NOTE: This determination contains an order prohibiting publication of certain information at paragraphs [11] and [107].

IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2024] NZERA 670
3264379

	BETWEEN	LISA KNOFF Applicant
	AND	PAULA MORRIS Respondent

Member of Authority:	Natasha Szeto
Representatives:	Hayley Johnson, advocate for the Applicant Beverley Edwards, counsel for the Respondent
Investigation Meeting:	24 July 2024 in Nelson
Further information and submissions received:	31 July and 15 August 2024 from the Applicant 5 August and 15 August 2024 from the Respondent
Date of Determination:	13 November 2024

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

[1] Ms Knoff was employed by Ms Morris as a support worker to provide care for Ms Morris' severely disabled son (referred to in this determination as RDK).

[2] When Ms Knoff started work for Ms Morris on 2 February 2022, she fairly consistently worked on Wednesdays between 10:00am and 3:00pm alongside RDK's main support worker as a second support worker. Ms Morris' intention was for Ms Knoff to take RDK for bike rides, but Ms Knoff was never told that is why she was

employed. Over the entire tenure of her employment until mid-December 2022, Ms Knoff only went bike riding with RDK once. Instead, Ms Knoff did other activities with RDK both at his home and outside.

[3] In November 2022 Ms Morris raised an issue with Ms Knoff about the future prospects of her employment. On 16 December 2022 Ms Knoff's employment was terminated for redundancy.

[4] Ms Knoff says she was a permanent part-time employee at the time of her dismissal and is entitled to wage arrears. Ms Knoff also says there was no genuine reason for her redundancy, and Ms Morris did not follow a fair process and did not act in good faith. Ms Morris says Ms Knoff was a casual employee and is not entitled to any arrears. Ms Morris says Ms Knoff's position was genuinely redundant and she followed a fair and reasonable process.

[5] This determination resolves the issues of Ms Knoff's status as a casual or permanent part-time employee and whether she is owed any arrears. It also resolves whether Ms Knoff was unjustifiably dismissed from her employment including whether Ms Morris acted towards her in good faith.

The Authority's Investigation

[6] Written witness statements were lodged by Ms Knoff and her fiancé Kurtis Hine. For Ms Morris, written witness statements were lodged by herself and two of her employees Ms Dana Morgan and Mr Alen Babu.

[7] All witnesses attended the Investigation Meeting and answered questions under oath or affirmation.

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

Issues

[9] The issues the Authority is to investigate and determine are:

(a) Whether Ms Knoff was a casual or permanent part-time employee.

(b) Whether Ms Knoff was unjustifiably dismissed from her employment on the basis of redundancy, including whether Ms Morris breached her statutory obligation of good faith.

(c) Whether Ms Knoff is owed unpaid wages.

(d) If Ms Knoff is found to have a valid personal grievance, whether she should be awarded any compensation (subject to contribution) or lost wages (subject to mitigation and contribution).

[10] Ms Knoff makes additional claims relating to the Covid-19 wage subsidy, and her travel costs for delivering food and medicine to Ms Morris.

[11] On 24 July 2024 I made a permanent non-publication order over the name of Ms Morris' son. He is a dependent minor and has not participated in the Authority's investigation. It is not in the public interest for him to be named in this determination, and it would not be contrary to the principle of open justice for his name to be anonymised. He is referred to in this determination by the letters RDK.

Relevant Background

[12] Ms Knoff was working as a caregiver in a rest home and she heard through caregiving circles Ms Morris was looking for a support worker to help her with caring for her son RDK. Around this time, Ms Morris had been thinking about starting bike rides for RDK which would require two support workers. RDK's condition includes having seizures which need to be carefully managed, and he requires twenty-four hour care.

[13] Ms Knoff contacted Ms Morris by phone and organised to meet at Ms Morris' house. Ms Morris says she introduced Ms Knoff to RDK and talked to Ms Knoff about the role including bike rides.

[14] It was discussed and agreed Ms Knoff would start working for Ms Morris on 2 February 2022. Ms Morris' intention was that the first period of employment would be to ensure both parties were happy, and later she would add Ms Knoff to the payroll system administered by Manawanui, an agency that supports people with self-directed disability funding.

[15] Ms Morris did not give Ms Knoff an individual employment agreement at the start of her employment. She did give Ms Knoff a variety of forms to complete, such

as a tax code declaration form, KiwiSaver deduction form, and Employee Information form. The Employee Information Form was from Manawanui and recorded Ms Knoff had been engaged as a support worker. Ms Knoff provided her address, bank account details and tax information, and Ms Morris filled in the "Tenure" box by ticking "casual" (the other option was "permanent") and the hourly rate which was to be $25.50. Ms Knoff signed and dated the form on 3 March 2022 approximately a month after her employment started. Ms Morris never signed or dated the form.

[16] At the outset, Ms Morris understood the employment relationship would be ongoing, but on a casual basis. Ms Morris hoped RDK's bike rides would become a regular activity.

[17] Ms Knoff understood she was a permanent part-time employee. She would be working with one of RDK's other two support workers - Dana Morgan - on Wednesdays from 10:00 am until 3:00 pm. The job involved doing activities with RDK both inside and outside the house. Some activities such as going to get hot chocolates, going to the library or beach, and going on bike rides would involve leaving the house in the car. Ms Knoff said two support workers were needed for the activities outside the house for RDK's safety and security. While two support workers were not required when RDK was being cared for at home, it meant one support worker could do housework or pop out for supplies, while the other support worker looked after RDK.

[18] Ms Knoff understood the work would only be for five hours, one day a week because Ms Morris had limited funding for RDK's care. Although the work was consistently on Wednesdays from 10:00am until 3:00pm, Ms Knoff did work one Thursday at Ms Morris' request to go on a bike ride with RDK in fine weather, and on this occasion the time was rearranged by text message. Unless there was sickness or holidays, the work went ahead.

