IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2025] NZERA 120
3292799

BETWEEN	LINDO GEORGE Applicant
AND	COMMUNITY LIVING LIMITED Respondent

Member of Authority:	Natasha Szeto
Representatives:	Applicant in person Glenys Steele, representative for the Respondent
Investigation Meeting:	19 September 2024 in Hamilton
Submissions and further information received:	13 October 2024 and up to 21 January 2025 from the Applicant 15 October 2024 and up to 28 January 2025 from the Respondent
Date of Determination:	28 February 2025

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

[1] Lindo George was employed by Community Living Limited (CLL) as a Specialist Support Worker, providing disability support to people in residences. Mr George mainly worked at two of CLL's residences. In anticipation of the closure of one of the residences, the parties began attempts to finalise a permanent roster for Mr George in April 2023.

[2] By November 2023, the parties had still not finalised Mr George's roster. CLL started a disciplinary process with Mr George and he was dismissed on 1 December

2023 for refusing to perform a roster, and for refusing to obey a lawful and reasonable instruction to complete his rostered shift after medication training.

[3] Mr George says he was unjustifiably disadvantaged by the changes that were proposed and then made to his roster. He says he was then unjustifiably dismissed. He seeks compensation for both his personal grievance claims.

[4] CLL says it acted fairly and reasonably towards Mr George in respect of his roster, and Mr George's dismissal was both substantively and procedurally fair.

The Authority's Investigation

[5] Mr George lodged a written witness statement and submissions. Three witnesses from CLL gave evidence: Roshan Thomas (former Service Manager), Philip Rush (former People and Culture Manager), Saffron Mitchell (former General Manager and decision-maker). All witnesses attended the Investigation Meeting, and answered questions under oath or affirmation.

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

Issues

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

(a) Whether Mr George was unjustifiably disadvantaged in relation to changes that were made to his regular roster.

(b) Whether Mr George was unjustifiably summarily dismissed from his employment.

(c) If Mr George is found to have a personal grievance, whether he should be awarded compensation under s 123(1)(c)(i) of the Act and / or reimbursed for any wages or money lost as a result of the grievance under s 123(1)(b) of the Act.

[8] During the investigation, Mr George:

(a) Withdrew his claim to reinstatement as a remedy.

(b) Confirmed he is no longer asking the Authority to order action against managers under the company's bullying and harassment policies.

(c) Acknowledged he is out of time to raise a separate personal grievance claim of bullying and harassment. To the extent Mr George has raised bullying and/or harassment as context for his disadvantage or dismissal claims, CLL says that these actions are out of time and have been dealt with.

(d) Made a claim for legal expenses of $4,727.25 and medical expenses of $160.00 relating to a visit to his doctor in September 2023.

Relevant Background

[9] Mr George was employed by CLL as a Specialist Support Worker in June 2021. His role involved supporting disabled people living in residences. From 18 November 2022, Mr George had a permanent base roster working mostly at two residences - Crosby Road (Crosby) and Galloway Street (Galloway). Different Service Managers were responsible for each residence but Mr George had the same Service Manager, GKZ[1], throughout most of his employment. GKZ was responsible for Galloway. In May 2023, Mr George also reported to Roshan Thomas, the Service Manager for Crosby. Mr Thomas said Mr George was well regarded and they generally had a good working relationship.

[10] Support Workers' terms and conditions are governed by a Collective Employment Agreement (the collective) effective 9 December 2019 to 5 December 2021. In relation to rostering, Part 9 of the collective provides:

(a) 9.2 except in cases of sickness, accident, absenteeism or by agreement of a member, any changes to the ordinary rostered hours shall be advised to members as follows:

(i) In the case of minor temporary changes…two weeks'.

(ii) In the case of significant change to an established roster four weeks' notice shall be given. The employer shall take into consideration the needs of a member(s) concerned and the service before such a change is made provided that where sub

[1] This Service Manager did not give evidence, and I do not consider it in the public interest to name her. I have therefore anonymised her name in this determination. She is referred to by the randomly generated letters "GKZ".

clause 7.4 requires permanent changes to a roster those changes are mutually agreed between the employer and member.

(iii) Any increase or decrease in a member's rostered hours, whether permanent or temporary, may only occur with the agreement of a member.

[11] Clause 7.4 of the collective provides:

> In some circumstances to maintain service delivery requirements, or to enhance service delivery, contracted hours of work shall be worked over a 12-week period but shall not exceed an average of 80 hours per fortnight over the 12-week period.

[12] Rostering at CLL was described as a complex jigsaw puzzle. The main purpose of rostering is to provide a service to clients, or "people we work for" (PWWF). Service changes were often needed to accommodate vocational changes, new PWWF coming into the service and to utilise vacant bedrooms. Within CLL, the Operations Manager works with the Service Managers to create rosters that work for both the PWWF and the Support Workers. From CLL's perspective, the collective allows for Support Workers to be transferred between services or residences through consultation, and where mutual agreement is not reached, by way of notice. Support Workers for CLL do not work for individual PWWF, and most Support Workers did not consistently work at the same residences. It was usual for Support Workers to be redeployed to different residences within CLL to make up the hours guaranteed under their agreements. Mr George said employees would usually get two weeks' notice of redeployment if a PWWF was to be away. However, the collective allows for redeployment with less than 24 hours' notice, following a conversation between CLL and the Support Worker. If redeployment is agreed, the Support Worker is reimbursed for additional kilometres travelled. The collective requires that changes to a temporary roster are to be notified in writing, but they do not have to be signed. Significant changes to permanent rosters require four weeks' notice.

