New Zealand Employment Relations Authority Decisions

Cavanagh v Ritchies Transport Holdings Limited (Christchurch) [2018] NZERA 1051; [2018] NZERA Christchurch 51 (18 April 2018)

Last Updated: 27 April 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2018] NZERA Christchurch 51
3003411

BETWEEN MARIA CAVANAGH Applicant

A N D RITCHIES TRANSPORT HOLDINGS LIMITED Respondent

Member of Authority: David Appleton

Representatives: Applicant in person

Anthony Shaw, Counsel for Respondent

Investigation Meeting: 10 & 11 April 2018 at Christchurch

Submissions Received: 11 April 2018 from Applicant

11 April 2018 from Respondent

Date of Determination: 18 April 2018

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

A. Ms Cavanagh was not unjustifiably dismissed. Ms Cavanagh is

partially successful in her claims of unjustified disadvantage, and is awarded compensation in the sum of $5,000. She was not the subject of an unlawful lockout.

B. Ms Cavanagh is entitled to be paid for not being rostered on for Saturday 4 February 2017, and is entitled to be paid public holiday pay for Waitangi Day 2017, if she has not already been paid in respect of that public holiday.

C. Ms Cavanagh is not entitled to any further remedies for the

reasons set out in this determination.

D. Costs are reserved.

Employment relationship problem

[1] Ms Cavanagh brings claims against the respondent for breaches of her individual employment agreement, unjustified

disadvantage in her employment and unjustified dismissal. She also claims she was unlawfully locked out. The respondent denies all of these allegations. It also asserts that Ms Cavanagh did not raise a personal grievance in respect of some of her claims within the statutory 90 days' time period.

[2] The delay in holding the Authority's investigation meeting was due to a combination of factors, including a need for Ms Cavanagh to particularise her claims more accurately, an adjournment granted at the request of Ms Cavanagh of the investigation meeting set down for December 2017 and the need to accommodate Ms Cavanagh's university timetable when setting down the dates for the initial and subsequent investigation meetings.

Account of the material events leading to the termination of employment

[3] The respondent operates a bus and coach hire service in the North and South Islands of New Zealand. Ms Cavanagh was initially hired by the respondent as a bus driver in September 2015 in Auckland. On or around 1 February 2016 Ms Cavanagh commenced driving buses for the respondent in Christchurch working approximately twenty hours a week driving a school bus, eight hours a week driving an airport shuttle bus and around two hours a week carrying out bus cleaning duties. She would also carry out bus charter work as required.

[4] Ms Cavanagh was paid $17.36 per hour in Auckland but, initially, $17.00 an hour in Christchurch, which was the rate for South Island based drivers at the time. Ms Cavanagh had not entered into an individual employment agreement when she started employment with the respondent but did spend several months negotiating with the respondent over the terms and conditions under which she was eventually employed. This individual employment agreement was eventually signed by the parties in August 2016.

[5] Although Ms Cavanagh had raised various queries with the respondent up until August 2016, it appears that the relationship did not begin to become strained until around September 2016. One issue which arose around this time, and which is

the subject of a claim by Ms Cavanagh before the Authority, relates to clause 5.3 of the individual employment agreement, which states the following:

5.3 NZQA

All Employees who attain a NZQA recognized qualification and which is also relevant to the position shall receive the following payment - $0.50 cents per hour worked.

[6] According to Ms Cavanagh, while she was negotiating with the respondent about the terms of her employment agreement, the respondent had agreed that clause

5.3 would recognise individual units making up an NZQA qualification, and not just the NZQA itself. She acknowledges that there needed to be discussions about which of those units were considered to be relevant for the purposes of the clause, but she says it was clear that individual units were capable of counting.

[7] Ms Cavanagh had identified 15 units (otherwise called 'standards' or 'unit standards') that partly made up her National Certificate in Employment Skills which she says could have each counted to trigger her right to receive an additional 50 cents supplement to her hourly rate of pay, subject to the respondent agreeing they were each relevant. If they had all been accepted, according to Ms Cavanagh that would have entitled her to an extra $7.50 an hour.

[8] On 19 September 2016 Mr Glenn Ritchie, the managing director of the respondent, agreed to meet with Ms Cavanagh to discuss her claim to be paid extra in recognition of her qualifications. The position of the respondent was that Ms Cavanagh was seeking to be paid in relation to qualifications that did not qualify for the extra payment. Its position is that she did not have a National Certificate in Passenger Service – Urban Services and that she was, in addition, seeking to be paid in relation to unit standards which made up a qualification but did not amount to a qualification in themselves for the purposes of the extra payment. For Ms Cavanagh, this was a change of position by the respondent from that which they had previously adopted.

[9] Ms Cavanagh also complains about the door to Mr Ritchie's office being left open during this meeting with him to talk about qualifications, at which Kelvyn Clark (operations manager) and Richard O'Keefe (corporate services manager) were also present. With respect to this allegation, Mr Clark says in evidence that it was an impromptu discussion initiated when Ms Cavanagh entered into Mr Ritchie's office

unannounced and without an appointment. He said that, whilst the door was left open, she had left the door open herself, there was no one in the corridor anyway, and that Ms Cavanagh could have requested that the door be closed if she had wanted it to be closed. Ms Cavanagh says she did not know it had been left open until she stood up to leave.

[10] In early October 2016 Ms Cavanagh enrolled with Canterbury University to study law on a full time basis and advised Ritchies that she would have to reduce her hours of work once she started her studies. During October 2016 the respondent made an error in Ms Cavanagh's pay about which she emailed Mr Andrew Ritchie, the CEO, but it appears that this error was quickly rectified.

[11] In November 2016 the parties were still in dispute over the recognition of Ms Cavanagh's qualifications by way of additional pay. On 17 November 2016 Ms Cavanagh was asked to attend a meeting with Mr O'Keefe in his office. Ms Cavanagh was not told in advance what the meeting was about, although it turned out to be in response to an email that Ms Cavanagh had sent to ask why her pay rate had seemingly increased from $17 per hour to $18 per hour. She was asked whether she wanted a support person present, and she had said no, before she knew what the meeting was about.

[12] Ms Cavanagh says that, once she became aware that the meeting was discuss her pay increase, and the NZQA issue, she stated that she did not wish to become involved in a "verbal discussion regarding [her] contract with management as, previous experience had shown her that such discussions only result in animosity between both parties". Ms Cavanagh says that she was then threatened to be stood down as an employee if she did not participate in any further discussion.

[13] According to the evidence of Mr O'Keefe, when Ms Cavanagh had said again in the meeting that she should be paid 50 cents per hour for each unit standard relevant to her position, Mr Ritchie had told her that "she could not keep wasting management time requesting this when it was clear that she knew Ritchies' position prior to signing the IEA". Mr O'Keefe says that Ms Cavanagh stated that she wanted Ritchies' response in writing and that all future discussions needed to be in writing so that she could have her legal representative review it.

[14] Mr O'Keefe says that it was when Ms Cavanagh insisted that she wanted an explanation in writing again why she wasn't being paid 50 cents per hour for each unit standard that Mr O'Keefe stated that it was "unacceptable for Ritchies to have to keep repeating what has already been agreed and that the options available to Ritchies were resolve it today, wait until your legal representative is present or stand you down until your legal representative is present". Ms Cavanagh said that they could not stand her down and the company needed to bargain in good faith. It was at that point that Ms Cavanagh left Mr O'Keefe's office. In his oral evidence Mr O'Keefe said that the statement he had made about the options had really been addressed to Mr Clark. In any event, Ms Cavanagh was not stood down from her duties.

[15] Mr O'Keefe emailed Ms Cavanagh later that day on 17 November 2016 stating that Ms Cavanagh was in receipt of a 50 cent per hour increase which had been applied to all non-union drivers to bring them up to the same pay rate as drivers who were members of the union. In addition, in a separate email, he told Ms Cavanagh that she was already in receipt of an additional 50 cents per hour in relation to having an NZQA qualification even though the respondent did not believe that she was entitled to that recognition. According to the respondent this was because Mr Glenn Ritchie had decided, after his meeting with Ms Cavanagh, to pay her the additional 50 cents per hour "as a sign of good faith", although it also stated in evidence that it was "a payroll error". In any event, there is no dispute that Ms Cavanagh was receiving the 50 cents per hour supplement.

