

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-Ā-TARA ROHE**

[2022] NZERA 598  
3158782

BETWEEN	CAREY ROBINSON Applicant
AND	PACT GROUP Respondent

Member of Authority:	Claire English
Representatives:	Ross Jamieson and Cushla Jamieson, advocates for the Applicant Fiona McMillian, counsel for the Respondent
Investigation Meeting:	20 September 2022 at Wellington
Submissions received:	5 October and 1 November 2022 from Applicant 27 October 2022 from Respondent
Determination:	16 November 2022

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The applicant was a community support worker after some 15 years service. She was dismissed by the respondent following a Zoom meeting, when the General Manager of the respondent raised concerns the applicant was not completing her timesheets correctly.

[2] The applicant claims she was unjustifiably dismissed, which the respondent denies.

## **The Authority's investigation**

[3] For the Authority's investigation written witness statements were lodged from the applicant, and a former colleague, Ms Cristina Cotogni, and on behalf of the respondent by its General Manager, Mr Thomas Cardy, and managers Ms Evelien Post, and Ms Sylvia Wouters. All witnesses answered questions under affirmation from me and the parties' representatives. The representatives also provided closing submissions.

[4] 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 orders made. It has not recorded all evidence and submissions received.

## **The issues**

[5] The issues requiring investigation and determination were:

- (a) Was the applicant unjustifiably dismissed?
- (b) If the respondent's actions were not justified, what remedies should be awarded, considering:
  - Lost wages (subject to evidence of reasonable endeavours to mitigate loss); and
  - Compensation under s123(1)(c)(i) of the Act?
- (c) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by the applicant that contributed to the situation giving rise to her grievance?
- (d) Should either party contribute to the costs of representation of the other party.

## **Background**

[6] The applicant, Ms Robinson, was employed by Pact Group (and its predecessor company) (PACT) as a community support worker for some 15 years. Her job involved supporting clients to live in the community. The job was varied, as each of Ms Robinson's clients had differing support needs. Ms Robinson would meet with her clients at least once a week, either in the office or at other places as the need arose – for example, she explained she would assist her clients with whatever their personal needs were at that time, which might range from accompanying them to, and staying with them for, medical appointments, helping with groceries or other day to day tasks, or

even walking and talking with them to support their personal needs for health, mobility and confidence.

[7] Ms Robinson gave evidence that she is a private person, who does not habitually share details of her personal life with her colleagues, and she values face to face interactions. She said the Covid-19 period had brought challenges and disruptions for her work and her clients. This included a change in office accommodations, where her team moved to a small hot-desking set-up, which provided fewer desks than there were team members, and one bathroom for the team to share.

[8] Ms Robinson was not comfortable with this, particularly in light of the incidence of Covid-19. She recalls that the team was encouraged to work from home as needed, which she did often.

[9] In 2021, Ms Robinson was required to complete certain additional training around the administering of medication. She gave evidence that she had difficulty doing this, as this required her to be in the office at or before 8.00 am. This was problematic for her as she provided daily care for her elderly mother prior to starting work at her normal start time of 9.00 am.

[10] On 21 September 2021, Ms Robinson's manager emailed her asking her to "please book the start of your day from 9-10am for [the office premises]". Ms Robinson emailed back thanking her for the confirmation, and saying that she had been trying to catch up with all her clients "for the first time in 3 weeks<sup>1</sup>, and trying to complete the medication requirements outside my rostered hours. As you can imagine, this has been a huge juggle for myself and my clients. I have also spent time orientating our new staff..."

[11] Ms Robinson then proceeded to complete her medication training with the support of her manager. Despite her comments on 21 September that this had been a "juggle", this was completed by 28 September 2021.

[12] Unbeknownst to Ms Robinson, the general manager Mr Cardy, had been concerned by Ms Robinson's comment that "this has been a huge juggle". He decided to look into Ms Robinson's work. He looked into Ms Robinson's work diary and the

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<sup>1</sup> For context, I note that New Zealand went into Alert Level 4 on 17 August 2021, and did not return to Alert Level 2 until 7 September 2021.

clients assigned to her as shown on the respondent's on-line management system, as well as the electronic time recording system used by all staff, and the GPS records on her work vehicle.