[13] Mr George had a permanent base roster working mostly at Crosby and Galloway since 18 November 2022. His base roster was for 78 hours of daytime shifts per fortnight, and five sleepover shifts although CLL says that sleepover shifts were not guaranteed. Issues started in Mr George's employment when his base roster was disrupted by the impending closure of the Crosby service.

[14] Mr Thomas was tasked with the closure of Crosby around the end of 2022. When Crosby hours were being removed from Support Workers, Mr Thomas was aware it was important to discuss the changes, however it was not possible to accommodate every Support Worker's preferences. Staff needed to be flexible to work in a variety of service locations, with different PWWF. In order to maintain Support Workers' guaranteed hours, Mr Thomas used the hours Support Workers would have been working at Crosby to orient them to different sites in anticipation of the closure. As long as Support Workers worked within their usual rostered hours, CLL did not consider working at a different site to be a redeployment.

[15] In April 2023, Mr Thomas asked Mr George to work at the Mason Road residence (Mason) for an orientation and at Antrim House (Antrim) for re-orientation. By this stage, Mr George had been working to his permanent base roster for around six months. Mr George questioned CLL about whether the orientations and re-orientations were redeployments, but says he did not get a clear answer. Mr George declined to work at Mason because he had not worked there before.

[16] On 2 May 2023, Mr George was asked to redeploy to Antrim, which he declined because of an elbow injury which he thought would be aggravated by the level of physical support the Antrim PWWF needed with their personal care. He says he considered working at Antrim a safety issue. However, after discussion with Mr Thomas, Mr George agreed to work at Antrim, as long as there was no physical support or lifting needed.

[17] Mr George told CLL he felt there were other staff who had not been redeployed because of the loss of Crosby shifts. CLL reminded Mr George that under the collective, he had an obligation to follow reasonable and lawful instructions including redeployment of shifts. Mr George was told that if he refused a reasonable request to redeploy, CLL would classify this as refusing work.

[18] Although Mr George had agreed to redeploy to Antrim, the next day on 3 May, he raised concerns about the level of stress he had been experiencing and requested EAP (Employee Assistance Programme) counselling. On 8 May, Mr George provided CLL a medical certificate relating to his elbow injury which stated he should not carry out heavy lifting (more than 20 kg) until after 8 July 2023.

[19] On 11 May, Mr Thomas advised Mr George he was redeployed to work at Mason. By this time, Mr George was represented by his union and the union representative wrote to CLL about Mr George's stress. The union representative said Mr George could not work at Mason, but was willing to work at Galloway for sleepovers. CLL's response was if Mr George was stressed about his health concerns then he should not work the sleepover shift. As a consequence of this discussion, Mr George took leave without pay from his planned sleepover shift at Galloway.

[20] Less than a week later on 17 May, Mr George raised a complaint about Mr Thomas in relation to bullying and his shifts being redeployed. Around this time, the Operations Manager[2] took over responsibility for arranging rostering with Mr George and sent Mr George the first proposed permanent roster change due to the closure of Crosby. On 18 May CLL told the Support Workers that Crosby would be closing and this was confirmed on 19 May in meeting minutes sent to all staff. Mr George did not attend the staff meeting on 18 May, but he received the minutes.

[21] On 22 May 2023, Mr George was permanently removed from rostered shifts at Crosby, and as a result, also removed from Mr Thomas' line management. CLL presented Mr George with a proposed new permanent roster which included shifts at the Oxford Street service (Oxford). The Operations Manager told Mr George the roster would take effect immediately if Mr George agreed, otherwise it would take effect on 19 June 2023.

[22] Mr George said he would not accept the proposed roster and asked CLL for information and documents about safe rostering practices. CLL provided Mr George with the information he had asked for, and asked why Mr George would not accept the roster. Mr George's response was that he would like to keep his Galloway shifts because he had been doing them for a long time, and he could pick up additional shifts at Galloway which would bring his fortnightly total to 78 hours and would work around his wife's roster and his childcare arrangements. The Operations Manager said he would consider Mr George's feedback.

[23] On 24 May 2023, the Operations Manager pointed out that four out of the six shifts Mr George had said he could pick up were already in his proposed roster and all

[2] The (then) Operations Manager did not give evidence, and I do not consider it in the public interest to name him. I have therefore referred to him in this determination by his job title.

proposed shifts at Galloway had been arranged according to service needs. The Operations Manager reiterated that the roster would be implemented on 19 June 2023 if "agreement cannot be met".

[24] On 25 May 2023 Mr George's union representative wrote to CLL asking if CLL could accommodate Mr George keeping his Galloway hours and dropping his hours at Crosby (which had been removed on 22 May in any event), on the understanding that his overall hours and income would fall significantly. Mr George indicated he was not keen to negotiate dropping or changing his current roster at Galloway.

[25] On 29 May 2023 the Operations Manager sent Mr George another proposed roster. CLL said it would facilitate dropping Mr George's hours at Crosby and Mr George would need to complete an employee details amendment because of the change to his hours. Under the proposed roster Mr George would maintain the majority of his shifts at Galloway, but there would be a change as the service was undergoing minor roster changes with staff to ensure service needs were met. Even with dropping all his Crosby hours, Mr George would still be short 8.5 hours and CLL proposed that he could make these hours up at Oxford.

[26] On 30 May 2023, CLL held a meeting to investigate Mr George's formal complaint against Mr Thomas. Because Mr George was still unhappy with the roster proposed by the Operations Manager, he wrote to GKZ asking her to investigate why his regular shifts were being taken out and hours changed. On 31 May Mr George responded to the latest proposed roster by saying that he could not go to less than 60 hours with current sleepovers. He asked again to keep his Galloway shifts and also to negotiate start times.

