

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2025] NZERA 374
3307740

BETWEEN KARRON PINK
 Applicant

AND POWERNET LIMITED
 Respondent

Member of Authority: Antoinette Baker

Representatives: Mary-Jane Thomas, counsel for the Applicant
 Naoimh McAllister, counsel for the Respondent

Investigation Meeting: 12 March 2025 in Invercargill

Final information received: 3 April 2025

Determination: 27 June 2025

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Pink was employed by the respondent (PowerNet) as its sole occupational health nurse (OHN) from August 2017 until 21 November 2023 when PowerNet ended her employment due to a decision that her role was surplus to its business requirements. Ms Pink was the only PowerNet employee in PowerNet’s redundancy process.

[2] PowerNet is an electricity management company. It manages the supply of electric power to more than 73,000 customers in the Southland Region of New Zealand. It employs over 300 employees predominantly working in the field on power lines, cables, poles, sub stations and transformers across multiple sites including the Stewart Island.¹ Ms Pink’s role

¹ Paragraphs 6-7, Brief of Evidence, David Stevens, Powernet’s ‘GM People Culture and Communications’ dated 19 December 2024.

included, amongst other things, delivering pre-employment and scheduled periodic health checks for PowerNet's employees, part of PowerNet meeting its obligations to ensure that in particular its field staff working with electricity were monitored as healthy and safe when doing their work.

[3] Ms Pink claims that PowerNet unfairly disadvantaged her in her employment because she was given insufficient time to feedback on its proposal to disestablish her role. She says PowerNet also disadvantaged her because it did not give sufficient time for PowerNet's wider employee workforce to feedback about contracting out the service provided by her, and that she did not receive all details of this wider employee feedback.

[4] Ms Pink claims that PowerNet's decision to dismiss her was unjustified procedurally and substantively. She says the process was rushed, her feedback about increasing her hours was not genuinely considered, and that redeployment options offered were not a match to her skill set. Ms Pink says this supports that PowerNet predetermined the decision with a lack of genuineness.

[5] Ms Pink claims 'global' \$30,000.00 compensation for the grievances together with lost wages and legal costs.

[6] PowerNet denies the claims. It says that it carried out a fair process after which it reached the conclusion that the OHN role was surplus to its requirements. PowerNet says that its decision to end Ms Pink's employment was a genuine business decision to achieve more flexibility with an external provider of health services and in particular to ensure that the pre-employment and health checks were carried out within required timeframes for the business. PowerNet says it provided sufficient time for all feedback and genuinely considered this. PowerNet says in relation to feedback from the wider workforce it provided Ms Pink with a sufficient summary of themes which did not add to what Ms Pink had already provided. PowerNet says that Ms Pink had an opportunity to engage with redeployment options and declined.

The Authority's Investigation process

[7] I received briefs of evidence from Ms Pink and her daughter; and for PowerNet from Mr David Stevens, General Manager People, Safety and Communications. Under oath and affirmation, I and the representatives asked questions of all witnesses. I then timetabled for further information to be provided and thereafter written submissions, all of which I received. Just after the investigation meeting I asked for some further clarifying information from the parties about a spreadsheet from PowerNet that was provided at my request. Parties were given the opportunity to provide written comment.

[8] Having received the above, I reserved my determination on 3 April 2025.

[9] This determination makes findings, expresses conclusions and as appropriate makes orders with the aim to bring an end to the employment relationship problem before me. It has not recorded all evidence and submissions received.²

The issues

[10] The overall issue is whether PowerNet's decision to dismiss Ms Pink due to her role being 'surplus to requirements,' and how that decision was reached, were what a fair and reasonable employer could have done in all the circumstances at the time.

The issues within this for me to determine are:

- a. Was PowerNet justified to have concluded the time frame for receiving feedback was sufficient and if not did this action unfairly disadvantage Ms Pink?
- b. Was PowerNet justified not to provide Ms Pink with all details of wider employee feedback and if not did this unfairly disadvantage Ms Pink?
- c. Was PowerNet justified to have concluded that Ms Pink's role, as an in-house occupational health nurse, was surplus to its requirements?
- d. If so was PowerNet justified to have dismissed Ms Pink because there were no redeployment options?
- e. Depending on the above what, if any, lost wages and compensation are to be paid by PowerNet to Ms Pink?

² Employment Relations Act 2000, s 174E.

- f. Under s 124 of the Act are any remedies to be reduced for employee contribution to the grievance?
- g. Are costs one to the other to be ordered?

Further background

[11] Ms Pink commenced employment with PowerNet in 2017 after PowerNet had previously decided to end its contracted-out occupational health service and bring it 'in house'. Ms Pink had a series of managers. Mr Stevens became her manager in September 2021. He is a human resources manager for PowerNet and Ms Pink's role was positioned within his team.

[12] The business case in 2016 that resulted in the inhouse role that Ms Pink was employed to do³ included the following (italics are my emphasis):

- a. PowerNet had identified the need to comply with recent legislative change (referencing '2015') relating to the employer's duties to 'monitor worker's health and workplace conditions' to be 'carried out or supervised by an occupational health practitioner (medical practitioner, registered nurse or nurse practitioner) who has the knowledge, skills and experience in occupational health).'
- b. PowerNet needed to give paramouncy to its employee's 'health and wellbeing' 'providing the best, most efficient and *cost effective* support to our teams.'
- c. It was proposed to employ or 'contract in' a registered health nurse to work on a 'regular .5 FTE basis, offering *not only* the necessary pre-employment and annual health checks, *but other services* such as wellness clinics, education sessions, and health monitoring for all staff across the network whether you are a field staff member on a standby roster or an administrator, it would benefit the overall health and wellbeing status of our teams.'
- d. That by employing an in-house service it would 'allow [the nurse employed] ... the opportunity to stagger health checks throughout the year, present health

³ *PowerNet Additional Staff Occupational Health Nurse*, November 2016. Provided to me after the Investigation Meeting at my request by D Stevens after he had referred to the same in his oral evidence.

education at safety days, be available for a wellness clinic each week (at different locations through the year) and monitor staff with any health needs and those on return to work plans.’

- e. That there could be potential to use the role to ‘facilitate or undertake exposure monitoring’.
- f. That there was a cost benefit for an in house employed person in the .5 role compared to ‘an externally contracted position.’ Figures then recorded were (\$70-\$80,000) FTE⁴ pro-rated ‘plus operating costs’ compared to \$88,000.00 per annum for an FTE ‘contracted position.’
- g. That the proposed bringing in of the service would mean there would be ‘consistency across the company’ with ‘one nurse covering the whole company delivering one message and providing the same level of care’.
- h. Financial comparisons at the time were that employing an OHN on .5 would cost approximately \$35-40,000 pro-rata of an FTE of \$70-\$80,000 ‘plus operating costs’ ‘or alternatively an externally contracted position at approximately \$88,000 per annum.’
- i. There were further detailed comparative costs broken down for the various health checks, pre-employment assessments and flu vaccinations which all recorded approximately a double in cost for a contracted out service. There were further ‘one off’ establishment costs against this for an in-house service: a clinic room, medical supplies and a pool car which in the proposal anticipates the need to travel to ‘depots 3 times per year.’
- j. There was a further benefit deficit analysis between ‘employee versus contractor’ in house in the proposal. Reference included consistency and commitment from an employee with whom there could be ‘ease of negotiating additional duties’ with an ‘ongoing relationship’ versus leave accruals, cost of training and ongoing renewal of registration costs (not costed out) and the ability to renegotiate a contract annually as opposed to permanent employment.

⁴ Acronym used for a ‘full time employee’ position.