[19] Ms Knoff was to be paid fortnightly. She recorded the days and time she worked by writing these on a calendar at Ms Morris' home. She also made records in her personal diary. Ms Morris organised Ms Knoff's pay through Manawanui. Ms Morris did not tell Ms Knoff about Manawanui or show her how to use it. Ms Knoff became aware of the system in June when she started caregiving work for a different family, although says she never accessed any records in the system relating to her work with Ms Morris. Ms Morris found the Manawanui system difficult to use, but she understood Ms Knoff would receive an email from Manawanui telling her how to access the app

and complete her timesheets, as had happened with Ms Morris' other employees. However, this never eventuated and for the duration of Ms Knoff's employment, Ms Morris completed timesheets for her through Manawanui. Ms Knoff was not sent payslips or timesheets by Ms Morris.

[20] Throughout her employment for Ms Morris, Ms Knoff always worked alongside support worker Ms Morgan and never worked on her own. Ms Knoff would show up to the house on Wednesday mornings, or sometimes be picked up by Ms Morgan with RDK on their way out to an activity. Ms Morgan said RDK's activities did not require a second support worker and all the funding Ms Morris had available for RDK was "soaked up". In evidence before the Authority, Ms Morgan said having two support workers for RDK's activities on a long-term basis was not feasible. Working with RDK required a long induction into his care because of the nature of his seizures and RDK did not function well with more than one person. Ms Morgan says she encouraged Ms Knoff to look for other caregiving work to supplement her work with Ms Morris.

[21] Ms Morris, for her part, was happy with Ms Knoff's work. She said Ms Knoff got sick quite a lot but she got on well with RDK.

[22] On 16 March, Ms Knoff was off work for two weeks for a medical injury. At the time, Ms Morris thought it was okay for Ms Knoff to have time off work because Ms Knoff was a casual employee.

[23] On 3 April 2022, Ms Knoff received her first pay from Ms Morris, which appeared to be short by some hours. That month there had been several absences for illness and holidays. On 6 April, Ms Knoff was away from work due to illness. On 13 April Ms Morris and RDK were unwell. Ms Knoff then contracted Covid-19 and was unavailable for work on 20 April. On 27 April Ms Morris and RDK were away on holiday and Ms Morris paid Ms Knoff for that day. Ms Knoff contacted Ms Morris on 29 April and asked whether Ms Morris could apply for the Covid-19 Leave support scheme on her behalf.

[24] Around the end of April, Ms Knoff planned to return back to work casually at the rest home she had worked at before taking the job with Ms Morris and she took a holiday for two weeks as a break before restarting the rest home employment. Ms Morris said she was happy for Ms Knoff to have a holiday.

[25] Around June or July, Ms Knoff took up another caregiving job working between 15 and 24 hours at variable times. However she told her new employer she was not available on Wednesdays because of her employment with Ms Morris.

[26] On 3 October 2022, Ms Morris advised Ms Knoff that RDK was unwell with Covid-19 and she should not come to work that week (5 October). Ms Knoff offered to drop off supplies, which Ms Morris agreed to. Ms Knoff spent $21.80 on food and medicine, and dropped them off to Ms Morris at home on Friday 7 October. Ms Morris later reimbursed Ms Knoff for the purchases, but not for her time or any travel costs. Ms Knoff did not use Ms Morris' car for her travel as the keys were inside the house with RDK who had Covid-19. There was no discussion between Ms Morris and Ms Knoff at the time about Ms Knoff being reimbursed travel costs.

[27] By mid-October, when Ms Knoff had been employed by Ms Morris for over 8 months, multiple issues around Ms Knoff's pay were starting to arise. Ms Knoff's fiancé encouraged her to confirm her employment status with Ms Morris. Ms Knoff raised issues with Ms Morris but feels they got forgotten and it was better to text Ms Morris so everything was in writing. One of the bigger issues for her was around whether she was going to receive Covid-19 pay.

[28] On 25 October 2022, Ms Knoff told Ms Morris her mother in law was unwell. Ms Knoff provided a medical certificate for 28 October to 11 November although one had not been requested or required by Ms Morris. Ms Knoff also sent an email to Ms Morris asking if her contract could be updated from casual to set hours. On 29 October 2022, Ms Knoff again asked Ms Morris about the Covid-19 leave payments from April. Ms Morris responded to say she had heard back about the Covid leave, and it had been declined because it needed to have been done within 8 weeks. On the same day, Ms Morris sent Ms Knoff a text message saying she was sorry she "*mucked around re Covid scheme*". She said she would pay Ms Knoff for two weeks in April and for two weeks in October when RDK had Covid even though it had been Ms Knoff's decision to stay away from work in the second week.

[29] On 30 October 2022 Ms Knoff told Ms Morris her mother in law had passed away and she would not be back at work the following week.

[30] By this stage, Ms Morris was considering disestablishing Ms Knoff's role. She had been thinking about RDK's funding for a while and wanted it resolved by 2023.

Only one bike ride had happened in the preceding 8 month period, and Ms Morris considered she could not waste RDK's funding on a second support worker if the bike riding activity was not happening. Ms Morris acknowledges she let the situation go on longer than it should have.

[31] Ms Morris sent Ms Knoff an email on 4 November stating:

> I would like to meet with you over the next couple of days to talk to you about the future of your employment with me.
>
> My plans for [RDK] have changed, and the reason for hiring you was for the other staff to go biking with [RDK] and have you as an additional support person but that plan is no longer feasible and there are no other activities that require two staff assistance so consequently I am thinking about the future of your role here and would like to talk to you about it.