[27] On 1 June 2023 the Operations Manager proposed a further roster. The Operations Manager acknowledged that the proposed roster was not exactly what Mr George was seeking, but an alternative that allowed him to support one of the PWWF from Galloway in a day service. CLL said it was not possible for Mr George to keep his Galloway shifts and negotiate some of the start times, or to pick up an available shift on Saturdays because the shifts were no longer available, and if available they were not permanent and could not be given in any permanent roster change. The Operations Manager told Mr George if he did not agree with the proposed roster (to begin from 5 June 2023), Mr George could consider he had four weeks' notice of a roster change under his employment agreement.

[28] Mr George again questioned why his regular shifts at Galloway were no longer available.

[29] On 2 June, having failed to reach agreement, the Operations Manager gave Mr George four weeks' notice of a change to his roster to take effect on 19 June 2023. In setting this date, the Operations Manager relied on correspondence dating back to 22 May 2023. CLL said the latest roster proposal accommodated Mr George's requests, in that it removed his shifts under a specific line manager and reduced his hours to a minimum of 60 hours per fortnight. CLL said there was no agreement to Mr George's request to have all his shifts at Galloway. It proposed an alternative where Mr George would work with the PWWF under a different service, just not at Galloway. CLL required Mr George to sign an employee details amendment form to reduce his contracted hours. Mr George would not agree to this roster because he was still suspicious that his regular shifts at Galloway had been taken away from him and given to another Support Worker.

[30] CLL then put Mr George on a temporary roster on 9 June 2023. A face-to-face meeting was proposed to sort out the roster between Mr George, his union representative and CLL. On 12 June, Mr George's union representative wrote to CLL to put Mr George's position as follows: Mr George would consider 60 hours per fortnight (instead of his usual 78 hours) but would need to be assured of four sleepovers (instead of the five he had been previously working). At the time, CLL were purportedly offering Mr George 60 hours per fortnight plus three sleepovers, and no shifts at Galloway.

[31] On 15 June, CLL sent Mr George a closure letter as a result of the investigation into his complaint about Mr Thomas. Mr George's complaint was independently investigated and ultimately was not upheld. On 21 June Mr George slipped on a wet kitchen floor and was off work on ACC for a number of weeks. A meeting about the roster was postponed until after Mr George's planned return to work in early September.

[32] On 5 September, Mr George raised a personal grievance for disadvantage relating to his roster. In correspondence with CLL, Mr George advised CLL he was unable to accept roster changes and pick up other shifts due to family commitments.

[33] On 12 September 2023 after he had returned to work, Mr George met with Phillip Rush, People and Culture Manager to discuss the roster still not being finalised

but nothing was resolved from that meeting. Mr Rush sent Mr George an email on 14 September saying that if the roster is again declined, CLL would be recommending mediation as the next step. In the interim, Mr George says he received advice from the union that the four weeks' notice CLL had given him of his permanent roster change was invalid and could not be implemented.

[34] On 15 September 2023 Mr George was working at Galloway when GKZ and Mr Rush turned up to the residence, presented Mr George with a temporary roster and asked him to sign it. Mr George refused to do so because the temporary roster contained a shift he was unable to work. Mr George refused to listen to what GKZ and Mr Rush had to say, and the situation escalated to Mr Rush - out of frustration - telling Mr George to shut up. Mr Rush and the service manager ended up leaving Galloway without Mr George signing the roster. Mr George was so upset after the visit that he rang GKZ and left a message telling her that he could not continue working. He went to his doctor with chest pains and he was given a medical certificate for a week off work. Mr George made a formal complaint to CLL on 20 September about Mr Rush. The complaint was investigated and ultimately closed on 18 October 2023. Mr George was unhappy with the outcome.

[35] On 27 September 2023, CLL emailed all staff who did not have permanent rosters including Mr George. Mr George did not turn up to scheduled medication training on 28 September and it was postponed to the next day. On 29 September Mr George was at medication training in the CLL office between 11:30 am and 1:45 pm. GKZ instructed Mr George to go to Galloway to complete his shift in the afternoon after he had finished the training. Instead of going straight to Galloway, Mr George went home to have a lunch break. GKZ called him and asked why he had not followed her instructions. In response Mr George raised health and safety issues and said he had not had his designated breaks during the training.

[36] On the same day, the Operations Manager gave Mr George notice that starting 9 October 2023, he would have 4 weeks of temporary rosters and then commence a new permanent roster on 27 December 2023. This was seemingly revised by CLL and on 12 October, the Operations Manager emailed Mr George a further roster and advised that CLL was giving him notice of a significant change of roster. Starting 9 October 2023, Mr George was given 4 weeks of temporary rosters, with a permanent roster due to take effect on 7 November 2023.

[37] On 20 October 2023, Mr George emailed his union representative, the Operations Manager, his then legal representative and the Chief Executive of CLL stating that going forward he would only be able to work his available days and times. Mr George concluded the email by saying he hopes CLL will consider his situation when making the roster.

[38] CLL decided to escalate the roster situation to a resolution. On 10 November 2023, the Operations Manager invited Mr George to a disciplinary meeting with himself, Mr Rush and Saffron Mitchell, General Manager. CLL put three allegations to Mr George:

> (a) Refusing to perform a roster as per clause 9.2 (ii) of the Employment Agreement.
>
> (b) Refusal to obey a lawful and reasonable instruction, in that you went home when instructed to return to Galloway Street.
>
> (c) Wilfully submitting false information or claims, or deliberately falsifying Community Living or employee records in that you have clocked into work when not at his place of work.

[39] Mr George was advised he would be given an opportunity to provide an explanation to the allegations, and if not acceptable, that the meeting could result in disciplinary action up to and including dismissal.