- k. The proposal included that there could be more availability for an in-house role to provide education sessions and an in-house OHN could build ongoing familiarity with employees to assess trends proactively rather than reactively.
- l. The proposal anticipated the role would be managed in the Human Resources team but with 'close links to the Health and Safety team for monitoring and education'.
- m. The proposal anticipated developing a 'clinical perspective to the risk register' and to 'provide health monitoring for all of the Company whether or not they are in a high risk area.'
- n. The role was proposed to be included in the following year's budget 'with on-boarding in the next financial year' and 'quarterly reporting to SLT⁵ on trends/benefits/continuous improvement'.

[13] As noted above, the above proposal resulted in PowerNet employing Ms Pink.

Ms Pink's employed role, terms and conditions

[14] A written individual employment agreement was signed by Ms Pink's then PowerNet manager on 14 June 2017 and by Ms Pink on 22 June 2017 (IEA). It employed her on a .5 of FTE position.

[15] Ms Pink says that at interviews for the role her first manager discussed that the role was envisaged for an FTE role, and that it was discussed that this could happen once Ms Pink completed the training she was then undertaking. There is nothing about this in the above proposal, the IEA or any other documentation before me. Ms Pink in her oral evidence says she thinks it was a verbal discussion. From starting her employment in 2017 to April 2021 when there is discussion⁶ recorded about Ms Pink wanting to increase her hours to do more education and ergonomic assessments⁷ I have nothing to show me there was any reference to increasing hours from .5 to FTE. PowerNet through Mr Stevens says he checked the above 2016 proposal and says that it was only at the time of the restructuring proposal to disestablish

⁵ Acronym for Senior Leadership Team.

⁶ Ms Pink's performance review with Mr Stevens in April 2021.

⁷ The ergonomic assessments had continued to be contracted out throughout Ms Pink's employment as they were prior.

Ms Pink’s role that she referred to discussions at the time she was employed about the role being scoped for FTE. I find this likely.

[16] Ms Pink’s IEA referenced⁸ an annexure of a job description for her role but the copy initially lodged by Ms Pink in her Statement of Problem did not contain the job description. I noted this and asked that the job description be provided to me in evidence.⁹ It was provided by PowerNet just before the Investigation Meeting. I take this document to have been a description of Ms Pink’s role which is signed by her on 22 June 2017, the same day she signed the body of the IEA. The role description included the following detailed ‘role specific accountabilities’ in a chart format:

I am responsible for	What is expected of me	I will be successful when I
Undertake Health Surveillance	<p>Complete annual and bi-annual health assessments including lung function, spirometry, musculoskeletal, eyesight and hearing checks</p> <p>Undertake pre-employment and post-employment health assessments for all staff for all new and existing staff</p> <p>Follow up on any health irregularities and monitor progress</p> <p>Undertake hazard exposure monitoring as required</p>	<p>Schedule and undertake health assessments on all staff within PowerNet’s health monitoring timeframes</p> <p>Complete health assessments for new staff prior to appointment and exiting staff prior to their last day</p> <p>Follow up with any health concerns with staff and maintain accurate records</p> <p>Monitor any health hazards as soon as they are identified and monitor on a regular basis</p>
Facilitate Health and Wellbeing programmes	<p>Securely maintain accurate records and manage and record the health of staff</p> <p>Hold wellness clinics throughout the network covering areas such as nutrition, sun exposure, BP checks etc</p> <p>Undertake PowerNet’s annual influenza vaccination programme</p> <p>Provide education sessions and support on industry related health topics, injury prevention, smoking cessation, fatigue</p> <p>Assist with the coordination of PowerNet’s online health and wellbeing programme, [name of programme].</p>	<p>Ensure staff health records are up to date and stored confidentially</p> <p>Schedule wellbeing clinics across the network on a regular basis</p> <p>Promote and facilitate the influenza vaccination programme annually</p> <p>Schedule and deliver education sessions on relevant topics throughout the year</p> <p>Promote [name of online programme] whenever possible to all staff</p>
Coordinate Return to Work Plans	<p>Work alongside ACC case managers and GP’s to assist with rehabilitation programmes to support staff back to work after injury or long term illness</p>	<p>Monitor staff return to work plans so that staff are supported to return to work safely</p>
Policy procedure development	<p>Assist with the development and implementation of health and injury related policies and procedures</p>	<p>Manage the effective implementation and review of health related policies and procedures</p>

⁸ Paragraph 2.1 Position Description referred to as ‘Appendix A’.

⁹ Directions of the Authority dated 16 September 2024 at [5].

Workstation assessments	Undertake workplace assessment as required	Complete workstation assessments for all new staff and as required for existing staff
Reporting	Monitor the health and wellbeing of staff and collate trends for reporting purposes	Trends are reported annually and reported to SLT on a quarterly basis/ Store all health records securely and confidentially
Other Duties	Undertake such other responsibilities as may be reasonably required from time to time	Take on additional duties willingly when asked/ Look for additional work when not busy/ Support others whenever possible/Am willing, participative and responsive in emergency situations.

Hours of work

[17] Ms Pink's IEA annexed¹⁰ a description of her hours of work and remuneration and other payments including that she would work 20 hours per week worked between Monday to Friday. It is not in dispute that Ms Pink worked 20 hours per week albeit by the time she was made redundant she was working her hours across a fortnight as Monday to Wednesday one week, Monday and Tuesday the following week. It is agreed she had always worked '.5' of a full-time employee (FTE) role for PowerNet. This is consistent with the proposal for change in 2016 and Ms Pink's IEA.

Terms of employment relating to redundancy

[18] Ms Pink's IEA included the following agreement about what would happen in a redundancy proposal situation. I include only the relevant parts:

15.1 Redundancy is defined as a situation where your employment with us is terminated by us, the termination being attributable wholly or mainly to the fact that the position filled by you is or will become superfluous to our needs. This could be due to:

- a) Disestablishment of the position as a result of closing down of all or any part of our business;
- b) Disestablishment of a position due to internal restructuring of our business;
- c) When there is a reduction in work available; or

¹⁰ Annexure B of the IEA included in the terms of the IEA by paragraph 8.1. initialled by the employer 29 June 2017.

- d) As a result of any genuine business decision.
- 15.2 Where we propose to implement a decision that could result in a redundancy situation for you, we shall where practicable consult with you and your representative:
- a) To advise you of the situation and the reasons giving rise to it;
 - b) Through consultation, give you an opportunity to identify and consider alternatives to the proposed redundancy;
 - c) Where relevant, advise you of the proposed selection criteria to be applied and allow you the opportunity to comment on such criteria; and
 - e) Discuss ways in which we may be of assistance to you if you are made redundant.
- 15.3 Where we declare your position redundant, we shall where practicable give you four weeks' notice of termination of employment due to redundancy. If such notice is not given payment in lieu shall be made by us.
- 15.4 ...[This clause and subclauses provides for redundancy compensation and includes a formula based on salary at the time of termination but not to exceed 26 weeks] ...
- 15.5 ... [This clause and subclauses provides for the situation under s69OI of the Act where there has been a restructuring, and the employer is obliged to follow a process of negotiations for the affected employee whereby they have an opportunity of continued employment with a new employer on the same terms and conditions of employment]

[19] Clause 15.5 above appears not applicable here - 'contracting in' or 'subsequent contracting' are not part of the definition of 'restructuring' under the Act¹¹. Here PowerNet proposed to 'contract in' services to undertake the OHN role Ms Pink was employed to do.

¹¹ Employment Relations Act 2000, s69OI(1)'Restructuring'(a),(b).