[16] There was a further disagreement between the parties towards the end of November 2016, about Ms Cavanagh's P endorsement expiring and her insisting that she should still be allowed to drive, but as that does not feature as part of Ms Cavanagh's claims I shall say no more about it.

[17] On 15 December 2016 Mr O'Keefe emailed Ms Cavanagh to notify her that the respondent had received a written complaint about her from the transport operations manager of Christchurch International Airport Limited ("CIAL") two days previously. CIAL had requested that Ms Cavanagh cease driving at the airport on both the staff shuttle and the hopper bus. Mr O'Keefe stated that he wished to meet with Ms Cavanagh and Mr Clark to discuss the issues raised and asked if she could meet that afternoon after her shift. She was also offered a support person.

[18] Ms Cavanagh complained that the CIAL complaint had been forwarded to her by Mr O'Keefe just before she was about to go on leave. She also complained that the CIAL complaint that had been forwarded to her also referred to one of her co-workers by name, and that the email therefore had personal information about another employee. She was fearful that that other co-worker had seen the complaint about her.

[19] In replying to the substance of the CIAL complaint later on 15 December in an email headed "I find Richard's style of management extremely insulting" Ms Cavanagh stated that she had requested that Mr O'Keefe not be involved in her management. She had therefore addressed her response to Mr Clark and Mr Goudie instead of Mr O'Keefe.

[20] On 19 December 2016 Mr Clark emailed Ms Cavanagh to advise her that Mr O'Keefe had raised some questions with CIAL about its concerns regarding Ms Cavanagh and that, essentially, all three of the concerns about Ms Cavanagh were unsubstantiated. CIAL had therefore agreed that Ms Cavanagh was able to perform bus driving services at the airport again. In his reply Mr Clark also questioned Ms Cavanagh having an issue with Mr O'Keefe's management style and stated that Mr O'Keefe had followed the respondent's "very strict protocols when dealing with potential employee related issues", that he was part of senior management and was responsible for dealing with employment related issues. Mr Clark also said that Mr O'Keefe has always been "fair to deal with" and had always offered Ms Cavanagh time to bring in a representative or support person.

[21] Mr Clark also stated that it was unacceptable that, on 15 December, Ms Cavanagh had arrived in the office, had refused to discuss the potential issues raised by CIAL with Mr O'Keefe and himself, but had instead "marched into Glenn Ritchies' office and closed the door to have a private discussion with him". Mr Clark stated that that was not acceptable conduct and that, in the future, "we request that you direct any concerns to your Supervisor, Will Goudie, or myself as the Branch Manager".

[22] Mr Clark also referred to Ms Cavanagh's notification of her study plans, offered an early morning shift (01.00 to 09.30) to

Ms Cavanagh until 16 January and stated “after the 16th of January, it will be difficult to accommodate a minimum of 30

hours, as per your employment agreement, with your study times during week days1. If you are unavailable during week days then we need to look at renegotiating your employment agreement”. He ended the email by asking to meet with Ms Cavanagh on 21 December with him and Mr O’Keefe.

[23] Ms Cavanagh replied the same day, seemingly immediately, with the subject line “I will not meet with Richard”. The body of her email stated that he was not her line manager and that her legal advisor was not available until February. She also stated “Please be advised that I maintain that written communication regarding this matter is the only form of communication acceptable”.

[24] Mr Clark replied the following day to say that the request to meet with him and Richard was a lawful and reasonable request. He also stated “Unfortunately, if you are not prepared to meet before the commencement of duties then we will need to roster the work to another driver”. Ms Cavanagh’s three responses reiterated that she would not meet with Mr O’Keefe, stated “I will see you in the Employment Relations Tribunal” and “As per your email instructions, I won’t be working until February”.

[25] Because of Ms Cavanagh’s continuing refusal to meet with Mr O’Keefe, the

respondent’s lawyers, Timpany Walton, wrote to Ms Cavanagh on

21 December 2016. In the letter it set out a brief history of events up to Ms Cavanagh’s last communication and then stated that the respondent was entitled to request Ms Cavanagh to meet with Mr O’Keefe and that she could not dictate that the communication had to be by way of email. It stated that the respondent was prepared to postpone the meeting to enable her to have legal representation or a support person present if she wished and that the meeting was not a disciplinary meeting as the main item to be discussed was to be her work hours given her study commitments.

[26] The letter also stated that Ms Cavanagh was rostered to work until

17 January 2017 but after that date the only work available would be on an on-call or casual basis given the times which she said she was available. The letter stated that the respondent could not continue to provide Ms Cavanagh with 30 hours of work per week if she was unavailable to work daylight hours during the week. It was that issue that needed to be discussed with her if she wished to continue to work 30 hours per

week.

1 It is not clear exactly what Ms Cavanagh had said to the respondent about her availability up to this point, but clearly she had stated that she would not have full availability during week days.

[27] It appears that Ms Cavanagh failed to turn up for work on 21 December 2016, and on 22 December Timpany Walton wrote again to Ms Cavanagh saying that Ms Cavanagh had failed to attend work the previous day and that her purported justification was that she had previously been advised by Mr Clark that a meeting had to take place before she could resume duties. They also said that they understood her position to be that, because her legal representative was not available until February 2017, then she would not work prior to that time.

[28] The letter went on to say that it was not accepted that Ms Cavanagh could simply decline to work her scheduled rosters until February and that it was not a requirement of the respondent that a meeting with Ms Cavanagh had to take place before she undertook further duties. The letter went on to warn Ms Cavanagh that if she did not work her rostered shifts, and there was no proper and reasonable justification for not working, then the respondent would need to consider whether Ms Cavanagh had breached her employment agreement and abandoned her employment. The letter urged Ms Cavanagh to contact Mr Clark to arrange a time to meet to discuss her working hours from 17 January onwards. It appears that Ms Cavanagh began working her rostered shifts again.

[29] Mr Clark sent an email to Ms Cavanagh on 23 December requiring her to attend a meeting with himself, Mr Glenn Ritchie and Mr O’Keefe to discuss her availability for rostered duties on 17 January onwards, and that the meeting was not a disciplinary meeting. Ms Cavanagh responded to say that she had previously advised on numerous times that February 2017 was the earliest her representative was prepared to meet. She did not, in that email, say that she refused to meet with Mr O’Keefe. She also copied Mr O’Keefe into her email.

[30] Mr Glenn Ritchie then got involved and asked Ms Cavanagh by email whether she was refusing to attend a meeting, to which Ms Cavanagh stated that she was asserting her legal right to have her chosen representative with her. She also stated in a separate email sent on 23 December that Mr Ritchie could email her anything he wished to discuss. She stated that her university timetable from 4 January to 5

February allowed her 21 hours per day, and that “My university schedule from 20

February will be advised upon my learning to access passwords etc to gain such information from my University of Canterbury accounts. I request that I have at least one day free, per week.”

[31] In the subsequent emails, Mr Ritchie stated that the company had lost runs under tender to a competitor so that circumstances had changed for a number of rosters. To a question from Ms Cavanagh regarding the percentage of reduction of hours and more details Mr Ritchie replied "you don't use email for these sorts of things that's why you should come in as per our request". In her reply Ms Cavanagh stated "I have, in good faith, tried meeting with your team. I will not meet your management team again, without appropriate representation". Mr Ritchie replied "I haven't seen any attempt from you regarding the issues only be email. Kelvyn will

therefore have to do what he see's [sic] fit with the rosters after the 16th January

without your input if you are not prepared to come in and discuss."

[32] On 2 January 2017 Ms Cavanagh emailed Mr Goudie, operations supervisor, and her line manager, about an apparent shift change and he replied on 4 January saying that it was very difficult to fit Ms Cavanagh into the roster with her changes of availability without completely disrupting everyone else's assigned shifts and that her changes of availability affected the respondent's ability to provide her with her expected hours of work. Mr Goudie said that they needed her to come in to discuss her contract. Ms Cavanagh replied the following day saying: "as stated to Glenn, Kelvyn and Richard, I am exercising my legal right to have my legal representative present at any further meetings with Ritchies management. My legal representative is unavailable until February." She also said that it seemed that the difficulty was only the afternoon shifts.