[40] A disciplinary meeting was held on Friday 17 November 2023. Mr George had a representative attend with him. CLL put the three allegations to Mr George. Mr George's response was that his availability had not been considered when creating the roster, and the collective says there has to be mutual consent between the parties in the allocation of rosters.

[41] On 22 November 2023 CLL gave Mr George notice of its preliminary decision to terminate his employment. It found allegations 1 and 2 to be substantiated, and allegation 3 not substantiated. It said Mr George's actions had irreparably damaged its trust and confidence in him as an employee. CLL gave Mr George opportunities to provide feedback on the preliminary decision, which he did on 23 and 27 November.

[42] On 28 November 2023, CLL confirmed its decision to terminate Mr George's employment and effective 1 December 2023 Mr George was summarily dismissed from his employment.

[43] On 24 February 2024 Mr George raised a second personal grievance against CLL for unjustified dismissal.

Was Mr George unjustifiably disadvantaged by the roster changes?

The law

[44] For his disadvantage claim to succeed, Mr George must establish that one or more conditions of his employment was affected to his disadvantage by an unjustified action by CLL.[3] This means I need to determine whether Mr George suffered a disadvantage in his employment, and – if so – whether this was caused by an action by CLL and whether that action was unjustified.

[45] CLL's actions are assessed in light of the test under s 103A of the Act and in particular, whether its actions and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred. This includes consideration of whether CLL sufficiently investigated matters before taking action, raised its concerns with Mr George, gave Mr George a reasonable opportunity to respond to its concerns, and genuinely considered Mr George's explanations before taking action.

What do the parties say?

[46] Mr George says he was disadvantaged by having his sleepovers at Galloway removed and being offered a roster that was not suitable. Sleepovers suited his family life and he liked working at Galloway. He was close to the PWWF at Galloway and more confident working with them because he knew them well. Mr George initially said he was happy to reduce his hours to remove his Crosby hours and just keep Galloway. He then consistently told CLL he wanted hours he had worked at Crosby (two days per fortnight) to be replaced with shifts that were not under Mr Thomas' management, were physically safe for him given his elbow injury, and were not too remote. Mr George saw the roster changes he was then offered as being retaliation or retribution from the Operations Manager in relation to him raising a formal complaint about Mr Thomas. He says there was no service requirement to remove him from his Galloway shifts, and he says CLL had still not filled some of "his" Galloway shifts as at February 2024. Mr George says CLL used the service review as an excuse to

[3] *ANZ National Bank Ltd v Doidge* [2005] ERNZ 518 (EmpC).

implement changes to his roster and he never received any further explanation or evidence about the alleged service review. Because Mr George felt he was not given any reasons for the roster changes and because the rosters could not be agreed, he says CLL just unfairly tried to impose changes on him. Mr George says CLL has not taken into account any of his reasons for refusing to accept the roster changes. While he accepts roster negotiations went on for a significant time between June and November, Mr George says CLL misled him about the shifts that were available which were then filled by other staff.

[47] CLL says certain matters Mr George has raised are out of time[4] including Mr George's complaint against Mr Thomas, the 22 May roster that was alleged to be a retaliatory action, Mr George's allegations of being forced into an unsafe situation, and the circumstances of the slipping accident on a wet floor (which were not raised on 5 September 2023). It says CLL was more than willing between May 2023 and October 2023 to "try to find a resolution to the roster conundrum, to no avail". CLL says Mr George could not meet the rostering requirements because of his childcare arrangements, his own restrictions on where he would work, his elbow injury and his insistence on a minimum number of sleepovers. CLL says it was contractually obliged to maintain Mr George's 78 hours per fortnight (which did not include sleepovers) and it attempted to do so.

[48] CLL's position is that clause 9.2(ii) of the collective enables the employer to give four weeks' notice of a permanent roster change once the views of the employee have been considered. It says it did consider Mr George's views as evidenced by the continuation of discussions and the provision of multiple proposed rosters.

Analysis – Mr George was unjustifiably disadvantaged

[49] I accept CLL's submission that certain matters which may have been raised as separate disadvantages are out of time and therefore cannot give rise to separate findings or attract remedies. CLL does not claim Mr George's 5 September 2023 grievance relating to roster changes was out of time. CLL's actions relating to rostering between the end of May 2023 and 21 June 2023 were ongoing, and are part of the disadvantage grievance because Mr George's roster was not resolved before he went

[4] Section 114 of the Act.

on ACC leave. I find the grievance raised on 5 September 2023 relating to rostering changes was in time.

[50] Based on the evidence before the Authority, Mr George has established a condition of his employment – his roster – was affected to his disadvantage by the actions of CLL. Mr George was clearly comfortable working to the permanent base roster he had for almost six months and did not want his roster to change because it worked with his family commitments. The changes CLL proposed to Mr George's permanent roster made it less likely he could perform the roster, and made his employment less secure, which was clearly a disadvantage. The issue I need to resolve is whether CLL's actions were unjustified.

[51] I find CLL had genuine reasons for proposing the changes to Mr George's permanent base roster because of the closure of the Crosby service. I also accept Mr Rush's evidence that managers worked very hard to come up with new rosters.