[32] Almost immediately after the 4 November email was sent, Ms Morris said the relationship started to become threatening. Prior to this time, Ms Morris and Ms Knoff had talked on the phone or via text and now Ms Knoff only wanted to communicate by email. Ms Morris said she felt like Ms Knoff was avoiding her and describes the relationship being on a "downwards spiral".

[33] Ms Knoff says the timing of the 4 November email was unkind because Ms Morris knew she was at a tangi. She felt Ms Morris was not being honest with her and the email was an attack because she had spoken up about Covid-19 pay. The reason for disestablishing her role made no sense to Ms Knoff because she had never been told she was only hired for taking RDK on bike rides and over the preceding months she had done a range of different activities with RDK. Ms Knoff read the 4 November email as though the decision to dismiss had already been made and Ms Morris wanted to "get rid of" her.

[34] Ms Morris asked for a meeting and Ms Knoff said she would not be able to discuss things further until after 11 November 2022 because she was then off sick with sinusitis. Ms Morris set a meeting for 11 November and Ms Knoff said she was unable to make the meeting, and asked for it to be rescheduled. Ms Morris then asked for a Zoom meeting on 13 November 2022, which Ms Knoff again delayed asking for time to sort out a union representative. Ms Morris asked Ms Knoff for her thoughts on bike riding and Ms Knoff said she had answered her already.

[35] On 15 November Ms Morris asked Ms Knoff to provide her with a medical certificate because Ms Knoff had been sick for more than two consecutive calendar

days. Ms Morris then asked Ms Knoff to attend a meeting on 22 November 2022 and Ms Knoff said she could not confirm her attendance on that date as she was still sick.

[36] On 18 November Ms Knoff provided Ms Morris with a medical certificate for 16 to 17 November and Ms Morris paid Ms Knoff for five hours' sick leave on 16 November.[1] Ms Knoff asked for more detail about what would be discussed at the meeting.

[37] On 21 November 2022 Ms Morris confirmed the meeting was to discuss the restructuring of Ms Knoff's role and agreed to wait two weeks for Ms Knoff to obtain a union representative. She responded to the request for more information by saying it was about changes in RDK's programme affecting Ms Knoff's role. Ms Knoff responded by saying she found it difficult to understand why the change arose so suddenly, especially when a bike ride had been organised for 26 October.

[38] In November 2022 Ms Morris provided Ms Knoff with a template casual employment agreement, saying she was unable to find Ms Knoff's signed agreement in her records.

[39] On 23 November, Ms Morris sent Ms Knoff an email titled: *Proposal to Disestablish your Role"*. The email contained the following:

> …my plans for [RDK] have changed and the purpose for which I employed you has changed. The role of biking with [RDK] is no longer an activity I will pursue for him, and that makes your role possibly redundant.

[40] Ms Knoff continued to express that she was unclear on why the change was being made now. Ms Knoff said she was available for work on 23 November. Ms Morris said no work was available but agreed to pay Ms Knoff for the day anyway.

[41] Ms Morris proposed a meeting on Friday 25 November and said if Ms Knoff was unable to meet with her, Ms Knoff could send comments by email or they could meet on Zoom. Ms Morris said if she was unable to consult with Ms Knoff before 2 December, she would have to make a decision based on the information she had.

[42] Ms Knoff contacted community law and the nursing union for legal advice and support. Throughout early to mid-December, Ms Knoff was represented by the nursing

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[1] Pay Packet 10178187, pay period ending 27 November 2022.

union who were corresponding with Ms Morris and requesting further information in relation to Ms Knoff's employment. Ms Knoff's union representative started trying to obtain relevant employment documentation, and to find a date for a meeting which would suit all parties. Ms Knoff's representative indicated to Ms Morris that a meeting before Christmas may not be possible. Ms Knoff says she was available to meet and wanted to resolve issues with Ms Morris, but began to have panic attacks and was unable to attend a meeting alone.

[43] On 5 December, in response to further communications about the meeting, Ms Morris said the points Ms Knoff was raising were not relevant to the proposed meeting agenda. Ms Knoff indicated she would raise matters regarding her employment in the meeting. Ms Knoff then offered some potential dates and Ms Morris said she could meet on 14 December.

[44] The meeting on 14 December was not confirmed and it did not proceed. Ms Morris emailed Ms Knoff's union representative that day, setting out her efforts to try to meet with Ms Knoff since 11 November. Ms Morris asked for a meeting on 19 December but the union representative did not respond. Ms Knoff said she was available to meet at this time, but the union representative had made it clear she needed the relevant documentation before the meeting.

[45] On 15 December Ms Knoff advised Ms Morris she would be going on holiday with her fiancé, and said she and her union representative could meet with Ms Morris on 20 December on her return. Ms Morris proposed a meeting on 21 December, which was not confirmed by Ms Knoff or the union, and invited Ms Knoff to provide comments in writing. Ms Morris stated in the email that she would make a decision and communicate it by the end of 2022, and if there was no comment from Ms Knoff or a meeting with Ms Knoff before 23 December, then she would proceed to make a decision. Later that day, Ms Knoff responded to the email again asking why she was no longer needed and what had caused the sudden change to stop bike riding.

[46] On 16 December, Ms Morris sent Ms Knoff her preliminary decision which was to implement her proposal that Ms Knoff's role was to be disestablished effective immediately as at 16 December 2022. In the preliminary decision, Ms Morris responded to Ms Knoff's question about the reason for the change being that Ms Morris had hired Ms Knoff as a second person to take RDK biking for safety reasons, and through no fault of Ms Knoff's, the biking had only happened once. Ms Morris stated:

> Whilst you have not been biking with [RDK], I have tried, in good faith, to have you do other things with [RDK] but those things, like going to the library and the beach, do not require two people. You are aware that his funding is not unlimited and I have to consider what is in his best interests.
>
> This means that I have proposed to disestablish your role, as it just comes down to the fact that [RDK] won't be biking because it isn't feasible, and there are no other activities that he does that require two staff and his funding does not extend to a second, duplicating employee.
>
> Lisa, I am aware this is not what you want to hear, but I am obliged to put [RDK]'s funding to the most productive use, and having excess staff is causing his funding to be used unwisely.

