more hours and he made it clear that MCL could not provide guaranteed hours. Mr Purton says he was aware that Ms Stevenson occasionally supplemented her income by working elsewhere and he suggested that was the route to earning more hours. Ms Purton recalled Ms Stevenson asking if she had been fired and says Mr Purton said he was not firing her but reiterated if she wanted more hours' she would have to work elsewhere Mr Purton says Ms Stevenson then said she was going to take it further and hung up on him.

[56] Ms Henare and Ms Stevenson's daughter gave evidence of interaction with Ms Stevenson after the call and that Ms Stevenson was of the view she had been fired and was distraught.

[57] I find from the witness accounts I am unable to conclusively determine whether Mr Purton confirmed an ending of the employment relationship during the 10 September call or whether he emphasised that nothing would change in how Ms Stevenson's hours were allocated and she should look elsewhere for extra work (or work of a permanent nature) .

The aftermath communications

[58] On 11 September by text of 2:35 pm, Ms Stevenson indicated:

Hi can I please have the last year's worth of payslips and the timesheets. I need a copy of my contract and can you please have an email stating the day I was fired which was Sunday the 10th of September and the reason why I was fired.

[59] Ms Purton responded to Ms Stevenson later on 11 September saying MCL did not retain timesheets and to obtain her payslips she provided KPMG's email she then stated:

Kyle didn't fire you he said, that if you were unhappy with not getting more hours, it would be better to find alternative work and I was standing there, he had the phone on speaker.

[60] Ms Stevenson retorted:

I said I was happy to continue working there and he said not to turn up. I said are you firing me and he said yes.

[61] I observe at this point in time MCL could have offered to meet Ms Stevenson but inexplicably did not advance an offer to do so. When pressed, Mr Purton says he could not recollect why they did not offer to meet and he did not seek any advice until after his lawyer received a personal grievance letter from Ms Stevenson's advocate on 17 September.

[62] I do note however, that the personal grievance letter refers to communication between Ms Stevenson's advocate and MCL's lawyer on 15 September. The personal grievance letter asserted Ms Stevenson had been dismissed following a unilateral decision to reduce her hours of work and that the termination was at the initiative of the employer or that she had been constructively dismissed. In addition, the categorisation of the role as casual was challenged and a concern that no paid holidays had been provided.

[63] MCL's lawyer responded on 10 October denying the personal grievance "in its entirety and provided detail of MCL's view that Ms Stevenson was employed as a casual "as and when required basis" throughout the employment relationship. MCL's lawyer noted Ms Stevenson had immediately obtained alternative employment and suggested this together with the haste in raising a grievance, was evidence that she had no intention of resolving the matter.

[64] The parties did not attend mediation.

Was Ms Stevenson unjustifiably dismissed?

[65] The leading definition of "dismissal" is "termination of employment at the initiative of the employer",⁴ whilst such must flow from an unequivocal act, this can include a "sending away" that is also considered an element of a constructive dismissal.⁵

[66] In assessing the situation and perception of Ms Stevenson that she was dismissed, a useful approach is the test described in *Cornish Trucks & Van Ltd* where Judge Holden posited that:

⁴ *Wellington Taranaki and Marlborough Clerical IUOW v Greenwich (t/a Greenwich and Assocs Employment Agency and Complete Fitness Centre* (1983) ERNZ Sel Cas 95 (AC) at 103.

⁵ *Actors IUOW v Auckland Theatre Trust Inc* [1989] 2 NZILR 154, (1989) ERNZ Sel Cas 247 (CA).

The test is an objective one; was it reasonable for somebody in Mr Gildenhuis' position to have considered that his or her employment had been terminated? ⁶

[67] The question that follows is not necessarily what was said or not said during the 10 September phone call but one of:

Were the actions or omissions of MCL in addressing Ms Stevenson's concerns about her working hours on 10 September before being allowed to continue working, an unequivocal act bringing the employment to an end?