[13] On 28 September 2021, he wrote to Ms Robinson, explaining that he had "undertaken a review of your current workload", and that as a result, he had "some concerns in relation to how you are spending your work hours". Mr Cardy set out his concerns over some 6 pages of closely typed text, complete with illustrative tables. His concerns can be stated simply, that is, he was concerned that Ms Robinson was claiming payment for time that she had not in fact worked.

[14] He based this allegation on data he had taken from Ms Robinson's vehicle GPS, electronic timesheets, and work diary. From this data, he calculated the start and finish times of Ms Robinson's work day. He calculated how long he believed Ms Robinson was at scheduled appointments, how long he believed it would take Ms Robinson to travel to and from her destinations, and made an allowance for the time he believed was reasonable for her to make updating notes on a client file following a meeting. On this basis, he reached the conclusion that Ms Robinson was not performing work for all the hours in a work day, and that her receiving payment for those hours via the electronic time sheet system amounted to her having "falsified records and made fraudulent claims for payment<sup>2</sup>". Dismissal was listed as a possible outcome.

[15] Ms Robinson was taken aback to be confronted with these allegations, especially after having worked in the same role for 15 years. She appreciated that they were very serious, and she asked to meet with Mr Cardy to discuss in person.

[16] Mr Cardy refused, and instead said that he would meet with Ms Robinson via Zoom. He explained that he was based in Dunedin, and he travelled to Wellington once a month to meet with Wellington-based staff. However, this matter was so urgent, he could not put it off until his next monthly visit to Wellington. When I inquired why he did not arrange a special meeting with Ms Robinson, he explained that traveling to Wellington from Dunedin was inconvenient and disruptive to him.

[17] Ms Robinson attended the scheduled Zoom meeting, together with her representative. She felt that the meeting did not allow her to talk to Mr Cardy in a direct

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<sup>2</sup> As stated at page 5 of the letter dated 28 September 2021.

and personal way, and that he was not listening to her. She recalls this being exacerbated by the small screen size, and difficulties with sound quality on the call.

[18] Ms Robinson had several responses to the allegations against her. Again, these can be summarised succinctly. First, Ms Robinson's view is that she was (and always had been) paid to work an 80-hour fortnight, and that she had some ability to be flexible with when she worked, which was necessary as she served clients in the community and her work involved travel as a result. Secondly, she stated that, consistent with her understanding of this, "I was accused of claiming overtime. There is no way I can claim overtime when [my manager] Marisa Berridge edits the timesheets to an 80hr fortnight prior to submitting them to the payroll department<sup>3</sup>."

[19] Thirdly, Ms Robinson was also of the view that Mr Cardy had unfairly made assumptions that when she was not with a client or driving during the working day, she was not working. She pointed out that Mr Cardy had made an assumption that after meeting with a client, a set amount of time was all that was needed to enter updating notes onto the client's file, however, there was often more than this that needed to be done, for example, liaising with other services to meet a client's needs at that point in time. She gave as a particular example a time when she spent more than 2 hours one afternoon finding rental accommodation for a particular client who had an urgent need for housing, and the time she had recently spent to train and support new staff, which tasks were properly part of her work, but which were not necessarily allowed for in Mr Cardy's time allocations.

[20] On 12 October 2021, Mr Cardy wrote again to Ms Robinson. This second letter was 13 pages long. The letter expressed a preliminary view that the respondent "cannot have trust and confidence in your ability to complete your stipulated hours of work and that you have fraudulent claims for payment". The letter refers to "a pattern of you seeking payment for the time you have worked over your contracted hours<sup>4</sup>."