[47] Ms Morris says she is going to implement her proposal to disestablish Ms Knoff's role effective immediately, with 24 hours' notice on the basis Ms Knoff is a casual employee.

[48] The email concludes by saying:

> Lisa, unless you wish to make any further comments, I thank you for your care & attention you have given [RDK], and wish you the best in your future endeavours.

[49] Approximately one hour later, Ms Knoff responded thanking Ms Morris for finally responding to her questions. She did not make any substantive comment in response to the proposal, and told Ms Morris she would see her in court. Around 17 December, Ms Knoff resigned her union membership.

Was Ms Knoff employed by Ms Morris on a casual or permanent basis?

What is the legal position?

[50] Casual employment is not defined in the Act, and therefore the factual evidence is of paramount importance in determining whether or not the employment is casual or permanent in nature.

[51] The Employment Court judgment in *Jinkinson v Oceana Gold (NZ) Ltd*[2] set out a series of indicia established by Australian case law, for determining whether or not the nature of the employment was casual or permanent. These are:

(a) The number of hours worked each week;

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

(b) Whether work is allocated in advance by a roster;

(c) Whether there is a regular pattern of work;

(d) Whether there is a mutual expectation of continuity of employment;

(e) Whether the employer requires notice before an employee is absent or on leave; and

(f) Whether the employee works to consistent starting and finishing times.

[52] In *Jinkinson* the court also held:[3]

> The strongest indicator of ongoing employment will be that the employer has an obligation to offer the employee further work which may become available and that the employee has an obligation to carry out that work.

[53] Ms Knoff submits she had a consistent and highly predictable pattern of work and the regularity of her work and the fact she was not separately engaged each time indicates she was a permanent part-time employee. Ms Knoff also says when she interviewed for other roles, she advised prospective employers that she was not available on Wednesdays due to her employment with Ms Morris.

[54] Between February and October 2022, Ms Knoff recorded she worked a total of 22 Wednesdays and two Thursdays at Ms Morris' request. A further three Wednesdays Ms Knoff was available for work but Ms Morris directed her not to attend work, six Wednesdays Ms Knoff was unfit for work and on two Wednesdays Ms Knoff was on holiday. Ms Knoff's understanding was for the first six months of her employment she was not entitled to leave and would not expect to be paid if she was not at work, however this was to change after six months.

[55] Ms Morris submits the evidence pointing to the employment relationship being casual was as follows:

(a) The tick next to "casual" on the Manawanui form;

(b) Ms Knoff's payslips clearly stated she was being paid casual holiday pay of 8 percent gross earnings;

(c) The template individual employment agreement Ms Morris sent Ms Knoff in October stated the employment was casual;

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[3] *Jinkinson v Oceana Gold (NZ) Ltd* [2009] ERNZ 225 at [41].

(d) Ms Knoff's IRD tax code is "SB" which relates to a secondary source of income;

(e) The email of 28 October 2022 where Ms Knoff asked Ms Morris to update her contract from casual to set hours;

(f) Ms Knoff's concession that she only worked 65 percent of the period she was employed;

(g) Days of work were varied and agreed by the parties.

[56] Ms Morris says the give-and-take of the relationship was not always documented, but the parties' true intention was for the contract to be casual and the irregular work pattern was at least 35 percent at Ms Knoff's behest. Ms Morris also said she found Ms Knoff to be unreliable and prone to giving her very short notice she would not be available.

[57] Based on the evidence before the Authority, I conclude this is a situation where there was significant ambiguity around the parties' intentions at the beginning of the employment relationship. However, labels are not determinative, and "*substance should prevail over form*"[4]. The real nature of the relationship was that Ms Knoff was a permanent part-time employee and was not casual for the following reasons:

(a) Ms Knoff had a regular pattern of work which she expected to complete. Ms Knoff was not on a variable roster – she would turn up to work unless there was prior communication between the parties that work was not to proceed for reasons of illness or holidays.

(b) Ms Knoff worked to consistent days, and starting and finishing times being Wednesdays from 10:00 am until 3:00 pm with few exceptions. The pattern of work was consistent and highly predictable.

(c) Ms Morris agreed to pay Ms Knoff for four days relating to Covid-19 absences (both Ms Knoff's and RDK's) which were paid as ordinary work hours rather than sick or other leave in the pay period ending 30 October 2022.

(d) Ms Knoff provided Ms Morris with notice when she was planning to be absent from her usual Wednesday work, usually by text message. Ms

[4] *Jinkinson v Oceana Gold (NZ) Ltd* [2009] ERNZ 225 at [37].

Morris also paid Ms Knoff for 23 November 2022 despite Ms Morris advising Ms Knoff there was no work available for her that day.

(e) Both parties appeared to mutually expect the employment to continue indefinitely, at least until November 2022.

(f) Ms Morris engaged in extensive efforts to consult with Ms Knoff over the proposed disestablishment of her position, without relying on the casual nature of the relationship to simply not offer Ms Knoff future engagements.