6 November 2023 - Ms Pink is first told of a proposal to disestablish her role.

[20] On 6 November 2023 Mr Stevens emailed Ms Pink to meet him that day at 1.00pm. He then soon after followed up with her in person in her office (both were office based in Invercargill) after he says she had not responded to him. Ms Pink's evidence is that she did not see the email and was preparing to go to Gore for an assessment check. Mr Stevens made a note of the discussion at the time which is the closest I have to contemporaneous evidence of what was said. Despite some difference in what was recalled or interpreted, I find it likely Mr Stevens told Ms Pink her role was being proposed for disestablishment after Ms Pink asked about this, that Ms Pink was very upset, and that a rescheduling of Mr Steven's proposed 1.00 pm meeting was moved to the next day.

First meeting and proposal document provided

[21] A meeting was scheduled for the next day at 2.00pm at which Mr Stevens gave Ms Pink a document setting out the proposal to disestablish her OHN role. Ms Pink brought her daughter to that meeting having been told she could bring a support person.

PowerNet's written proposal to dis-establish Ms Pink's role on the basis it was surplus to its requirements

[22] PowerNet's change document was created by, and its single version approved by, Ms Pink's manager, Mr Stevens. PowerNet referred in the document to legislative obligations to 'monitor worker health and workplace conditions' including that 'we must monitor our employees periodically to identify any changes in their health status due to exposure to protentional health hazards throughout the course of their duties.' PowerNet further stated that:

One of the critical success factors is Safety Always and the most important asset we have is the people who work for us. We need to ensure we are providing an effective, adaptable/flexible, efficient, and cost-effective service that meets both the needs of our people and business year-round.

[23] PowerNet focuses on the following reasons in its change document to explain its proposal to 'revert' to an outsourcing of PowerNet's Occupational Health Service to an external contractor:

- a. That the current OHN role is performed across .5 FTE; that Mondays are largely 'administration' with some pre-employment checks completed; that the pre-employment checks are 'frequently' done after the employee has started in their role thereby raising a risk for PowerNet of an employee being employed when not medically suitable.
- b. That a 'spreadsheet was created' to track periodical medicals; that periodic medicals had been reduced from a 12 month to an 18-month frequency to enable the OHN to keep periodic assessments current. PowerNet explained that 'despite these efforts, a number of periodic medicals are overdue' 'at any one time.'

Benefits proposed in outsourcing

[24] As can be expected in a proposal document, PowerNet set out the benefits of outsourcing the OHN role as follows:

- a. PowerNet would have year-round 'on demand access' to OH services, Monday to Friday. That this would better meet PowerNet's 'business needs'. That part time hours and the need for the current OHN employed role to have leave entitlements limited the time available to get pre-employment checks done before the employment starts. The risk to PowerNet is also noted.
- b. An outsourced service would have better systems in place to 'schedule and record occupational health assessments' improving the 'efficiency of the administrative tasks, noting two out of five days per fortnight are spent on administration by the currently employed OHN.
- c. Some employees decline to go to a periodic medical saying they prefer to go to their own doctor and that outsourcing had the potential to reduce this issue.

- d. Costs would be reduced due to PowerNet not having to obtain and maintain medical equipment including 'cold chain' storage and maintenance of flu vaccines.
- e. Professional development costs would be met by the outsourced service and not PowerNet.
- f. That outsourcing by using a number of people available in an OHN role reduced the risk of relying on just one employee who may retire. This was referred to as an issue with 'succession'.
- g. PowerNet would obtain 'regular and reliable reporting' on Occupational Health on both pre-employment and periodic assessments to inform focus areas and education.
- h. An outsourced service could provide multiple OHNs at a geographical site at the same time to complete assessments in a batch on one day. This was proposed as being disruptive to the geographical working team.
- i. That there would be 'Increased openness to taking a different approach to completing pre-employment or periodic medicals to reduce the time they take to complete.' A sole example is that the prospective employee completes a written questionnaire first rather than the OHN asking questions verbally and recording them.

Risks identified in outsourcing

[25] PowerNet identified three risks with its proposal:

- a. That the cost of externally provided occupational health services will cost PowerNet more. The mitigation stated was to find out about costs to 'understand and model expected costs upfront.'
- b. That the loss of a consistent in-house OHN 'leads to poorer Occupational Health outcomes for employees.' The mitigation was that this would be discussed with 'prospective external Occupational Health Service providers

and that other businesses that outsource Occupational Health services manage this risk.’

- c. That outsourcing would lose the ‘flexibility’ of one nurse. The mitigation was to schedule in advance with an external provider to complete periodic, pre-employment and return to work medicals.

Proposed Feedback

[26] PowerNet proposed in its above 7 November 2023 change document that feedback needed to be provided by 8.00am on 13 November 2023. This effectively gave three working days for Ms Pink to respond. The only affected employee was Ms Pink although the wider workplace was emailed the proposal document and were given the opportunity to feedback against the same timetable. The proposal included an explanation that consideration would be given to ‘any reasonable variations to the proposal that the affected employees present during the consultation process, and these may be incorporated in formulating and reaching a final decision.’ Any changes made would be those ‘deemed appropriate’ by Mr Stevens and he would announce the outcome by ‘4.00pm on 15 November 2023’ with the new role and implementation to commence 18 December 2023. This timeframe was stated as being subject to any significant change which may require further consultation and a revised timeframe.

[27] The only further information included in the above change document were two charts showing the OHN role in the HR team in the first chart and an ‘outsourced role’ in the same place in the second chart.

Ms Pink’s challenge to the feedback timetable

[28] Ms Pink through her Union representative challenged the short time to feedback and challenged that more precise information had to be provided to ensure that consultation was a ‘reality and not a charade.’ Ms Pink proposed an extension to 28 or 29 November 2023 and communicated a concern about whether the shift-rostered wider workplace would have a chance to see the email with time to respond. Mr Stevens allowed an extension to 9.00am on 15 November 2023 thereby extending the time for feedback by two working days. His view

was that the three week extension of time proposed by Ms Pink's union representative was unreasonable.¹²

[29] Ms Pink gave her own written feedback by email on Sunday 12 November 2023 while reiterating that she did not consider she had enough time to feedback. Her written feedback can be summarised as follows:

- a. Ms Pink referred to her understanding of PowerNet changing from outsourcing when she was employed. This was to have increased health monitoring, education sessions, relationships with staff leading to health awareness, improved access for staff to have their health needs met rather than scheduled, consistent return to work plans through a health professional who the staff know as this progresses, improved relationships (she gave the example of 'ACC') and the opportunity for PowerNet to be 'proactive rather than reactive' with the 'ability to identify risks and provide solutions from a clinical perspective.'
- b. That her role was originally 'scoped' at '0.5 to FTE' to '.8' or 'FTE' and that a discussion about re-scoping and re-sizing her role 'may have addressed what is being raised as reasons to outsource.'
- c. That the proposal could have included more background information for wider staff to understand the role.
- d. That the proposal focuses on the limits of the part time hours she worked in the role but does not consider increasing the current role to .8 or FTE (as originally scoped') and or having OHNs in different areas to reduce travel to geographical depots.
- e. That it is not clear in the proposal how an outsourced service could improve delivery with electronic maintained systems rather than the manual system currently used.
- f. That she did not spend all her time on Mondays on administration as noted in the proposal, but she was 'onsite' for 'walk in consultations' giving staff an

¹² David Stevens email to Karron Pink and her union representative dated 13 November 2023, 9.56am.

opportunity to discuss health issues including regular blood pressure and weight checks as well as being available for pre-employment assessments and meetings.