[21] Although the letter recorded Ms Robinson's comment that she wanted to meet in person, and felt "stripped of her mana, culturally disadvantaged, and that this mishandling of [her] mana has resulted in feelings of whakama or shame", there was still no proposal to meet with Ms Robinson in person.

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<sup>3</sup> Paragraph 16 of Ms Robinson's "will say" statement.

<sup>4</sup> Page 9 of the letter to Ms Robinson dated 12 October 2021.

[22] The letter also recorded details of Ms Robinson's personal circumstances, including that she was the carer for her mother who had dementia, that over the past two years during the Covid-19 epidemic she had suffered the loss of four close relatives, two of whom she had provided palliative care for, and that she was suffering from a health condition. However, dismissal without notice was proposed.

[23] Ms Robinson responded by way of letter on 21 October 2021. She indicated that she had found the Zoom meeting unsatisfactory, and it was hard to hear. She reiterated her position that "The seeking "payment for time over my contracted hours" is impossible. Marisa has always edited my timesheet to my standard 80 hours of work per fortnight as per rostered hours." She also raised concerns that Marisa, her manager, had not been part of the disciplinary meeting.

[24] On 22 October 2021, Mr Cardy wrote again to Ms Robinson. He stated "in our view, you have not provided a reasonable explanation for your actions whereby you have spent extended periods of time at home during work hours whilst not completing work related tasks, yet claiming payment." Ms Robinson was dismissed for serious misconduct, with immediate effect.

[25] Ms Robinson gave evidence that she was well-known in the health and disability sector, and in her local community, and that her dismissal, particularly given that it was expressed to be for fraud and theft, was a source of embarrassment and shame. As her dismissal was on a summary basis, she was not able to say good-bye to her clients, and she fell short of her 15 year service anniversary by 2 and a half weeks. Ms Robinson decided to undertake retraining and start her own business. She sought secured part time work in January 2021, that fit with her retraining commitments.

## **Findings**

[26] Ms Robinson's claim of unjustified dismissal requires a consideration of whether her dismissal was an action that the respondent could have taken in all the circumstances at the time. I must consider whether:

- a. PACT sufficiently investigated the allegations against Ms Robinson before dismissing her; and
- b. PACT raised the concerns that it had with Ms Robinson before dismissing her; and

- c. PACT gave Ms Robinson a reasonable opportunity to respond to its concerns before dismissing her; and
- d. PACT genuinely considered her explanations before dismissing; and
- e. any other factors I think appropriate.

[27] When considering if PACT sufficiently investigated the allegations against Ms Robinson before dismissing her, I consider that the answer is “no”. The allegations were concerns held by Mr Cardy, and expressed by him in very clear terms, that Ms Robinson was spending time at home during work hours whilst not completing work related tasks, and that Ms Robinson was claiming payment for time Mr Cardy believed she did not work. However, Mr Cardy arrived at his conclusions based on assumptions he himself made about what Ms Robinson’s work involved, how long certain tasks should take her, and his understanding of the relatively new electronic time recording and payment system and how this interacted with employees’ previously agreed terms and conditions of employment. Mr Cardy never checked his assumptions about Ms Robinson’s work with her manager, and he actively discounted Ms Robinson’s own explanations about time taken and work performed. Mr Cardy essentially reached his own conclusions about what Ms Robinson’s role should cover, and the time these assumed tasks should take, and then concluded that Ms Robinson was not working at all other times, despite her explanations to the contrary.

[28] In relation to the allegation that Ms Robinson was making fraudulent claims for payment, Mr Cardy based this allegation on his own assumption as to how the recently-instituted electronic time sheet system should work, and the assumptions that Ms Robinson was strictly paid by the hour, and that the electronic system was invariably accurate. In contrast, Ms Robinson gave evidence that the electronic system was not necessarily accurate, as it relied upon staff entering their start and finish times on a “real time” basis, and often staff forgot to enter their exact start times, or forgot to log off at the end of the day. When this happened, staff simply asked their manager to correct the times as needed. Mr Cardy gave evidence that he never asked Ms Robinson’s manager if she had a practice of correcting timesheets, and that he never asked Ms Robinson’s manager for her view on whether Ms Robinson worked “an 80-hour-fortnight”. He simply did not investigate matters further where they contradicted his own starting assumptions.