[58] There was no individual employment agreement at the start of Ms Knoff's employment, and therefore the relationship started in default by Ms Morris. The template agreement provided in October cannot be determinative of the issue because it was provided more than eight months into the employment and only reflected Ms Morris' understanding of the relationship. Putting the default to one side, the documentary evidence that does exist is not determinative of the relationship issue. While the Employee Information Form suggests Ms Morris' intention was for Ms Knoff's status to be casual (based on the tickbox), I accept Ms Knoff's evidence the payrate and tick were not in her handwriting and may have been added by Ms Morris after Ms Knoff had signed and dated the form. While it is also correct that Ms Knoff's payslips recorded she received "casual holiday pay" being 8 percent of her gross earnings, Ms Knoff did not have access to Manawanui at the start of her employment and did not see her payslips until the end of her employment. The fact Ms Knoff provided a 'secondary' tax code is not determinative of the issue.

[59] Ms Knoff admittedly did ask in October 2022 for her contract to be changed from casual to "set hours", but I am not persuaded there is any significance to this, because Ms Knoff said she did not understand there was any legal distinction, and at the time she was already working set hours. The real nature of the relationship was already that of a permanent part-time employment arrangement where there were ongoing mutual obligations on both parties which persisted between periods of work. The process Ms Morris later embarked on to disestablish Ms Knoff's role provides further support for the view that she considered she was obligated to offer Ms Knoff further work which may become available, and Ms Knoff was obligated to carry out that work.

[60] The Employment Court in *Jinkinson* described the mutual expectation of continuity of employment in the following way:[5]

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

[61] Ms Knoff declined other work on the basis that Wednesdays were committed to her employment with Ms Morris. Ms Knoff turned up to work on Wednesdays and was not separately engaged for each day of work. Both parties expected the employment to continue indefinitely. On the basis of these factors, Ms Knoff was entitled to an expectation of continuing employment which created an obligation on Ms Morris to provide her with work on an ongoing basis. Based on the evidence before the Authority, I find this obligation arose shortly after the start of her employment and well before her employment was terminated. I consider when Ms Knoff provided her employment documentation to Ms Morris and was "added" to the Manawanui system approximately one month after her employment started, her status was that of a permanent-part time employee and was not casual. That position is also consistent with Ms Knoff's employment being continuous from the end of February or beginning of March because Ms Morris first paid Ms Knoff sick leave for 24 August 2022 for in the pay period ending 4 September 2022, and the entitlement to sick leave only arises after 6 months' continuous employment with the employer.[6]

[62] Based on the evidence before the Authority, I find Ms Knoff was a permanent part-time employee from the beginning of March 2022, and was a permanent part-time employee at the time of her dismissal.

Was Ms Knoff unjustifiably dismissed?

What is the legal position?

[63] In considering a dismissal for redundancy the Authority must carefully assess the reasons given to the employee by the employer including the business reasons and decide, on an objective basis, whether what the employer did, and how it was done, were what a fair and reasonable employer could have done in all the circumstances.

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[5] *Jinkinson v Oceana Gold (NZ) Ltd* [2009] ERNZ 225 at [52].
[6] Holidays Act 2003, s 63(1)(a).

[64] The Authority is required to consider the four procedural fairness factors as set out in s 103A(3) of the Act. The Employment Court in *Allison v Ceres New Zealand LLC*[7] noted it is necessary to interpret the test in s 103A(3) adaptively as it applies to a redundancy dismissal.

[65] In reaching its decision on the scope of the application of s103A of the Act to redundancy dismissals, the Court of Appeal[8] has emphasised the Act's legislative context and in particular, the strengthening of the provisions relating to the duty of good faith and the requirement on both 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.[9]

[66] A fair and reasonable employer is expected to comply with their statutory obligations which include these good faith obligations. One of the Act's objects is "acknowledging and addressing the inherent inequality of power in employment relationships". Failure by an employer to comply with its good faith obligations may fundamentally undermine their ability to justify a dismissal or other action "because a fair and reasonable employer will comply with the law."[10] Fairness in the redundancy context includes meeting the statutory obligations placed on an employer proposing to make a decision likely to have an adverse effect on the continuation of a person's employment.[11]

[67] If an employer can show the redundancy was genuine and that notice and consultation requirements have been met, the s 103A test may well be satisfied.

[68] In reaching a conclusion about whether Ms Morris' actions as Ms Knoff's employer were justified, I consider whether Ms Morris:

(a) Identified the problem, reviewed the options and developed a proposal;

(b) Provided information to Ms Knoff;

(c) Gave Ms Knoff an opportunity to respond;

(d) Was active, constructive, responsive and communicative.

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[7] *Allison v Ceres New Zealand LLC* [2021] NZEmpC 177 at [14].
[8] *Grace Team Accounting Ltd v Brake* [2014] NZCA 541, [2015] 2 NZLR 494 at [85].
[9] Employment Relations Act 2000, s4(1A)(b).
[10] *Simpsons Farms v Aberhart* [2006] 1 ERNZ 825.
[11] Employment Relations Act 2000, s 4(1A).

[69] The Authority is not to substitute its decision for what a fair and reasonable employer could have done in the circumstances. The overarching requirement is for an assessment of substantive fairness and reasonableness, not minute and pedantic scrutiny to identify failings.[12] The resources available to the employer may also be a relevant consideration.

What are the parties' submissions?

[70] Ms Knoff submits there was no genuine business need to restructure because she was never employed solely to take RDK on bike rides. She says her dismissal was retaliation for raising pay issues with Ms Morris including relating to the Covid-19 wage subsidy. Ms Knoff says the 4 November 2022 email from Ms Morris was a "done deal" and Ms Morris had already decided to terminate her employment before it was sent. Ms Knoff submits Ms Morris has not complied with the statutory duty of good faith, there was no process and she was treated unfairly.

