

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2026] NZERA 342
3397604

BETWEEN

FIONA SCOTT
Applicant

AND

RITCHIES TRANSPORT
HOLDINGS LIMITED
Respondent

Member of Authority: William Fussey

Representatives: James Sawers, counsel for the applicant
William Henriksen, for the respondent

Investigation Meeting: 6 March 2026 in Dunedin

Submissions received: 14 April 2026 from the applicant
30 April 2026 from the respondent

Date of Determination: 2 June 2026

DETERMINATION OF THE AUTHORITY

[1] On 13 December 2022, Fiona Scott signed a casual employment agreement to commence work as a Charter Driver with Ritchies Transport Holdings Limited (“Ritchies”). Ms Scott performed variable hours each week.

[2] In December 2023, Ms Scott turned down the offer of a permanent employment agreement. However, in early 2024, she became concerned about the reduction in her hours and raised this with Ritchies. The response she received at the time indicated that having not agreed to permanent employment, Ritchies did not want her working regular hours because of the risk that, if she did, the law would deem her a permanent employee.

[3] On 23 March 2024, an incident occurred in which Ms Scott deviated from the bus route she was driving to take a toilet break at home, resulting in a disciplinary process and a first written warning. While Ms Scott was working through this process two of her scheduled

shifts were cancelled, and then from approximately 30 March 2024 onwards she was not offered any further shifts.

[4] Ms Scott alleges unjustified dismissal on the basis she was a permanent employee, and unjustified disadvantage in relation to the first written warning.

The Authority's investigation

[5] For the Authority's investigation a written witness statement was lodged from Fiona Scott. On behalf of Ritchies, a written statement was also lodged from the Depot Manager, David Gordon.

[6] Both witnesses attended the Investigation Meeting, confirmed their evidence, and answered questions under oath or affirmation.

[7] Following the Investigation Meeting, submissions and provision of further information were timetabled.

[8] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law and expressed conclusions on issues necessary to dispose of the matter. It has not recorded all evidence and submissions received.

The issues

[9] The issues for determination are:

- (a) Was Ms Scott a casual employee, or was she a permanent employee?
- (b) Was Ms Scott unjustifiably dismissed?
- (c) Did the issuing of a first warning amount to an unjustified action causing disadvantage?
- (d) If a grievance is established, what remedies should be awarded?

Background

Ms Scott's employment

[10] Having signed a casual employment agreement on 13 December 2022, Ms Scott worked her first shift for Ritchies before the end of the year.

[11] Despite her employment agreement formally recording her position as a Charter Driver, Ms Scott refers to having been both an urban and charter driver. The distinction is that a charter driver works with private groups such as schools, workplaces and tour groups, and is affected by seasonal demand, whereas an urban driver works on fixed public transport routes set by the Regional Council.

[12] Ritchies has provided details of each shift, which show that Ms Scott regularly drove urban routes. In fact, approximately 90 percent of her shifts were urban.

Shift allocation and communicating absences

[13] Ms Scott was allocated work by way of the Distinctive Systems Driver App (“the App”). She would log in to the App on her phone and see the shifts she had been allocated for up to one week in advance. If she wanted to see beyond that, the next two weeks’ shifts were also set out on physical roster sheets affixed to the depot’s walls. If she was allocated a shift she was unavailable to perform, the process was to let the Operations Supervisor know.

[14] Ms Scott said that she could not accept or decline shifts through the App, instead the primary purpose of the App was to see the shifts she had been allocated. Mr Gordon’s witness statement described drivers selecting available shifts through the App; however, consistent with Ms Scott, he clarified at the Investigation Meeting that employees were allocated individual shifts and the process for declining them was to call or text.

[15] Having had an opportunity to provide further information following the Investigation Meeting, Ritchies’ HR Business Partner and representative, Mr Henriksen, sent an email stating that: “shifts were made available via the Driver App and could be accepted at [Ms Scott’s] discretion. Where a shift was not accepted, no action was required. Where a shift had been accepted, employees were expected to notify operations if unable to attend.” However, Mr Henriksen was not a witness in the proceedings, there was no opportunity for this evidence to be tested, and Mr Henriksen was not employed by Ritchies at the time of Ms Scott’s employment. I therefore disregard this evidence.