[29] PACT did raise its concerns with Ms Robinson before dismissing her. The documents show that Mr Cardy set out PACT's position exhaustively in some 19 pages of close text, and several tables. Although this may have been challenging for Ms Robinson to respond to, all the relevant information was set out for her in these letters.

[30] The evidence shows that PACT did not give Ms Robinson a reasonable opportunity to respond to its concerns before dismissing her. Mr Cardy's decision not to meet face to face with Ms Robinson before making the decision to dismiss her falls far short of his obligations to deal with her in good faith, and to be active, communicative, and responsive. His conflicting stance, that the matter was so important that he had to push ahead and meet with Ms Robinson by way of Zoom, rather than waiting for his usual monthly visit to Wellington, sits uncomfortably beside his other evidence that he did not think the matter merited the expense and personal inconvenience of a separate trip.

[31] Ms Robinson raised her concerns that the Zoom format did not give her a real opportunity to communicate effectively with Mr Cardy, and reiterated those concerns (including difficulties with the small screen view and sound quality) after the first meeting. Even in the face of these practical concerns and where the ultimate sanction of dismissal was being proposed, Mr Cardy did not take the opportunity to resolve those concerns by the simple act of a face to face meeting, which on his own evidence, could have been scheduled to coincide with his own usual travel to Wellington if he had chosen to do this.

[32] Did Pact genuinely consider Ms Robinson's explanations before dismissing her? The answer to this is "no". In fact, Mr Cardy's evidence was that he did not investigate Ms Robinson's explanations where they conflicted with his own starting assumptions.

[33] In this respect, Ms Robinson provided an explanation that was (if accepted) a complete defence to the allegations that she had falsified her timesheets, and that she had claimed wages for time not worked. She said that she was paid on the basis of an 80-hour fortnight, and that her manager would change or adjust her timesheets as needed to ensure that this occurred.

[34] I have considered Ms Robinson's pay records, as provided by PACT. I have also considered her most recent employment agreement and letter of offer. The letter of offer states that "your standard hours of work will be 80 each fortnight". Ms Robinson's employment agreement states that she will be paid at an hourly rate, and also refers to pay for an 80-hour fortnight. The pay records show that Ms Robinson was always paid at least 80 hours per fortnight, and was never paid less.

[35] The pay records provided show there were three exceptions where Ms Robinson received payment in excess of 80 hours per fortnight. The first was a period of time when she was performing additional work in Ms Cotogni's team, and was receiving payments in excess of 80 hours per week. The pay records show that when she returned to her normal duties, the overtime payments likewise stopped. Apart from this period of time, there were two other instances in the last year of her employment when Ms Robinson was paid overtime, amounting to approximately 5 hours in total. Ms Robinson was able to account for those two instances, and recollect the additional work she had done on those two occasions which resulted in her being paid overtime in excess of 80 hours per week. Otherwise, the pay records show that Ms Robinson received a standard payment of 80 hours per fortnight. This is consistent with her own evidence that this was how she was paid, and that this was her long-standing understanding (going back some 15 years) of her agreement with PACT.

[36] In other words, PACT's own records support Ms Robinson's evidence that she was paid on the basis of an 80-hour fortnight. PACT has provided no evidence to refute Ms Robinson's understanding of her own terms and conditions of employment.

[37] Mr Cardy's evidence was that he did not investigate this matter any further and did not speak with Ms Robinson's manager about it. He relied entirely on the fact that Ms Robinson was paid in accordance with an hourly rate. However, this does not engage at a fundamental level with the explanation Ms Robinson gave, that her actual terms and conditions of employment included an agreed hourly rate, but that this did not encapsulate the entirety of her terms and conditions as to how she was actually paid. Mr Cardy actively discounted Ms Robinson's evidence that she was paid for an 80-hour week, and his own evidence to me at the investigation meeting was that he did not check with her manager, consider past practice, or consider what the detail in the employment agreement and payroll records might mean.

