IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2026] NZERA 206
3375943 & 3424964

BETWEEN	BEN DEVINE Applicant
AND	HEALTH NEW ZEALAND - TE WHATU ORA Respondent

Member of Authority:	David G Beck
Representatives:	Evie Hope, counsel for the Applicant Andrew Shaw, counsel for the Respondent
Investigation Meeting:	10 February 2026 in Christchurch
Submissions Received:	20 February 2026 from the Applicant 4 March 2026 and further information 25 March 2026 from the Respondent
Date of Determination:	8 April 2026

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ben Devine worked as a registered nurse, latterly for Health New Zealand Te Whatu Ora (HNZ), at various locations and roles on the West Coast from 1 July 2021 until his employment ended in disputed circumstances on 18 September 2025. At the time of the employment ending, there was an ongoing dispute as to whether Mr Devine occupied a casual position or not; which had been signalled by his lawyer in a letter of 31 October 2024 and an application to the Authority of 5 May 2025, seeking a declaration on Mr Devine's status and

various remedies. The unresolved dispute about Mr Devine's status was overtaken when he was suspended on 14 August 2025, to enable an HNZ investigation of clinical practice issues. Mr Devine was paid up to and including 19 August, which led to an unjustified disadvantage personal grievance being identified. However, before the latter matter could be resolved Mr Devine's lawyer communicated a belief the employment relationship had been repudiated and on 18 September, identified a further personal grievance alleging Mr Devine had been unjustifiably dismissed. Mr Devine amended his Authority application on 18 September 2025, to include an unjustified dismissal claim and claims for penalties for statutory breaches. In a further interim application of 20 November 2025, Mr Devine sought the additional remedy of reinstatement.

[2] HNZ maintains that in the latter period of his employment, Mr Devine was a casual employee and has not been disadvantaged or unjustifiably dismissed by the operation of the suspension.

The Authority's investigation

[3] Mr Devine attended the investigation meeting. Vivienne Patterson, HR Business partner, also attended for HNZ and Alison Gilseman, West Coast Director of Nursing. Maya Piercy, a Clinical Nurse Specialist and Mr Devine's former line manager, gave evidence by an audio-visual link. All provided written evidence and made themselves available for questioning.

[4] 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 or submissions advanced by the representatives.

Issues

[5] The issues the Authority must decide are:

(a) The nature of Mr Devine's employment relationship at the time he resigned – i.e. was it genuinely casual?

(b) If not, was Mr Devine unjustifiably dismissed?

(c) The contextual factors leading up to the employment relationship ending and whether Mr Devine has established he was unjustifiably disadvantaged when he was allegedly suspended.

(d) If Mr Devine is found not to have been a casual worker and an unjustified dismissal and/or unjustified disadvantage actions are established, what, if any remedies should be awarded including consideration of statutory leave entitlements?

(e) If Mr Devine is successful in all or any elements of his personal grievance claims should the Authority reduce any remedies granted because of any contributory conduct?

(f) If I consider a statutory breach is established, what is an appropriate level of penalty and should any portion of this be awarded to Mr Devine?

(g) An outline of how costs are to be determined.

What caused the employment relationship problem?

[6] Mr Devine, after deciding to change his career from working in the automotive industry, completed tertiary nursing and paramedicine studies in Australia by December 2020. Upon looking for employment opportunities during the COVID period, Mr Devine was persuaded by a friend and fellow emigree, that he should relocate to New Zealand. In June 2021, Mr Devine secured a Registered Nurse position in Westport working locally at the Buller Acute Assessment and Stabilisation Unit (Buller ASU). The job was permanent 0.8 FTE (64 hours per fortnight), and it was Mr Devine's first nursing role. The "primary location" of the job was described in the letter of offer as "the Buller Region" within the then West Coast District Health Board and: "From time to time we may require you to work at other locations but will always consult with you first". The position Mr Devine occupied fell under a collective agreement and Mr Devine immediately became a union member – latterly, due to health sector reorganisation, the applicable collective agreement became the Te Whatu Ora – Health New Zealand and New Zealand Nurses Organisation, Nursing and Midwifery, Collective Agreement, 31 March 2023 – 31 October 2024 (HNZ/NZNO Collective).

Changed location: Working at Te Nikau

[7] In early April 2022, while working at Buller ASU and living in Westport, Mr Devine commenced working additional casual shifts at Te Nikau Grey Base Hospital (Te Nikau) which developed into an interest in him relocating to a new role at Te Nikau. Email exchanges of 8-12 April show Mr Devine was aware that to continue picking up additional shifts would require he be placed on what was described as "a casual contract".

[8] Mr Devine says he sought no advice on the potential impact on his security of employment and says his intention was to 'trial' working at Te Nikau to gain more experience. To support this contention, an email from Mr Devine to a Te Nikau manager of 19 July 2022, initially suggested he was seeking.

> … to change my FTE from its Current 0.8 here on Foote ward [now ASU] and request this be changed to a casual role, as I trial and FTE working out of Greymouth.

[9] Mr Devine then thanked his manager for the opportunity of working at Buller and suggested once he further developed his skills at Te Nikau, he would be able to "bring lessons learnt and experience gained back here to Foote ward [latterly Buller ASU] as part of a broader rural health model". Ms Piercy's evidence was in August 2022 : "Ben requested to work at Te Nikau in a permanent part time role and switch to a casual role only at Buller".

[10] However, the arrangement to base Mr Devene at Te Nikau became objectively 'messy' involving a split role whereby he worked 0.6 hours permanent part-time in the Emergency Department (ED) and some casual hours on top of this, in the Critical Care Unit (CCU) for 0.2. The arrangement was recorded for Mr Devine in two brief separate letters of 17 August. The first letter from Mr Devine's Clinical Nurse Manager at Buller, was headed "Change of Contract – Permanent To Casual" and indicated after discussions with Mr Devine he was now "employed as a Registered Nurse for in (sic) a casual capacity as opposed to a permanent capacity effective 21st August 2022". The letter then stated:

> Your conditions of employment will be affected by this change in that you will be paid 8% in lieu of annual leave as opposed to accruing annual leave on a pro-rata basis. Your salary rate will remain unchanged, and you will be paid for actual hours worked. Other terms and conditions of your employment will remain unchanged as per the collective agreement.

[11] I observe that the above letter did not reference any location for the casual position. However, I was provided a copy of an email the next day from the author of the above letter to a payroll officer and the Te Nikau clinical nurse manager, indicating Mr Devine would not be doing a rostered shift the next day at Buller but would be undertaking an afternoon shift at Te Nikau and: "As from Monday 22nd August, Ben will be a casual employee for Buller". This email was not copied to Mr Devine.