[16] If a permanent employee sought annual leave or a casual employee was planning on being unavailable for a period, the process was to fill out a form. Mr Gordon said this was a requirement for permanent employees but only encouraged for casual employees given they had the right to decline shifts regardless.

How rostering was determined

[17] Mr Gordon explained that at the time of Ms Scott's employment, permanent full-time employees were split between 80% of their hours on fixed roster and 20% of their hours on holiday relief. This would mean that if for example a full-time worker was guaranteed 40 hours per week, 80% of their hours would be weekly fixed urban routes and the other 20% would be variable based on the needs of the business, including charter work.

[18] In contrast, there was a pool of casual employees who could be called up to perform ad hoc work, often as a cruise ship driver or cruise ship shuttle driver (for example), but also to cover holiday relief and sickness, including on urban routes.

Ms Scott's hours

[19] For the duration of her approximately 15-month employment, Ms Scott worked in all but one of her fortnightly pay periods. For the fortnights she did work, her hours ranged from fewer than 10 to more than 120. Ms Scott rarely, if ever, said no to work.

Appointment of David Gordon

[20] In August 2023, David Gordon was appointed as Depot Manager. Ms Scott had previously worked under Mr Gordon at another bus company and described having felt intimidated by him. She perceived Mr Gordon as having an unreasonably negative perception of her. In contrast, Mr Gordon said that before he took on the Depot Manager position his view of Ms Scott was broadly positive and he considered her a reliable employee.

Offer of permanent employment

[21] In December 2023, Mr Gordon offered Ms Scott a permanent employment agreement, effective 18 December 2023. Ms Scott declined the offer. Ms Scott says this was because she was concerned about the effect of the 90-day trial period which could put her employment at risk; however, having subsequently been provided with a copy of the permanent employment agreement she was offered, this does not contain a trial period. Ms Scott also said that she enjoyed the flexibility of being a casual employee.

[22] Mr Gordon said the reason for the permanent employment agreement offer was because he understood Ms Scott was also performing work for Exploring New Zealand

Limited (“Exploring New Zealand”) at the time, and he wanted her to work solely for Ritchies.

[23] Ms Scott says she worked for Exploring New Zealand on a very informal basis. She does not recall signing an employment agreement or receiving payslips from the company but did provide correspondence which she says indicate the start and end dates of her employment. On 26 October 2022, Ms Scott emailed Exploring New Zealand Director, Andrew Rutherford, with the hours for her first pay, and on 24 July 2023, she emailed a full and final invoice which she says related to a disagreement regarding her final pay.

Reduction in hours

[24] From early 2024, Ms Scott noticed a reduction in her hours. Between August and December 2023 she had been averaging over 100 hours per fortnight but between January and March 2024 her average fortnightly hours had reduced to a little over 60. Although Ms Scott was “happy with [her] hours being irregular and prone to fluctuation, [she] could not understand why the overall number of hours...should be reduced so heavily simply because [she] had declined a full-time [employment agreement]”.

[25] On 25 January 2024, Ms Scott raised her concern about the reduction in hours with Director of People, Sharon Scott. Ms Scott was worried that her hours had been reduced at Mr Gordon’s direction, given her prior dealings with him. The Director of People stated:

“I have emailed Gordie and he advises that this issue is a FT contract was offered to you prior to Christmas but you have chosen not to return this as yet. We cannot have you working regular hours on a casual contract as this is illegal”.

[26] “FT contract” refers to the permanent employment agreement offered in December 2023 and “Gordie” refers to Mr Gordon.

Disciplinary matter

[27] On 23 March 2024, Ms Scott was performing a regular route (Logan Park to Balaclava) and instead of completing the route by finishing at the Opoho terminus as scheduled, she bypassed the final two stops and headed to her home in Normanby to use the toilet. There are no toilet facilities at the Opoho terminus, which means that if a driver needs to use the toilet, they would generally be expected to drive to the depot in central Dunedin. Ms Scott had no passengers on board the bus at the time she deviated from the route.

[28] On that day, Ms Scott was to resume her shift from the Opoho terminus and so she decided that, rather than drive to the central depot to use the toilet, she would instead drive home for her break.

[29] The main reason for this was that Ms Scott considered the depot's toilet facilities to be "filthy". In particular, Ms Scott had an issue with the foam soap which she said did little to remove the diesel from her hands. In her view, the depot should have been equipped with "proper" liquid soap which she considered to be more effective. Ms Scott also used the detour to her home as an opportunity to check on her pets.