[52] However, CLL did not act as a fair and reasonable employer could, because it did not raise concerns with Mr George and genuinely consider his responses before taking action. In particular, CLL did not give genuine consideration to Mr George's proposal to remove his "Crosby hours", and leave his existing Galloway shifts in place. From the time that new rosters were being proposed, Mr George consistently communicated to CLL that he wanted to retain his Galloway shifts. This remained the case even when it would have resulted in a reduction of his overall hours and a drop in income. CLL did not give Mr George good reason for declining this option, instead stating it would not be possible for Mr George to retain his Galloway shifts because changes had been made to meet service needs, without saying what these service needs were. CLL also told Mr George he could not pick up (what looked to be) an available shift on a Saturday because the shift was either no longer available, or was not permanent and could not be given in any permanent roster change, but without giving him an explanation. It did not explain why the start times of shifts were non-negotiable. The "service needs" and "service review" reasons CLL provided to explain why it could not accommodate Mr George's requests were vague and obfuscatory. CLL was not responsive and communicative with Mr George and this was inconsistent with its duty of good faith.

[53] Ms Mitchell gave evidence that staff have to be orientated to a range of services, and it is not safe or appropriate for Support Workers to just work in certain services

with the same PWWFs. They need to be re-deployable so that PWWFs do not develop a dependency on Support Workers, and Support Workers do not develop a dependency on PWWFs. At the investigation meeting, CLL properly acknowledged there are some benefits to having a steady roster, but maintained that the greater benefit to the organisation is in having its Support Workers be flexible. That would have been a reasonable explanation for refusing Mr George his request to work all his shifts at Galloway, but that is not what CLL communicated to Mr George. Because CLL did not communicate its underlying concerns about his proposal, it deprived Mr George of the opportunity to respond. Those were not the actions of a fair and reasonable employer.

[54] Based on the communications that have been provided to the Authority, I also conclude that throughout this period, CLL was not clear with Mr George that it was invoking the four-week notice period of a change to a permanent roster until its email of 2 June 2023, at which point CLL relied on an earlier communication (22 May 2023) to advise Mr George that the roster would take effect on 19 June 2023. Between 2 June and 12 June, both Mr George and his union representative believed CLL was open to negotiating and reaching agreement on a permanent roster, but based on the evidence before the Authority, this was not entirely accurate. CLL's view was that Mr George did not have to agree to the roster, and because it had invoked the four-week notice period required by the collective, Mr George was required to perform the permanent roster on 19 June. However, CLL was not clear and transparent with Mr George about this and did not advise Mr George of the consequences of failing to perform the permanent roster, which would likely have been the commencement of a disciplinary process.

[55] While I am not persuaded by Mr George's submission that the rosters were imposed out of retaliation or retribution, or that CLL's failures to communicate were intended to mislead Mr George, I conclude that CLL has not acted as a fair and reasonable employer could in relation to the rostering changes. CLL did not properly raise its concerns with Mr George and genuinely consider Mr George's feedback – especially in relation to his proposal to keep his existing Galloway shifts. It did not provide sufficient information about why his existing shifts became unavailable. CLL did not clearly invoke the four-week notice period of a significant change to an established roster, and it did not transparently advise Mr George of the consequences

of his failure to perform the roster. These actions have resulted in Mr George being treated unfairly. It follows Mr George's claim of unjustifiable disadvantage succeeds.

Was Mr George unjustifiably dismissed?

What is the law?

[56] In determining whether a dismissal was unjustifiable, the Authority must apply the test of justification in s 103A of the Act and is required to consider on an objective basis whether CLL's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[57] The Authority must consider the four procedural fairness factors as set out in s 103A(3) of the Act. Fairness, in this context, includes meeting the statutory obligations placed on an employer proposing to make a decision likely to have an adverse effect on the continuation of a person's employment.[5]

[58] I need to assess whether the decision Ms Mitchell made on CLL's behalf to dismiss Mr George, and how Ms Mitchell made that decision were what a fair and reasonable employer could have done in all the circumstances at the time including whether:

(a) CLL fully and fairly investigated the allegations against Mr George before dismissing him;

(b) CLL raised the concerns it had with Mr George (including giving him relevant information) before dismissing him;

(c) CLL gave Mr George a reasonable opportunity to respond to its concerns before dismissing him;

(d) CLL genuinely considered Mr George's explanations before dismissing him (the decision was made without predetermination).

[59] The Authority must not find a dismissal to be unjustifiable solely because of minor defects that did not result in the employee being treated unfairly.[6] While adequate consideration of alternatives to dismissal are not one of the specific statutory factors to

[5] Section 4(1A) of the Act.
[6] Section 103A(5) of the Act.

consider, evidence that an employer has fully considered alternatives to dismissal will support that the substantive decision to terminate was fair and reasonable.

What do the parties say?

[60] Mr George submits his roster was changed in retribution for his complaint about Mr Thomas, and because he could not agree to perform the roster, he was dismissed. In terms of process, Mr George says CLL invited him to a disciplinary meeting without a solid basis for the allegations as evidenced by the fact one allegation was withdrawn. Mr George says CLL's preliminary decision letter was "forged" and shows the influence of the Operations Manager in the decision to dismiss him. Mr George submits he was targeted because roster changes at a "settled" service only happen when service changes happen. Mr George also says it is relevant context that he made notifications of his injury to CLL to avoid other accidents and unsafe work practices.

[61] CLL says Mr George's dismissal was both substantively and procedurally justified. CLL's reasons for dismissing Mr George were based on the two allegations it upheld which both related to Mr George refusing to follow lawful and reasonable instructions: refusing to perform a roster, and refusing to attend his shift at Galloway immediately after medications training. CLL submits it consulted extensively to find an agreeable permanent roster and Mr George refused to perform the roster as evidenced by his email to the Chief Executive on 20 October 2023. CLL says it put allegations to Mr George, carefully considered his responses and made a decision. In addition, CLL says its failure to uphold the third allegation does not mean the allegation was false or raised with malicious intent.

Analysis – Mr George was unjustifiably dismissed

[62] As I have already found, CLL had genuine reasons to initiate rostering changes as a result of the closure of Crosby. However, the communication problems the parties were experiencing prior to Mr George raising his first personal grievance persisted in the lead-up to his dismissal.