- g. That those declining to have periodic assessments done were only '5% (i.e.16/300). Ms Pink refers PowerNet to the policy that says employees have a choice and that it would have been helpful to see the previous decline rate when the service was previously outsourced given PowerNet proposed the decline rate would improve with an outside nurse operating.
- h. That concerns about succession were not different to any employed role and that replacements with suitable qualifications could be found.
- i. That health trends and reporting could be streamlined to improve access to reporting regardless of her part time role.
- j. That an in-house OHN has an established rapport with staff which Ms Pink says is 'appreciated' and that she has been able to help employees 'navigate the health system for their health issues'.
- k. That an outsourced service may not be best placed to update policies as her internal role can.
- l. That doing one assessment at a time is less disruptive to a team and the team can carry on as if that person was on leave.
- m. That in relation to flu vaccinations and in-house cold chain maintenance of the vaccinations is worth it because staff had indicated to her they would not have taken the step if the opportunity was not given on site in the workplace. Ms Pink gives some of her own calculations of comparative costings being a difference of \$10.00 per head vaccinated by her with \$40-65 per head for an outsourced service. She does not include any reference to where she obtained these estimates.

[30] Ms Pink continued her feedback with her own proposed option in light of the above:

- a. That her hours could be changed to ensure more availability to work across five days with some flexibility for 'unexpected requirements.' Her proposal was to work 24 hours per week across five days, Monday and Tuesday 7 hours, 4 hours

Wednesday, and 3 hours on a Thursday and Friday.’ This proposal meant Ms Pink would be working every weekday instead of the current alternating Monday and Tuesday one week, Monday to Wednesday the following week. I note that based on this the hours Ms Pink proposed increased by 4 hours per week which would be .6 of the FTE. She proposed supplementary OHN resource to take up the FTE scope of the role.

- b. That ‘clerical tasks’ be contracted out because they took her away from her ‘key tasks’ of her clinical role. Ms Pink also considered the spread of hours across a whole week mitigated the public holiday issue often falling on a Monday.
- c. That she was ‘prepared to support’ having a questionnaire to start the pre-employment checks as was the example in PowerNet’s proposal. However, she said she did not consider this ‘best practice’. Her evidence has further included her view that it is necessary to have a verbal face to face discussion to read unspoken cues. I note PowerNet’s proposal related only to pre-employment checks so that the process could be more efficiently done.
- d. That the frequency of ‘audiogram monitoring’ could be decreased to free up more OHN time.
- e. Further ‘general comments’ were that Ms Pink considered PowerNet was meeting Health and Safety requirements by having the employee OHN role; that she had a ‘personal interest’ in the ‘staff health and wellbeing as they are my colleagues’ and that she had historical knowledge of the staff’s past health issues; that the cost of maintaining her ongoing required professional development to retain her registration was being met ‘50%’ by her supplementary employer; that staff will ‘not have a health professional on site to discuss theirs and their family’s health concerns’ increasing stress factors and having an effect on mental health ‘of which there is evidence of this increasing’. Ms Pink noted that ‘While this is not necessarily a function of the role it is a part of providing a holistic approach. While there are some initiatives that have been introduced to address health and wellbeing and improve access, the reality is staff often like to talk to someone they know and trust.’ Ms Pink considered reducing time for what I take to be

periodic assessments meant that ‘a significant unperceived problem may be missed, and timely interventions/education will also be missed’; that it may be timely to assess where the OHN role sits, and it may be better placed within the health and safety ‘environment’.

- f. Ms Pink finished by including that there was nothing to show what financial gains there would be from outsourcing, that ‘occupational health is more than doing pre-employment and annual health assessments’ and that it is about ‘empowering’ staff to maintain ‘a healthy lifestyle’, something ‘that has always been an objective of the role’ and has flow on positive impact on productivity.

[31] As well as the above written feedback Ms Pink also met with Mr Stevens with support to talk to her feedback at what became the second meeting on 15 November 2023. The contemporaneous notes taken by Mr Stevens indicate the following feedback from Ms Pink was given. I summarise what she added or expanded on from her written feedback. I have not repeated her reiterations of her written feedback at this meeting:

- a. Ms Pink expressed concern that wider staff had not been given all the details and did not realise she would be made redundant as a result of outsourcing her role;
- b. That Mondays were not just administration days as stated in the proposal but were also pre-employment checks, meetings and included her having employees drop in which (when asked about by Mr Stevens) she said could be to talk about ‘whatever they want to discuss’ giving an example of her picking up on a lifesaving issue;
- c. That technology would help with health trend reporting and another employee could do data entry on statistics. Ms Pink when asked said she would anonymise statistics for employee privacy;
- d. That ‘employees are acting on my medical advice - I am making a difference’, listed examples being ‘diet, exercise, teeth, audiograms’;
- e. Ms Pink is recorded as saying that ‘team leaders’ report less disruption for one person away at a time when doing geographical depot assessments;

- f. Ms Pink reiterated her concern about written questionnaires including that verbal cues are important as is the problem with some people not being able to write or those with neuro diversity. She explained that despite this, she would be willing to 'trial' a written questionnaire approach.
- g. That vaccination rates (37%) is a good result and came at a lower cost than outsourcing;
- h. Ms Pink confirmed she could be flexible in relation to the counterproposal for extended hours in her written feedback. She confirmed she could work across five days per week, four hours per day. This I note would have been 20 hours per week (still .5) of her role, the same hours she was already doing;
- i. That paying her as an OHN to do clerical work was a waste of her time;
- j. That statutory days for an employee versus a contractor is the same for everyone. Mr Stevens responded that the impact is greater for a part-time employee;
- k. Ms Pink says 'I seldom know about someone starting' employment until they have started and refers to communication issues between the human resources team and her role being an issue in relation to the pre-employment checks not happening until after the employment commenced.
- l. To the above Ms Pink said another issue with late pre-employment checks is that employees were not able to be released from their current employment. Mr Stevens expressed concern about checks not being done prior to commencement. Ms Pink is recorded as saying she could 'set aside some time for pre-employment medical slots.'
- m. Ms Pink refers to paying herself for some of her requisite ongoing professional development and Mr Stevens referred to the issue of funding a part time OHN for FTE professional development.
- n. Ms Pink asked that her feedback proposal be shared with wider management and Mr Stevens agreed to this and did this. He reiterated that he was the decision maker.

- o. Ms Pink said she was not happy about handing over employee medical records without individual employee consent referencing in general legislation. Mr Stevens replies he expected the PowerNet policies to cover this situation, that Ms Pink could send him the legislation she referred to, and that the records are not owned by her.

[32] At the end of the meeting Ms Stevens photocopied Ms Pink's speaking notes and a date to meet further was set for 21 November 2023.

Decision delivered

[33] On 21 November 2023 Ms Pink met again with Mr Stevens with her daughter as support again. According to the email he sent to Ms Pink after the meeting that day, Ms Pink was provided with documentation giving the decision disestablishing her role which included a summary of feedback and PowerNet's responses, her redundancy letter and a list of PowerNet vacancies. It is not disputed that Ms Pink when shown this list at the meeting on 21 November 2023 is recorded as saying none of the jobs suited her. The roles in summary were all related to qualified field work in electricity front line operations such as line mechanics, supply electrical, systems controllers and engineer positions. There was one role that appeared to be office based being 'Administration and Governance support'.

[34] PowerNet's decision to disestablish Ms Pink's role included the following:

- a. There was little response to Ms Pink and one others' feedback about the 'short' timeframe for the process. I note that Mr Steven's notes of the meeting on 15 November 2023 are consistent with his explanation in his evidence that he did not want to prolong the process unnecessarily for Ms Pink. His oral evidence included that she could get 'emotional'.
- b. That while feedback included increasing the .5 OHN role to .8 or FTE with variations that included a further employee(s) to meet this, or outsourcing pre-employment assessments, the decision was not to accept that this outweighed the benefit of an external service being accessed for these tasks to meet 'demand.'