[71] Ms Morris says she was clear from the outset that the whole reason for employing Ms Knoff was so RDK could go bike riding with two support workers. Ms Morris also says that there were complexities relating to her son's condition and she hoped she made that clear to Ms Knoff. Ms Morris said it was no fault of Ms Knoff's, or anyone, that the bike riding was not able to go ahead. Ultimately Ms Morris had been unrealistic about the prospect of RDK going on bike rides and it became clear after ten months that the biking program was not going to work. Ms Morris denies that making Ms Knoff's role redundant was retaliation for Ms Knoff raising payment issues with her.

[72] Ms Morris says her process was compliant with s 103A of the Act, she did not predetermine the outcome when she asked Ms Knoff for her views on 23 November 2022, and she reasonably gave Ms Knoff the opportunity to respond in person, or by email or Zoom. Ms Morris says that she tried at least twice to put a proposal to Ms Knoff and actively sought feedback. Ms Morris says Ms Knoff's responses to her communications were a "bad faith resistance" to the proposal.

[73] Ms Morris asks me to consider that she herself is a "vulnerable employer" – being the single mother of a severely disabled child who employs carers to help her

[12] *Cowan v Idea Services Limited* [2020] NZCA 239 at [18] and [40].

with her son. She says an employer's actions are to be considered in light of the resources available to them.

Was Ms Knoff unjustifiably dismissed?

[74] Based on the evidence before the Authority, Ms Morris did not make it clear to Ms Knoff from the outset of her employment that she had employed Ms Knoff to be a second or additional support worker primarily for the activity of taking RDK bike riding. I accept Ms Knoff's confusion was genuine when she received the 4 November email because she had never understood she was employed just to do bike riding with RDK and this was reinforced by the fact that in her 10-month employment she had only taken RDK bike riding once.

[75] However it does not automatically follow, as Ms Knoff submits, that the redundancy was not genuine. The business rationale was Ms Morris could not afford to continue using RDK's funding to employ a second support worker for activities that did not require two support workers. There is no substance to Ms Knoff's assertion that Ms Morris decided to dismiss her as retaliation for raising pay issues. Ms Morris's explanation for the timing was that she wanted to resolve issues with RDK's funding prior to 2023. Based on the evidence before the Authority, I conclude there were legitimate and genuine business reasons for Ms Knoff's position to be made redundant.

[76] Ms Knoff also says that there was not genuine consultation because Ms Morris did not provide detailed reasons for the redundancy, despite her requests. Ms Knoff says Ms Morris has breached sections 4(1A), (b) and (c) of the Act by not being responsive and communicative, and by not providing her with opportunity to comment before the decision to dismiss was made.

[77] When Ms Morris first raised the issue of the future of Ms Knoff's employment with her on 4 November, she had not proposed to disestablish Ms Knoff's role. The points Ms Morris raised were that Ms Knoff had been hired as an additional support worker, and that RDK's activities (other than bike riding) did not require "two staff assistance". Ms Knoff was the only employee working as a second or additional support worker. Based on the evidence before the Authority, I accept that in early November, Ms Morris had genuinely identified an issue with the continuation of Ms Knoff's employment into 2023, and wanted to engage with Ms Knoff about it.

[78] The timing of Ms Morris raising the issue with Ms Knoff was – in hindsight - poor. Ms Morris was aware that Ms Knoff had flown up to Auckland for a family emergency which sadly became a bereavement, and she ought to have considered that Ms Knoff was unlikely to be able to actively engage with her. However I accept Ms Morris' evidence that she did not know what day the tangi was, and she did not realise the closeness of the family connection. I am therefore not persuaded Ms Morris was acting in bad faith when she first raised the issue with Ms Knoff.

[79] More importantly, even if the initial timing of raising the issue was poor, Ms Morris did then attempt to engage with Ms Knoff on multiple occasions. Between 4 November and 16 December when Ms Knoff's employment was terminated, Ms Morris proposed multiple meeting dates which went unconfirmed or were cancelled by Ms Knoff for reasons including illness, and representative unavailability / unwillingness to attend. Ms Knoff was entitled to support and representation, and this was recognised and accommodated by Ms Morris. Ms Morris only formally proposed to disestablish Ms Knoff's role on 23 November, several weeks after she had first raised the issue. Ms Knoff was aware of the timeline Ms Morris was working to in terms of making a decision about the use of RDK's funding before the end of the calendar year. Based on the evidence before the Authority, I am persuaded there is some force to Ms Morris' submission that Ms Knoff was trying to avoid meeting with her, including arranging to go away for a break around mid-December which Ms Knoff says was needed on medical advice.

[80] Ms Knoff says that there was a lack of genuine consultation because Ms Morris did not provide detailed reasons for the disestablishment of her role until 15 December. That submission ignores the fact that the main purpose of the communications was to arrange a meeting to discuss the issues, and that Ms Knoff had (on more than one occasion) asked Ms Morris to deal with her union representative rather than communicating directly with her. There was some opaqueness around whether Ms Knoff wanted direct and substantive engagement from Ms Morris and Ms Morris submits that the nature of the communications from Ms Knoff constituted a "psychosocial hazard" for her. Despite this, up until 15 December, Ms Morris persevered with trying to set a time for a meeting on 21 December after Ms Knoff was due to return from holiday, and which would be before the end of the calendar year.

[81] Ms Morris wrote to Ms Knoff on 15 December at 3:59 pm, stating: *failing the December 21st, I am happy to receive your written comments on my proposal to disestablish your role*. Ms Knoff's email sent at 6:06 pm that night did not confirm the meeting on 21 December. It was reasonable at that point for Ms Morris to conclude that the email was the only further feedback she was likely to receive and a meeting on 21 December would not be proceeding.

[82] Ms Morris recorded she took Ms Knoff's email into account as the written feedback to her proposal. Ms Morris gave Ms Knoff one last opportunity to provide feedback in her 16 December 2022 letter. While I accept, based on the wording of the letter, Ms Morris had all but made the decision to disestablish Ms Knoff's position by this point, there were indications that Ms Morris was open to feedback from Ms Knoff including that the disestablishment of Ms Knoff's role was referred to as "proposed", and Ms Morris specifically invited comment. Ms Knoff did respond to that email an hour later, albeit not substantively, instead threatening court action.