[12] In a second letter of 22 August from Mr Devine's Clinical Nurse Manager based at Te Nikau, headed: "Change of Employment Position", it was confirmed Mr Devine was "now employed in permanent part time capacity as opposed to a casual capacity as a Registered Nurse within Acute / Paediatrics Te Nikau Hospital & Health Centre". This letter then stated the position would be 0.6 FTE (24 hours per week) "with the ability to flex up as and when required". The arrangement of working hours was described as to be determined by Mr Devine's manager, consistent with his terms and conditions of employment and the needs of the service Mr Devine was to be based in.

[13] Both the above letters were said to be the subject of signed acceptance within five working days and were both copied to the payroll team. I observe neither letter advised Mr Devine of his right to seek advice. In the event, Mr Devine says he took no advice from his union or otherwise, trusting his employer. As can be easily discerned although not explicitly stated, Mr Devine relinquished his permanent 0.8 hours at Buller in return for less guaranteed hours of work at Te Nikau. Mr Devine remained living in Westport and commuted to Greymouth with the support of a discretionary mileage allowance to defray fuel costs (it being a three-hour return commute).

[14] Mr Devine says it did not make sense why he had to sign two new contracts, but he thought it was to ensure rostering went smoothly. Mr Devine initially claimed he had no idea it would affect his status as an employee, or disadvantage him, and that he had surrendered his permanent role at Buller ASU. However, when questioned during the investigation meeting, Mr Devine accepted it was unreasonable to expect that the Buller job would be held over as a vacancy pending his return (as the timing of this was uncertain). Mr Devine also conceded that reducing his hours to 0.6 was partly motivated by personal lifestyle factors (mainly the lengthy commute). When pressed with the content of the two 17 August letters,

Mr Devine accepted he had effectively given up his Buller position. Counsel for HNZ also drew to Mr Devine's attention, an email he received on 19 September 2022, that noted his change of hours and location and detailed that he now had separate employee identifying numbers for firstly his ".6, 24 hours week – Staff Nurse at Te Nikau" and a separate number to use when working casually (albeit the latter number only identified this occurring at Buller).

[15] Mr Devine's evidence struck me as sincere. However, while I accept Mr Devine would be unfamiliar with New Zealand employment law, it is difficult to accept that he was unable to discern the difference between the concepts of permanent and casual work. It was evident in correspondence that his employer treated the two concepts as distinct, with at least two distinguishing features Mr Devine could not fail to appreciate – these were: his holiday pay was treated differently in each context, and he had no set guaranteed hours when working casually. It was also clear that Mr Devine knew he had reduced his guaranteed working hours from 0.8 to 0.6. and he was initially comfortable about this; preferring the professional growth he would get at Te Nikau. I objectively find that given the three hours return commute, it was not surprising Mr Devine sought less hours. I also consider a further compelling factor was Mr Devine sought the changes to his status - it was not imposed.

Problems in the Te Nikau role – and return to Buller ASU

[16] Unfortunately, the part-time and casual jobs at Te Nikau did not work out and Mr Devine resigned on 28 November 2023 (effective 26 December) and then took a break before resuming working back at Buller ASU in a casual capacity in February 2024. During his notice period, Mr Devin inquired whether he could return to a permanent position at Buller ASU.

[17] The Authority was provided with an email to Mr Devine from Ms Piercy, the then acting Buller ASU, clinical nurse manager, of 14 November 2023, that indicated Buller ASU was "essentially short 2.4FTE in ASU". While Ms Piercy was encouraging of Mr Devine's return to Buller ASU, the email fell short of an offer of a return to a permanent role. Ms Piercy's email indicated: "If you are keen to do more shifts in ASU, we could continue on this casual pathway" and she also specifically referenced a potential one day per week role to cover for a nurse engaged in a triage pilot program.

[18] Mr Devine says after getting initial assurances it was possible to return to a permanent role he was told a hiring freeze prevented this occurring. Ms Piercy initially indicated while no ‘freeze’ was in place at the time, recruitment had slowed and was being managed by a nursing recruitment team in Greymouth that was also subject of a new government “approval to replace process”. Ms Piercy qualified this when being questioned during the investigation, by recalling she had requested the 2.4 FTE gap be filled but she says the whole recruitment process was shut down.

[19] Mr Devine at the time did not raise a personal grievance about his perceived status and says he simply accepted the situation as he needed ongoing employment and hoped his situation would improve. I note an email exchange between Mr Devine and a Te Nikau manager of 12 December 2023 shows Mr Devine knew his status had changed, as he indicated:

> As per our discussion in regards to my notice to cease operations in Te Nikau I just wanted to make sure that it is understood that I am only ceasing my contract with Te Nikau only and will be continuing my casual contract with Buller.

[20] Upon returning to Buller ASU in February 2024, Mr Devine says he started working the same regular hours as previously, he described this as 0.6 to full time, usually four shifts a week. Ms Piercy conceded because of the then Buller ASU staffing situation, it was likely Mr Devine was regularly offered more than 0.6 hours per week.

[21] Mr Devine applied for a permanent role in Nelson in late June 2024 and says he was offered it subject to a reference check from Ms Piercy, but after discussing his preference to remain at Buller he declined the role on the suggestion by Ms Piercy that he should apply for an upcoming permanent vacancy at Buller ASU. While this situation was unfortunate, it was also just as likely Mr Devine chose not to relocate to Nelson as he resided in Westport (a preference Mr Devine later confirmed in an email discussed below). Ms Piercy recalled at the time Mr Devine was, in addition to working casually at Butler ASU, undertaking casual shifts at Wairau hospital and the St John ambulance service.

[22] Mr Devine was not appointed to the Buller ASU vacancy and says he also applied for various permanent vacancies in the West Coast/Tasman area between January 2024 and March 2025 but was unsuccessful in all applications.

9 September 2024 email

[23] Mr Devine then emailed Ms Piercy on 9 September 2024, setting out his concerns and asking how things were progressing and if there was any possibility of obtaining a permanent role at Buller ASU, but he got no response. Ms Piercy says she had no recollection of receiving the email and first viewed it when it was disclosed by Mr Devine's counsel as part of the Authority investigation process. Ms Piercy says she has been unable to locate the email. I note the email was addressed to Ms Piercy's personal Hotmail address and I accept Ms Piercy's explanation. However, the email is good evidence of Mr Devine's situation and his concerns at the time it was sent, Mr Devine asserted in summary, he:

- Regularly, for some time had been covering the equivalent of a full-time workload on a casual basis and was active in the leadership team and had been stepping up as a shift co-ordinator as well as contributing to a triage flow improvement initiative.

