

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2026] NZERA 376
3318120

BETWEEN NISHA THAKKAR
Applicant

AND LS TRAVEL RETAIL NEW
ZEALAND LIMITED
Respondent

Member of Authority: Sarah Blick

Representatives: Ruth Katsui, representative for the applicant
Anne Wilson, counsel for the respondent

Investigation meeting: 19 and 25 February 2026 in Auckland and by audio visual link

Submissions and further information received: 4 March 2026 for the applicant
11 March 2026 for the respondent

Determination: 12 June 2026

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Nisha Thakkar was employed by LS Travel Retail New Zealand Limited (LS Travel) as a team member in its retail stores at Auckland Airport in October 2023. She pursues personal grievances for unjustified disadvantage and unjustified (constructive) dismissal on the basis LS Travel unilaterally varied her work hours and failed to provide her with minimum hours guaranteed in her individual employment agreement (IEA). She seeks personal grievance remedies. She has also brought a penalty claim for breaches of good faith.

[2] LS Travel submits Ms Thakkar's disadvantage claim is a matter derived solely from the interpretation of the IEA barred under s 103(3) of the Employment Relations Act 2000 (the Act) and should be determined as a dispute. LS Travel says its rostering of Ms Thakkar was in accordance with her IEA was both within its contractual rights and justified. It says she resigned prematurely when she could have engaged with it about its proposal to offer interim

arrangements pending resolution of the dispute. It submits she is not entitled to remedies but if the Authority determines otherwise, they should be reduced for contributory conduct. It further says her penalty claim was brought out of time.

The Authority's process

[3] The Authority received a witness statement from Ms Thakkar. For LS Travel, witness statements were received for former HR Business Partner (now Talent Acquisition Manager) Maria Kyriacou who is employed by an entity related to LS Travel. LS Travel Talent Acquisition Partner Hadis Barzandeh, HR Business Partner Katherine Bird, and Area Manager Immanuel Charles Sidal also provided statements. All witnesses were questioned under oath or affirmation at the Authority investigation meeting. Helpful closing submissions were provided by the representatives.

The issues

[4] The issues for investigation and determination were agreed as follows:

- (a) Taking into account the IEA, does Ms Thakkar have a personal grievance for unjustified disadvantage relating to:
 - i. a unilateral variation of terms of employment around her work hours; and
 - ii. a failure to provide guaranteed minimum hours?
- (b) Does Ms Thakkar have a personal grievance for unjustified constructive dismissal?
- (c) If she has a personal grievance(s), what remedies should be awarded, if any, and are there issues of contribution?
- (d) Has Ms Thakkar's penalty claim been brought within time?
- (e) If so, has LS Travel breached good faith obligations as alleged, and should a penalty be imposed on it?

[5] Counsel for LS Travel advanced the further issue of whether the unjustified disadvantage claims are precluded due to the jurisdictional bar in s 103(3) of the Act.

Background

[6] LS Travel is part of a group of companies that operates retail stores in airports worldwide. It says its business requires it to operate its stores at variable hours to cater to the airport environment which has varying flight schedules. As a result, LS Travel employs staff

with varying work patterns pursuant to rostering and shift arrangements that change as the operational needs of the business changes.

[7] In October 2023, LS Travel held a candidate recruitment evening. At the recruitment evening, it says interested candidates were asked to fill out a form expressing their interest and their availability for roles. Ms Thakkar attended and submitted an application for employment. LS Travel said managers attend and are trained to explain to candidates the nature of airport operations and the resultant need for LS Travel to set shifts in accordance with a roster and for candidates to be flexible about hours of work. There was no direct evidence about Ms Thakkar was told this at the evening. In her application, Ms Thakkar recorded she was able to work the following rosters if successful:

- 4:00am to 12:30pm Tuesday to Saturday;
- 4:00am to 12:30pm Sunday to Thursday;
- 4:30am to 1:00pm Friday to Tuesday;
- 1:30pm to 10:00pm Tuesday to Saturday; and
- 1:30pm to 10:00pm Sunday to Thursday.

Offer of employment and terms of IEA

[8] Ms Kyriacou's evidence was that candidates who had the most availability were given preference during recruitment in line with LS Travel's need for flexibility. Following receipt of Ms Thakkar's application, on 10 November 2023 Ms Barzandeh emailed Ms Thakkar advising two full-time roles had become available in its Auckland Airport location. Ms Thakkar responded stating she was available for the position with the preference for the 12pm to 8pm shift. LS Travel responded stating Ms Thakkar's preference would be passed on to the manager making the hiring decision, Mr Sidal.