[33] On 13 January 2017, a roster was released for the period 16 to 29 January and Ms Cavanagh was offered a permanent shift allocation working on Thursdays, Fridays, Saturdays and Sunday mornings from 01.00 to 9.30. Ms Cavanagh responded on 18 January to say that her timetable for the first term was still uncertain but that she could not work the 01.00 to 09.30 shift during the week because of her study requirements, but that she could "possibly" do either the Sunday or the Saturday shift, possibly on alternative weeks. She asked to work the Rangiora 04.30 shift but also said that afternoon school runs were not now suitable.

[34] Mr Goudie responded the following day by email to say that, apart from the

01.00 to 09.30 shift, the respondent now had all of the rosters covered, "so the best we can offer you is a casual contract". He stated that there would be no guaranteed hours

but there would probably be work available from time to time that could work around her schedule, as a relief driver or to cover other staff on leave or for charter work.

[35] Ms Cavanagh responded to say that she already had a contract with the respondent and Mr Goudie responded the following day to say that Ms Cavanagh had indicated that she could not perform the same duties as last year anymore, and that the respondent had offered her new duties which fitted in with her university timetable, which she had declined. He said that the respondent could not provide new shifts past 29 January until a new contract had been negotiated.

[36] Ms Cavanagh replied to say that she would continue with her morning school runs, the normal Sunday at the airport and morning urban run but that she could not confirm the afternoon runs. Mr Goudie asked if Ms Cavanagh thought that the company was still obliged to provide her with 30 hours per week work although her reply does not appear to have been provided to the Authority. Mr Goudie said in a later email that the 30 hours were on the basis of her being able to work mornings and afternoons, that Ms Cavanagh could not now comply with her contracted requirements, but that the company was willing to negotiate a new contract as a casual. Otherwise, he said, they would have to end the relationship.

[37] On 26 January 2017 Ms Cavanagh emailed Mr Goudie to say that she had injured her shoulder and later sent in a medical certificate. On 30 January Ms Cavanagh emailed to Mr Goudie what she said her contracted hours had been, setting out the runs on Mondays through to Fridays, and Sundays. She ended her email by saying "this employment relationship obviously needs to be sorted by a third party, because I WONT BE BULLIED into accepted adjusted conditions of employment to what was agreed in negotiations, prior to signing the contract." Mr Goudie responded as follows:

Hi Maria

Unfortunately your decision to commence university studies has affected your availability to perform rostered duties assigned to you. We offered the same roster that you had last year but you advised that this was not suitable as you could not work afternoons. We had an opportunity become available for early mornings at the Airport however you also declined this roster as well.

Given your limited availability, we see no alternative but to negotiate a new employment agreement, on a casual basis.

We have provided you with significant opportunities to discuss this in person. Subsequently, all rostered work for the school terms is now covered and we are unable to offer you any further work until a new employment agreement is negotiated.

[38] On 2 February Ms Cavanagh sent to Mr Goudie the following email:

What is most impressive, is that now the university have had time to sort more papers, and my timetable is forming, (effective 20/2/17), your incorrect prediction that my University hours are have limited my ability to work my contracted hours is

INACCURATE.

[39] Mr Goudie replied to this email from Ms Cavanagh to point out that her own email dated 18 January had stated that "the afternoon school runs aren't suitable now either" and that that was her own statement of unavailability, not the company's, nor was it a prediction that the company had made. Mr Goudie also stated that the company had needed to set 29 January 2017 as a cut-off date so that they could organise for the school term. He said that the school term had now started and they had set the rosters. He said that Ms Cavanagh had had ample opportunity to come and talk to the company so that they could work out where best to fit her in but she had not. He then closed by asking her to advise what availability she actually did have. Ms Cavanagh's response was as follows:

Will,

Honestly, Ritchies has caused enough stress by threatening to "stand me down", "no rostered work form 16/1/2017" and the latest "no work rostered from 29/1/2017". And now, when I am in need the most for employment confirmation, immediately prior to commencing full-time Law studies, Ritchies advised me they are breaching our Employment contract agreement.

Amongst many other things, Ritchies management team is lacking in many areas.

Let's allow the appropriate authority to deal with these issues, from

now on. Maria.

I repeatedly advised Ritchies my timetable wasn't confirmed, however I continued to keep them up to date on my summer school pre-law timetable.

I have shown nothing but prof [sic].

[40] On 7 February Ms Cavanagh sent in a scan of her hours worked, and sick days together with medical certificate and the page of her employment agreement showing

that she was entitled to be given 30 plus hours per week. She then stated "it isn't my problem if you do not roster me for 30 hours, you still have to pay me for them".

[41] In her email she also attached her National Certificate in Employment Skills reiterating her claim for 50 cents per hour for each qualification for the period

29 September 2015 to 22 October 2015.

[42] On 8 February 2017 Mr Clark responded saying that the company was not obligated to pay Ms Cavanagh when she had declined to work the duties assigned to her, having offered her two different rosters which she had declined. He also reiterated that the NZQA qualification that she was claiming for was not a relevant qualification but that the company had been paying her "as a sign of good faith" the additional 50 cents per hour in any event.

[43] Mr Clark ended the email by saying the following;

We continue to request that we discuss your employment situation in person. It is now the 8/02/2017. You have previously stated that you want legal representation and that they would be available on

20 February 2017. Please advise what time on this date that you, and your representative, would like to meet with Ritchies management.

[44] Ms Cavanagh confirmed in evidence that she did not reply to this email. Ms Cavanagh lodged her statement of problem with the Authority on 14 February 2017. A mediation between the parties took place on 10 April 2017 and, on 20 April 2017, Timpany Walton wrote to Ms Cavanagh saying the following:

Dear Ms Cavanagh

RITCHIES TRANSPORT HOLDINGS LIMITED

As you are aware, Ritchies have requested you on several occasions to meet with them to discuss your employment situation. We record that at present, you are not being rostered to work any shifts because you have advised that you are not available to work in the afternoons. Because of your unavailability since January, Ritchies have had to make alternative arrangements to cover your roster. They have been required to enter into contractual arrangements with other staff such that they would not now be able to roster you onto your old duties even if you were in a position to return to work mornings and afternoons.

Richard O'Keefe and Kelvyn Clark therefore wish to meet with you to discuss your future employment with them. They are willing to consider any reasonable proposal you may have as to your working hours but you do need to be aware that you will need to be available mornings and afternoons, and it will not be possible to roster you on

your old route. We also note that the meeting will need to be face-to- face. You are encouraged to bring a support person or legal representative.

If Ritchies do not hear from you within 10 days of the date of this letter they will assume that you are no longer interested in employment with them and will take steps to formally end the employment relationship. This will include paying to you any outstanding holiday pay.

[45] On 12 June 2017 Timpany Walton wrote the following letter to Ms Cavanagh:

RITCHIES TRANSPORT HOLDINGS LIMITED

As we have had no response to our letter of 20 April 2017, and as you refused to meet or communicate with Ritchies, Ritchies feel they have no choice but to formally terminate your employment. This letter accordingly is formal notice of termination of your employment.

Your outstanding holiday pay will be paid to your bank account. Please arrange for the return to Ritchies' office of keys and any other property in your possession which belongs to Ritchies.

Yours faithfully

Timpany Walton

[46] On 13 June 2017 Ms Cavanagh sent an email to Timpany Walton asking Mr Shaw of that firm to clarify for the record on what grounds her employment agreement was being terminated. Mr Shaw responded as follows:

As has been previously advised, you made yourself unavailable to work morning and afternoon shifts, you have repeatedly refused or failed to meet with your employer upon request, and have failed to communicate in any way about what work you may be able to undertake. These are repeated and continuing breaches of your employment agreement. Quite simply, Ritchies cannot be expected to continue to employ you when you have made it very clear that you are unable to work when required to do so.

Kindly return Ritchies property to their office as soon as possible.