- Failed to understand why his ongoing regular shifts were not made permanent from a cost/benefit standpoint.

- Had an expectation his allocation of regular shifts would continue.

[24] The email also explained Mr Devine was seeking a permanent role to ensure he had some financial stability including being able to secure a mortgage to buy a house. Mr Devine alluded to his wish for career development and a wish to undertake post graduate training to work as a rural nurse specialist and ultimately a Nurse Practitioner (that he understood could include funding support from HNZ but only if he was in a permanent role). All objectively legitimate concerns.

Potential decline in shifts on offer

[25] Further, in a 23 October 2024 email exchange between Mr Devine and a roster co-ordinator enquiring as to why his "nearly full-time equivalent" shifts were not being allocated from 18 November, it is explained by the co-ordinator:

> As originally discussed, we have been rostering you into known gaps due to resignations.
>
> As we have a NetP nurse now, once she has completed her orientation, she will be needed to be included in the floor numbers which is where your shifts have started to drop unfortunately.
>
> We appreciate the help you have given over the past few months and will definitely be the first person we contact when gaps occur in the roster.

[**NB** NetP (Nurse Entry Practice) refers to someone undertaking a 12-month paid structured support programme to assist either new graduate, registered or enrolled nurses].

[26] From his perspective, Mr Devine's situation now became more tenuous and he was understandably aggrieved, as he viewed the situation as a less qualified nurse usurping his access to regular work shifts.

The first personal grievance: questioning his employment status

[27] Mr Devine sought legal advice and in a letter of 31 October 2024, his lawyer wrote to Ms Gilsenan then interim director of nursing. The letter said Mr Devine was facing reduced hours and suggested Mr Devine's prior pattern of hours worked should lead to an agreement he be made a permanent part-time employee, to reflect the "true nature of the employment relationship". The letter attached a statement from Mr Devine noting he:

- Had worked for several years and had been rostered on regular shifts.
- Was regularly working more than 0.8 hours per week.
- Often was rostered months in advance and allocated set shifts.
- At times was asked to work beyond eight hours to ensure coverage.
- Took on additional duties and responsibilities he perceived would not normally be allocated to casual nurses.
- Had been encouraged to invest in further training.

[28] Ms Gilsenan acknowledged the above letter the next day, but when no further substantive reply was forthcoming, Mr Devine's lawyer emailed HNZ's Group Manager – Employment Law (GMEL) on 12 November, seeking a response and suggesting mediation as an option. There was then an unexplained gap in communication, with Mr Devine's lawyer not following the matter up till 20 January 2025, when he emailed why there was a delay in the provision of Mr Devine's wage and time records and the GMEL responded on 29 January with payroll data on Mr Devine's hours worked per fortnight and, a promise to further provide timesheets.

[29] In a further email of 17 February, the GMEL provided paper time sheets and advised he had made some enquires on how Mr Devine's "relationship with HNZ operated". In the first substantive response to Mr Devine's concerns, the GMEL briefly opined that Mr Devine had been offered and accepted shifts throughout his casual engagement and this was consistent "with a truly casual relationship"; he acknowledged the timesheets evidenced a variable work pattern that included a period between August until November, when Mr Devine "worked more hours than normal" but then observed that "towards the end of November and in January he has gone back to having reduced hours". The GMEL (now designated "Principal Legal Counsel – Employment") communicated HNZ's stance as: "Ben is truly casual and [HNZ] does not recognize his claim to permanence". Without offering to attend mediation or meet, the email ended with a bland suggestion HNZ were "prepared to continue engaging in good faith".

[30] No further communication was disclosed, and the matter remained unresolved despite the parties' attending mediation. Mr Devine then lodged an application in the Authority on 5 May 2025, seeking to resolve the question of his employment status. The matter was initially the subject of an Authority conference call on 14 August 2025, which set the matter down for an investigation meeting on 7 November 2025, but in the interim a further development occurred which is discussed below.

The 'stand down' or 'suspension' and subsequent resignation.

[31] On 13 August 2025, Ms Gilsenan received an email from the Buller ASU clinical nurse manager detailing concerns about four of Mr Devine's clinical practice matters occurring between 17 July and 7 August and it was also suggested Mr Devine had on two (undated) occasions not turned up for shifts with inadequate communication. The concerns also generally suggested Mr Devine had, at times, an issue with HNZ policies and procedures (although no specific breach was alluded to) and Mr Devine had allegedly made a disparaging comment about co-workers' competency and made himself unavailable for a rostered shift without explanation.

[32] After seeking advice from Ms Patterson on whether she could stand down a casual employee to conduct a clinical review Ms Gilsenan, via Ms Paterson, wrote to Ms Devine on

14 August, briefly detailing some of the concerns that had been provided to her (concentrating only on the clinical issues) without disclosing the correspondence they were based on, but identifying their source. Ms Gilsenan's letter concluded due to the nature of the "perceived clinical concerns" Mr Devine was to be stood down from any work until an investigation was completed and an outcome determined. Ms Gilsenan then detailed only the next four rostered shifts Mr Devine was due to work, would be paid as special leave.

[33] Ms Gilsenan says another director of nursing also rang Mr Devine on 14 August to advise he was immediately to be stood down, but there was no record of the call produced and, the director of nursing involved did not give evidence to the Authority. Mr Devine recalled the 14 August telephone conversation but says he was not provided with any details of the clinical concerns and despite being informed the call was being recorded and assured he would receive a copy of the recording; it was not provided. HNZ advised the Authority they have been unable to locate a copy of the recording cited and no notes of the conversation were taken.

[34] Mr Devine then identified a personal grievance action in an email from his lawyer of 19 August, communicating a belief that he had been unjustifiably suspended without due process and that he had insufficient information on the specific nature of the clinical concerns his employer held. In a response of 19 August, HNZ's lawyer indicated they were now acting and the following day they provided the detailed letter of concerns the clinical nurse manager had raised with Ms Gilsenan.

[35] There was then an unfortunate period of poor communication, as HNZ did not immediately commence an investigation and were slow to address the concerns about Mr Devine's enforced absence from work and lack of ongoing income opportunities (Mr Devine's lawyer requested he be paid during what they viewed as a suspension in an email of 20 August). Despite this, there was a further delay in communication with Mr Devine's lawyer having to email HNZ's lawyer on 4 September, noting her email of two weeks previous had not been addressed (including the request for paid leave) and reiterating that a personal grievance had been raised pertaining to what was described as a unilateral suspension without consultation. The HNZ lawyer's response of 5 September, was that they were taking instructions from their client and would revert when they were obtained.