[9] LS Travel says it relied on Ms Thakkar's representations about her availability when offering her the position of Fixed Term Full Time Team Member in its Auckland Relay stores. On 17 November 2023, LS Travel sent Ms Thakkar a formal offer of employment and draft IEA. The offer letter stated Ms Thakkar was entitled to take independent legal advice and encouraged her to do so within five business days.

[10] The IEA contained an acknowledgement that Ms Thakkar read, understood and agreed to its terms and had been advised of the entitlement to obtain independent advice and had a

reasonable opportunity to do so. At the investigation meeting, Ms Thakkar confirmed that she had not sought independent advice about the IEA.

[11] Ms Thakkar stated at the investigation meeting that between October 2023 and November 2023, her availability changed for health reasons and she could no longer work the graveyard or early morning shifts. There is no evidence she advised LS Travel of this.

[12] Ms Thakkar signed the IEA, with employment to commence on 27 November 2023. It was offered on a fixed term basis due to Ms Thakkar holding a work visa expiring on 21 September 2024. In relation to hours of work, the IEA relevantly stated:

7 Hours of Work

- 7.1 Your working days and hours will be set by your manager in advance in accordance with a roster. The Company will guarantee to provide you at least the number of Guaranteed Hours of work set out in Appendix A per week. But you must be available to perform up to the number of Availability Hours per week set out in Appendix A, between the Times and Days of Work specified in Appendix A. Any hours worked above your Guaranteed Hours per week must be approved in advance. Your remuneration includes reasonable compensation for your availability to perform all of your hours of work (including any Availability Hours), and your performance of those hours of work.
- 7.2 The Company reserves the right to trade at any time provided by law and as required by its leases or tenancy. Due to the nature of the Company's business, the Company's stores may trade seven days a week and as such, weekday, weekend and evening work may be required as part of your fortnightly roster.
- 7.3 The Company may vary (including reduce or increase) your days and hours of work referred to in clause 7.1. Any reduction of Guaranteed Hours will be by no more than 5 hours. The Company will consult with you prior to making any such change, and will give you at least two weeks' notice of the change.
- 7.4 Hours of work for employees paid on an hourly rate will not, without the agreement of the parties:
- exceed 12 paid hours in a working day, or-
 - exceed more than 100 paid hours in a standard pay fortnight, or
 - exceed 6 consecutive days.
- 7.5 The Company will endeavour to make rosters available one week in advance of hours to be worked. You will be required to work the shifts on which you are rostered, unless otherwise agreed with your manager. The Company may require you to work shifts with less than one week's notice in emergency situations, including, without limitation, a fellow employee's illness, injury or bereavement.

[13] Appendix A of the IEA also provided the following:

Commencement Date	27 November 2023
Fixed Term Contract Termination Date	20 September 2024
Probation Period	Six months
Hourly Rate	\$24.50 gross per hour
Guaranteed Hours	40.00
Availability Hours	45.00
Times and Days of Work	Tuesday to Saturday - 12:30pm to 20:30pm
Place of Work	Auckland Airport
Notice Period	Four (4) weeks
Restraint Period	One (1) month

[14] The IEA included a clause stating it represented a full record of the employment agreement entered into and superseded and excluded “any prior or collateral negotiation, understanding, customary practices, communication or agreement or term of agreement (written or oral) by or between the parties”.

LS Travel’s move to 24/7 operations

[15] On 13 November 2023, as a result of a direction from its landlord Auckland Airport, LS Travel’s arrivals Relay store was to move to operating on a 24/7 basis. LS Travel says the Airport had the ability under the terms of their lease, to dictate its hours of operation. The Airport initially directed a trial of this new arrangement for two weeks, and following that, it confirmed the new 24/7 arrangement, which became permanent on 23 November 2023. Mr Sidal gave evidence that the move necessitated a new shift being added to the roster and start and finish times of existing shifts to change. Mr Sidal also explained that, regardless of the anticipated changes from moving to 24/7 operations, the rosters changed regularly in accordance with flight schedules.

Ms Thakkar commences employment

[16] On Ms Thakkar’s first week beginning 27 November 2023, LS Travel rostered her to work her Guaranteed Hours of 40 hours: Monday, Tuesday and Wednesday from 10am to 6.30pm (for training), Saturday 1pm to 9.30pm and Sunday 3.45am to 12.15pm.