The issues

[47] Ms Cavanagh complains about the following issues, which need to be determined by the Authority;

(a) That the respondent breached her employment agreement by not paying her 50 cents in relation to each NZQA unit she had obtained;

(b) That she suffered an unjustified disadvantage in her employment when a discussion about her qualifications had taken place in an office with the door left open on 19 September 2016;

(c) That she suffered an unjustified disadvantage in her employment when no further offer of a shift had been made to her after she had declined a shift;

(d) That the respondent breached her employment agreement by failing to pay her a minimum of 30 hours per week;

(e) That Ms Cavanagh suffered an unjustified disadvantage in her employment when a threat had been made by Mr O'Keefe to stand her down on 17 November 2016;

(f) That Ms Cavanagh suffered an unjustified disadvantage in her employment when the respondent refused to allow Ms Cavanagh to wait until February 2017 to seek advice for a meeting;

(g) That Ms Cavanagh suffered an unjustified disadvantage in her employment when Mr O'Keefe allegedly "walked in and refused to leave" a meeting;

(h) That Ms Cavanagh suffered an unjustified disadvantage when the respondent failed to follow up on her raising of concerns about events occurring at CIAL;

(i) That the respondent had breached Ms Cavanagh's privacy;

(j) That the respondent breached her employment agreement and that she had suffered an unjustified disadvantage in her employment when the respondent failed to roster her on for work after 29 January 2017. Ms Cavanagh also alleges that this amounted to an unlawful lock-out; and

(k) That she was unjustifiably dismissed from her employment.

Did the respondent breach Ms Cavanagh's employment agreement by not paying

her 50 cents in relation to each NZQA unit she had obtained?

[48] The respondent accepts that a personal grievance was raised in time in respect of this matter, in so far as Ms Cavanagh also claims she was unjustifiably disadvantaged in her employment.

[49] Ms Cavanagh's position is that it was only after she had entered into the employment agreement that she discovered that the respondent was interpreting clause 5.3 of her employment agreement as obliging the company to pay no more than

50 cents in recognition of one NZQA qualification, and not 50 cents per relevant unit standard. Ms Cavanagh is adamant that when she signed the agreement, Mr Clark had accepted that the company would pay 50 cents per relevant unit standard, and that it only remained to agree which were relevant.

[50] The parties each produced in evidence a copy of drafts of the agreement which they say were produced during the negotiations between them. Mr Shaw points out that one of the drafts has an amendment to clause 5.3 written in in manuscript saying "per qualification" immediately after the words 50 cents per hour worked. He also points out that the signed agreement does not include those added words. In response, Ms Cavanagh says that other hand written amendments were not taken through into the final agreement, such as an amendment changing the notice from two weeks to a month.

[51] In order to determine this issue, I must apply the usual principles of contractual interpretation, which are derived from the well-known authorities of *Vector Gas Limited v Bay of Plenty Energy Limited*2, *Silver Fern Farms Limited v New Zealand Meat Workers and Related Trade Unions Inc*3 and *New Zealand*

*Professional Fire Fighters Union v New Zeeland Fire Service Commission*4, amongst

others. The key principles arising from these cases may be summarised as follows:

a. The principles of contractual interpretation applicable to employment agreements are the same as apply to all contracts.5

2 [2010] NZSC 5, [2010] 2 NZLR 444

3 [2010] NZCA 317

4 [2011] NZEmpC 149

5 *Silver Fern Farms*

b. The starting point is the natural and ordinary language of the parties.6

c. If the language used is not on its face ambiguous, then the court (or Authority) should not readily accept that there is an error in a contractual text.

d. It is valid to cross-check the provisional view of what the words mean against the contractual context and extrinsic evidence, if admissible, to identify contractual context if it tends to establish a fact or circumstance capable of demonstrating objectively what meaning the parties intended their words to bear.

[52] The wording of clause 5.3 as set out in the final, signed agreement is, in my view, open to an interpretation that 50 cents is payable for each NZQA recognized qualification. Furthermore, it does not define what is meant by a qualification – that is, the overall NZQA certificate or the unit standards making up that certificate. In the absence of absolute clarity in the meaning of the clause, it is necessary to consider context and extrinsic evidence.

[53] I agree with Mr Shaw that there is a conflict of evidence between the parties as to what was agreed when the agreement was signed. The parties' stated intentions do not, of course, assist in deciding this matter. What I can take into account, though, is the fact that bus drivers are not paid significantly high levels of pay in New Zealand, and that bus companies tend to operate to fairly tight margins.

[54] When Ms Cavanagh started her role in Christchurch the adult minimum wage was $14.75 an hour, and she was paid $17 an hour, $2.25 an hour above the minimum wage. An additional 50 cents an hour increased the difference by 22%. Ms Cavanagh's starting point was that she believed that 15 of her units were relevant to the role of driving a bus. That would have increased the difference by 330%, and would have put her on a gross pay rate of $24.50 an hour. Even if Ms Cavanagh was not seriously expecting that pay rate, her certificate was made up of 30 unit standards, so that, on her argument, her pay rate could theoretically have been increased by $15

an hour.

6 *Vector Gas*

[55] Upon standing back and reviewing the probable purpose of clause 5.3, I cannot accept that the respondent would ever have agreed to a situation where each unit standard was potentially worth 50 cents an hour, as the achievement of a single unit standard would not materially improve an employee's bus driving skills. It would be the entirety of the NZQA qualification that

would do that, in any material sense.

[56] There is another difficulty that Ms Cavanagh faces; she says that the parties had agreed that they would discuss what unit standards would count after the agreement was signed. However, that would be an agreement to agree, and as such is unenforceable.

[57] I must therefore prefer the respondent's position, and decline to find that it

agreed to pay Ms Cavanagh for each relevant unit standard.

[58] During the Authority's investigation meeting Ms Cavanagh produced two certificates which showed that she had a Class 2 drivers licence and a P (passenger) endorsement. She suggested that she should have received 50 cents an hour for each of these certificates. However, the respondent's evidence is that every bus driver it employed had to have those certificates and that they would not pay an addition to the hourly rate for having them. I accept the respondent's evidence, which is logical.

Did Ms Cavanagh suffer an unjustified disadvantage in her employment when a discussion about her qualifications took place in an office with the door left open on 19 September 2016?

[59] There was another conflict of evidence about the circumstances of the meeting which Ms Cavanagh complains about. Some of the conflict is about whether Ms Cavanagh was aware that Mr Clark and Mr O'Keefe had followed her into Mr Glenn Ritchie's office on 19 September or not. I do not believe that I need to resolve that conflict to determine whether the door being left open during the conversation was a breach of Ms Cavanagh's right to privacy (and so an unjustified disadvantage) as there is no disagreement that the door was indeed left open or that Mr Clark and Mr O'Keefe did follow her in, and so were the ones who left the door open (even if it was already open).

[60] However, first I must determine whether Ms Cavanagh raised a personal grievance within the statutory 90 days about this issue, as Mr Shaw contends that she did not.

[61] Section 114 of the Employment Relations Act 2000 (the Act) provides as follows:

114 Raising personal grievance

(1) Every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), raise the grievance with his or her

employer within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless

the employer consents to the personal grievance being raised after the expiration of that period.

(2) For the purposes of subsection (1), a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the

employer aware that the employee alleges a personal grievance that the employee wants the employer to address.

(3) Where the employer does not consent to the personal grievance being raised after the expiration of the 90-day period, the employee

may apply to the Authority for leave to raise the personal grievance after the expiration of that period.

(4) On an application under subsection (3), the Authority, after

giving the employer an opportunity to be heard, may grant leave accordingly, subject to such conditions (if any) as it thinks fit, if the Authority—

(a) is satisfied that the delay in raising the personal grievance was occasioned by exceptional circumstances (which may include any 1

or more of the circumstances set out in section 115); and

(b) considers it just to do so.

(5) In any case where the Authority grants leave under subsection (4), the Authority must direct the employer and employee to use mediation to seek to mutually resolve the grievance.

(6) No action may be commenced in the Authority or the court in relation to a personal grievance more than 3 years after the date on

which the personal grievance was raised in accordance with this section.