[30] When Mr Gordon became aware of Ms Scott's actions, he was concerned that Ms Scott may have failed to complete a contracted public service, deviated from her route without authorisation, and used the company vehicle for personal reasons. Consequently, on 28 March 2024, he issued Ms Scott a letter inviting her to an investigation meeting on 2 April 2024, immediately following the upcoming Easter weekend. The letter said that the meeting was not disciplinary in nature but noted that if her explanation did not resolve the issues, then the next step would be to conduct a disciplinary meeting.

[31] Ms Scott did not attend the meeting, having not yet arranged her union representative, Angus Wilson, to attend with her. As such, shortly after the meeting's scheduled time, Ms Scott advised Mr Gordon by email of the reason for her absence and notified her willingness to attend a rescheduled meeting when Mr Wilson was available.

[32] On 3 April 2024, Mr Gordon sent Ms Scott a second letter (dated 2 April 2024) acknowledging that the long weekend may have caused her difficulty in obtaining a support person. The letter also stated that Ritchies was giving Ms Scott "one further opportunity to respond to the allegations" and invited her to a meeting on 5 April 2024. This time, the letter said the meeting would be a disciplinary meeting as Ritchies had reflected on the nature of the allegations and it considered them to be serious. The letter also noted a potential outcome of disciplinary action up to and including dismissal.

[33] On 5 April 2024, Ms Scott attended the disciplinary meeting alongside Mr Wilson and responded to the allegations. Ritchies then provided Ms Scott a letter later that day issuing her a first written warning. The letter stated that Ritchies did not accept Ms Scott's explanation that she did not know she was to finish each trip as scheduled.

No more shifts

[34] Following the 23 March 2024 incident of alleged misconduct and prior to the disciplinary meeting taking place, Ms Scott alleges that shifts which had previously been scheduled for 30 March 2024 and 2 April 2024 were removed from her roster. To demonstrate this, Ms Scott provided 27 March 2024 screenshots from the App showing her having been scheduled shifts on both days, as well as 28 March 2024 screenshots from the App showing that the shifts were no longer scheduled on either day.

[35] On 30 March 2024, Ms Scott sent a text message to the Ritchies Operations Office asking why her shifts had been removed from the App. Ritchies attempted to call her back, but Ms Scott was unable to answer. Ms Scott then followed up again to ask about the removal of the shifts but did not receive a reply.

[36] On 5 April 2024, during the disciplinary meeting, Ms Scott and Mr Gordon discussed the issue of the scheduled shifts disappearing from the App. Arising from this, the subsequent letter issuing the first written warning commented that Ms Scott would be paid for the days she was rostered to work in the last week. This was in reference to the shifts Ms Scott had originally been rostered for, but which later disappeared from the App.

[37] At the Investigation Meeting, Mr Gordon said he did not know why the shifts had been removed from the Driver App but suggested the following. When permanent full-time drivers are scheduled on charter jobs such as cruise ships, and these jobs are cancelled, they then need to be moved to an urban route to meet their minimum hours of work. The effect is that returning a permanent full-time driver to an urban route could mean such a driver replacing a casual employee who had been scheduled on that route. Ms Scott said that her shifts disappearing had never happened before and suggested that the timing was suspicious.

[38] Irrespective of who is correct, from approximately 30 March 2024 onwards Ms Scott was not scheduled any more shifts. Ms Scott says she was certain of this because she infrequently checked the App. Ms Scott did not follow up to ask why, both because she was disillusioned by Ritchies lack of response to her query about the disappearing shifts and because she was under the impression that Ritchies had deliberately stopped scheduling her shifts.

[39] Mr Gordon's only explanation for Ms Scott not being scheduled any more shifts was that the App had multiple issues where it did not show correct information. However, Mr Gordon did not recall the App having any specific issues in or around April 2024.

[40] In July 2024, Ms Scott became unable to access the App. When she logged in with her usual details, she would instead receive an error message stating that her email address or password was incorrect. Mr Gordon had no explanation for this either other than to suggest it could have been due to an administrative deactivation or technical issues. He also said that as a hands-off manager, he was not involved in rostering and left this to the rostering team. Mr Gordon said that he was unaware for quite some time that Ms Scott was no longer being rostered shifts.