[83] Viewed objectively, I conclude Ms Morris followed a fair process which involved providing relevant information to Ms Knoff and seeking her views.

[84] The duty of good faith is a mutual obligation and requires both parties to an employment relationship to be active and constructive. Ms Morris could have provided more detailed reasons for the proposed redundancy at an earlier stage, but having reviewed all the available communications over the five-week period, I conclude Ms Morris did provide Ms Knoff with sufficient information to allow Ms Knoff to reasonably respond to the proposal to disestablish her role. The point Ms Morris expressed to Ms Knoff was that by November 2022, Ms Morris had decided the bike riding activity was not happening, and she did not require an additional support worker for RDK's other activities. Ms Knoff focused on challenging Ms Morris about the basis for her employment, and whether RDK could potentially go bike riding, rather than responding to the core issue that affected her ongoing employment - whether RDK needed an additional support worker for the activities she had undertaken with him for the past ten months.

[85] Based on all the evidence before the Authority, I find Ms Morris was active and constructive in her attempts to engage Ms Knoff in the discussion about the feasibility of Ms Knoff's ongoing employment. Fundamentally, Ms Knoff did not accept the proposal to make her position redundant and did not accept the reasons because she did

not accept the basis for her employment as a second support worker to assist for two-person activities. Ms Morris said that in making the decision to terminate Ms Knoff's employment, she did not really think about other options because the relationship had turned by that point and there was a lack of trust on both sides.

[86] Ms Morris provided Ms Knoff with access to information relevant to the continuation of Ms Knoff's employment and gave her opportunities to comment. I take into account the limited resources Ms Morris had available to her. Ms Morris did not hurry the process – it took almost five weeks from the time that Ms Morris first raised the issue with Ms Knoff until her employment was terminated on 16 December 2022. Ms Morris gave Ms Knoff reasonable opportunities to have a support person, and to engage a union representative. I accept Ms Morris's submission that it was solely due to Ms Knoff's actions that there was never a meeting, that she tried to obtain feedback from Ms Knoff on the proposal and she did not really feel like she had received feedback because Ms Knoff was avoiding her.

[87] I conclude Ms Morris acted as a fair and reasonable employer could in the circumstances. The decision to make Ms Knoff's role redundant was made for genuine business reasons and Ms Morris met the notice and consultation requirements. Consequently I find Ms Knoff was not unjustifiably dismissed and she is not entitled to an assessment of remedies for a personal grievance. I find that Ms Morris did not breach her statutory obligation of good faith towards Ms Knoff.

Is Ms Knoff entitled to wage arrears or other arrears claimed?

What is the legal position?

[88] Having found Ms Knoff was a permanent part-time employee from the beginning of March 2022, it is necessary to consider her arrears claims.

[89] An employee is entitled to sick and bereavement leave after they have completed 6 months' continuous employment.[13] The start date of Ms Knoff's employment was 2 February 2022, but I have found her permanent status was established from the beginning of March 2022. Ms Knoff therefore became entitled to sick and bereavement leave from the start of September 2022. Bereavement leave is

[13] Holidays Act 2003, s 63(1)(a)

similarly available after 6 months' continuous employment following the death of a partner's parent.[14]

What are the parties' submissions?

[90] The wage arrears claims have been difficult to ascertain with any specificity. However, in closing submissions, Ms Knoff itemised her arrears claims as follows:

(a) $124.95 for 4.9 hours underpayment in the period ending 3 April 2022.

(b) Unpaid sick leave on 16 March, 11 May and 13 July.

(c) Wage arrears: available for work but not paid on 13 April.[15]

(d) $24.78 as reimbursement of travel costs on 7 October 2022 (being 35.4 km at 0.70c per km).

(e) Bereavement leave on 26 October 2022.

(f) $359.00 in lost eligible Covid-19 leave (from April 2022).

(g) Wage arrears: available for work but not paid on 30 November, 7 December and 14 December.

(h) $255.00 for 10 hours being a two-week notice period.

[91] Ms Morris says a wages claim has not been made out by Ms Knoff on the evidence or at law. However Ms Morris also submits that where the evidence lacks precision, the Authority's equity and good conscience jurisdiction can be called in to aid, and the Authority should take the approach of applying equity and good conscience to calculation of any wage arrears.

Underpayment of wages in first period of employment

[92] Ms Knoff provided the Authority with records including diary / calendar entries to show that she had worked a total of 28 hours in her first period of employment to 3 April 2022 (when she received her first pay). Ms Knoff's timesheets record, somewhat confusingly, that she was paid for three periods of 7.7 hours worked from 22 to 24 March, being a total of 23.1 hours. Giving Ms Morris the benefit of the doubt, I

[14] Holidays Act 2003, s 69(2)(a)(vii).
[15] Submissions refer to claims for both 13 April (available but not allowed to work) and 16 April (sick) but as the 13 April was a Wednesday, that is assumed to be the correct date.

conclude she has attempted to input the correct overall number of hours into Manawanui retrospectively, but has unfortunately come up short.

[93] There being no documentary evidence to support Ms Morris' position that Ms Knoff had been paid for all hours that she worked, I order Ms Morris to pay the shortfall of 4.9 hours at $25.50 (gross) per hour, amounting to $124.95 (gross).

Unpaid sick leave

[94] Ms Knoff was not entitled to any sick leave until she had completed six months' continuous employment. That was from the beginning of September 2022. She was not entitled to sick leave on 16 March, 11 May or 13 July. There being no arrears for these dates, I decline to make any orders.