[62] Ms Cavanagh says that she signalled that she was going to raise a personal grievance in an email dated 19 September 2016 to Mr Ritchie which stated, inter alia, the following:

1) As I stated as I left your office, with Kelvyn, you and Richard, your ability to maintain Privacy when in employment related discussions is noted.

...

There is more, but as time is limited due to my work requirements, the [sic] will be addressed at a later date, or in a

Personal Grievance.

[63] In *Creedy v Commissioner of Police*7 the then Chief Judge of the Employment

Court stated the following at [36]:

[36] It is the notion of the employee wanting the employer to address the grievance that means that it should be specified sufficiently to enable the employer to address it. So it is insufficient, and therefore not a raising of the grievance, for an employee to advise an employer that the employee simply considers that he or she has a personal grievance or even by specifying the statutory type of the personal grievance as, for example, unjustified disadvantage in employment as Mr Barrowclough did on Mr Creedy's behalf in this case. As the Court determined in cases under the previous legislation, for an employer to be able to address a grievance as the legislation contemplates, the employer must know what to address. I do not consider that this obligation was lessened in 2000. That is not to find, however, that the raising cannot be oral or that any particular formula of words needs to be used. What is important is that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates.

[64] In paragraph [37] Colgan CJ said:

It is clearly unnecessary for all of the detail of a grievance to be disclosed in its raising, as is required, for example, by the filing of a statement of problem in the Employment Relations Authority. However, an employer must be given sufficient information to address the grievance, that is to respond to it on its merits with a view to resolving it soon and informally, at least in the first instance.

[65] What Ms Cavanagh did in her email of 19 September 2016 was to make an oblique comment about the managers' ability to maintain privacy being "noted", and then she wrote that "more...will be addressed at a later date or in a Personal Grievance". The oblique comment does not say that she is complaining about the managers' ability to maintain privacy, or to say that she wanted something done about it. It is not enough to expect an employer to read between the lines. The comment Ms Cavanagh made comes across as a brief sarcastic comment, but does not suggest that she wanted action of any kind to be taken.

[66] Furthermore, the reference to a personal grievance in the email does not say that Ms Cavanagh was raising one, but that she might do so, as an option. That is not

the raising of a personal grievance.

7 [2006] NZEmpC 43; [2006] ERNZ 517 , overturned in part on appeal but not in respect of the commentary above.

[67] I therefore do not accept that the email of 19 September raised a personal grievance at all, or if it did, it did not do so with sufficient specificity.

[68] During the investigation I indicated that there was a possible argument that the respondent had impliedly consented to the personal grievance being raised out of time by engaging with the substance of the allegation, so that that consent would be an exceptional circumstance for the purposes of s 114(4) of the Act8. Mr Shaw had described Ms Cavanagh's statement of problem as a "dog's breakfast", and it was initially hard to understand what claims were being raised, so that I had to issue a

memorandum on 14 July 2017 which set out a list of the issues which I had discerned from the documents lodged which Ms Cavanagh wished to have investigated. This list was agreed to by Ms Cavanagh in a later telephone conference call on 14 August

2017, and Mr Shaw did not say that his client raised jurisdictional issues in relation to any of the matters I had identified. One of those matters was "alleged discussion of an employment issue with the door open – unjustified disadvantage".

[69] In *Barbara Twentyman v The Warehouse Limited*9 the Employment Court explored the issue of implied consent to the late raising of a personal grievance. In that case, the respondent had "disputed the substance of the allegations and generally engaged in addressing them"10 and was treated as having "entertained the grievances even though they were out of time"11. That case concerned an existing employee in an on-going relationship, and so can be distinguished, but I believe that the principle of engagement can still apply to signal consent after the relationship has ended.

[70] The question of whether consent has been given is a matter of fact and degree12, and has to be more than acquiescence13. In *Commissioner of Police v Hawkins*14 the Court of Appeal stated15

This is a case in which the employer did not expressly consent. That however is not fatal, and the Commissioner concedes as much. However, the issue as framed by the Commissioner is something of a red herring. The real issue is not whether, in formal terms, the Commissioner "turned his mind" to the extension, but rather

8 Michael Talbot v Air New Zealand Limited – [2015] NZEmpC 90 at [33].

9 [2016] NZEmpC 172

10 Ibid., at paragraph [64]

11 Ibid., at [65].

12 *Commissioner of Police v Hawkins* [2009] NZCA 209, [2009] 3 NZLR 381 at [24]

13 *Cashmere Capital Limited v Carroll* [2009] NZSC 123.

14 [2009] NZCA 209

15 at [24]

whether he so conducted himself that he can reasonably be taken to have consented to an extension of time.

[71] When it became clear to the respondent, on 14 August 2017, that the issue of the door being left open was a matter which Ms Cavanagh wished the Authority to investigate, the respondent was well aware that the 90 days for raising a personal grievance about that matter had passed a long time beforehand. However, no protest about jurisdiction was raised, and the respondent's witnesses addressed the substance of the allegation fully in their briefs of evidence and their oral evidence.

[72] However, and this is an important caveat, I had expressly stated in my memorandum of 14 July 2017 that I would have to be satisfied that personal grievances had been validly raised in respect of each allegation of unjustified disadvantage.

[73] Whilst a protest as to jurisdiction was only expressly raised by Mr Shaw on 10

April 2018, on the first day of the Authority's investigation meeting, I do not believe that it would be just to infer that the respondent had impliedly consented to the raising of the grievance about the door being left open out of time when I had stated in the memorandum of 14 July that an enquiry about validly raising personal grievances would be part of the Authority's investigation. Therefore, I must find that no valid personal grievance was raised about this alleged disadvantage, and that no exceptional circumstances have been established.

[74] However, I will also say that, even if I had established that the Authority did have the jurisdiction to investigate whether the door being left open on 19 September

2016 amounted to an unjustified disadvantage in Ms Cavanagh's employment, I would have concluded that it did not do so. This is because there is no evidence of any actual breach of privacy. Mr Goudie said in evidence that he worked in the adjoining office and recalled Ms Cavanagh's meeting on 19 September 2016, but that he did not hear any detail of what was being said.

[75] There was a potential breach of privacy, as someone could have overheard the conversation. However, I am not satisfied that a potential breach amounts to an unjustified disadvantage, as Ms Cavanagh was not in reality disadvantaged.

[76] Ms Cavanagh also raised in the Authority's investigation meeting three other complaints of a breach of privacy. One was completely new to me; that was that Mr

Goudie had kept her application for annual leave on his desk. The second was that when she was training, a driver said that he or she had seen her CV. The third was that the CIAL complaint had been forwarded to her with details of another employee.

[77] Ms Cavanagh's statement of problem and accompanying documents referred to a large number of issues, and the memorandum of 14 July 2017 was designed to narrow down and focus on what appeared to be the key issues. That was Ms Cavanagh's chance to state what else she wanted to be investigated. However, neither the first, nor the second of these specific examples of breach of privacy was raised by Ms Cavanagh during the case management conference call on 14 August 2017 as further matters to investigate, and it is too late to raise them during the investigation meeting itself.

[78] With regard to the third example cited, concerning the CIAL complaint, there is no evidence that the email was forwarded to the other named employee citing the complaint against Ms Cavanagh. Ms Cavanagh may fear that it was, but that is not sufficient proof. Of course, any breach of a third party's right to privacy cannot be brought before the Authority by Ms Cavanagh.

Did Ms Cavanagh suffer an unjustified disadvantage in her employment when no further offer of a shift was made to her after Ms Cavanagh had declined a shift?

[79] I will examine this issue as part of the investigation into how the respondent dealt with Ms Cavanagh after she announced that she was going to be studying full time.

Did the respondent breach Ms Cavanagh's employment agreement by failing to pay her a minimum of 30 hours per week?

[80] I will examine this issue as part of the investigation into how the respondent dealt with Ms Cavanagh after she announced that she was going to be studying full time.

Did Ms Cavanagh suffer an unjustified disadvantage in her employment when a threat was allegedly made to stand her down on 17 November 2016?