[36] After no prompt response was forthcoming, a 11 September email from Mr Devine's lawyer placed HNZ on notice of a potential resignation within 7 days, asserting Mr Devine could not remain suspended without pay for an indefinite period and a consequent constructive dismissal claim was likely. The email suggested the employment relationship had been repudiated, due to HNZ's "deliberate and ongoing failure to provide reasons for the unpaid nature of the suspension and any supporting evidence".

[37] I observe the latter assertion is not sustainable – HNZ had, by this point in time, provided sufficient information as to why they were standing Mr Devine down but crucially no response on why they viewed the situation as being a 'stand down' as opposed to a conventional suspension. HNZ also failed to address Mr Devine's ongoing lack of income opportunities or detail what was happening with their investigation (it transpired – nothing).

[38] I observe the collective agreement has no provision to suspend an employee and upon seeking confirmation on whether HNZ has any policy guidelines on suspensions or standdowns, I was advised by HNZ's counsel that they do not and, that they rely on past custom, and practice as explained by Ms Paterson during the investigation meeting.[1] I however acknowledge this is an unusual situation given Mr Devine's then disputed status as a casual employee.

[39] Despite the seemingly obvious urgency of the situation, by the morning of 18 September, HNZ had not responded, and Mr Devine's lawyer signalled a personal grievance that Mr Devine was now pursuing an unjustified dismissal claim and would be amending his application to the Authority to reflect this. HNZ have relied upon this email as Mr Devine's resignation, but the wording of the email is ambiguous. Mr Devine did not tender his resignation – rather his lawyer suggested an unjustified dismissal had occurred because HNZ had effectively repudiated the employment relationship. The Authority was provided with no further correspondence between the parties.

[40] At the Authority investigation, Ms Gilsenan and Ms Patterson could not articulate a reason for not promptly commencing the investigation of HNZ's clinical concerns other than

[1] Email of 25 March 2026.

HNZ was extremely busy at the time dealing with industrial action contingency planning and had to carefully consider and seek legal advice before responding to Mr Devine's lawyer. To sum up HNZ's position, Ms Patterson's written evidence was:

> From Te Whatu Ora's perspective, there has been no termination of Mr Devine's employment, and he remains a casual employee subject to the current investigation into the serious clinical concerns raised. This investigation is on hold given the current legal process.

[41] In the interim period from September to October 2025, Mr Devine has been applying unsuccessfully for permanent roles in West Coast/Tasman HNZ districts.

[42] During the investigation Ms Gilsenan in response to a question – 'what would they do if the Authority reinstated Mr Devine', said HNZ would have no problem continuing to employ him on a casual basis with an appropriate professional support programme. Despite the ostensible casual nature of Mr Devine's employment, this latter concession reinforced a view that HNZ saw the employment relationship as ongoing.

[43] Ms Gilsenan also said in her written statement of Mr Devine, that she was "not aware prior to his stand down, he had ever thought he was a permanent employee". I observe this cannot be the case, given the 31 October 2024 letter from Ms Devine's lawyer highlighting his status concerns was addressed and emailed to Ms Gilsenan.

[44] Ms Gilsenan who struck me as a fair and open witness, conceded that investigations involving a 'stand down' rather than a formal suspension were usually concluded in a more expeditious manner than occurred here and often resulted in support/improvement plans being put in place.

[45] As a result of the above developments, Mr Devine lodged an amended application in the Authority on 18 September 2025 suggesting he had been unjustifiably dismissed. Initially Mr Devine did not seek reinstatement as a remedy. The Authority directed the parties to mediation on 7 October, but the matter remained unresolved.

[46] After the unsuccessful mediation, Mr Devine made a further application to the Authority of 20 November 2025 seeking interim reinstatement. In a minute of the Authority of 16 December, the Authority offered to either investigate the interim reinstatement matter on 10

February 2026 or proceed (on the same date) to investigate the earlier amended substantive application (noting the reinstatement claim would also be at issue). The parties chose the latter option.

[47] In submissions, Counsel for Mr Devine summarised his position as he had allegedly been: **"….** unjustifiably disadvantaged by an unfair classification of him as a casual employee, and unfair suspension, and unjustifiably dismissed by the Respondent and ought to be reinstated".

Was Mr Devine's employment casual?

[48] I now assess whether the employment relationship was genuinely casual or otherwise from both the onset of the relationship, during the relationship and at the time it ended. This involves considering how the employment relationship functioned in practice, aided by extrinsic materials (including the wage records) and, an assessment of the parties' evidence.

[49] In assessing Mr Devine's pattern of hours, I do so in the period February 2024 to August 2025. Mr Devine's submission was from an initial standpoint of his whole work period at both locations from August 2021 until August 2025 which shows he worked on average 61.74 hours per fortnight. Mr Devine acknowledged his working hours latterly fluctuated but highlighted from 8 July 2024 to 13 October 2024 he had a high hours' period, averaging 85 hours per fortnight.

[50] In the latter period February 2024 to August 2025 Mr Devine says he worked on average 63.09 hours per fortnight and within that period he, for 80% of the time, worked more than 48 hours per fortnight. Mr Devine also highlighted his work allocation or roster requirements were overwhelmingly planned often a month or more in advance, rather than being ad hoc allocations.

[51] Mr Devine says he had an expectation of regular hours and at times was willing to work extra hours and always made it clear he was available to work more hours.

[52] In contrast HNZ, in submissions consistent with a contention Mr Devine was a genuinely casual employee, say when he resigned at Te Nikau on 26 December 2023, he chose not to make himself available at Buller ASU until 15 January 2024. From the latter time until he was suspended on 14 August 2025, HNZ says Mr Devine worked an average 57.02 hours

per fortnight and this included a period between August to November 2024 when he had consistent work covering a staff vacancy. HNZ contend this is the only period that should be assessed. HNZ says Mr Devine's hours were significantly variable, consistent with a casual engagement. HNZ also contend Mr Devine could remove himself from the forward roster without giving notice if he wished to take leave.