Travel / mileage costs

[95] Ms Knoff claims travel costs or mileage from Ms Morris relating to 7 October 2022 when she delivered food and medicine. Ms Knoff says it would be fair for her to be reimbursed mileage because the day she went to get the medicine was not a usual working day for her. She acknowledges she had no specific agreement with Ms Morris that she would be paid mileage, but Ms Knoff understood Ms Morris could claim mileage through Manawanui. There was no agreement or even understanding Ms Knoff would be reimbursed for travel costs or mileage for getting supplies for Ms Morris and therefore there is no basis for this claim. I decline to order travel costs or mileage to be paid.

Bereavement leave

[96] The records show Ms Knoff was paid one day's bereavement leave in the period ending 13 November 2022. This was to cover her attendance at her mother in law's tangi, and that is appropriate. She was not entitled to be paid bereavement leave for being in Auckland while her mother in law was in hospital on 26 October 2022[16] and I decline to make any orders.

Shortfall for sick leave / covid-19 pay

[97] Ms Knoff believed she was entitled to be paid under the Covid-19 wage subsidy scheme when she contracted Covid-19 and was away from work in April. Ms

[16] Holidays Act 2003, s 69(2)(a)(vii).

Knoff says not only should Ms Morris have claimed the Covid-19 subsidy for her, Ms Morris acknowledged she "dropped the ball". Ms Knoff seeks to be reimbursed the amount of the Covid-19 subsidy which was $359.00.

[98] Ms Morris initially said Ms Knoff was not entitled to be paid the Covid-19 subsidy as a casual employee, and when she realised this, she advised Ms Knoff. Ms Morris accepts she told Ms Knoff she would try to apply but she did not apply because she was told Covid-19 payments were not available to casual employees. In submissions for Ms Morris, it has now been claimed that only registered company businesses could claim the wage subsidy and Ms Morris, as a sole trader employer, could not claim the subsidy, making the claim a nullity.

[99] Based on the evidence before the Authority, I conclude that on 29 October 2022, Ms Morris told Ms Knoff in an email that she did hear back about the Covid leave, and it had been declined because it needed to have been "done" (applied for) within eight weeks. On the same day, Ms Morris sent Ms Knoff a text message saying she was sorry she "*mucked around re Covid scheme*". She said she would pay Ms Knoff for her absence over two weeks in April due to Covid, and for two days when RDK had Covid even though it was Ms Knoff's decision not to come to work the second week. In the same period, Ms Knoff received pay for two days' sick leave. This relates (in part) to Ms Knoff's claim in respect of the Covid-19 wage subsidy.

[100] I am not persuaded Ms Knoff was eligible for the Covid-19 wage subsidy when she was off work in April 2022, and even if she had been, what amount she would have been entitled to. It is clear, however that Ms Morris agreed in good faith to pay Ms Knoff for four days in relation to Covid-19 – two when Ms Knoff had contracted Covid and was unable to work in April 2022, and two when RDK had Covid and Ms Knoff was unable to work in October 2022. Ms Morris said this payment was made to Ms Knoff in the period ending 30 October 2022 and I am satisfied this is reflected in Ms Knoff's payslip for this date, despite not being separately identified as a Covid arrears or sick leave arrears payment.[17]

[101] Ms Morris has paid Ms Knoff what she agreed to. Accordingly, I decline to make any further orders in respect of any claim for a Covid-19 payment.

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[17] Pay Packet 10006204, period ending 30 October 2022.

Shortfall when Ms Knoff available but not allowed to work

[102] Ms Knoff says she was available for work on 13 April, 30 November, 7 December and 14 December but Ms Morris said she was not needed. Ms Knoff says that as she was a permanent employee, and as she should have worked a total of 20 hours over these days at $25.50 per hour, she should be awarded a further $510.00 (gross).

[103] Ms Morris' position is Ms Knoff should not be paid for these days because she was a casual employee. On 29 November, Ms Morris stated she would not be paying Ms Knoff for 30 November because of her casual status.

[104] I have found above that Ms Knoff's employment status from March 2022 was that she was a permanent part-time employee. As she had made herself available for work but was not needed, she was entitled to be paid for those days. I order Ms Morris to pay Ms Knoff for four days when Ms Knoff was available for work on 13 April, 30 November, 7 December and 14 December. That is a total of 20 hours at $25.50 per hour, which is $510.00 (gross).

Notice period

[105] Ms Knoff says she should have received a two-week notice period as a permanent employee instead of the 24 hour notice period she was given as a casual. There was no contractual notice period as there was no individual employment agreement. I consider it would have been fair and reasonable for a permanent part-time employee who was paid fortnightly to have a two week notice period in their agreement. Based on my finding that Ms Knoff was a permanent part-time employee at the time of her dismissal and she was not paid any notice, I consider it just that she is paid a further two days (10 hours) wages of $255.00 (gross) as a notice period. I order that to be paid.

Orders

[106] I order within 28 days of the date of this determination Paula Morris is to pay Lisa Knoff the sum of $889.95 (gross).

[107] I confirm the permanent non-publication order over the name and identifying details of Ms Morris' son under clause 10(1) of schedule 2 of the Employment Relations Act 2000, made on 24 July 2024.

Costs

[108] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. As Ms Knoff was successful on some of her wage arrears claims but not her personal grievance claim, it may be appropriate that costs lie.

[109] However, if there is an issue as to costs that the parties are unable to resolve and an Authority determination on costs is needed, the party who applies for costs 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 the other party 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.

[110] The parties can anticipate the Authority will determine costs, if asked to do so, with reference to the "daily tariff" unless circumstances or factors, require an adjustment upwards or downwards.[18]

Natasha Szeto
Member of the Employment Relations Authority

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