[38] In respect of Ms Robinson's related point, that her manager would adjust her timesheets if/when needed to reflect the agreed 80-hour per fortnight payment, Mr Cardy was unable to say what he had done to investigate this explanation at all. He gave evidence that he had not spoken with Ms Robinson's manager about this. He indicated that his view was that the recently indicated electronic time sheet system was always an accurate record. I note that this was not the evidence provided by other witnesses, who agreed that sometimes, due to human error, the timesheets might need to be corrected before a pay run. This again is evidence that is consistent with Ms Robinson's stance.

[39] If what Ms Robinson said was accurate, that it was her manager rather than herself that altered her time sheets, then there can be no fault on the part of Ms Robinson. The allegation that Ms Robinson somehow falsified her timesheets cannot stand in the face of this explanation, which Mr Cardy admits he did not investigate. It would have been a simple matter for Mr Cardy to ask Ms Robinson's manager about this, and he could not explain why he chose not to do so.

[40] In addition, if those timesheets were altered in accordance with the long-standing agreement between the parties that Ms Robinson was paid on the basis of an 80-hour fortnight, the altering of those time sheets (if it occurred) to reflect that agreement would not be blameworthy, it would simply be the parties keeping to the bargain they had struck.

[41] No evidence was given by Ms Robinson's manager, either to Mr Cardy as part of his investigation, or at the investigation meeting itself. Mr Cardy was unable to explain why Ms Robinson's manager was not present at the investigation meeting to rebut Ms Robinsons' evidence on these points. It is very surprising that Mr Cardy chose not to make what would have been a relatively straightforward inquiry of a manager who was known to him.

[42] Ms Robinson also had a substantive response to the third allegation against her, that she was not working for all the hours she was being paid for. This allegation was raised on the basis of Mr Cardy's own "time analysis", into which he inputted his own assumptions about what work Ms Robinson did, and how long certain tasks should take her to perform. Ms Robinson objected to these assumptions, and pointed out that she performed work which was not taken into account, and/or which would necessarily take

her longer than Mr Cardy's estimates allowed for. In response, Mr Cardy again did not check with others as to whether his own estimates were fair. He simply discounted Ms Robinson's explanations.

[43] I also have a fundamental concern with this aspect of the allegations against Ms Robinson, in that if PACT believed Ms Robinson was underperforming and should be doing more work than she was, this is a performance concern, not a matter of serious misconduct. A concern of this sort would normally be handled by way of first clarifying what work Ms Robinson was expected to achieve in what timeframes, and then giving her time to meet those expectations. This is especially so in circumstances where Ms Robinson had worked in her role without any performance concerns for almost 15 years. None of this occurred.

[44] Mr Cardy had firm assumptions as to how Ms Richardson worked and was paid. He was consistently unwilling to investigate any information about how Ms Richardson actually worked where it contradicted his previously held assumptions as to how she should work. If Mr Cardy and PACT wanted Ms Robinson to work and be paid strictly on the basis of an hourly rate, and to achieve certain time-based performance goals, both of which were different from the terms and conditions that she had previously enjoyed, then this needed to be communicated clearly and fairly to her. I find this was not done.

[45] In this respect, PACT failed to genuinely consider Ms Robinson's explanations before deciding to dismiss. This failure to consider whether the way that Ms Robinson actually worked might be fundamentally different from PACT's current preferred way, meant that Mr Cardy closed his mind to Ms Robinson's explanations, or to potential different ways to approach matters. It meant that PACT was not communicative or responsive, and did not take even simple steps to properly investigate if what Ms Robinson said might be accurate.

[46] Overall, the decision to dismiss Ms Robinson without notice for serious misconduct is not supported by the facts as I have found them to be, and was not what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[47] Accordingly, I find that Ms Robinson's dismissal was unjustifiable.