- c. That while there was an identified risk in the proposal about the continuity of having an in-house OHN, two externally contracted services had since been approached and confirmed they can provide a consistent OHN 'who would be PowerNet's primary OHN'.
- d. That feedback was received about the benefit of the incumbent OHN providing them with health support 'broader' than occupational health matters on a 'walk in' basis, some noted a preference not to engage with a peer in the workplace. However, the response to this was that the 'walk in' support for 'non work related health issues' is not accessible to all employees, and this activity impacts on the internal OHN's capacity to 'keep up with their routine work'. PowerNet noted that employees had health insurance benefits giving access to seven day a week doctors.
- e. That external providers can perform pre-employment drug and alcohol testing, glucose /cholesterol testing and exit interviews which are not currently performed.
- f. That while feedback was received about the convenience of on site flu vaccinations, external providers could do the same and could manage the 'cold chain fridge monitoring and maintenance' required for vaccinations on site.
- g. That while there was feedback for and against an internal versus an external model of service, Mr Stevens preferred the external service. He noted there was a gap in understanding whether employees choosing to go to their own doctor actually did so and in turn whether they remained fit for their role.
- h. In terms of the concerns about succession in the proposal it was still considered that having several OHNs available through an external service meant there was continued coverage compared to the situation where a single employed part time OHN was on leave or resigned or retired.
- i. In response to the feedback (mainly from Ms Pink) about administration and reporting, the position of PowerNet remained that an external provider takes care of all systems to schedule, record and report on occupational health assessments.

- j. In response to feedback that the internal OHN could continue to work without down time if an assessment were cancelled rather than PowerNet incurring fees, PowerNet considered that it had identified a risk of costs being more for an external provider. It also noted that the contracted service could use down time to perform other work such as reviewing policies or health trend reporting being the only brief reference to this part of Ms Pink's role within the change documents.
- k. In response to feedback about an internal OHN's professional development costs, PowerNet simply acknowledged this feedback without stating anything more.
- l. In response to a suggestion (Ms Pink) that 'peri-employment health assessments' could be carried out, in other words, assessments after the employee commenced work, PowerNet considered it unreasonable to do this given the risks for both PowerNet and the prospective employee. PowerNet confirmed that 'an advantage of an external [service] is that they can perform pre-employment medicals on any day of the week, with 3-4 days' notice, meaning the medical can be coordinated with the person's other pre-employment checks'. PowerNet did not address feedback from Ms Pink regarding communications between human resources and the internal OHN regarding timing of these checks.
- m. PowerNet confirmed that it would follow policy in relation to sharing of relevant employee health information as was already done with other external entities in this type of situation.

[35] Based on the above, the decision was to disestablish Ms Pink's OHN part time role and engage an external provider. A timetable was set for 'handover' to occur (including tidying the office so that it is ready to be re-used by the incoming external provider) during what was to be Ms Pinks' notice period to the last day of employment on 21 December 2023.

Ms Pink does not return to work her notice period

[36] Following the decision to disestablish her role, Ms Pink continued performing in her role at work for only a short time before handing in a medical certificate on 4 December 2023

that certified her 'unfit for work.' The medical certificate was dated 30 November 2023 and the certifying doctors refer to seeing Ms Pink on 10 November 2023 and considering her unfit for work for a period of 21 days from 4 December 2023 taking her a date beyond the end of her notice period.

[37] Ms Pink says she emailed Mr Stevens with the medical certificate on 4 December 2023 and told him not to contact her. He says he has no record of such an email and denies this happened. His evidence is that on the afternoon of 4 December 2023 he heard from another office employee that Ms Pink had handed in her keys and said she had 'finished up'. He then received the hard copy medical certificate from another employee. Mr Stevens has provided an email that he sent to Ms Pink at 5.30pm that day reflecting that Ms Pink had not talked to him about leaving and he asked her to call him the next day to discuss the medical certificate and her 'handover notes/exit checklist.'

[38] Ms Pink did not physically return to the workplace after 4 December 2023. She did not respond to Mr Steven's above email on 4 December 2025 asking her to contact him. Ms Pink's final payslip shows that she was paid a final pay that included a gross payment of \$13,555.00 as redundancy compensation together with a payment of \$4,010.25 for untaken annual leave entitlement, a further part year payment of holiday pay (\$2,282.48), statutory holiday entitlement and a payment for two sick days. I do not understand there to be a dispute about the final payment or compensation for redundancy under the IEA that was paid.

[39] Ms Pink instructed counsel and raised her grievances on 30 January 2024.

Was PowerNet justified to have concluded the time frame for receiving feedback was sufficient consultation and if not did this action unfairly disadvantage Ms Pink?

[40] Section 4 (1A)(c) of the Act provides that an employer has, as part of the obligation of a duty of good faith, to consult with an employee when 'proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment' by providing the employee affected with:

- (i) Access to information, relevant to the continuation of the employees' employment, about the decision; and

- (ii) An opportunity to comment on the information to their employer before the decision is made.

Consultation with Ms Pink

[41] While I find that Ms Pink gave detailed feedback in writing and then in person on 15 November 2023, this was to PowerNet's proposal as it stood. I note that the proposal lacked any detail relating to the financial benefits to PowerNet of outsourcing Ms Pink's role which even an employer of lesser size could have reasonably included by way of comparable figures. PowerNet was challenged by Ms Pink's union representative as to the lack of time to feedback and the lack of detail in the proposal, soon after the proposal was presented. Ms Pink's feedback also included there was a lack of detail for her to respond to when she again challenged the time frame to feedback as insufficient.

[42] PowerNet says through Mr Stevens that the change proposed was not related to anything financial but was to have flexibility with getting assessments completed. I do not accept this as plausible. This is inconsistent with the business case put forward in 2016 to employ Ms Pink which carries comparative financial estimates. Further, the proposal in 2023 to disestablish Ms Pink's role included introductory words that referenced cost efficiency:

We need to ensure we are providing an effective, adaptable/flexible, efficient, and cost-effective service that meets both the needs of our people and business year-round.

[43] That financial costings were unimportant to PowerNet in proposing to disestablish Ms Pink's role and replace it with an outsourced service is further inconsistent with Mr Stevens' response to Ms Pink in her annual performance review in May 2022. This was when she asked for more hours to do educative work and testing on skin issues. She had asked similarly for more hours in her review the year before. Mr Steven's recorded response was to say that an increase to the role's hours had 'fiscal constraints' and required a 'strong business case.' To the extent that Ms Pink's role was both important in relation to her work produced to meet PowerNet's aims to keep its workforce safe, and meet its safety obligations, I also find it implausible that the cost of doing this for such a large business was not relevant.

[44] As was the case in *Stormont v Peddle Thorp Aitken*¹³ the Employment Court found that the lack of financial information and the employer's responses that it was irrelevant was fatal to the employer showing it had sufficiently consulted about proposing to make the employee's role redundant. It was also found in that case that this was part of what supported the redundancy not being genuine based on the employer relying on 'gut feel' reasons to propose the disestablishment of the employee's role rather than details backing up financial reasons and/or how the employee's role operated in practice. I will return to these things below when considering justification because these actions overlap into the question of the genuine nature of the redundancy.

[45] Mr Stevens gave oral evidence to my questions that he considered the timeframe for Ms Pink to feedback was sufficient because he knew she would be upset, that she could get 'emotional' and that he did not want to elongate the process for her. He gave a two working day extension when the time frame was challenged and gave no reason for the short extension at the time other than to state his view that the extended time proposed was too long. I find Mr Steven's rationale here naive at best. This is especially because Ms Pink and her then representative had challenged the inadequacy of the time rather than saying they wanted an abridged quick time frame so that Ms Pink would not endure being too upset. Mr Steven's appears to have taken at best a blinkered approach on this issue in his apparent sole management of the process for PowerNet.