[17] Mr Sidal says that he and the store manager at the time held informal meetings with team members outside the store about the change. On 29 November 2023, Mr Sidal and the store manager met with Ms Thakkar and advised her the stores were moving to 24/7 operations in accordance with the Airport’s directive. Mr Sidal says they gave Ms Thakkar the option of two shifts (Tuesday to Saturday 4pm to 12.30am or Tuesday to Saturday 2.45pm to 11.15pm).

[18] Ms Thakkar declined to work the 4 December 2024 rostered shift starting at 4.30am.

Dispute regarding hours of work

[19] Ms Thakkar continued to have concerns about being rostered to work early morning or late shifts, and by early January 2024, she spoke with Mr Sidal and the store manager again. She was told LS Travel could not guarantee her preferred shifts. The store manager offered Ms Thakkar the option of a part time role as an alternative. Following the discussion, on 5 January 2024, LS Travel offered Ms Thakkar a part-time employment agreement with 16 Guaranteed Hours per Week.

[20] On 5 January 2024, Ms Thakkar responded to an LS Travel advertisement for Full-Time Team Members in its Duty-Free Stores. The advertisement stated LS Travel was looking for cover for afternoon to evening shifts, and that to be successful, the candidate would need to be 'flexible to work a rotating roster across Monday to Sunday which might include early mornings and late nights'. However, the roles in the Duty-Free stores were never filled as a recruitment "freeze" was put in place across the Duty-Free stores in early February 2024.

[21] LS Travel says its management team rostering Ms Thakkar's area of work did not do the schedule for the Duty-Free stores, but only the Relay stores, so they looked for suitable shifts for Ms Thakkar in those stores.

[22] On 6 January 2024, Ms Thakkar emailed Ms Barzende with the subject 'preferred shift timing', stating that LS Travel kept changing her shifts and 'she was not bothered as she wanted to work and was happy with work that was going on', but she soon noticed that new staff came in and they reduced her shifts from four days to three days. Ms Barzende referred Ms Thakkar's concern to HR Business Partner, Ms Kyriacou.

[23] On 10 January 2024, Ms Kyriacou responded advising the original shift pattern offered to Ms Thakkar was not available and that, should Ms Thakkar's availability to work other shifts change to please advise her, if the part-time contract was acceptable. Ms Thakkar responded stating her availability had not changed and she did not want to accept the part-time job offer.

[24] On 1 February 2024, Ms Thakkar spoke with Mr Sidal regarding her hours of work. During the conversation, Mr Sidal again proposed the option of part-time work. Ms Thakkar said she needed time to discuss this with her husband as she was only available from 12pm to

8.30pm and would confirm whether she would accept part-time work. While resignation was also floated, the witnesses disagree on who proposed this as an alternative option.

[25] On 3 February 2024, Ms Thakkar wrote to Mr Sidal, the manager and Ms Kyriacou expressing her decision to retain her full-time contract and that she did not want to accept a part-time contract and that she wanted to resolve the ‘discrepancy’ in hours between them.

Consultation regarding change to roster

[26] Ms Bird first became involved around March 2024. On 11 March 2024, she wrote to Ms Thakkar and advised that as the Airport had instructed LS Travel to move to 24/7 operations it was proposing to permanently change her roster. The letter stated LS Travel was now commencing a consultation process to allow Ms Thakkar to have input before any final decisions were made. LS Travel advised Ms Thakkar the proposed roster for her would be Tuesday to Saturday from 4am to 12.30pm. It invited Ms Thakkar to provide feedback by 13 March 2024. Ms Bird explains that LS Travel wanted to consult with Ms Thakkar in good faith to give her an opportunity to provide feedback about the proposed changes to the roster because they felt it was important to do so, particularly in light of Ms Thakkar's previous refusals to work certain shifts.

[27] On 22 March 2024, LS Travel held a meeting with Ms Thakkar, with her husband present, to discuss the proposal to change her roster. At the meeting, Ms Bird explained the stores’ 24/7 operating model and offered Ms Thakkar a 4am to 12.30pm shift. Ms Thakkar declined the shift stating that it did not fit with her availability. LS Travel says it considered Ms Thakkar’s feedback and decided to proceed with the change of roster. It gave Ms Thakkar two weeks’ written notice of the change with effect from Monday 8 April 2024. Ms Thakkar responded stating she did not agree with LS Travel’s decision to change her roster.