[68] From the evidence I have heard and documented communication provided, I am satisfied that MCL made an early attempt to clarify Ms Stevenson's perception that she was dismissed on 10 September. Unfortunately, this was not accompanied by an expression from Mr Purton of a willingness to engage and clarify his comments made on 10 September that could reasonably have been viewed as having at least an ulterior meaning when one takes all the circumstance into account. Mr Purton was adamant in giving evidence of the correctness of his position that the role Ms Stevenson occupied was a casual one and he took no note of the insecurity this was latterly causing Ms Stevenson. Objectively, a solution of declaring some guaranteed hours was available.

[69] On Ms Stevenson's part I find she seized upon the notion she had been dismissed despite it being quickly clarified this was not the case. Ms Purton's response was not conciliatory and did not offer a return to work and Mr Purton stayed 'incommunicado' during the critical early period of the dispute on his intentions of what was meant by his 10 September comments.

[70] Notwithstanding, taken all the contextual circumstances into account I do not find Ms Stevenson was unequivocally dismissed as once it became clear it was not Mr Purton's intention to dismiss her (regardless of what he said), Ms Stevenson did not engage in any efforts of reconciliation.

Unjustified disadvantage?

[71] While I have not found that Ms Stevenson was dismissed, I do need to consider whether MCL's actions were ones a fair and reasonable employer could have engaged in, in all the circumstances. In this respect I find they were not.

⁶ *Cornish Trucks & Van Ltd v Gildenhuis* [2019] NZEmpC 6 at [45].

[72] Mr Purton failed to communicate with Mr Stevenson in a timely and reasonable manner from the time Ms Stevenson raised her concerns seeking a meeting to discuss the allocation of tasks and working hours, Mr Purton rebuffed her and directed her to Ms Curtis. Ms Curtis did not deal well with the situation by not convening a meeting to discuss matters before the 7 September incident or at least indicating she was interested in trying to resolve matters. Unfortunately, the context of the discussion that should have been had earlier ended up in a confrontation on 7 September and Ms Curtis choosing to categorise Ms Stevenson as demanding unreasonable hours when the situation was more nuanced given Ms Stevenson had no guaranteed hours.

[73] Mr Purton instead of convening a meeting took it upon himself to reinforce Ms Stevenson's casual status in terms that were objectively open to misinterpretation. He then did nothing when he could have clarified his comments or sought to meet with Ms Stevenson. I got the impression from Mr Purton that he simply wanted Ms Stevenson to go away despite her fairly long service and willingness over the years to assist MCL. I appreciate this was partially complicated by Mr Purton naturally protecting his daughter's interests who I accept was clearly rattled by the forceful manner in which Ms Stevenson expressed her understandable frustration.

[74] Applying s 160(3) of the Act, Ms Stevenson was disadvantaged in her employment with MCL by the manner in which MCL manifestly failed to resolve the question of her hours of work. This caused Ms Stevenson detriment and distress exacerbated by the previously good working relationships she had with the Purtons, Mr Cocks and Ms Curtis.

[75] I have found the nature of the 'work bargain' changed over time as it became clear Ms Stevenson was making herself available for a regular work pattern and that she had reasonable expectations created that this situation would be recognised.

Finding

[76] In all the circumstances, I find Ms Stevenson has made out a disadvantage claim in that her former employer's actions and omissions in not making her role permanent part-time, caused her detriment when she was employed and Ms Stevenson is entitled to consideration of compensatory remedies discussed below.

Joining Kyle Purton and Hayley Curtis as respondents

[77] No submission was made on what legal basis the Authority should join Kyle Purton and Hayley Curtis in this matter and none has been made out. I, however, observe that should the identified company fail to meet their obligations in regard to minimum employment standards (i.e. the provision of holiday pay) I will grant leave for recovery against Kyle Purton pursuant to s 174Y of the Act.

Penalty actions

[78] I have also carefully considered whether penalty actions against MCL are appropriate for good faith breaches and a failure to produce wage time and holidays records when requested. It is my view that in all the circumstances described none of these alleged breaches have been established to a threshold degree to warrant penalties and I decline to do so.