[63] In relation to the first allegation, Mr George says he could not agree to work the shifts CLL had offered in its permanent rosters. He says he worked the hours he could on the temporary rosters, and took leave without pay.

[64] CLL's allegation of refusal to perform a roster referred to rosters dating back to May 2023. It was not specific about which roster (or rosters) it alleged Mr George had refused to perform. However CLL both stated in its termination letter and confirmed in evidence to the Authority, that it found the first allegation to be substantiated based on Mr George's email to the Chief Executive on 20 October 2023. The relevant roster at that time was the proposed permanent roster from the Operations Manager sent on 12 October that was due to take effect on 7 November 2023. In his email, Mr George highlighted his issues with the proposed roster, said he would be unable to fulfil the roster and asked CLL to reconsider imposing it. It was not fair and reasonable for CLL to conclude that Mr George had refused to perform the roster based on this email because:

(a) The email was sent on 20 October and the roster was not due to take effect until 7 November 2023.

(b) Mr George did not state he was not going to perform the roster, rather that he was unable to.

(c) Mr George asked for consideration of his situation "when making the roster" which suggests a misunderstanding about whether the proposed roster was mandatory.

(d) CLL did not respond to this email to advise Mr George of the consequences of refusing to perform the roster (that he may be subject to disciplinary action including dismissal).

[65] Based on all of the above, a fair and reasonable employer could not have concluded that Mr George's email was sufficient evidence of refusal to perform a roster.

[66] In relation to the second allegation, it was open to a fair and reasonable employer to find the allegation substantiated in that Mr George had gone home for lunch when he had been instructed to go to Galloway after his medications training. While CLL could have been more transparent in declining to accept Mr George's explanation, Mr George has not persuaded me he had good reason to go home for lunch when he had been directed to go straight to Galloway. If he was entitled to take a paid break after his training as he says, he could have advised GKZ of this. Mr George was provided with a copy of GKZ's statement, and was able to respond to the allegation.

Based on the evidence before the Authority, I conclude CLL has acted as a fair and reasonable employer could in relation to this allegation.

[67] Ms Mitchell gave evidence that both substantiated allegations were important in making the decision to dismiss Mr George but she also confirmed that finding a solution to the rosters was really important and weighed heavily in her decision-making. I conclude that of the two allegations, the first allegation was the more weighty factor in CLL's decision to dismiss and upholding the second allegation alone would not have substantively justified Mr George's dismissal.

[68] However CLL also failed in several key respects, to follow a fair process in investigating the allegations against Mr George, raising its concerns with him, and genuinely considering his explanations. The defects in its process were more than minor or technical defects. They have led to Mr George being treated unfairly for the following reasons.

[69] Firstly, CLL did not follow a clear and transparent process to invoke the four week notice period required for a permanent roster change as set out in the collective. In the relevant period from September to November 2023, CLL attempted to implement multiple temporary and permanent rosters for Mr George. However, CLL was not clear about its process and whether it was following the process of giving notice of a significant change to an established roster under the collective. An example of the lack of clarity is that before Mr George went on ACC leave in September, CLL had ostensibly invoked the four-week notice period with Mr George's permanent roster due to take effect on 19 June 2023. CLL then paused the process and attempted to impose a series of temporary rosters on Mr George throughout September 2023 before giving Mr George "extended notice" of a new permanent roster, which is not a process provided for in the collective. Another example is that on 29 September 2023, CLL gave Mr George notice that his proposed permanent roster would take effect on 27 December 2023, and less than two weeks later on 12 October CLL then emailed Mr George saying his permanent roster was due to take effect on 7 November 2023. Although it seems possible that the first communication contained an error in the effective date (because it gave far in excess of four weeks' notice), CLL did not make this clear to Mr George. A reasonable person in Mr George's position would have found CLL's process of attempting to implement a permanent roster to be confusing and unnecessarily protracted. I find the lack of clarity was unfair to Mr George.

[70] Secondly, it is apparent in hindsight that the parties had fundamentally different interpretations of the collective but CLL did not identify and attempt to resolve this issue early and in an open and transparent way. Based on advice he received from the union, Mr George thought he and CLL were obliged to reach "mutual consent in the allocation of the rosters" – in other words, Mr George thought CLL could not impose a permanent roster on him without his agreement. CLL's view was the collective required mutual consent to change the number of guaranteed hours but did not require mutual agreement to proposed rosters, meaning that CLL could impose a permanent roster on Mr George without his agreement provided his overall number of guaranteed hours remained unchanged. Each of them had a reasonable basis for their interpretation of the collective, given the ambiguous wording. However CLL's actions, including attempting to have Mr George physically sign his temporary roster at Galloway, were inconsistent with its view that rosters did not have to be agreed. This action by CLL would likely have reinforced Mr George's view that permanent rosters had to be agreed before they could be implemented. Based on the evidence provided to the Authority, CLL did not clearly communicate its position on this point to Mr George until it gave him the termination letter on 28 November 2023.

[71] Thirdly, CLL failed to properly raise the concerns it had with Mr George because it did not make it clear to him that failure to reach agreement or perform the roster would bring his employment to an end. This was first explained to Mr George in the letter inviting him to a disciplinary meeting on 10 November 2023. Both parties had become entrenched in their respective positions by this time.

[72] Fourthly, there were factors in the managers' and decision-maker's minds which influenced CLL's decision to dismiss Mr George, but that were not transparently raised with Mr George. These factors included:

(a) Mr George's history of "no-shows".

(b) Mr George's absences from work due to injuries and/or illnesses.

(c) CLL did not accept Mr George's explanation in relation to allegation 2.