[28] LS Travel says it continued to roster Ms Thakkar for 40 hours per week throughout her employment. The last shift Ms Thakkar attended was on 6 April 2024.

Ms Thakkar raises personal grievance for unjustified disadvantage

[29] On 1 May 2024 Ms Thakkar (via counsel at the time) raised an unjustified disadvantage claim for alleged breaches of good faith and unilateral variation of the terms of her employment

in relation to the timing of her shifts. LS Travel agreed to attend mediation on 17 May 2024, which was unsuccessfully in resolving any matters.

Ms Thakkar gives notice of resignation

[30] On 17 June 2024 LS Travel wrote to Ms Thakkar's counsel stating:

- (a) its interpretation of the IEA, in particular that the IEA allowed LS Travel to roster Ms Thakkar's hours in accordance with a roster set by her manager (in accordance with clauses 7.1 and 7.5) and that those hours could include weekday, weekend and evening work as part of her fortnightly roster (in accordance with clause 7.2);
- (b) LS Travel had, at all times, complied with the terms of the IEA and had not unilaterally varied her terms;
- (c) LS Travel had engaged with Ms Thakkar in good faith and met with her four occasions to discuss rostering and options.

[31] The letter proposed Ms Thakkar return to her role. Alternatively, LS Travel asked Ms Thakkar to confirm her intention to return to work or, if she wished to continue to pursue her claim, in which case LS Travel would make an 'interim proposal' to allow Ms Thakkar to return to work while the issue was resolved.

[32] On 20 June 2024 Ms Thakkar's counsel responded, saying she would not return to work, giving four weeks' notice of her resignation and asserting that Ms Thakkar would remain on sick leave for the entire period.

[33] On 1 July 2024, LS Travel's counsel responded stating it did not accept that the dispute over the terms of her IEA resulted in Ms Thakkar having no option but to resign.

Jurisdictional issue - unjustified disadvantage grievance

[34] Section 103(3) of the Act provides:

In subsection (1)(b), unjustifiable action by the employer does not include an action deriving solely from the interpretation, application, or operation, or disputed interpretation, application, or operation, of any provision of any employment agreement.

[35] LS Travel submits that the issue Ms Thakkar has raised turns entirely on a finding about the correctness or otherwise of LS Travel's genuine interpretation of the provisions in question

- the hours of work provisions in the IEA. On that basis it is a dispute (or a matter deriving solely from the interpretation of the IEA) and the Authority should determine it as such by applying the rules of interpretation to the relevant provisions of the IEA.

[36] Both parties refer to the recent the Court of Appeal decision in *Breen v Prime Resources Company Limited* which clarified the law in relation to s103(3).¹ It relevantly found:

- (a) The jurisdictional bar is not triggered for every matter which includes contractual interpretation issues, but only for those derived solely from the interpretation, application, or operation of the contract;
- (b) A disadvantage grievance will be available if there is something more than just the issue of the interpretation, application or operation of the employment agreement;
- (c) The words “application” and “operation” do not relate to actions taken to implement the employment agreement, but instead relate to the interpretation of contractual terms; and
- (d) A disingenuously held interpretation of an employment agreement would not bar an unjustified disadvantage claim (i.e. a party cannot rely on a contractual interpretation which they did not genuinely hold, in order to avoid jurisdiction).

[37] The Authority accepts Ms Thakkar’s submissions that the unjustified disadvantage grievances in this case are nor barred under s 103(3) of the Act. While contractual interpretation may be a factor in determining the agreed hours of work, the following actions are also relevant and go beyond mere contractual interpretation:

- (a) LS Travel’s actions in creating rosters for Ms Thakkar to work at times she said she was unavailable, and whether this was a reasonable implementation of the IEA as well as a reasonable action given the circumstances at the time;
- (b) LS Travel’s alleged decisions to provide shifts to other staff rather than Ms Thakkar, and whether this was a justified action due to operational requirements, or a result of potential disparity of treatment;
- (c) Representations made to Ms Thakkar which may have indicated she could expect a regular set shift, including the pre-employment email sent by Ms Barzandeh,

¹ *Breen v Prime Resources Company Limited* [2026] NZCA 33 at [125] and [126].