[81] Mr Shaw says that a personal grievance was not raised within 90 days of that action complained about. However, Ms Cavanagh's evidence was that she had immediately protested when she perceived that she was being threatened with being stood down, referring to her employment agreement. She also referred to the threat in her later email to Mr O'Keefe of 17 November. A personal grievance can be raised orally, and I regard these actions as being sufficient to convey to the respondent that she was raising a grievance about the words used.

[82] There is a conflict about the words used. Ms Cavanagh says that she was threatened to be stood down if she did not sit down and engage in the meeting. Mr Clark and Mr O'Keefe say that he was contemplating options, as described in paragraph [14] above. On balance, I believe that Ms Cavanagh's evidence is more likely to be true, as the options described in the evidence of the respondent are not particularly intuitive or logical. I conclude that Mr O'Keefe was frustrated with Ms Cavanagh, and her refusal to engage with him, and that he made the threat to stand her down on the spur of the moment.

[83] Did that threat amount to an unjustified disadvantage in Ms Cavanagh's

employment? Sub sections 103A(1) and (2) of the Act provides as follows:

Section 103A Test of justification

(1) For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).

(2) The test is 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 dismissal or action occurred.

[84] The employment agreement between Ms Cavanagh and the respondent did not give the respondent the right to stand down Ms Cavanagh for refusing to engage with managers about any particular issue. The threat made was therefore unable to be lawfully carried out. Ms Cavanagh was not stood down however.

[85] On balance, I accept that a threat by an employer to carry out an unlawful act which could have real consequences upon the employee's employment is a disadvantage in that employee's employment. I further find that no fair and reasonable employer could have made that threat in all the circumstances, as it was

not a proportionate response to Ms Cavanagh's refusal to engage with Mr O'Keefe about her employment agreement without a support person present. Ms Cavanagh did, therefore, suffer an unjustified disadvantage in her employment.

[86] I will deal with remedies in respect of this finding here. Section 123 of the Act provides for the remedies available to an employee (or former employee) where the Authority has determined that the employee has a personal grievance. Ms Cavanagh suffered no financial loss but may have suffered loss under s 123(1)(c)(i) of the Act as a result of this disadvantage.

[87] In her evidence Ms Cavanagh did not say what effect that particular disadvantage had on her. She spoke in her oral evidence of the financial and knock- on effects caused to her by not being rostered to work after 29 January 2017, but also said "I am very resilient and can handle a lot of crap".

[88] It is clear that Ms Cavanagh suffered anger as a result of being threatened with being stood down. I understand that this was because she saw the threat as a breach of her employment agreement. Can anger attract an award under s 123(1)(c)(i) of the Act? This sub section speaks of humiliation, loss of dignity, and injury to the feelings of the employee. In *Catherine Stormont v Peddle Thorp Aitken Limited16*, the Employment Court examined the three identifiable heads of damage, saying that each has distinct characteristics. At paragraph [106] Her Honour Judge Inglis (as she was then) said:

"Injury to feelings" may be experienced in a variety of ways,

including sadness, depression, anger, anxiety, stress or guilt.

[89] Therefore, the anger Ms Cavanagh felt is compensatable under s 123(1)(c)(i) of the Act. What award should Ms Cavanagh receive? Ms Cavanagh's reaction of anger at being threatened to be stood down manifested itself immediately in her asserting

her rights and leaving the meeting. It also led to her refusing to meet with Mr O'Keefe in the future. It was therefore real. However, I am not convinced it was particularly emotionally damaging for Ms Cavanagh, nor long lived, as the refusal to meet with Mr O'Keefe quickly morphed into a refusal to meet any managers until

February.

16 [2017] NZEmpC 71

[90] Adopting the three band approach of *Waikato District Health Board v Kathleen Ann Archibald17* I assess that the effects on Ms Cavanagh fall within Band 1, indicating low level loss/damage. That allows for an award of up to around $13,000 (taking into account that $20,000 was described in *Archibald* as falling around the middle of Band 2). I feel that the effect on Ms Cavanagh fell a little below the middle of Band 1, and so assess an appropriate award as being $5,000.

[91] Where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly (s124 of the Act).

[92] What led to the threat to stand Ms Cavanagh down was her refusal to participate in a conversation about her terms and conditions without a support person present. This was not an unreasonable expectation on the part of Ms Cavanagh. Whilst she may have reacted in a robust manner in asserting her expectation, that does not justify a reduction in my view. There is no evidence that she swore at, or was abusive to Mr O'Keefe. As a senior manager, Mr O'Keefe should be used to employees who adopt an assertive manner from time to time.

[93] In conclusion, I do not reduce the award.

Did Ms Cavanagh suffer an unjustified disadvantage in her employment when the respondent refused to allow Ms Cavanagh to wait until February 2017 to seek advice for a meeting?

[94] I will examine this issue as part of the investigation into how the respondent dealt with Ms Cavanagh after she announced that she was going to be studying full

time.

17 [2017] NZEmpC 132, at paragraph [62]

Did Ms Cavanagh suffer an unjustified disadvantage in her employment when

Mr O'Keefe allegedly "walked in and refused to leave" a meeting

[95] This event occurred on or around 20 December 2016 when Ms Cavanagh entered the office of Mr Clark to talk to him, and Mr O'Keefe came in and allegedly said to Mr Clark "you cannot talk to her on your own", or words to that effect. Mr O'Keefe says he stated that Mr Clark needed a support person with him. Ms Cavanagh's evidence was that she asked Mr O'Keefe to leave and, when he declined, she then asked Mr Goudie to join the meeting, which he did. I understand the meeting then proceeded.

[96] Although Ms Cavanagh referred to this incident in an email to Mr Clark on 20

December, it is not apparent that she made it clear in the email that she was raising a personal grievance about it. In any event, even if she did, it is also clear that Ms Cavanagh proceeded with the meeting even though Mr O'Keefe had stayed, once Mr Goudie had joined the meeting, and my distinct impression from her evidence was that she was not particularly upset by Mr O'Keefe staying. I cannot find that there was any material disadvantage suffered by Ms Cavanagh, therefore, in Mr O'Keefe remaining in the meeting. I will examine below the wider issue of whether the respondent was entitled to insist on Mr O'Keefe being present at each meeting.

Did Ms Cavanagh suffer an unjustified disadvantage when the respondent failed to follow up on her raising concerns about events occurring at CIAL?

[97] This allegation was clarified during the Authority's investigation meeting by Ms Cavanagh. Her complaint is that she did not receive feedback from the respondent in respect of issues of concern that she raised from time to time relating to incidents that she observed during her driving the shuttle bus at the Christchurch airport. These issues included potential hazards to travellers, left luggage, and other matters of a health and safety nature.

[98] I have seen no evidence that any personal grievance was raised about this complaint. Indeed, a personal grievance needed to have been raised by or on behalf of Ms Cavanagh within 90 days of each failure complained about. I find that that was not the case.

[99] In any event, evidence was given by the respondent that it would pass onto CIAL Ms Cavanagh's concerns, but that CIAL did not usually revert to the respondent with information about any resolution. There is no evidence that the respondent did not take Ms Cavanagh's raising of concerns seriously.

Did the respondent breach Ms Cavanagh's employment agreement and did she suffer an unjustified disadvantage in her employment when the respondent failed to roster her on for work after 29 January 2017?

[100] I will examine under this heading all of the issues that arose from Ms Cavanagh starting full time study in February 2017, as there is a complex interplay of factors and legal rights and obligations to consider, and examining each in isolation would risk missing the bigger picture.

[101] The starting point is that Ms Cavanagh had a right in her employment agreement to be given at least 30 hours of work per week. This was accepted by the respondent as a condition of Ms Cavanagh's employment, signalled by the manuscript amendment being initialled by Ms Cavanagh and by Mr Clark on behalf of the respondent.

[102] Up until the end of the school year in 2016, it appears that the respondent had had no difficulty in giving Ms Cavanagh at least 30 hours work per week. Indeed, it seems that she worked around 35 to 37 hours per week. Ms Cavanagh then advised the respondent of her Summer School timetable on 9 December 2016. The Summer School lasted from 4 January until 8 February 2017, or thereabouts. Again, it seems that the respondent was able to allocate enough hours to Ms Cavanagh up until 29

January 2017, when the 2017 school year started, to honour the 30 hours commitment. However, after that date, Ms Cavanagh was not allocated any further hours.