Remedies

Compensation for distress, hurt and humiliation

[79] Ms Stevenson impressed with evidence that this situation significantly dented her confidence and trust in employers that was made worse by it being a relationship where she felt close to the family owners of MCL. Ms Stevenson presented as genuinely hurt by the circumstances of MCL's failure to address her concerns.

[80] Ms Stevenson described a lack of agency in being able to resolve matters with Mr Purton and felt his communication was initially evasive and then became unconstructive. Ms Stevenson says she experienced significant anxiety about her future earnings prospects and how to provide for her children and that this was a tricky situation given the small and isolated community she lived in.

[81] However, I do acknowledge Ms Stevenson's distress was temporary and she has moved on.

Finding

[82] Considering the evidence proffered and awards made by the Authority and Court in similar circumstances and surveying cases I consider Ms Stevenson's evidence warrants reasonably modest compensation of \$8,000 under s 123(1)(c)(i) of the Act.⁷

Holiday pay

[83] As I have found that Ms Stevenson was not a casual employee and her status was permanent part-time, the question of how the minimum entitlement of holiday pay was dealt with emerges. The Holidays Act 2003 provides that if there is no compliance with annual holiday pay provisions, an employer is liable for unpaid holidays "in accordance with section 16 and paid in accordance with this subpart".⁸

[84] As such, I order Ms Stevenson be paid outstanding holiday pay for the entire period of her employment, to be calculated in accord with s 24 of the Holidays Act 2003 in a sum to be agreed between the parties and I also grant leave for the parties to return to the Authority should they not be able to determine the amount owed.

Contribution

[85] Section 124 of the Act states that I must consider the extent to what, if any, Ms Stevenson's actions contributed to the situation that gave rise to her personal grievance and then assess whether any calculated remedy should be reduced. To assess whether the remedy should be reduced I have considered the relevant factors summarised in *Maddigan v Director General of Conservation*⁹.

[86] I find that Ms Stevenson in all the circumstances, adopted an objectively reasonable position in thinking she had been dismissed even though I have not found that to be the case. However, apart from a failure to better engage at the ending of the employment relationship I have not found any factors that could lead to a conclusion Ms Stevenson contributed to the way in which her employment was set up as casual which was the prime causative factor of the employment relationship problem. I have considered the forceful manner in which Ms

⁷ See summary of compensatory approaches in comparable cases in *Richora Group Ltd v Cheng* [2018] ERNZ 337 at [65] – [66].

⁸ Holidays Act 2003, Section 28 (4).

⁹ *Maddigan v Director General of Conservation* [2019] NZEmpC 190 at [71] – [76].

Stevenson approached matters on 7 September but conclude her actions arose from the frustration of being ‘fobbed off’ by Kyle Purton, rather than deliberate misconduct.

Finding

[87] I find no reduction in Ms Stevenson’s compensatory remedy is warranted.

Orders

[88] I have found that Tammy Stevenson was not unjustifiably dismissed but she was unjustifiably disadvantaged by the actions of Mountain Chalets (2005) Limited. As a result, the sums below must be paid to Ms Stevenson by Mountain Chalets (2005) Limited:

- i. \$8,000 compensation pursuant to s 123(1)(c)(i) of the Act; and:
- ii. Mountain Chalets (2005) Limited must calculate or engage an agent to do so, pursuant to s 24 of the Holidays Act 2003, outstanding holiday pay owed to Tammy Stevenson for the entire period of employment and pay the calculated sum owed. Should the parties be unable to come to an agreement on this amount owed, either party can make a further application to the Authority to determine the matter.

Costs

[89] Costs are reserved.

[90] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Tammy Stevenson may lodge, and then should serve, a memorandum on costs within 28 days of the date of issue of this determination. From the date of service of that memorandum Mountain Chalets (2005) Limited will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[91] The parties can expect the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.¹⁰

David G Beck
Member of the Employment Relations Authority

¹⁰ For further information about the factors considered in assessing costs see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1