- availability information collected during recruitment, and subsequent job advertisements including specific shifts;
- (d) LS Travel's attempt to vary the IEA by offering part-time employment, and an alleged choice between that, and resigning; and
 - (e) LS Travel's second attempt to vary the IEA by carrying out a consultation process to change her shifts.

The terms of the IEA, correctly interpreted

[38] Ms Thakkar gave evidence that she understood the Times and Days of Work set out in Appendix A to be her regular shift pattern, meaning her hours would be worked between Tuesday to Saturday from 12:30pm to 20:30pm.

[39] In Appendix A the Availability hours were set at 45, with clause 7.1 saying she "must be available to perform up to the number of Availability hours" between the "Times and Days of Work specified in Appendix A (being Tuesday to Saturday from 12:30pm to 20:30pm). It is not clear in the Appendix when the 45 hours should be worked, as the Times and Days of Work only relates to that 40-hour period.

[40] Clause 7.5 says "You will be required to work the shifts you are rostered unless otherwise agreed with your manager". LS Travel submits this indicates Ms Thakkar was required to be available for other shift times and cannot refuse to attend a shift.² However, this reading of clause 7.5 is not consistent with the existence of Availability Hours, or the Times and Days of Work in Appendix A. If Ms Thakkar could be rostered, for example, a morning shift and was not able to reject it, then there would be no reason for the Availability Hours provision or to specify the Times and Days of Work.

[41] Mr Thakkar's representative noted that LS Travel appears to submit that the Times and Days of Work clause only has meaning in relation to the 45 availability hours, and this is despite the fact that period set out is only 40 hours, which aligns with the guaranteed hours per week. She submits this also is not consistent with the submission that Ms Thakkar should be available at times outside the availability hours. I agree with Ms Thakkar's representative that this is not a logical or readily understandable reading of the agreement.

² Other than pursuant to the limitations in clause 7.4 around maximum hours.

[42] In light of the above, the Authority's provisional assessment of the hours of work provisions in the IEA is:

- (a) The Times and Days of Work indicates the times Ms Thakkar will be provided with her Guaranteed Hours of Work;
- (b) The Availability Hours of 45 are how many hours Ms Thakkar must make herself available to accept additional shifts. If LS Travel had wanted full availability from Ms Thakkar, it could have indicated different availability hours.

[43] While LS Travel's witnesses emphasised that applicants to its roles are told flexibility is required due to operational requirements, that flexibility was not sufficiently or clearly reflected in the terms in the IEA. With LS Travel having drafted the agreement, which arguably created some ambiguity between the relevant clauses, the Authority considers it appropriate here to interpret it in favour of the party who did not draft it - Ms Thakkar. This is particularly appropriate given the imbalance in resources available to LS Travel and Ms Thakkar. If LS Travel wished Ms Thakkar to be available over a wider period of time, it could have included a wider timeframe in the "Times and Days of Work".

[44] As per the case law, contextual background should also be taken into account in interpreting the IEA. Of particular relevance here:

- (a) Ms Thakkar was asked for availability information as part of the recruitment process, which would indicate the rostering would include some consideration of the hours the employee says they are available;
- (b) Ms Barzandeh's email to offer the regular shift pattern was sent before the IEA was provided, with Mr Thakkar expressing her preference for the afternoon shift;
- (c) The Times and Days of Work generally reflected the shift Ms Barzandeh had offered and Ms Thakkar had agreed to, which was very likely to influence Ms Thakkar to believe she had been provided with a set shift;
- (d) LS Travel felt it was necessary to change the IEA, and offered her a part-time agreement, as well as attempting to consult on a "proposed roster change". These actions would not have been necessary if LS Travel genuinely believed it could contractually require Ms Thakkar to work at any time.

Finding

[45] The Authority accepts Ms Thakkar's interpretation is the correct reading of the relevant terms of the IEA, which is supported by the contextual background. Her grievances and breach of good faith claim will now be assessed, informed by that finding.

Personal grievances – generally

The test for justification and good faith

[46] In assessing whether an employer's actions are justified, the test is set out in s 103A of the Act involves determining whether the employer's actions and how the employer acted were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred.

[47] In addition, a fair and reasonable employer is expected to comply with its statutory obligations which include good faith obligations at s 4(1A)(b). These require the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative.