What was the nature of Ms Scott's employment?

Permanent and casual employment

[41] The fundamental difference between permanent and casual employment is that, for permanent employment the parties' mutual employment obligations continue between periods of work, whereas for casual employment those obligations exist only for the duration of each engagement.¹

[42] Employee is defined as a "person of any age employed by an employer to do any work for hire or reward under a contract of service".² For permanent employees, the continuing expectation of work creates the mutual employment obligations necessary for an ongoing contract of service. For casual employees, however, there are no mutual employment obligations between each engagement, and consequently each engagement is considered a separate contract of service.³

[43] A person's employment status may also evolve over time. How the relationship is characterised at its commencement is not necessarily determinative of the person's status at a later point.⁴ For the purposes of this case, I must determine Ms Scott's employment status at the time Ritchies ceased offering her shifts, by applying the legal test: what is the real nature of the relationship?⁵ I do so below by considering various factors.

¹ *Jinkinson v Oceana Gold (NZ) Limited* [2009] ERNZ 225 at [40].

² Employment Relations Act 2000, s 6(1)(a).

³ Above n 1 at [32]-[34] and [36].

⁴ Above n 1 at [62].

⁵ Employment Relations Act 2000, s 6(2).

Parties' intentions – the employment agreement

[44] Ms Scott's employment agreement explicitly set out her employment as a casual employee, stating that she would work for Ritchies "on a casual basis as needed". The employment agreement stated further: "it is expressly agreed and understood that the employer has no obligation to offer work and the employee has no obligation to accept any work that the employer offers from time to time".

[45] The employment agreement also specified: a) "the nature of this casual work is due to the needs of the business at the time, and the employee's availability", b) "on each occasion on which the employee offers work, and the employee accepts work, it is deemed to be a separate engagement", and c) "the employee agrees that there is no employment relationship between the ending of one period of work and the commencement (if any) of another".

[46] The casual nature of the employment relationship was therefore clear from the outset, and Ms Scott signed up to the employment agreement fully aware that she was commencing employment as a casual employee.

[47] The parties' intentions are only one factor, however, as the employment relationship that was agreed to at the commencement of employment does not determine the subsequent nature of the relationship. I must determine whether Ms Scott remained a casual employee throughout or whether her employment subsequently evolved such that she became a permanent employee.

Ms Scott's hours

[48] For a 15-month period, although the pattern of her shifts was not always predictable and fluctuated based on the needs of the business, Ms Scott worked extensively and consistently for Ritchies. Ms Scott's hours fluctuated more in the first six months or so of her employment, including four fortnights in which she worked 20 hours or fewer, however, after that time it was rare for her to drop to even 40 hours in a fortnight.

[49] In approximately 80 percent of the fortnightly periods, she worked at least 40 hours, and in slightly under half of the fortnightly periods she worked at least 80 hours. These included ten consecutive fortnights between August and December 2023 during which there were no occasions of Ms Scott working fewer than 85 hours. For the final 38 weeks of her employment, even accounting for the noticeable reduction of hours in early 2024, Ms Scott's average fortnightly hours exceeded 80.

[50] Across the course of her employment, the regularity and consistency of Ms Scott's hours, influenced by the predictability of urban routes she was predominantly scheduled for, created a legitimate and ongoing expectation of employment. This in turn created a corresponding obligation on Ritchies to provide Ms Scott with ongoing work. These aspects are indicative of permanent employment.

[51] Mr Gordon's comments during the Investigation Meeting that it would have absolutely been upsetting and come as a shock to Ms Scott to not be scheduled any more shifts, particularly given the frequency with which she was driving urban routes at that time, underline that legitimate and ongoing expectation of employment.

Rostering, shift acceptance and unavailability

[52] Ms Scott did not need Ritchies' approval for future absences, and she was encouraged rather than required to fill out a form to notify Ritchies of such absences (for example, if Ms Scott were planning a holiday).

[53] The ability to take a leave of absence without Ritchies having to agree to it is more indicative of a casual employment relationship, however, Ritchies' rostering practices are a strong indicator that Ms Scott's employment was continuous rather than casual.