[103] Ms Cavanagh asserts that, from 29 January 2017, she could still have been allocated her usual morning school run hours, together with her usual 04.30 to 06.45

Monday run from Rangiora to Hornby, and extra airport work. With bus cleaning duties as well, this would have made up 30 hours work a week she says.

[104] In his evidence to the Authority, Mr Goudie explained why he could not roster Ms Cavanagh on for 30 hours a week after she had stated that she was unable to take on the 01.00 to 09.30 airport shift from Thursday to Sunday, and that she would

probably not be able to work the afternoon school shifts. His explanation was that it was not appropriate to split morning school runs from afternoon school shifts because drivers get to know the children, and vice versa. Also, the drivers needed to be aware if an issue had arisen in the morning, or the previous afternoon, and continuity of drivers assisted in that.

[105] The biggest difficulty, though, was that each driver tended to have their own runs and hours each week, and it would be disruptive for those drivers if the runs had been split to accommodate Ms Cavanagh's changing needs. In addition, the drivers had to be trained for specific runs, and one driver could not easily just step into another run. I accept that these were valid reasons for the respondent not wishing to split up the morning and afternoon school runs.

[106] Mr Goudie also said that, apart from afternoon school runs and the very early morning runs which Ms Cavanagh had declined, there only remained an airport run on Saturday and ad hoc charter runs. The Saturday airport runs were already being done by other drivers though. In addition, each driver had to have a continuous period of at least 24 hours off each week, as required by passenger service regulations, so Ms Cavanagh could not have driven buses every day of the week. The charter runs were not entirely predictable, as they were often booked by schools on an ad hoc basis, and were fitted in around the regular runs. Some were in the afternoons.

[107] In addition, Mr Goudie said that the company had lost a net of two urban runs between December 2016 and January 2017, and this left one driver with more capacity. That driver took over most of Ms Cavanagh's runs from 30 January 2017.

[108] Mr Goudie explained that he believed that a casual contract would have suited Ms Cavanagh's new situation better, as it would have given her flexibility, in view of the fact that she was about to start full time study. She would have been offered runs on an ad hoc basis which she could have accepted or rejected as her university timetable allowed. Obviously, a university timetable does not stay the same from term to term.

[109] Was it reasonable for the respondent to have insisted that Ms Cavanagh came into the office to discuss her availability? Mr Goudie explained that he needed to physically show her the different rosters so they could explore what was available.

He did not want to try to communicate by email about the details of the rosters because it was inefficient and would have necessitated a back and forth exchange.

[110] This question needs to be examined in the context of what had occurred up to that point. Up until 20 December Ms Cavanagh had refused to meet with Mr O'Keefe, implying that she would meet with Mr Clark and Mr Goudie. However, the respondent insisted that she meet with Mr O'Keefe present.

[111] I do not agree that an employer can always insist on an employee meeting with a manager of its choice. A clear and incontestable example is a situation where an employee has made an allegation of serious misconduct against that manager, such as sexual harassment. Whilst there was no such allegation of this sort made against Mr O'Keefe, there was an allegation (in Ms Cavanagh's email of 20 December) that he had threatened to stand her down, and was not trustworthy. Whilst the word

'bullying' was not used, it was implied. In her oral evidence Ms Cavanagh said that

she felt that Mr O'Keefe always "inflamed" the situation.

[112] I find that the situation ended up in a battle of wills and an impasse, with Mr O'Keefe insisting that Ms Cavanagh meet with him, whereas Ms Cavanagh insisted she would not. That was not a helpful approach for the respondent to have taken when it had several layers of management, and a complaint had been made about Mr O'Keefe by Ms Cavanagh. Whilst I acknowledge that Mr O'Keefe was the most senior manager with day to day HR responsibilities, I believe that it was not the action of a fair and reasonable employer to have ignored the complaint by Ms Cavanagh and to have continued to insist that she meet with Mr O'Keefe. This is despite the fact that Ms Cavanagh used robust and sometime strident language in her emails and did not present herself as vulnerable.

[113] A far better action would have been for Mr Clark or Mr Ritchie to have enquired whether Ms Cavanagh was making a formal complaint against Mr O'Keefe. If she had said she was, Mr Ritchie should have investigated it. If she had said she was not, then the respondent's stance that she must meet with Mr O'Keefe would have been more reasonable, although his role in such a meeting would have had to have been clearly explained to Ms Cavanagh in advance. As it was, a strong willed employee was battling with a strong willed manager, which is not conducive to a

productive employment relationship in which the parties are, among other things, responsive and communicative18.

[114] However, from 23 December, Ms Cavanagh's refusal to meet with Mr O'Keefe had changed to not meeting at all until her legal representative was available, which would not be until February (with no precise date apparently being stipulated). Was it reasonable for Ms Cavanagh to insist that her chosen (but unidentified) representative be present at any meeting?

[115] An employee does not have an inalienable right to insist that she has a representative present at any meeting that her employer may wish to have. The right depends upon the nature of the meeting. Clearly, however, where there may be adverse consequences for an employee arising from the meeting, such a right arises. At first sight, a meeting just to talk about her rosters and her availability for work after her studies started is not likely to have caused Ms Cavanagh any adverse consequences. However, Mr Clark's email to Ms Cavanagh of 19 December stated that he and Mr O'Keefe wanted to talk to her about possibly renegotiating her employment agreement, if she was unavailable during week days.

[116] Section 63A of the Act provides as follows:

(1) This section applies when bargaining for terms and conditions of employment in the following situations:

...

(e) in relation to terms and conditions of an individual employment agreement, including any variations to that agreement:

(2) The employer must do at least the following things:

(a) provide to the employee a copy of the intended agreement under discussion; and

(b) advise the employee that he or she is entitled to seek

independent advice about the intended agreement; and

(c) give the employee a reasonable opportunity to seek that advice;

and

(d) consider any issues that the employee raises and respond to them.

[117] The respondent was contemplating the possibility of bargaining with Ms Cavanagh about varying her terms of employment and, if any intended variations to her agreement were going to be presented to her, she would have been entitled to have

sought independent advice about them. Whilst the initial meeting to which Ms

18 As is required by s 4(1A)(b) of the Act.

Cavanagh had been invited may not have got to that stage, clearly this was a situation that was likely to have touched upon Ms Cavanagh's employment rights (namely, her hours of work). In such a situation, I believe that Ms Cavanagh was entitled to insist she be accompanied by a support person.

[118] However, that right cannot cause unreasonable delays to a process which the employer needs to pursue. The respondent had clear operational needs; namely, to sort out rosters for its drivers before the 2017 school year commenced on 30 January. Mr Goudie said that all the other drivers had communicated with him as to their availability face to face. Whilst Ms Cavanagh did email Mr Goudie, her emails did not recognise the difficulties that her pending full time studies were causing the respondent in arranging a roster for her which gave her 30 hours of work a week. Rather, they tended to just assert her perceived rights.

[119] When I stand back and review the conduct of both parties at this time, neither can be said to have been ideal. On the one hand, the respondent:

a. Insisted that Ms Cavanagh meet with Mt O'Keefe, even though she had complained about his conduct in a previous meeting and clearly did not wish to meet with him;

b. Did not expressly warn her in any of its emails that it would give her morning shifts away to another driver prior to it happening;

c. Did not explain in any of its emails why it could not split morning school shifts from afternoon ones, or why it could not offer Ms Cavanagh airport runs on Saturdays.

[120] On the other hand, Ms Cavanagh:

a. Refused to meet with any of her managers until an unspecified date in February, when her unnamed representative would apparently be available;

b. Did not seek another representative who could be available earlier, despite her knowing that the respondent needed to finalise the rosters prior to 30 January;

c. Did not acknowledge the difficulties that the respondent was facing accommodating her right to work 30 hours a week given her uncertain availability from mid-February;

d. Failed to communicate at all with the respondent from 8 February

2017.