Unjustified disadvantage claims

[48] An unjustified disadvantage personal grievance is set out in s 103(1)(b) of the Act - an employee may have a personal grievance where the employee's employment or any condition of employment is or was affected to the employee's disadvantage by some unjustified action by their employer. Based on s 103(1)(b), the questions to be addressed are:

- (a) What does Ms Thakkar complain of in terms of LS Travel's actions and did it act as alleged?
- (b) If so, did LS Travel's actions cause any disadvantage to Ms Thakkar's employment or a condition of her employment?
- (c) If so, were LS Travel's actions unjustified?

Assessment

[49] Ms Thakkar's claims for unjustified disadvantage relate to LS Travel's allegedly:

- (a) Unilaterally varying terms of employment around her work hours; and
- (b) Failing to provide her guaranteed minimum hours.

[50] It is clear that Ms Thakkar was disadvantaged by not receiving the guaranteed hours during the times she was available to work, and had agreed to work. Having agreed to work on the basis she would be working full time on an afternoon/evening shift, she was faced with the prospect of working what could be termed as “graveyard” shifts. The Authority accepts this resulted not only in loss of wages, but also in financial and mental stress for her.

[51] LS Travel submits it was justified in not providing the shifts to Ms Thakkar, due to its interpretation of the IEA and its changing operational requirements. However, while LS Travel’s witnesses indicated the original shift offered was no longer feasible following the change to 24/7 operations, this was not borne out by the evidence.

[52] Firstly, Ms Bird gave evidence of her belief that consultation was necessary for all staff due to the change in operations, and that the proposed roster change letter was given to Ms Thakkar because she was the only staff member who did not agree to the change in her shifts. When it was put to Ms Bird at the investigation meeting that a consultation process would not be necessary if Ms Thakkar was contractually required to be available 24/7, she repeated that it was important to seek her feedback. The contractual interpretation now advanced by LS Travel was not shown to held by it until the late stages of the employment relationship. LS Travel has not been able to show its actions were justified on the basis of a genuinely held contractual interpretation, which has formed the back-bone of its defence before the Authority.

[53] Secondly, LS Travel have not been able to show its actions were justified on the basis it could no longer provide Ms Thakkar with afternoon shifts due to the 24/7 operational change. There was evidence that there were indeed other considerations. This included movement of other team members meaning Ms Thakkar’s shift was no longer available. It also included undisclosed performance and attendance issues, which Mr Sidal shared with Duty-Free managers, resulting in her not being offered a transfer so she could work afternoon shifts in the Duty-Free stores as an alternative. It is common ground such issues were not addressed with Ms Thakkar in a performance management or disciplinary context. Further, casual or part-time staff appear to have received afternoon shifts within the times and days of work in Ms Thakkar’s agreement, indicating there was flexibility available in rostering decisions.

[54] As early as 3 December 2023, Ms Thakkar was rostered onto a 3:45am shift, which she questioned as being outside of her regular hours. While there appeared initially to be some effort to roster Ms Thakkar on afternoon shifts for a short period after this, it reverted to rostering her on 40 hour shifts outside her Availability Hours. On 5 January 2024 she was only offered a reduction in her hours, after her shifts had already been changed, without her feedback or consent. She was being offered the part-time contract, with the only other actual or perceived option being resignation. LS Travel has not shown that its conduct prior to March 2024 complied with its consultation obligations under clause 7.3 of the IEA.

[55] Having made these findings, Ms Thakkar has established personal grievances for unjustified disadvantage on the grounds claimed.

Unjustified dismissal

Constructive dismissal

[56] Constructive dismissal refers to a situation where, as a result of an employer's action or inaction, an employee's job or workplace becomes untenable, and they are left with no option but to resign. The issue for determination is whether the decisions and actions taken by LS Travel meant Ms Thakkar's resignation can be considered to be a constructive dismissal. In order for there to be a constructive dismissal, the employer must have in effect dismissed the employee, although technically the employee resigned. The Court of Appeal has set out three non-exhaustive categories of constructive dismissal:³

- (a) An employer gives the employee a choice between resigning or being dismissed.
- (b) An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.
- (c) A breach of duty by the employer leads an employee to resign.

[57] Ms Thakkar submits that having made out that she was entitled to the Times and Days of Work set out in Appendix A of the IEA, and that her employer was refusing to provide her with these shifts, this would constitute a fundamental breach of the IEA, which impacted her ability to carry out work, or to be paid wages. She raised her concerns with LS Travel on multiple occasions and says it was foreseeable that she would resign as a result of the breaches.