## Remedies

[48] Ms Robinson has claimed lost wages, as well as compensation for hurt and humiliation resulting from her unjustified dismissal.

[49] Ms Robinson was dismissed with immediate effect on 22 October 2021. She gave evidence that she decided not to seek other work but to retrain with the view to starting her own business. She secured new work on 21 January 2022, on a part-time basis to fit with her study commitments. She has claimed for lost wages “until the matter is resolved”<sup>5</sup>.

[50] Section 123 of the Act provides that where the Authority determines that the employee has a personal grievance and has lost wages or other money as a result of the grievance, the Authority may order reimbursement of the money lost.

[51] Ms Robinson has a personal grievance of unjustified dismissal. However, her evidence was that she did not seek other employment but decided to retrain and start her own business, and when she did seek part-time work some three months later, she sought a job that would allow her to continue her studies.

[52] A dismissed employee has a duty to “use diligence to find another employment”<sup>6</sup>. The court has said that “it is well established that, where an employee who has been dismissed has made no attempt to obtain alternative employment, the loss of wages will not be “as a result of the grievance”<sup>7</sup>. Rather, the loss is caused by the choice to pursue further education<sup>8</sup>.

[53] As Ms Robinson’s own evidence was that she chose to focus on retraining, I find that she has not been able to establish her claim for lost wages. Accordingly, I must decline to award any lost remuneration on this basis.

[54] Ms Robinson has also claimed for compensation for hurt and humiliation, in accordance with section 123(1)(c)(i) of the Act. Ms Robinson gave compelling evidence of the shame and loss of mana she experienced as a result of the loss of her

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<sup>5</sup> At page 4 of the Statement of Problem.

<sup>6</sup> *Waugh v The Commissioner of Police*, EmpC Wellington, WRC 13/04, at paragraph 31.

<sup>7</sup> *Gorrie Fuel (SI) Ltd v Andrew Marlow*, EmpC Christchurch, CRC 9/05, 21 November 2005, at paragraph 68.

<sup>8</sup> *Ibid*, at paragraphs 68 and 69.

job, particularly because of the type of allegations that were made against her (being that of fraudulent behaviour), and the fact that she was not permitted by virtue of the summary nature of her dismissal to say good-bye to her colleagues and clients, who thought she might have been ill or that something worse or shameful had happened to her. She also stated that Mr Cardy “was unable to understand the emotional, physical, whanau and spiritual wellbeing connection, essentially my Tikanga, and how this did and continues to impact on me in a cultural capacity”. I accept this is so, especially given that Mr Cardy did not know Ms Robinson or her work in any meaningful way prior to beginning his investigation of her, and declined to meet with her personally during this process, which Ms Robinson experienced as de-humanising.

[55] Weighing these matters, my view is that a compensatory award of \$20,000 is appropriate in this case.

[56] PACT has submitted that Ms Robinson’s own conduct, in working less hours per day than PACT expected her to work, contributed to her dismissal, and the “maximum reduction would be appropriate”. I have found that PACT was unable to establish that she was not working in accordance with the terms and conditions of her employment as it has alleged. Accordingly, I decline to find that any reduction in remedies is appropriate, as I have not found as a matter of fact that Ms Robinson committed the conduct that PACT alleged she committed.

## **Orders**

[57] PACT Group is ordered to pay to Carey Robinson:

- a. The sum of \$20,000 without deduction as compensation for hurt and humiliation.

## **Costs**

[58] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves, and are reminded of the Authority’s practice of awarding costs in accordance with its daily tariff.

[59] If they are not able to do so and an Authority determination on costs is needed Ms Robinson may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of

service of that memorandum PACT would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[60] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>9</sup>

Claire English  
Member of the Employment Relations Authority

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<sup>9</sup> Please note the Authority's Practice Note on costs, effective from 2 May, available at <https://www.era.govt.nz/assets/Uploads/practice-note-2>