[121] It is highly probable that, had Ms Cavanagh met with the respondent in December 2016, it would have explained to her about the problems of splitting school shifts and allocating her the Saturday airport run. However, Ms Cavanagh would not meet. Furthermore, Ms Cavanagh did not advise the respondent what her availability was once she knew it herself, even though she would have known her university timetable by the third week of February 2017 at the latest.

[122] The parties to an employment relationship owe each other a mutual duty to be active and constructive in establishing and maintaining a productive employment relationship in which they are, among other things, responsive and communicative19. This duty is implied into the employment agreement between the parties. I find that Ms Cavanagh failed significantly in this duty. The respondent failed to a much less significant degree.

[123] Whilst Ms Cavanagh was entitled under her employment agreement to be given 30 hours of work per week, I find that there was implied into that employment agreement a requirement upon Ms Cavanagh to ensure that she was available to work those 30 hours per week at times and on days which fitted in with the respondent's operational and regulatory needs and which recognised its obligations to other drivers. This term is implied into the agreement by way of business efficacy as, otherwise, the respondent would have been obliged to have paid Ms Cavanagh even when she could not carry out her contractual duties in a way that fulfilled its needs, and that cannot have been in the contemplation of the parties when the agreement as entered into.

[124] Therefore, the right to receive 30 hours' work a week was subject to the implied term, and so it follows that, as Ms Cavanagh did not fulfil the requirement contained in the implied term, the respondent did not breach the employment

agreement when it stopped giving her 30 hours of work a week.

19 Section 4(1A)(b) of the Act

[125] There was also implied into the employment agreement between the parties a duty to be responsive and communicative. I find that Ms Cavanagh did not comply with that duty in a way that enabled the respondent to fulfil its own duties towards her.

[126] Ms Cavanagh partially fulfilled her obligation under the implied term to ensure she was available for work by continuing to be available for the Sunday airport run and the Monday morning Rangiora to Hornby run, making a total of 10 hours of work per week. The respondent therefore failed in its contractual duty to make those hours available for her. However, Ms Cavanagh stopped communicating with the respondent altogether from 8 February, and so failed to mitigate her loss from that date.

[127] Any loss suffered by Ms Cavanagh therefore must be limited to eight hours pay, for the Saturday airport run on 4 February 2017, as Monday 6 February 2017 was Waitangi Day, and it seems no service was available on that day. However, she is entitled to be paid for Waitangi Day 2017 as a public holiday in accordance with s 49 of the Holidays Act 2003, if she was not already paid for that day. I am unable to reach any conclusions in respect of public holiday pay for Easter, Anzac Day and Queen's Birthday 2017 as I do not know whether these days would otherwise have been working days for Ms Cavanagh by that time, as I do not know what work she would have been doing had she cooperated with the respondent in communicating with it about her availability.

[128] In conclusion, I cannot find that Ms Cavanagh suffered an unjustified disadvantage in her employment when no further shifts were offered to Ms Cavanagh after she had turned down the 01.00 to 09.30 shifts, as I accept that the respondent needed to meet with Ms Cavanagh face to face to explore properly how to accommodate the needs of the business in accordance with her uncertain availability.

[129] I further conclude that the respondent did not breach Ms Cavanagh's

employment agreement by not offering her 30 hours of work per week after 29

January 2017, as she herself was unable to show that she could carry out 30 hours of work per week in a way that met the operational and regulatory needs of the respondent, and which did not cause it to breach its duties of good faith owed to other drivers.

[130] I also conclude that Ms Cavanagh did not suffer an unjustified disadvantage in her employment when the respondent did not allow her to wait until an unspecified date in February 2017 to obtain a representative, given that it needed to finalise the rosters prior to 30 January, when the new school year commenced.

[131] I do find that the respondent subjected Ms Cavanagh to an unjustified disadvantage in her employment when it continued to insist that she meet with Mr O'Keefe even after she had complained about his conduct towards her, without first investigating her concerns. However, I am not satisfied that Ms Cavanagh suffered any material humiliation, loss of dignity or injury to her feelings as a result of this. It was not long before she moved from saying she would not meet with Mr O'Keefe to her saying she would not meet with any manager until February 2017. No pecuniary loss flowed from this unjustified disadvantage, as Ms Cavanagh's loss of income came from her refusal to meet and the respondent's consequential inability to roster her on for operational duties.

Was Ms Cavanagh subjected to an unlawful lock-out?

[132] Ms Cavanagh submits that not giving her work after 29 January 2017 was an unlawful lockout. Section 82 of the Act defines a lockout:

82 Meaning of lockout

(1) In this Act, **lockout** means an act that—

(a) is the act of an employer—

(i) in closing the employer's place of business, or suspending or discontinuing the employer's business or any branch of that business; or

(ii) in discontinuing the employment of any employees; or

(iii) in breaking some or all of the employer's employment

agreements; or

(iv) in refusing or failing to engage employees for any work for which the employer usually employs employees; and

(b) is done with a view to compelling employees, or to aid another employer in compelling employees, to—

(i) accept terms of employment; or

(ii) comply with demands made by the employer.

(2) In this Act, **to lock out** means to become a party to a lockout.

[133] I do not accept that the situation Ms Cavanagh found herself in amounted to a lockout as defined. This is because the failure to roster Ms Cavanagh on after 29

January 2017 was not done with a view to compelling her to accept terms of

employment. It was because they could not roster her on due to her uncertain availability, and its operational and regulatory needs. The references to putting Ms Cavanagh onto a casual employment agreement in the various communications with Ms Cavanagh were all made in the context of there being no reasonable alternative left in the light of Ms Cavanagh' uncertain and limited availability. Indeed, I find that the respondent wanted to be able to roster Ms Cavanagh on as before, giving her 30 hours of work a week, but they could no longer do so. That is not compulsion.

Was Ms Cavanagh unjustifiably dismissed from her employment?

[134] Section 103A of the Act sets out the requirements of an employer prior to dismissing an employer. It provides:

Section 103A Test of justification

(1) For the purposes of section 103(1)(a) and (b), the question of

whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).

(2) The test is 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 dismissal or action occurred.

(3) In applying the test in subsection (2), the Authority or the court must consider—

(a) whether, having regard to the resources available to the

employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the

employee; and

(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and

(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing

or taking action against the employee; and

(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the

employee before dismissing or taking action against the employee. (4) In addition to the factors described in subsection (3), the

Authority or the court may consider any other factors it thinks appropriate.

(5) The Authority or the court must not determine a dismissal or an

action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were —

(a) minor; and

(b) did not result in the employee being treated unfairly.

[135] When Timpany Walton wrote to Ms Cavanagh on 20 April 2017 it asked her

to meet with Mr O'Keefe and Mr Clark to discuss her future employment. It stated

that they were willing to consider any reasonable proposal she may have as to her working hours. Ms Cavanagh did not reply. Even if she still refused to meet with Mr O'Keefe, she needed to say that she would meet with the respondent, her employer, but not with Mr O'Keefe. Silence, though, left the respondent in a position where it had no idea what Ms Cavanagh's then availability was. Its decision to dismiss Ms Cavanagh on 12 June 2017 was not an unreasonable one. It was an action which a fair and reasonable employer could have taken in all the circumstances.

Orders

[136] I order the respondent to pay to Ms Cavanagh:

a. the gross sum of $144 in respect of Saturday 4 February 2017,

b. Public holiday pay in relation to Waitangi Day 2017, calculated in accordance with the Holidays Act 2003, if she was not already paid for that day; and

c. the sum of $5,000 pursuant to s 123(1)(c)(i) of the Act.

Costs

[137] I reserve costs and make no finding at this stage as to whether costs should be awarded given that Ms Cavanagh was not wholly unsuccessful. The parties are to seek to agree how costs are to be dealt with between them. However, if they have failed to reach agreement within 14 days of the date of this determination, if the respondent seeks a contribution towards its costs it may serve and lodge a memorandum of counsel seeking a contribution towards its reasonable costs, explaining what contribution it seeks, and the basis for that contribution, and Ms Cavanagh shall have a further 14 days after receipt of the

memorandum to serve and lodge her own memorandum in reply. The matter of costs would then be determined by the Authority on the papers.

David Appleton

Member of the Employment Relations Authority