[53] HNZ says Mr Devine's situation is analogous to the Employment Court decision *Savage v Capital & Coast Health Board* where the court declined, in terms of the situation of the nurse involved (Mr Savage) and the analysis of his pattern of work, to find a permanent status had been established. [2]

Legal issues

[54] The Act provides no definition or statutory test to apply to determine 'casual employment' other than s 6 of the Act indicating that an assessment of employment status (impliedly including whether 'casual' or not) needs to examine the real nature of the relationship with the parties' description of the relationship in an employment agreement not being determinative. In contrast, in Australia the Fair Work Act has a broad statutory definition of 'casual' as being a worker who has no advance or firm commitment to continuing and indefinite work, which would entitle them to a casual pay "loading" or a specific set contractual rate. [3]

[55] Useful guidance on determining what is or is not, a genuine casual employment relationship is found in the leading Employment Court decision *Jinkinson v Oceania Gold (NZ) Ltd.* [4] In *Jinkinson* Couch J, while observing the 'essence' of casual employment is normally that obligations only exist during each period of employment or engagement and no mutual obligations exist outside these periods, drew a contrast with permanent employment that is normally indicated by a situation where an employer is obligated to offer further work and an employee is obligated to take it. However, where there is a contention that a casual

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[2] *Savage v Capital & Coast District Health* [2016] NZEmpC 83.

[3] Fair Work Act 2009 (Cth), s 15A.

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

relationship may have essentially 'morphed' into a permanent one, the court in *Jinkinson* identified the following relevant factors to consider:

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.

[56] Taking a broad view and applying and balancing factors cited above, HNZ's staffing needs generally arise from a need to set safe staffing levels and cover for patients. The evidence was that in the Buller ASU established staffing levels was difficult to maintain and constrained at times by externally imposed hiring policies. The evidence disclosed that at the time Mr Devine sought to return to Buller ASU, it was short staffed. From what has been described it was difficult not to conclude that some staffing 'gaps' were being deliberately plugged by casual staffing in preference to engaging permanent or at least permanent part time staffing. This situation appears at odds with the collective agreement definition of how a casual should be deployed which states:

> Casual employees cannot be used to replace genuine permanent or temporary situations except to meet business requirements where no other alternative is available.

[57] Notwithstanding, the above, the pattern of work undertaken between February and November 2024 when the impact of the appointment of the NetP Nurse reduced Mr Devine's shift opportunities, indicated a regular pattern of hours akin in number to what Mr Devine had worked previously at Buller AEU when he was permanent. Mr Devine had an expectation of being offered ongoing work. As observed after reviewing authorities Couch J in *Jinkinson* noted:

> …. where the conduct of the parties gives rise to legitimate expectations that further work will be provided and accepted, there will be a corresponding mutual obligation on the parties to satisfy those expectations.

[58] Here HNZ had an ongoing need to roster Mr Devine to fill staffing shortfalls and Mr Devine made himself consistently available to assist.

[59] I appreciate for HNZ local staff that it was a very difficult exercise to allocate hours to nurses but I could not comprehend why Mr Devine, who had a proven track record of keenness, commitment, reliability and availability, could not be provided core minimum hours based on his consistent pattern of work when he returned to Buller AEU. The evidence at the time demonstrated local management had a significant degree of trust and confidence in his abilities and future potential.

[60] While I do not accept counsel's contention in submissions, that Mr Devine was at all times engaged by the same employer and his permanency 'per se' should stem from this, there is merit in the proposition that HNZ in a time when they were experiencing difficulty in attracting nurses to work on the West Coast and elsewhere, should have sought to retain Mr Devine in a more secure tenure. In the circumstances however, I find Mr Devine technically resigned from HNZ when he vacated his position at Te Nikau and he then sought re-employment with HNZ at Buller ASU, but no permanent role was offered, so he re-engaged with HNZ in a casual role. There was a short break in the continuity of the employment relationship and it's status.

Assessment

[61] First, I consider the analogy of *Savage v Capital & Coast District Health Board* as suggested by HNZ"s counsel, distinguishable in a factual context, as in that case Mr Savage was a more experienced nurse than Mr Devine and Mr Savage had had several prior employment arrangements and latterly, specifically sought casual work due to not being able to cope with roster pressures and when he became casual he used this flexibility. By contrast, Mr Devine was seeking a permanent role and the casual arrangement was circumstantially

imposed on him and, evidence suggests Mr Devine rarely turned down shifts.[5] Unlike the correspondence Mr Devine was provided, The terms of Mr Savage's casual relationship were explicitly set out in a detailed letter of offer and the Judge found this "was not a situation where an employee wished to advance his career by moving from casual to permanent". Mr Savage did not seek that the casual arrangement be terminated or changed. [6]

[62] I find HNZ's employment relationship with Mr Devine is better described as permanent part-time and an obvious option would have been to maintain continuity by devising an agreed floor of guaranteed hours when Mr Devine sought to return to Buller ASU, consistent with the terms he was appointed on when he chose to relocate from Australia.

[63] However, the casual 'label' was imposed on Mr Devine as the only option available when he sought to return to Buller ASU and I find he was unjustifiably disadvantaged by this situation. I find HNZ did not act as a fair and reasonable employer could have done which then included an unreasonable delay in properly addressing Mr Devine's concerns about his employment status that inevitably caused him ongoing stress and uncertainty.

[64] The context of Mr Devine's re-engagement at Buller ASU and how the work was allocated over time, created a reasonable expectation of ongoing regular employment. This was an unfortune set of circumstances where I find that HNZ not only did not act reasonably but also breached a good faith duty to be communicative and maintain a constructive and productive employment relationship in all the given circumstances.

[65] I find the employment of Mr Devine could be described as casual as evidenced by how his holiday pay was treated, but this label did not in all the contextual circumstances,

[5] Note 2 see discussion at [55] to the effect the court noted casuals should not be used to deny staff security of employment and [56] where the court notes Mr. Savage's situation was an "entirely different fact context" as he had resigned a permanent role to seek the flexibility of a casual role.

[6] Above n 2 at [101].

accurately describe the real nature of the employment relationship; both in common law terms and under s6 of the Act. [7]

Finding

[66] I find the employment relationship in its duration and nature, had the characteristics of permanent part-time work and the stance of HNZ reiterating their view it was a casual employment relationship is unsustainable had they conducted a proper and careful analysis of Mr Devine's working hours and the prevailing contextual factors. I also find the continued utilisation of Mr Devine in a casual capacity amounted to a breach of the HNZ/NZNO collective agreement provision on the legitimate use of casual employees. While it is arguable that Mr Devine's employment engagement and hours changed over time and to assess the nature of the relationship is normally an exercise conducted at a time appropriate to the proceedings, here Mr Devine had raised the issue of the appropriateness of his tenure when he returned to Buller AEU in early 2024 and formally by way of a grievance lodged on 13 October 2024. In these circumstances, it is not appropriate just examine the nature of the relationship at the time Mr Devine ostensibly resigned.