[54] Physical rosters were published two weeks in advance, creating a genuine expectation that Ms Scott would perform her scheduled shifts, unless she communicated otherwise. Ritchies provided no evidence that Ms Scott was given a particular timeframe to turn down shifts, however, she would have had to do so with reasonable notice to avoid impacting on Ritchies' operations.

[55] I accept Ms Scott's evidence that she was only able to decline shifts by calling or texting Ritchies to inform them she was unavailable. The App was therefore a tool to keep Ms Scott informed of her upcoming shifts rather than a means by which to accept or decline shifts. In other words, the operating assumption was that Ms Scott would always work as rostered, and it required direct contact from Ms Scott to displace that assumption.

[56] Consequently, each issued roster constituted an offer of work which, having been treated as automatically accepted (unless expressly notified otherwise), immediately gave rise to mutual obligations sufficient to constitute an employment relationship for the duration of

each engagement. The rosters being issued two weeks in advance therefore created a continuous sequence of accepted periods of work and mutual employment obligations.⁶

[57] Given both the regularity Ms Scott worked and the advance issuance of rosters, the practical effect was that accepted periods of work followed one another without any meaningful break in the operative employment relationship. This supports the conclusion that the employment relationship was continuous (and therefore permanent) in nature rather than consisting of discrete casual engagements.

Offer of permanent employment

[58] Ritchies has said that it was inconsistent for Ms Scott to decline an offer of permanent employment and later assert she was a permanent employee.

[59] Although the two positions may appear inconsistent, the legal question as to the nature or status of Ms Scott's employment does not rely on Ms Scott's subjective view of her employment status, or her preferences.

[60] At the time Ms Scott was offered a permanent employment agreement Ms Scott was receiving a considerable number of hours on an ongoing basis and she was therefore happy with the status quo. Ms Scott viewed herself as a casual employee and saw benefit in the flexibility and autonomy a casual employment relationship offered, however, this does not undermine a subsequent claim of permanent employment, primarily because Ms Scott's subjective perception does not assist an objective assessment of the real nature of the relationship. Her subjective view is relevant to the parties' intentions, but these are already established.

[61] Ms Scott's perception is also coloured by her not having a sophisticated understanding of employment law. For example, Ms Scott was subsequently unhappy about the reduction in her hours, but had she properly understood the nature of casual employment she would have appreciated that there is no obligation on an employer to offer any hours at all to a casual employee and consequently that any concern about reduced hours would likely be unfounded.

⁶ In determining that the mutuality of obligations arises at the time work is offered and accepted, i.e. prior to the commencement of scheduled shifts, I have also taken into account that the section 6 definition of "employee" includes a "person intending to work" and a person intending to work is defined in section 5 as "a person who has been offered, and accepted, work as an employee". This is consistent with the approach in *Jinkinson v Oceana Gold (NZ) Limited* [2009].

[62] Ultimately, Ms Scott turning down the offer of permanent employment cannot be interpreted as a reason for finding she was a casual employee, especially as any reasons Ms Scott may have had for doing so are coloured by her own understanding of Ritchies' employment obligations.

[63] In other words, there is no expectation on Ms Scott to be fully informed about the practical consequences of accepting or declining permanent employment and it would therefore be inappropriate to consider her decision not to accept permanent employment as a relevant factor.⁷ There is, however, an obligation on Ritchies to ensure that its employment practices are consistent with the labels it uses in its employment agreements.

[64] I have factored any genuine flexibility or autonomy Ms Scott had in her role into my objective assessment of the real nature of the relationship, but her preference for casual rather than permanent employment at the time permanent employment was offered does not assist.

Ms Scott's employment with Exploring New Zealand

[65] Ritchies asserts that it offered Ms Scott permanent employment because it was aware that she was also performing work for Exploring New Zealand and it wanted her to work solely for Ritchies. Ms Scott's evidence is that she performed some hours for Exploring New Zealand between October 2022 and July 2023, overlapping with the first six months or so of her employment with Ritchies, but she was not performing any hours for them at the time of the permanent employment offer. In addition, the ending of her employment with Exploring New Zealand approximately coincides with the increase in her hours at Ritchies.

[66] Given Ms Scott was working at least 95 hours per fortnight for the 18 weeks prior to the offer of permanent employment, and often more than 100, Ms Scott would have had little time to take on additional shifts for another employer. I therefore accept her evidence. In addition, Ritchies provided no evidence of Ms Scott turning down shifts due to other work commitments; in fact, it was widely accepted that Ms Scott rarely, if ever, said no to work.