[73] GKZ wrote a statement for CLL saying she had been concerned at a "pattern of No Shows and high level of S/L" (sick leave). She included evidence that Mr George had been a "No Show' for Thursday 28 September for Medication Training, Basic First Aid and Epilepsy Training. She stated Mr George left a shift at least an hour early on

4 October without contacting his line manager, a service manager, or centralised rostering and that Mr George "has had a number of other NOSW noted on attached roster". Ms Mitchell gave evidence to the Authority that she sat next to GKZ at work, and had noted Mr George's refusal to go to a shift because he was medically unfit. The essence of evidence from at least two CLL witnesses was that Mr George's medical and stress-related absences from work were disproportionately frequent. In the termination letter, CLL states that Mr George's actions have frustrated CLL to a stage where it questions his ability to follow direction and policies associated with the care and welfare of PWWF. While Mr George may have been aware that some of these issues were of concern to CLL, they were not raised as specific allegations for him to respond to. I find these factors influenced the decision to dismiss Mr George and CLL should have transparently raised them as concerns. CLL's failure to do so has unfairly deprived Mr George of the opportunity to respond.

[74] Lastly, I find that CLL did not genuinely consider alternatives to dismissal. Both Ms Mitchell and Mr Rush said they could not see any other option other than to restart the roster process, and that was not appropriate because months had passed with no resolution already. Based on the evidence before the Authority, CLL had closed its mind to alternatives other than dismissal. Lack of consideration of alternatives is not necessarily sufficient in itself to support a finding that an employer has failed to act as a fair and reasonable employer could. However, in the circumstances of a significant history where the parties had been trying to resolve the rostering issue for many months, a fair and reasonable employer could have considered alternatives including mediation (which had been proposed by Mr Rush shortly after Mr George's return to work after ACC leave) to dismissal.

[75] When considering the situation as a whole, I find Mr George's dismissal was unjustified. There was a significant period of time over which CLL failed to act as a fair and reasonable employer could, for the reasons given above. By the time CLL communicated to Mr George that his employment was at risk, the employment relationship had broken down to the point where CLL had closed its mind to alternatives to dismissal.

Conclusion on personal grievances

[76] Mr George was unjustifiably disadvantaged by CLL's ongoing actions relating to changes to his roster from late May to late June 2023.

[77] Mr George was unjustifiably dismissed. Based on the evidence before the Authority, CLL did not sufficiently investigate the first allegation such that it could be reasonably satisfied the allegation was substantiated. It did not properly raise its concerns with Mr George and genuinely consider his responses. While CLL had a reasonable basis to find the second allegation substantiated, on its own this allegation was not sufficient to justify the decision to dismiss Mr George.

[78] I accept CLL's evidence that it eventually lost trust and confidence in Mr George, lost hope that it would get to an agreed roster and could not be confident of an outcome where Mr George was happy to continue working in the Support Worker role available. Mr Rush's evidence was that CLL risked losing managers, and were trying to force a resolution to get Mr George back to work. CLL was also anxious to ensure it did not have to restart the notification process under the collective again. However, these motivations did not obviate CLL's duty to act as a fair and reasonable employer could in the circumstances. CLL became frustrated with the protracted process of attempting to resolve the roster and took procedural shortcuts. It did not transparently raise concerns about Mr George's conduct and give Mr George an opportunity to respond to them. It did not consider alternatives to dismissal. For all these reasons, I find Mr George has been treated unfairly and was unjustifiably dismissed.

Remedies - personal grievances

[79] I have found Mr George was unjustifiably disadvantaged in relation to CLL's actions around rostering, and he was unjustifiably dismissed from his employment. Mr George is therefore entitled to an assessment of remedies.

[80] Mr George seeks:

(a) Compensation under s 123(1)(c) of the Act for hurt and humiliation, loss of quality time with family, emotional and psychological stress;

(b) Compensation under s 123 (1)(b) of the Act for lost wages;

(c) Expenses incurred for legal advice and medical bills.

[81] Mr George says he was intimidated and humiliated at the time he was pressured to sign the roster at Galloway which played out in front of a colleague and a PWWF. After his dismissal Mr George says he felt humiliated and almost fell into depression. He had severe mental health issues and had to take medication to sleep. He became diabetic due to stress and unhealthy lifestyle. Mr George says his dismissal impacted

his whole family for almost a year. He says his character was changed and he lost himself. He could not enjoy time with his children and felt isolated from his community because he wanted to avoid questions. Mr George says initially he stayed home a lot and it was not until February or March that he really started looking for work online. Most applications were unsuccessful. He went for interviews, but could not find any work for five months because he had to disclose he had been dismissed from his previous job. He managed to find a part-time job in June 2024 at a bakery, and a casual administrative support staff role. He struggled financially. Mr George had to borrow money from family, his wife had to work extra shifts and the family had to cut down on expenses. Mr George says he sometimes went without food in order to pay loans. It was a tough situation and he says he could not afford a lawyer to support him in raising his complaints.

[82] Given the disadvantage grievance related to rostering issues which also arose in the context of Mr George's dismissal grievance, it is appropriate to award a global sum of compensation for both grievances. I have considered the general range of compensation awards in other cases. Standing back to objectively assess the impact as best I can, and subject to any reduction for contribution, I consider an appropriate award of compensation under s 123(1)(c)(i) of the Act is $18,000.00.

Lost wages

[83] Under s 123(1)(b) of the Act, the Authority is able to order that an employee be reimbursed a sum equal to the whole or part of any wages or other money lost by the employee as a result of the grievance. Section 128 says the Authority must order the employer to pay lost remuneration or three months' ordinary time remuneration where the Authority determines an employee has a personal grievance and has lost remuneration as a result of the grievance.