Was the 'stand down' or suspension an unjustified action in all the circumstances.

[67] I observe at the outset, that regardless of how this situation is categorised, I see no distinction between a stand down and a suspension. They are interchangeable terms with the same impact on the employment relationship which is the Authority's sole focus. I will use 'suspension' as the more commonly understood term.

[68] While an employer would normally not suspend a casual employee unless they were impliedly committed to an ongoing employment relationship and it is evident here that HNZ was seeking to maintain the relationship, it was objectively a drastic step. HNZ considered it appropriate that a planned investigation necessitated Mr Devine be immediately removed from duties due to the nature of the concerns. Ms Patterson, HR Business Partner for HNZ, introduced a further complicating factor, that is HNZ apparently has a long-standing practice

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[7] 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.

of ‘standing down’ employees rather than formally suspending them because suspension triggers a requirement to notify the Nursing Council which may then entail an additional investigation and potentially place the nurse’s practicing certificate in jeopardy.

[69] While I acknowledge it has long been recognised that an employer may temporarily suspend an employment relationship without an express contractual provision to do so (as is here), the common law approach is that suspension is only permitted, as the Employment Court recently reiterated, where an employer “has good reason to believe that the employee’s continued presence in the workplace will or may give rise to a significant issue, and the suspension is undertaken fairly and with procedural justice”. Further, the “minimum requirements” supporting a fair process involve the employee being told a suspension is in contemplation, the reasons why and crucially an opportunity to be heard before a decision is made. [8] Chief Judge Goddard in *G & H Trade Training Ltd v Crewther* stated:

> It is well settled that being suspended from employment is a devastating experience and, even when it is necessary, it should be handled in a humane way. It is also settled that there should be some inquiry into the question whether a suspension is necessary and the employee should be given an opportunity to argue that he or she should not be suspended or should be suspended on pay and other proper conditions. [9]

[70] The problem for HNZ is the ‘stand down’ letter of 14 August, did not explain HNZ’s perceived distinction between stand down and suspension and their reasoning for opting to take the approach adopted. For Mr Devine the financial impact of him not working during an investigation was devastating as not only was he on unpaid leave but his ability to mitigate his loss was significantly compromised. On the latter issue, Mr Devine disclosed an 18 August 2025 email from the clinical nurse manager at Buller ASU indicating annual leave opportunities in the coming 6 months which impliedly if taken up would need ongoing casual staff coverage.

[71] In assessing the process adopted prior to the suspension letter being issued, I find Mr Devine had no input or ability to comment on a proposal nor was he apprised of vital

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[8] *Edgecumbe Supermarket Limited v Petersen* [2026] NZEmpC 56 [25 March 2026] at [16] citing *Singh v Sherildee Holdings Ltd (t/a New World Opotiki)* [2005] EMNNZ 812 (EmpC at [91] and [93].

[9] *G & H Trade Training Ltd v Crewther* [2002] 1 ERNZ 513 at [39].

information on his employer's reasoning behind standing him down. These actions and omissions were unjustified. I also have a concern that HNZ has objectively not made out compelling grounds for the urgency to suspend. The concerns identified were at HNZ's own admission by using a stand down, insufficiently serious to warrant a formal suspension and reporting to the Nursing Council. If that was the case, it puts into question what alternatives were available that could have avoided suspension. For example, as affirmed by Ms Gilsenan in contemplating Mr Devine's return to employment, a supportive education programme may have been a better option while Mr Devine continued in employment. I am conscious that the step to suspend was made without first ascertaining Mr Devine's initial response to the concerns raised about him or evidently any initial enquiries to ascertain contextual issues.

[72] The next significant factor is once Mr Devine was suspended, HNZ took no steps to initiate an investigation in a timely manner. An obvious step missed was setting up a prompt meeting with Mr Devine to hear his perspective of the situation - this did not occur. I find a reasonable employer in the circumstances, knowing their actions had effectively stopped Mr Devine's earning capacity, would have taken immediate steps to engage with Mr Devine and then commence an investigation of the concerns that led to the drastic step of suspension without pay.

Finding

[73] I find Mr Devine was unjustifiably disadvantaged by the unilateral process of suspension and its duration without any prompt instigation of an investigation or communication of a compelling explanation why this was not occurring. I also observe that although the parties eventually engaged in dealing with the personal grievances of Mr Devine, this should not have prevented HNZ's concerns being addressed or being placed on a pathway to resolution. The matter was unnecessarily aggravated by prior to the suspension, HNZ not dealing promptly with the issue of Mr Devine's employment status in a timely, fair and constructive manner. HNZ's unresolved concerns have effectively stalled Mr Devine's work prospects and career progression. I have considered that HNZ is a large and well-resourced employer and should have got this process correct. I consequently find HNZ has not acted how a fair and reasonable employer could have done in all the circumstances and they have

caused Mr Devine detriment and distress to which he is entitled to a consideration of appropriate remedies.

How the employment relationship ended

[74] How the employment relationship ended is a different matter and difficult to resolve where one party considers there was no obligation to offer ongoing employment. However, given my findings above, the circumstances of the employment ending needs scrutiny to determine on who's initiative it ended and if I find Mr Devine resigned, there is a question of whether he was constructively dismissed. If I am also wrong in my analysis of the relationship evolving into a permanent one, I observe that the Authority has previously held an unjustified dismissal can occur during an agreed period of casual employment. [10]

[75] The events that led to the breakdown of the employment relationship have been described above and can be summarised as Mr Devine losing patience with his employer not promptly addressing his legitimate concerns about them suspending him without pay, placing HNZ on notice he was contemplating resignation and then on not receiving a prompt response, choosing to treat the employment as at an end. I find Mr Devine's approach objectively understandable, but the question then becomes, was there a significant enough breach committed by HNZ (or series of breaches) that it was foreseeable Mr Devine would resign.

Was Mr Devine constructively dismissed?

[76] A 'constructive dismissal' can be found if an employer's breach worthy conduct compels a worker to resign in circumstances where although on the surface, the worker appears to have voluntarily resigned, it can be held to constitute an unjustified dismissal. One instance of this premise (as alleged here) and described as the 'third category' in the leading Court of Appeal authority [11] is where the resignation is caused by an alleged breach of a duty owed to the worker and the employer could reasonably foresee that rather than put up with the breach,

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[10] *Ford v Haven Falls Funeral Home Ltd* [2024] NZERA 224.
[11] *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372.

the worker resigns - effectively signalling a belief that their employment agreement has been repudiated by the employer.