[46] Based on the above, I find Ms Pink was unfairly not given an opportunity to consider the comparative costings for outsourcing the service she was employed to perform for PowerNet, this closely then links to her having inadequate time to have given feedback on the proposal. The information may well have assisted her to better particularise, for example, the proposals she offered as alternatives to disestablishing her role. PowerNet's actions disadvantaged her unfairly in her employment at a time it was proposing it could end. I find PowerNet's actions also breached its duty of good faith to have consulted on matters relating to a proposal to end her employment under the above referenced s4(1A) of the Act.

¹³ *Stormont v Peddle Thorp Aitken Limited* [2017] NZEmpC 71, Judge Inglis.

Was PowerNet justified to have not provided Ms Pink with all details of the feedback provided and if not did this unfairly disadvantage Ms Pink?

[47] Ms Pink says that that she was disadvantaged because the wider workforce was also not given sufficient time to feedback on the proposal given timings with their shift work and that many employees were unlikely to have seen the email invitation to feedback when first communicated. In her oral evidence Ms Pink explained to me her concern was that she thought many employees would have supported that she was doing a good job and the truncated time frame meant PowerNet did not hear from this support base. Ms Pink's oral evidence returned often to her concern that she was affronted to be let go when she considered she did a good job in her role, a role she was passionate about.

[48] I accept Ms Pink only received the actual emails received from the wider employee feedback after the end of her employment after communications between representatives. There was a small amount of feedback comparative to the entire workforce that Mr Steven's invited to give feedback on. PowerNet defends not providing the specific feedback emails to Ms Pink because they were anonymous (it is not clear to me this was the basis on which feedback was sought); and because Mr Stevens summarised the themes in the decision document, and they did not add to what Ms Pink had already fed back on. As a process this does not appear unreasonable given that Ms Pink was the only affected employee. Wider employees were not affected in that their jobs were not proposed for disestablishment. Ms Pink's was a profession-specific role unique in this large workforce. No one else did a job closely the same. Ms Pink says that by not being able to consider the details of the wider employee feedback, including who it was from, she had no opportunity to feedback on what others had to specifically say. While I accept it odd that this material could not have been reasonably provided to Ms Pink even with anonymisation of the names, overall, I am not satisfied this caused an unfair disadvantage to Ms Pink. Any feedback from the wider workforce could only be useful as to how they might have benefited from their employer's provision of OHN services by an outsourcing of the service that was purportedly provided by Ms Pink's role.

[49] While Ms Pink's feedback at the 15 November 2023 meeting records her concern that the wider workforce needed more details to understand that it was *her* being proposed for redundancy. This is consistent with her explanations to me at the investigation meeting about how she felt about losing her role, a role I accept she felt passionate about doing in a holistic way. I can understand her desire to have supporters to support her personally to retain her employment. However, their feedback as noted above was not for the purpose of supporting Ms Pink personally. The feedback from the wider workplace was brief and I agree it covered similar themes to Ms Pink's feedback albeit hers more informed as the single affected employee. I find it within reasonable scope for PowerNet to have summarised the themes of the feedback in the outcome document and do not find this an unfair disadvantageous action.

Was PowerNet justified to have concluded that Ms Pink's role, as an in-house occupational nurse, was surplus to its requirements?

[50] In a redundancy situation, an employer must be justified to terminate an employee's employment by showing the decision and procedure used was what a fair and reasonable employer could have done in all the circumstances at the time. This includes meeting the minimum procedural standards under s 103A of the Act.

[51] Section 4(1)(a) and (b) of the Act includes that parties to an employment relationship must act in good faith towards each other and not mislead or deceive each other or do anything that 'is likely' to mislead or deceive each other. I have already referred above to the obligation on the employer to consult about posing any consideration to the end of employment.

[52] A justified redundancy by its nature is a decision by the employer to dismiss an employee based on no fault of that employee. A redundancy may be unjustified if the real reason for dismissal is intended to remove an employee whose role is not surplus to requirements but rather the employer's perceived problem is the way the employee performs the role.

[53] Under s 15.1 of the above referred IEA, Ms Pink and PowerNet agreed to a definition of redundancy in that it was a termination of employment ‘attributable’ to Ms Pink’s position becoming ‘superfluous to our [PowerNet’s] needs.’ The agreement continues to include that reasons could be due to things that I do not find apply here. This was not a closing down of part or all of PowerNet’s business, it was not an internal restructuring. It simply proposed to continue to need Ms Pink’s role albeit to be sourced elsewhere. To this extent I agree with the submission for Ms Pink that it is difficult to say the role was ‘surplus to requirements’. This was also not a situation where there was a reduction of work available for the role. To the contrary it is clear that the .5 role included hours that may have not enabled completion of all of the tasks of the role. This leaves at 15.1 (d) that a reason for a redundancy could be due to the general catch all of ‘any genuine business decision.’ It is the genuineness of PowerNet’s decision to decide to disestablish her role based on a ‘genuine business decision’ that Ms Pink challenges as to justification of her dismissal under s 130A of the Act.

[54] The Authority’s role in examining the genuineness of an employer’s decision to dismiss for a ‘genuine business reason’ has been summarised by the Employment Court¹⁴:

It will be insufficient under s 103A, where an employer is challenged to justify a dismissal or disadvantage in employment, for the employer simply to say that this was a genuine business decision, and the Court (or Authority) is not entitled to inquire into the merits of it. The Court (or the Authority) will need to do so to determine whether the decision, and how it was reached, were what a fair and reasonable employer could have done in all the relevant circumstances’.

[55] The Court of Appeal¹⁵ has also said that:

If the decision to make an employee redundant is shown not to be genuine (where genuine means the decision is based on business requirements and not used as a pretext for dismissing a disliked employee) it is hard to see how it could be found to be what a fair and reasonable employer would or could do. The converse does not necessarily apply. But if an employer can show the redundancy is genuine and that the notice and consultation requirements of s 4 of the Act have been complied with, that could go a long way towards satisfying the s 103A test.

¹⁴ *Totara Hills Farm v Davidson* [2013] NZEmpC 39 at [54].

¹⁵ *Grace Team Accounting Limited v Judith Brake* [2014] NZCA 541 at [81]

[56] Accordingly, my inquiry is to consider the genuineness of PowerNet's decision to disestablish Ms Pink's role as an employed in-house OHN.

[57] I find a likelihood that Mr Stevens had not consulted Ms Pink's job description during the time he was at the sole forefront of proposing Ms Pink's role 'as surplus to requirements.' His oral evidence was vague about the content of the job description. As noted above, the job description was not provided with the IEA in PowerNet's evidence initially and I asked for it. I also find a likelihood that Ms Pink did not take much notice of her written job description either. She said in her oral evidence she could not recall seeing it before these proceedings despite her signing it on the day of signing her IEA. At the very least I am satisfied the job description was not presented to or referred to by PowerNet in its proposal approved and written by Mr Stevens that her role was to be surplus to its requirements. This points away from a genuine look at the role PowerNet was proposing to disestablish in its entirety.

[58] Ms Pink's job description, while expansive for a .5 position, includes reference to what has been the focus of this matter for PowerNet's proposal to disestablish Ms Pink's role: the pre-employment and periodic assessments being tracked and timely. This part of Ms Pink's role shows at the first line of the above job description table¹⁶. Ms Pink's feedback included this was only part of her role. I agree. There is little, if nothing in the change documentation that referred to any reasoning about the other tasks of Ms Pink's role. I pause to note the difficulty of disestablishing an employee's role without the employer understanding what it was in total.