[67] Had Ms Scott continued to work for Exploring New Zealand, this may have pointed towards casual employment, as those other work commitments could have conflicted with

⁷ This is consistent with the object of the Act in section 3(a)(ii) including acknowledging and addressing the inherent inequality of power in employment relationships.

her ability to perform shifts for Ritchies and any obligations she may have had to not work for a competitor.⁸

[68] Regardless, as I have found that Ms Scott's employment with Ritchies did not overlap with her employment with Exploring New Zealand at the material time, it is not an issue I need to consider.

Other considerations

[69] The Director of People's email to Ms Scott on 28 January 2024 regarding her not having accepted permanent employment and Ritchies consequently not being able to provide her regular hours on a casual employment agreement because this would be unlawful, clearly shows that Ritchies was concerned Ms Scott's employment had evolved to permanent status.

[70] Although Mr Gordon said the offer of permanent employment was to ensure Ms Scott worked solely for Ritchies, I am nevertheless persuaded by the Director of People's email that the predominant reason was a concern about Ms Scott's employment potentially having evolved into permanent employment.

[71] Although it is an objective assessment of the real nature of the relationship rather than a subjective one which ultimately determines Ms Scott's employment status, the Director of People's email shows that Ritchies were concerned about the issue and had themselves identified a regular pattern of employment.

[72] I do not consider that Ritchies reduced Ms Scott's hours due to Mr Gordon having a negative view of Ms Scott, and nor did Mr Gordon provide any evidence for his claim that the reduction arose from seasonal demand. I am therefore persuaded that, whether or not it was the primary reason, the reduction was influenced by an (unsuccessful) attempt to minimise the risk of Ms Scott being deemed a permanent employee.

[73] Ritchies did not breach any employment obligations by reducing Ms Scott's hours. Such reduction, whilst significant to Ms Scott, still provided her with an average of around 30 hours per week for the final 14 weeks of her employment. I have not established that Ms

⁸ I note that Ritchies' permanent offer of employment included a clause that Ms Scott would have to request the company's agreement before working for other employers, and that such a request would only be declined for genuine reasons based on reasonable grounds such as excessive working hours or a conflict of interest.

Scott's pattern of work entitled her to hours exceeding those she was scheduled to (and did) perform.

Conclusion on employment status

[74] At the time Ritchies ceased scheduling shifts for Ms Scott, a permanent employment relationship between the parties had become established. Although there are some factors pointing towards a casual employment relationship, the most important ones establish that Ms Scott was a permanent employee in all but name.

[75] In particular, I am persuaded by the regularity, consistency and volume of Ms Scott's work; her long-standing availability and the expectation that she would work her scheduled shifts; the predictability of rosters issued two weeks in advance; the high proportion of repeated urban shifts despite being employed as a Charter Driver; and the fact that her engagement was continuous rather than limited to discrete shifts arising from unforeseen operational need.

Was Ms Scott unjustifiably dismissed?

[76] Shifts scheduled for 30 March 2024 and 2 April 2024 were removed from Ms Scott. Although Ritchies provided an innocuous explanation, given the contemporaneous events around the disciplinary process I find that the events were connected. Ms Scott did not claim a disadvantage for this and was ultimately paid for the two shifts.

[77] Subsequently, from approximately 30 March 2024 onwards, Ms Scott was not offered any further shifts. Again, Ritchies put forward an innocuous explanation, but I infer from the timing that it was deliberate. Neither the removal of shifts or the cessation of shifts being offered had occurred previously, and nor was I satisfied by the feasibility of the explanations. In addition, the frustrations that Ritchies had experienced arising from the disciplinary process provided a plausible reason for its actions.

[78] Irrespective of how the cessation of shifts came about and whether technical issues or operational demands could adequately explain such an occurrence, Ms Scott went from performing ongoing and regular work for Ritchies to not performing any.

[79] At the time, Ms Scott was a permanent employee with a legitimate ongoing expectation for work. Ritchies' failure to continue providing shifts amounted to a dismissal, which was highlighted by her deactivation from the App in July 2024. Although Ms Scott did

not follow up the cessation of her shifts, or raise a concern, this was reasonable given Ritchies' earlier failure to respond to her queries about the disappearing shifts and provide an explanation for their removal.