[77] The Court of Appeal has stated the broad legal approach as:

> In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.[12]

[78] The overarching and well recognised duty that is now statutorily recognised as a component of 'good faith', [13] is that an employer should not without proper cause, act in a manner calculated to or likely to destroy or seriously damage the relationship of trust and confidence between the parties to the employment relationship. [14]

[79] However, before I need to assess the nature of the breaches alleged and whether they were sufficient to cause a situation whereby it was reasonably foreseeable Mr Devine would resign, the unique context of this situation must be carefully assessed. That is, the parties at the time Mr Devine purported to resign, were already in a dispute about their rights on two issues (the suspension and Mr Devine's employment status) as well as the early stages of a potential performance and/or disciplinary investigation. I must also consider the unusual fact that despite indicating his employment was at an end, Mr Devine is seeking reinstatement. In essence there was already existing unresolved and ongoing disputes at the time Mr Devine resigned.

[80] In a case where there was dispute as to the parties' respective obligations the Employment Court in *New Zealand Institute of Fashion Technology v Aitken* held:

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[12] *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 2 NZLR 415 (CA), [1994] 1 ERNZ 168, 172.

[13] Employment Relations Act 2000, ss 4 (1A)(a) and 4(1A)(b).

[14] *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372

> Where there is a genuine dispute between the parties as to their rights, especially if it is based on reasonable grounds, neither party can use the other party's stance in the dispute as a ground for either dismissal or resignation intended to be treated as a dismissal …. The parties owe each other a duty to refer the dispute to mediation. [15]

[81] However, *Aitken* while enunciating a sound principle, involved the non-payment of a bonus not being sufficient to establish a causative breach may be distinguished here - where Mr Devine in addition to his existing dispute about his status, was suspended without pay from any ongoing earning opportunities; no prompt investigation had occurred and his employer was uncommunicative in the face of being put on notice of Mr Devine contemplating resignation.

[82] Given I have found the suspension to be unwarranted and procedurally unjustified, the only questions I have are were the employers actions and omissions sufficiently causative of a breach so as to make it reasonable that Mr Devine would treat the employment relationship as being at an end given the laxity of HNZ responding to his concerns or did Mr Devine resign too early before giving HNZ an opportunity to resolve matters including utilising the option of mediation. I must also consider fairly whether Mr Devine had a mixed motive for resigning as he was under the threat of investigation for identified clinical concerns. I also have considered that HNZ at the time genuinely considered the employment relationship to be casual and to their credit has expressed a willingness to re-engage Mr Devine.

Finding

[83] Assessing all contextual factors and submissions and by a narrow margin, I find that Mr Devine was not constructively dismissed as I find him to have taken the step of resignation to effectively force his employer to more promptly deal with his existing grievances over his status and the suspension. The desire of Mr Devine to be reinstated militates against the notion of a fundamental breach bringing the employment relationship to an end.

Summary

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[15] *New Zealand Institute of Fashion Technology v Aitken* [2004] 2 ERNZ 340 (EmpC).

[84] Given my finding on Mr Devine's retrospective status being permanent and not casual; that he has been unjustifiably disadvantaged by the suspension and the lack of good faith in not promptly addressing his concerns, Mr Devine is entitled to the consideration of remedies including reinstatement discussed below.

Remedies

Lost remuneration

[85] In the context of the Authority findings, Mr Devine claims lost wages from the date the suspension became effective until the date of the investigation meeting.

Finding

[86] Exercising the discretion the Authority has under s 123(1)(b) of the Act in all the circumstances I find the unjustified suspension without pay caused Mr Devine to lose wages on an ongoing basis and severely constrained his ability to mitigate his situation. The claim is established in full in accord with the Authority's discretion in s 128(3) of the Act to compensate Mr Devine for remuneration lost as a result of his established personal grievance claims.

Compensation for distress, hurt and humiliation.

[87] Mr Devine impressed with compelling medical evidence that this situation significantly impacted his mental wellbeing in several facets of his life and ability to progress his chosen career.

[88] Mr Devine had his confidence and trust in his employer eroded by their actions and omissions, then once he was suspended, he felt understandably ignored and humiliated. Mr Devine presented as genuinely hurt and bewildered by the circumstances of the employment ending and I accept the suspension caused him unnecessary distress and humiliation.

[89] Mr Devine was afforded little agency in being able to resolve matters with HNZ including his dispute about his employment status that has gone on unresolved for an inexplicable period. Communication from HNZ was evasive and unconstructive and I accept this caused Mr Devine an additional sense of isolation and humiliation.

Finding

[90] Considering the evidence proffered and awards made by the Authority and Court in similar circumstances and surveying cases, I consider Mr Devine's evidence warrants reasonable compensation of $15,000 under s 123(1)(c)(i) of the Act. [16]

A Penalty for breach of good faith?

[91] This matter relates to my finding that HNZ breached obligations under s 4(1A)(b) of the Act by failing to be communicative and constructive in communications with Mr Devine both in responding to the issue of his employment status and then resolving matters arising from the suspension. In submissions Mr Devine did not articulate why a penalty should be awarded and I consider in all the circumstances, that an additional penalty is not appropriate as the threshold was not met of HNZ's conduct being deliberate, serious and sustained or deliberately undermining of the employment relationship. I consider the remedies provided below adequately address Mr Devine's concerns and notwithstanding, arise from the same set of facts.

[92] However, I observe HNZ need to reflect on their lack of timely and constructive communication and seek to improve on this aspect when dealing with employee grievances.

Finding

[93] I find it is not appropriate to award a penalty for HNZ's breach of good faith.

Reinstatement

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

[94] Mr Devine seeks reinstatement in a permanent role and asks the Authority if they grant this remedy to not place Mr Devine back at Buller AEU or the West Coast district of HNZ. Pursuant to s 123(1)(a) of the Act Mr Devine is seeking reinstatement in a position "no less advantageous" to him. [17]

[95] HNZ oppose reinstatement suggesting inherent problems in appointing Mr Devine to a materially different position suggesting this option is neither practical nor reasonable. HNZ in submissions construct their opposition to reinstatement on the principal ground that Mr Devine occupies a casual position and they cite outstanding "potential clinical concerns" and Mr Devine's dismissive attitude to them as a reason for considering him unsuitable to return. HNZ then imply that should Mr Devine be reinstated this be preceded by the completion of an investigation of the clinical concerns identified and then only on a casual basis. HNZ, note they operate a high trust environment, and nurses carry significant responsibility for patient safety. Further HNZ submit there is little precedent for reinstating an employee to a position in a location of their choosing and the employer's duty is to reinstate wherever reasonable or practicable to the position the employee previously held. HNZ also suggest Mr Devine has not made out that his relationships with co-workers at Buller AEU has irrevocably broken down.