[84] Mr George has provided evidence of roles he applied for in May and June 2024. In July 2024 and August 2024 he earned taxable income from General Distributors Limited. CLL says Mr George has not mitigated his loss because Mr George did not apply for any jobs between 28 November 2023 and 27 May 2024, and only applied for nine jobs in the two-month period from 27 May to 31 July 2024.

[85] Mr George was dismissed in December 2023. I accept his evidence that he first started taking steps to look online for jobs around February or March 2024. There is

no reason to displace the default position of an award of three months' ordinary time remuneration under s 128(1)(b).

[86] In calculating loss, CLL says Mr George was absent from work for a total of 230 days during 2023, none of these at its behest. It says he worked an average of 28.72 regular hours per week in the 12 months prior to his termination (at $28.25 per hour) and an average of 16.5 sleepover hours per week (at $22.70 per hour). His weekly wages averaged $811.34 plus sleepovers of $374.55 for a weekly total of $1,185.89 (gross).

[87] Mr George says the proper assessment of loss should be based on the hours agreed under his agreement of 78 per fortnight (39 hours per week) which would amount to $1,101.75 plus sleepovers. The parties agree that according to pay records and the base roster, the pattern of payments for sleepovers was 47 hours per fortnight (23.5 hours per week) amounting to a further $533.45.[7] On Mr George's calculations, his weekly expected total would therefore have been $1,635.20 (gross).

[88] I accept Mr George's calculations of his contractual base rate pay as being the most appropriate approach to calculate three months' ordinary time remuneration for his base rate. While I accept CLL's evidence that sleepovers were not guaranteed, they were part of Mr George's "ordinary" remuneration, and I find it appropriate to use the average weekly calculation provided by CLL. That results in an amount of $1,101.75 wages plus sleepovers of $374.55 for a weekly total of $1,476.30.

[89] Subject to any reduction for contribution, I consider an appropriate award for lost wages under s 123(1)(b) of the Act is three months' ordinary time remuneration which totals $19,191.90 (gross).

Contribution

[90] In deciding the nature and extent of remedies for any personal grievance, I must consider the extent to which Mr George may have acted in a way that contributed to the situation that gave rise to his grievances.[8]

[91] CLL says Mr George's contribution should be taken into account. CLL submits it used its best efforts to attempt to find a suitable roster but they were unsuccessful. It

[7] Four sleepovers of 9.5 hours, and one sleepover of 9 hours.
[8] Employment Relations Act 2000, section 124.

says the barriers to confirming the roster were all factors in Mr George's control or instigated at his request – namely, childcare arrangements, the request not to work with Mr Thomas, the requests to only work at Galloway, and his injuries/illnesses. CLL says an integral part of employment with the organisation is flexibility and Mr George's contribution to his grievances is 100 percent.

[92] The Employment Court has recently succinctly summarised the key principles relating to contribution as follows:[9]

> (a) First, the Court must be satisfied that the actions of the employee contributed to the situation that gave rise to the personal grievance; if so
>
> (b) Second, an assessment of whether the employee's actions "require" a reduction in the remedies that would otherwise have been awarded.

[93] The Court also stated:[10]

> The primary considerations when determining whether a particular action should result in a reduction for contribution are causation and proportionality.

[94] The Court has endorsed an approach where a reduction of 50 percent sits at the higher end with 25 percent representing a still significant reduction.

[95] Based on all the evidence before the Authority, I consider Mr George contributed to the situation giving rise to both of his grievances. While the frustration experienced by CLL was not sufficient to justify its procedural errors, I accept Mr Rush's uncontested evidence that Mr George would not take calls from his manager, meetings were delayed, teams meetings were conducted without Mr George being present on the screen and Mr George refused to attend an on-site meeting. His conduct was not conducive to resolving the roster, and contributed to the situation giving rise to his grievance.

---

[9] *Keighran v Kensington Tavern Limited* [2024] NZEmpC 28; see also *Maddigan v Director General of Conservation* [2019] NZEmpC 190 at [71] – [76].
[10] *Keighran v Kensington Tavern Limited* [2024] NZEmpC 28 at [17].

[96] Stepping back to consider the matter objectively and in line with other cases, I consider a reduction of 10 percent to be an appropriate reduction in remedies in acknowledgement of this contribution.

Other claims

[97] Mr George made late claims in respect of legal costs he says he incurred relating to representation by NZ Wide Employment Law during CLL's investigation process amounting to $4,727.25. He has provided evidence in support consisting of invoices and bank records for attendance at meetings, raising a personal grievance, following up, emails and phone calls. This claim was raised late but because it relates to legal representation, I consider it appropriate to reserve final determination in relation to this matter for a costs application, should that be necessary.

[98] Mr George also claims medical expenses of $160.00 relating to a doctor's visit in September 2023. CLL says it is not liable to pay Mr George's medical expenses as his health is his own concern and not that of the company's. The claim was raised late and is not properly supported on the evidence. I decline to make any orders.

Orders

[99] Mr George was unjustifiably disadvantaged and unjustifiably dismissed by Community Living Limited.

[100] I order within 28 days of the date of this determination Community Living Limited is to pay Lindo George:

(a) Compensation for humiliation, loss of dignity and injury to feelings under s123(1)(c)(i) of the Act in the amount of $16,200.00 ($18,000.00 minus 10 percent for contribution).

(b) Lost wages of $17,272.71 (gross) under s 123 (1)(b) and s 128 of the Act (being $19,191.90 (gross) minus 10 percent for contribution).

Costs

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

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

[103] 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.[11]

Natasha Szeto
Member of the Employment Relations Authority

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