[59] A prime reason for PowerNet's proposal to disestablish Ms Pink's role was because PowerNet wanted more flexibility in getting periodic medical assessments and pre-employment assessments completed by the time they are due. It is submitted for Ms Pink that by the time of these proceedings Mr Stevens described this as being able to 'flex up and down' the service as per demand. I accept this seems to add a further aspect to PowerNet's reasoning after the fact and Ms Pink did not get an opportunity to respond to this. On the face of it however, I accept the submission for PowerNet that more flexibility to meet demand to require periodic assessments and pre-employment checks done according to scheduled timings could a concern for the business. I accept that assessment timeliness were

¹⁶ Paragraph [16].

particularly important for PowerNet's safety obligations for those field employees exposed to hazardous work environments. It is not unreasonable to have these up to date and it was part of Ms Pink's role. I also accept the genuine risk for an employer of having pre-employment checks done after the employment commences. Again, this was part of Ms Pink's role despite Ms Pink appearing to consider it was acceptable to do them after the employee started. I accept a way of reliably tracking the above two types of assessment would make sound business sense.

[60] My further concern is that PowerNet's proposal is premised on something that was a live unresolved issue in performance discussions by the time PowerNet proposed to disestablish Ms Pink's whole role.

[61] The number of periodic assessments that Ms Pink had allegedly not completed on dates they fell due during her role of .5 FTE weekly hours. I say allegedly because my consideration of the spreadsheet apparently relied on to count these 'over dues' includes 'assumptions' of 'overdue' assessments when they may have been employees declining to have them done. I am satisfied the 'assumption' was that made by PowerNet. There is a communication from Mr Stevens stating that after this change process the policy changed to remove the ability for employees to decline assessment, not something that appeared to have figured in the change proposal. I find the above 'assumptions' may have unfairly impacted the numbers of overdue assessments or at the very least questions the reliability of the numbers relied on by PowerNet in the change process when it proposed the number of periodic assessments overdue. That said I find some likelihood this was also down to an issue relating to an inconsistent tracking of due dates.

[62] Ms Pink's annual performance meetings¹⁷ with Mr Stevens since his commencement as her manager in 2021 show that Mr Stevens had asked Ms Pink to develop a 'system to track' assessments recording and that this had been asked for 'many times' before (April 2021); that a system was in place by May 2022; that in May 2023 s Pink's final performance document refers to '32' outstanding periodic assessments but Mr Stevens wanted regular updates to keep the spreadsheet current as well as a status update regarding pre employment

¹⁷ Performance Review documents Karron Pink with David Stevens dated 27 April 2021; 30 May 2022; 8 May 2023.

assessments. I reasonably take the latter to relate to the issue of having these done pre-employment.

[63] The record of annual performance discussions also shows me that Ms Pink asked for more hours albeit to carry out educative proactive work as part of her role. Mr Stevens' responses at the time were that 'he was not prepared to look at this until Ms Pink managed a system to track assessments being done' (April 2021); and then that there were 'fiscal constraints' in relation to increasing the role to an FTE and it would need a 'strong business case' (May 2022). In May 2023 there is reference to pre-employment checks needing to be done before employment commenced. There is discussion also in May 2023 about the potential of contracting pre-employment assessments out and this transposes into a forward goal to look at. Subsequently, in about August 2021, when Ms Pink was on leave, that is what happened. Mr Stevens arranged an external service to get some pre-employment checks completed. Mr Stevens emailed Ms Pink upon her return, said it worked out well and that this service could be available if she could not get the pre-employment done prior to the employment commencing in the future.

[64] There are references in the performance reviews, and in an email, to extra administrative help being sought by Mr Stevens but nothing before me shows this occurred or made any difference. It also appears to relate to setting up new client files rather than the tracking of assessment spread sheets that Mr Stevens kept asking to be done.

[65] As well as the above, I understood from the oral evidence of both Mr Stevens and Ms Pink that they also had regular one on one meetings. I have nothing recording the content of these meetings but both witnesses confirm a tension existed between them that remained unresolved. Having heard from them both, I find this tension was likely about *how* Ms Pink would or could perform her role. Mr Stevens confirms he is not clinically trained. Ms Pink obviously is. I find it was likely that Mr Stevens wanted statistics and data showing that assessments were done for the overall management of the business and its risks. Ms Pink wanted to focus on the wider aspects of her clinical role, including a personalised service to employees and also to be proactive at noting health trends and ensuring employees kept healthy generally. She references an increase in dealing with mental health problems. In her May 2023 review she refers to her clinical time being wasted on administrative tasks. Her

entry in this final May 2023 annual performance review was the frank statement to Mr Stevens that shows me she was unhappy about the way Mr Stevens was wanting things done:

Stop expecting me to be a secretary and do basic office tasks when I'm employed as a clinician and have minimal time available.

[66] In the same review Mr Stevens had asked for regular updates on the spreadsheet which tracks periodic medicals and for more information about the 'status' of pre-employment checks. I find Ms Pink's above reaction is likely linked to this.

[67] I find it likely that Ms Pink's resistance to Mr Steven's consistent issue with wanting assessments tracked and kept timely related to her view this was 'administrative time' that she needed help with or had not time to do in her 'clinical' side of the role.

[68] There is also evidence that Ms Pink did not agree to using a written questionnaire to speed up pre-employment checks. Again, I find it likely, given my perusal of the performance review documents, that this related to what was clearly expressed as the employer's direction in the May 2023 annual performance review to have these done before the employee commenced employment. PowerNet's wording in the proposal document listed a benefit of an outsourced service as being 'open' to a different way of working including the use of a written questionnaire. A reasonable reading of this language shows me that it references the written questionnaire dispute and arguably a performance issue. Ms Pink's evidence addresses her reluctance to written questionnaire use in that she clinically considers nonverbal cues are important to observe in order to do an appropriate assessment that would help to guide further important questions that may otherwise be missed. She referred in her feedback at the 15 November 2023 meeting to neuro diverse people and illiterate people both of whom may not be able to fill in a written questionnaire satisfactorily. It should be noted again that Ms Pink's feedback to PowerNet's proposal about this was that she still did not agree but would be prepared to 'trial' this process. I find that this backwards and forwards further supports that both witnesses held positions that are consistent with strong views about the way to do Ms Pink's role. By the time of the proposal to disestablish Ms Pink's role was proposed in November 2023 I find a likelihood these things remained unresolved in relation to

performance discussions and that Mr Stevens likely sought to find someone ‘open’ to using the questionnaire and a way to get assessments up to date and tracked.

[69] Standing back from the above, I find that PowerNet through Mr Stevens did not likely consider the whole role that Ms Pink was disestablished from. PowerNet could not then have genuinely considered the role it proposed to disestablish. If it did I would have expected this to feature in the change proposal and final decision documents. The starting point for PowerNet’s proposal appeared never to have been the actual job description for the role, nor an examination of what Ms Pink was actually doing in her role. Mr Stevens’ evidence is that it was a surprise to him to discover in Ms Pink’s feedback that Mondays were not spent only on administration tasks (as is recorded in Ms Pink’s annual performance review in May 2023) but that she also operated a ‘walk in’ service for employees to come in and discuss anything they felt they needed to about their own or their family’s health uses. Her feedback and some wider employee feedback supported that this happened with examples of outcomes where Ms Pink followed through to assist with individual health problems. Ms Pink’s feedback included the difference she made to employee health outcomes. I find a likelihood that Mr Stevens did not know all that Ms Pink performed in her role and that a not insignificant part of the .5 FTE hours related to the ‘open door’ service that Mr Steven’s says he was surprised to discover in the change process. A fair and reasonable employer could have paused at this ‘discovery’ and been prepared to go back and more properly and fairly reconsider the role it was proposing to disestablish and the purpose of its proposal.