[96] Although a national employer with a centralised recruitment requirement, HNZ says it would be impractical to simply create a role in a particular district which is still dependent on local financial resources and recruitment policies and processes. HNZ also cite the delay Mr Devine took before seeking reinstatement (being three months since his last shift worked).

Assessment

[97] The reinstatement claim is made pursuant to s 123(1)(a) of the Act. Section 125 of the Act details reinstatement is the primary remedy and subs (2) indicates this may occur wherever practicable and reasonable, irrespective of whether any other remedy prevails.

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[17] Employment Relations Act 2000, s 123 (1)(a).

[98] The Employment Court in *Christieson v Fonterra Co-operative Group Ltd* drew a distinction between practicable and reasonable as:

> Practicability and reasonableness are two separate considerations. For reinstatement to be practicable, it must be capable of being carried out in action, be feasible and have the potential for the re-imposition of the employment relationship to be achieved successfully. There may be considerations separate from the reasons for the dismissal that are germane to this question. In looking at reasonableness, the Court needs to consider the respective effects of an order, not only on the individual employer and employee in the case, but also on other affected employees of the same employer and, in some cases, perhaps third parties who would be affected by the reinstatement. [18]

[99] The Employment Court has found that where it is established "the employer still requires work to be done which the employee is capable of doing", the onus of proving that it is not reasonable and practicable to reinstate rests with the employer. [19] While reinstatement is predominantly sought in successful unjustified dismissal contexts the Act does not make this distinction. [20] An analogous case is the Employment Court in *Jinkinson* after determining the preliminary matter of Ms Jinkinson's status (as not casual), the court proceeded in a subsequent decision to reinstate Ms Jinkinson (albeit in the context of an unjustified dismissal pertaining to a redundancy selection issue). [21]

[100] I find HNZ's evidence did not establish it would be impractical to reinstate Mr Devine. Ms Gilsenan's evidence did not support this notion despite her apparently drawing a distinction that Mr Devine could only be reintegrated back to his casual role. Given Mr Devine is a relatively experienced registered nurse he is well capable of undertaking a permanent role as he previously worked in two such roles. I am also conscious that HNZ's rather incongruous position on the unjustified dismissal grievance was that Mr Devine had

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[18] *Christieson v Fonterra Co-operative Group Limited* [2021] NZEmpC 142 at [39].

[19] *Jinkinson v Oceana Gold (NZ) Ltd (No 2)* [2010] NZEmpC 102 and see also *Lewis v Howick College Board of Trustees* [2010] NZCA 320 at [7].

[20] Employment Relations Act 2000, s 123(1) refers merely to the remedy being one of a number to address a "personal grievance" which is defined in s 103 as including an unjustified disadvantage.

[21] Above n 16.

not resigned and his employment relationship had only paused due to the necessity to suspend him and complete an investigation of their concerns.

[101] In contrast, not reinstating Mr Devine would have likely grave consequences on him re-establishing his chosen public nursing career given the dominance of HNZ in the sector (and likely constrain his ability to secure jobs outside the public sector).

[102] On the issue of reasonableness, I am persuaded that the size and scope of nursing jobs within HNZ provides a unique opportunity to fashion a suitable placement that will not inconvenience an employer who is generally known as finding it difficult to recruit and retain registered nurses.

Finding

[103] In all the circumstances I find that Mr Devine should be reinstated to a permanent role on conditions detailed in my order below and have his holiday entitlements established as a permanent employee.

Contribution

[104] Section 124 of the Act states that I must consider the extent to what, if any, Mr Devine's actions contributed to the situation that gave rise to his personal grievance and then assess whether any calculated remedy should be reduced. While I have considered evidence that clinical concerns were brought to Mr Devine's attention and HNZ invited the Authority to consider the concerns to be factors that should be considered as contributory behaviour, I am unable to do so. This is because the concerns raised were essentially allegations that had neither been tested by an investigation nor established by any evidence led in the Authority.

[105] I consider no reduction in the remedies is justified. Mr Devine did not contribute to the factors that gave rise to his personal grievance – the grievances arose from HNZ's ongoing breaches of its obligations to treat Mr Devine fairly including an overarching obligation to be constructive and timely in addressing Mr Devine's concerns.

Overall findings and orders made

[106] I have found that:

(a) Ben Devine was not dismissed, constructively or otherwise.

(b) Ben Devine was unjustifiably disadvantaged by being suspended without pay in an inappropriate and unfair manner for an investigation that was not commenced, this effectively prevented Mr Devine from ongoing income opportunities in his chosen career.

(c) I have found that the position Mr Devine latterly occupied at Buller ASU was not casual because Health New Zealand Te Whatu Ora initially ignored a term of the collective employment agreement on the use of casual employees and the pattern of hours Mr Devine subsequently worked was not consistent with a causal relationship.

(d) As a result, Mr Devine is to be reinstated to a permanent position as a Registered Nurse for a minimum of a 0.6 FTE (24 hours per week) within 20 days of the issuing of this determination at a location and on terms to be agreed between the parties. This must include Mr Devine agreeing to a suitable professional support programme that addresses both the clinical concerns identified and his reintegration into a nursing position. If the parties cannot reach an agreement on the terms of reinstating Mr Devine within 20 days, leave is reserved for either party to apply to the Authority to determine the matter.

(e) In the interim from the date of this determination Mr Devine is to be restored to HNZ's payroll as a 0.6 FTE registered nurse.

(f) In addition, Health New Zealand Te Whatu Ora must also pay Ben Devine:

   (i) $15,000 compensation without deductions pursuant to s 123(1)(c)(i) Employment Relations Act 2000.

   (ii) A sum of lost wages from the date Mr Devine was suspended without pay up until the date of the Authority investigation

meeting - calculated at an average of his ordinary pay (including employer Kiwi Saver contributions) for the twelve months preceding the suspension. If the parties are unable to agree on this amount, then leave is reserved for an application to the Authority to decide the quantum of wages owed.

(iii) In accord with s 28(4) of the Holidays Act 2003, Mr Devine is to have an entitlement to annual holidays created and calculated from an effective date of 1 February 2024.

Costs

[107] Costs are reserved.

[108] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Ben Devine 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 Health New Zealand – Te Whatu Ora 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.

[109] The parties can expect the Authority to determine costs, if asked to do so, on its usual "daily tariff" basis unless circumstances or factors, require an adjustment upwards or downwards.[22]

David G Beck
Member of the Employment Relations Authority

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