³ *Auckland Shop Employees v Woolworths (NZ) Ltd* [1985] 2 NZLR 372 at 374-375.

[58] LS Travel submits that its letter of 17 June 2024 offered Ms Thakkar a reasonable alternative to resignation, which was to accept an interim proposal. Ms Thakkar says this is despite her attempting for six months to receive shifts during her Times and Days of Work, to no avail. At the time of this letter, she says she had not received any wages from LS Travel since 16 April 2024. She says it was clearly foreseeable that she would resign as a result of LS Travel's continued refusal to provide her with her guaranteed hours during the Times and Days of Work, especially following the response to her personal grievance letter.

[59] Having carefully considered LS Travel's actions following the consultation process, the Authority is satisfied they were what a fair and reasonable employer could have done the circumstances.

[60] Clause 7.3 of the IEA allowed LS Travel to change Ms Thakkar's hours by giving her two weeks' notice in writing after consulting with her (which it says it did in March 2023 and gave her notice of the change to occur from 6 April 2023). While Ms Thakkar says the consultation was predetermined, the Authority is not satisfied that was the case. Further, in her evidence, Ms Thakkar said she 'did not accept the shift' and that LS Travel was required to consult with her and obtain her agreement before changing the shift. This was not the case under clause 7.3 of the IEA.

[61] The Authority ultimately considers Ms Thakkar's resignation was premature. Ms Thakkar could have engaged with LS Travel to understand what interim arrangements could be agreed pending resolution of the parties' employment relationship problem. She resigned before such options were explored. Ms Thakkar was not constructively dismissed from her employment.

Personal grievance remedies

[62] Ms Thakkar has established personal grievances for unjustified disadvantage, and she is entitled to a consideration of remedies under the Act.

Compensation

[63] From the first week, Ms Thakkar says she noticed there was favouritism for existing team members, and was very upset and surprised by the behaviour of managers. Instead of solving the main issue she raised, they gave her options she was not comfortable with. They told her two or three times that they would fix the problem, but did not. Ms Thakkar's evidence

also referred to the upset and pressure she felt from LS Travel to give up her hours and full-time role. Ms Thakkar has described some mental and emotional distress towards the end of employment, and after it ended, which in the Authority's view is not attributable to the grievances established.

[64] Taking into account the evidence presented, I consider \$8,000 as a global award to be appropriate under s 123(1)(c)(i) of the Act for humiliation and injury to feelings caused by the unjustified actions of her employer.

Lost wages

[65] Based on the unjustified disadvantage grievances established, the Authority is satisfied that Ms Thakkar should have been rostered her guaranteed 40 hours at the Times and Days of Work in Appendix A prior to 6 April 2024 (when consultation had occurred). Where she was not rostered for those guaranteed hours and was paid for less than 40 hours, she is entitled to payment equivalent to that shortfall, up to and including 5 April 2026. Annual holiday pay of 8% should be calculated on the amount calculated.

Good faith – penalty claim

[66] Section 135(5) of the Act states that an action for recovery of a penalty must be commenced within 12 months of the date the cause of action first became known, or ought reasonably to have become known by the person. Ms Thakkar did not raise her penalty claim within 12 months.

[67] The alleged breach of duty of good faith occurred while Ms Thakkar was employed (until 18 July 2024). Ms Thakkar's statement of problem (filed on 19 August 2024) does not raise a breach of duty of good faith claim. It raises a disadvantage personal grievance claim for breach of duty of good faith and it does not seek penalties as a remedy. The claim for penalties was not added until 15 August 2025 which is over the 12 month limitation for pursuing a claim for penalties.

[68] In any event, the Authority would not have been satisfied on the evidence that the conduct of the employer warranted the imposition of a penalty under s 4A of the Act. The claim for a penalty is declined.

Outcome

[69] Within 21 days of the date of this determination, LS Travel Retail New Zealand Limited is to pay Nisha Thakkar:

- (a) \$8,000 in compensation (disadvantage grievances) under s 123(1)(c)(i) of the Act;
and
- (b) Lost wages and annual holiday pay (calculated pursuant to [65] above) under s 123(1)(b) of the Act.

Costs

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

[71] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Ms Thakkar 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 LS Travel 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.

[72] 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 upwards or downwards.⁴

Sarah Blick
Member of the Employment Relations Authority

⁴ For further information about the factors considered in assessing costs see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1