[70] I note further that it seems wholly surprising that Mr Stevens was unaware of the additional ‘walk in’ service given the undisputed frequency of one-on-one meetings he had with Ms Pink about her activities and how she did these. It is also not a stretch to find that because the same issues about timeliness of assessments and the tracking of them continued to be a topic of likely disagreement that this in effect remained a frustration for Mr Stevens. The above situation does support a finding of a genuine business reason to disestablish Ms Pink’s role.

Other issues

[71] Other issues raised by Ms Pink may each on their own not have impacted on justification but combined with the above I accept they add to a form of predetermination and lack of genuineness to propose and decide to disestablish Ms Pink's role.

Fast process

[72] As already noted above, Mr Stevens' decision to have what was a fast process of consultation and decision making through to implementation (little over a month in total) was based on what he explained in his oral evidence as a desire not to delay the process for Ms Pink who he said in his oral evidence could get 'emotional'. Ms Pink herself indicated she was forthright in her views. As the Courts have noted, a genuine reason for proposing to make an employee's role redundant cannot be a charade for exiting a perceived difficult employee. I find this was likely the situation here. In saying this my findings do not extend to include that Ms Pink was actually 'difficult' or 'emotional'.

No costings

[73] While Mr Steven's evidence and submissions invite me to accept that the proposal to disestablish Ms Pink's role was not about costs but flexibility to have occupational health services on demand, I find this inconsistent with the same two things I have already outlined above. This also supports an overall finding that the proposal to disestablish was not genuine.

Comparisons with the previous outsourced situation

[74] No information was provided to Ms Pink to support the submission made for PowerNet that the employing of an in-house OHN had not worked out as planned. There was no comparative information provided to Ms Pink in the proposal to explain this view. This is surprising given that the 2016 business case remained accessible as did the job description for Ms Pink's role. I find it likely that Mr Stevens only delved into looking at the 2016 business case document when Ms Pink's feedback was that she understood the role was actually scoped for an FTE. This in turn I am satisfied was in relation to getting the two types of assessment checks done and tracked.

[75] I find the above further supports an overall finding that the proposal to disestablish Ms Pink's role was not genuine.

Lack of genuine consideration of feedback

[76] It is further submitted for Ms Pink that the answer to the issue of assessments within the .5 time frame was simply to have had a conversation about increasing Ms Pink's role to an FTE if not performed by her. While Ms Pink's counterproposal was at best only to perform an additional 4 hours per week herself across five days and not a whole FTE role, she included varied suggestions of a mix of others employed or outsourced to the FTE level including a proposal that others employed or contracted could meet geographical challenges by being local. These suggestions appeared to be addressed to an extent in the change decision document weighing the convenience of an outsourced service *in total* on demand versus employing staff.

Justification for the reasons to disestablish after the fact

[77] Mr Stevens gave evidence that the outsourcing of Ms Pink's role has proven successful for efficiency beyond his expectations given the higher than expected numbers of periodic assessments completed at any one time. However, none of this was before Mr Stevens at the time of proposing a change. It also does not explain how the parts of Ms Pink's whole role beyond the assessments has been replaced or improved. In short this evidence has not largely assisted me given that I have to consider the situation and PowerNet's process and decision making at the time.

Summary

[78] I find that Mr Stevens had no real information about cost comparisons when proposing for PowerNet to disestablish Ms Pink's role when these could reasonably have been costed out and provided to Ms Pink; I find the evidence that the comparative financial costings to outsource the OHN role were likely relevant and the non-provision of these as not relevant breached PowerNet's duty of good faith to properly consult; that the process of consultation was unfairly rushed when taking into account the lack of information to consult about costings and that PowerNet had not likely considered the whole role and just the parts that had been the subject of unresolved tense performance discussions between Mr Stevens and Ms Pink. My findings lead me to conclude this was not a genuine redundancy.

If so was PowerNet justified to have dismissed Ms Pink?

[79] There being a finding of a lack of genuine reason to disestablish Ms Pink's role, it follows that because there was no disciplinary process I find that Ms Pink was unjustifiably dismissed. As appropriate, I have made no findings about the merits of Ms Pink's performance.

Depending on the above what if any lost wages, and compensation is to be paid by PowerNet to Ms Pink?

Compensation

[80] Ms Pink and her daughter's evidence included consistent evidence about the impact that the decision to dismiss had on Ms Pink. I accept that Ms Pink's evidence supports she felt humiliated and was devastated that what she perceived was a good job done using her pride in her clinical skills ended with what she perceived to be a message that it was otherwise. I can, for the reasons above, understand why she drew that conclusion that she was not genuinely made redundant and in the process not listened to or appreciated. I find this was particularly exacerbated by the short process and being shown a list of redeployment positions that by any stretch of objectivity could not be seen as suitable. There was no apparent consultation about these as envisaged at clause 15.2 (e) of the IEA: "discuss ways in which we may be of assistance to you if you are made redundant." Rather PowerNet took what could only be a formulaic approach of going through the step of offering clearly unsuitable vacancies. This I can understand exacerbated Ms Pink's humiliation when she was handed the list on 21 November 2023 along with PowerNet's decision to disestablish her role in a process commenced from scratch little over a week before. I further note that the context wherein Ms Pink already had a likely fraught relationship with her manager, Mr Stevens found herself facing him solely in the whole redundancy process. Again, it is not a stretch to understand her humiliation and powerlessness in relation to this apparent single-handed action even if Mr Stevens himself did not see or personally understand it that way.

[81] I find that appropriate global compensation for the two interlinked grievances found should be \$25,000.00.

Lost wages

[82] It is submitted for Ms Pink that I should exercise my discretion and award her lost earnings as a result of her unjustified dismissal beyond the usual three months. This is based on two things, the large nature of the employer with legal advice and internal human resources (which I note was headed by Mr Stevens), as well as her (close to retirement) age and the likelihood of not easily obtaining further work because of this. I note a number of attempts that Ms Pink made to obtain further employment. I note further that she also had other employment ongoing during and beyond her role finishing that were part time casual or non-permanent although those extending beyond hours at PowerNet appeared to have occurred after the three months post-employment.

[83] I am not satisfied that I should consider more than three months post-employment lost earnings as reimbursement for the grievance of unjustified dismissal. While I note that Ms Pink's already paid contractual compensatory payment for redundancy cannot be taken into account, I have nothing to show me that further employers were rejecting her for part time work due to her age. While I accept PowerNet is large and might have been expected to have considered its actions more carefully, I am not satisfied this situation sits outside of other cases where large employers get things wrong.

[84] Accordingly, I order three months lost wages based on payslips before me. This is based on a fortnightly salary of \$1,742.00 x 6 = \$10,452.00 gross. I find a likely difference in Ms Pink's submitted calculations being the difference between nett and gross figures.

Under s 124 of the Act are any remedies to be reduced for employee contribution.

[85] I must consider contribution under s 124 of the Act. I do not find Ms Pink contributed to the situation that resulted in her personal grievances that would warrant a reduction in any remedies ordered.

Summary of outcome

[86] PowerNet Limited is to pay Karron Pink the following:

- a. Compensation of \$25,000.00 gross under s 123(1)(c)(i) of the Act.

- b. Lost wages of \$10,452.00 gross under s 123(1)(b) of the Act.

Costs

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

[88] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Ms Pink 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 PowerNet will then have 14 days to lodge any reply to memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[89] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual 'daily tariff' basis unless circumstances or factors, require an adjustment upwards or downwards.¹⁸

Antoinette Baker
Member of the Employment Relations Authority

¹⁸ www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1