[80] The dismissal was not substantively or procedurally justified. Ritchies did not have a valid substantive reason to end her employment (such as serious misconduct or redundancy) and it did not follow any process, let alone one that would have accorded with its section 103A obligations.

Unjustified disadvantage

[81] I must now determine whether Ritchies unjustifiably disadvantaged Ms Scott by issuing her a first warning.

[82] Ms Scott's primary submission was that Ritchies escalated from inviting her to an investigation meeting to inviting her to a disciplinary meeting with the prospect of dismissal. However, Ms Scott has also raised issues around the substantive decision, saying that she suffered a disparity of treatment and was unaware driving home during her break could constitute misconduct.

Procedural fairness

[83] I find that Ritchies followed a procedurally fair process. I accept that the escalation from a meeting to investigate concerns to a disciplinary meeting with the prospect of dismissal may have surprised Ms Scott; however, Ritchies had a legitimate basis for treating the issue as disciplinary in nature and could have done so from the outset. Although the nature of the meeting changed, Ritchies alerted Ms Scott to the change and it was entitled to put its allegations to her, seek her response, and then determine what disciplinary outcome (if any) was justified.

[84] Given the seriousness of the allegations, Ritchies was entitled to indicate that the outcome could be up to and including dismissal. Furthermore, by providing Ms Scott an opportunity to respond to the allegations, Ritchies complied with its section 103A obligations. I also accept that Ritchies genuinely considered Ms Scott's explanations. The letter issuing the disciplinary outcome discusses the basis for her responses and takes mitigating factors into account in establishing the first written warning rather than a more adverse outcome.

Substantive

[85] I also find that Ritchies' decision to issue a first written warning was reasonable. Although Ms Scott said that other drivers commonly acted as she had without consequence, and therefore claimed disparity of treatment, I was provided no evidence that Ritchies was aware of this or that it condoned such behaviour.

[86] Ms Scott's claim that she was unaware she was not permitted to drive home during a break arises from her not having attended toolbox meetings where it was discussed or seen it recorded in a written policy.

[87] The Code of Conduct does not specifically set out the requirement not to drive a bus home during a break, however, it does indicate that misuse of company property may result in disciplinary action. Further, it includes the deliberate misuse of company resources as an example of serious misconduct.

[88] Consequently, Ms Scott should reasonably have understood that driving the bus home for her own personal reasons could constitute the misuse of company property. Moreover, Ms Scott acknowledged in her Statement of Problem that a driver on her route "would typically be expected to spend their break either at the depot in central Dunedin...or at the Opoho terminus" yet did not comply with those expectations.

[89] Furthermore, Ritchies' concerns with Ms Scott's behaviour were not only that she drove home, but also that she did not complete the scheduled route, bypassing the final two stops. Irrespective of whether customers were waiting, Ms Scott understood that she was expected to complete the journey.

[90] Nevertheless, I accept that Ms Scott did not know about the financial penalties Ritchies was exposed to from its contractual agreements with Otago Regional Council for not completing the route. As such, without knowledge of these consequences, a more severe outcome than a first written warning may not have been justified.

[91] Finally, I note that Ms Scott's explanation around the lack of toilets at the Opoho terminus and being unhappy with the toilet facilities at the depot are not sufficient to render a first written warning unreasonable. Ms Scott could have raised concerns with management about the quality of the soap in the toilets, and she could have sought permission to drive home during her break; however, she did neither.

[92] Having found that Ms Scott was unjustifiably dismissed but not unjustifiably disadvantaged, I now turn to consider remedies.

Remedies

[93] Ms Scott was unjustifiably dismissed and so I must therefore consider the appropriate lost wages and compensation remedies pursuant to section 123(1)(b) and 123(1)(c)(i) of the Act.

Lost wages

[94] Ms Scott lost remuneration as a result of her unjustified dismissal. Pursuant to sections 123 and 128 of the Act, if an employee has a personal grievance and they have lost remuneration because of that grievance, the Authority must order the employer to pay the employee the lesser of their actual lost remuneration or three months' ordinary time remuneration.

[95] This is subject to the employee's duty to take reasonable steps as are appropriate in the circumstances to mitigate loss. I accept that Ms Scott appropriately took such steps, for example applying to work for Go Bus Transport Limited and applying for roles as a Truck Driver, Heavy Machinery Operator, and in Customer Services.

[96] Ms Scott seeks payment of the difference between the amount she would have earned at Ritchies and the amount she received for Jobseeker Support from Work and Income during the 13-week period following her dismissal. However, this is a lesser amount than both her three months' ordinary time remuneration and her actual loss which, based on her evidence that she continues to receive Jobseeker Support and has only received payments from temporary employment for 34 hours in October 2024 and two to three weeks in January to February 2025, was considerably higher.

[97] Nevertheless, even where the amount sought by the applicant is lower than the statutory remedies, I am required to apply section 128(2) which stipulates that I "must" award the lesser of three months' ordinary time remuneration and Ms Scott's actual loss. I also note that the amounts paid by Work and Income to Ms Scott are not a matter requiring any adjustment in the amount of lost wages Ms Scott is awarded. Whether Ms Scott, after payment

of the award by Ritchies, must reimburse Work and Income for any benefit payments received in that period is a matter for her to address with Work and Income.⁹

[98] I therefore award three months' ordinary time remuneration. I do have the discretion pursuant to section 128(3) to award a greater amount; however, this is not appropriate in a situation where the applicant has sought a lesser amount than the remedy awarded.

[99] In addition, I note that Ms Scott had the opportunity to sign a casual employment agreement with InterCity, however, Ms Scott chose not to do so when she discovered that InterCity's operations were intertwined with Ritchies. Ms Scott did not want to "muddy the waters" in relation to her personal grievance against Ritchies. Had Ms Scott sought lost wages for a greater period than three months, Ms Scott's decision not to have accepted that employment would have counted against any exercise of my discretion.

[100] I calculate Ms Scott's three months' ordinary time remuneration based on her average weekly hours across her employment (including the one fortnight where she did not work). I consider this to be an appropriate method for calculating ordinary time remuneration given the fluctuation of hours across her employment.

[101] I determine Ms Scott's average weekly hours as being 33 (to the closest half hour). Her ordinary time pay rate fluctuated based on the type of work she was performing and the applicable hourly rate, which ranged from \$27.76 to \$34.00. On balance, in the latter part of her employment, her ordinary time hourly pay rate was mostly set at \$30. As such, this is the rate I have used for my calculation.

[102] Ms Scott's three months' ordinary time remuneration amounts to \$12,870 (gross).¹⁰

Compensation

[103] Ms Scott sought a compensatory amount of \$10,000. This is a moderate and appropriate amount given the clear distress Ms Scott exhibited throughout the Investigation Meeting relating to the ending of her employment. Ms Scott suffered a loss of dignity and

⁹ *Hutchison v Nelson City Council* [2014] NZEmpC 117 at [103] states that "any accounting in respect of wages received for a period where social security benefits were previously paid is a matter to be resolved between the beneficiary and the Chief Executive of the Ministry of Social Development". See also *Shakeshaft v All Seasons Pet Resort Limited* [2016] NZERA Auckland 10 at [55].

¹⁰ This was calculated by multiplying 33 hours per week by an hourly rate of \$30.00 and multiplying this again by 13 weeks.

injury to feelings due to the abrupt cessation of shifts and even Mr Gordon acknowledged that this would have understandably caused Ms Scott considerable shock and upset.

[104] I am limited by Ms Scott's claim for \$10,000 and so I accordingly award \$10,000 compensation.

Contribution

[105] I am required by section 124 of the Act to consider the extent to which Ms Scott's actions contributed towards the situation that gave rise to the personal grievance. I find that they did not contribute to the grievance and so I do not award any reduction to the remedies.

Outcome and costs

[106] Ritchies unjustifiably dismissed Ms Scott, but it did not unjustifiably disadvantage her. Within 28 days from the date of this determination, Ritchies is ordered to pay Ms Scott:

(a) \$10,000 compensation pursuant to section 123(1)(c)(i) of the Act; and

(b) \$12,870 (gross) in lost wages.

[107] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[108] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Ms Scott may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum Ritchies 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 anticipate the Authority will determine costs, if asked to do so, on its usual "daily tariff" basis unless circumstances or factors require an adjustment.¹¹

William Fussey

Member of the Employment Relations Authority

¹¹ www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1