

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2022] NZERA 190
3108052

BETWEEN ANDREJUS ALFIOROVAS
Applicant

AND ANNEX GROUP LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: Allan Halse, advocate for the Applicant
Matthias Polzleitner, advocate for the Respondent

Investigation Meeting: 10 February 2022 at Hamilton

Submissions Received: 23 February 2022 from the Applicant
28 February 2022 from the Respondent

Further information
received up to: 8 April 2022

Date of Determination: 9 May 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Andrejus Alfiorovas came to New Zealand from where he had been working in Iceland on or about 11 December 2018 to work with Annex Group Limited (Annex Group) as a signwriter. He is originally from Lithuania. There was a delay with the approval of his work visa and in the interim period Mr Alfiorovas undertook work for Annex Group without payment.

[2] Mr Alfiorovas says that after his work visa was approved, he suffered disadvantage by the failure to investigate his concerns about bullying and health and safety. He says that he

was subjected to a protracted disciplinary investigation without language and other support so that he could understand the issues he was facing and was then unjustifiably dismissed from his employment on 5 May 2020.

[3] Mr Alfiorovas seeks payment for the period he worked without pay between 12 December 2018 and about 21 May 2019 for 250 hours in the sum of \$6,875. He also seeks four months' lost wages from the date of his dismissal in the sum of \$19,067, compensation and reimbursement of costs. In the statement of problem a penalty was also sought for a breach of good faith for failing to provide information. It was confirmed by both parties at the investigation meeting that the claim for annual leave payments had been resolved.

[4] Annex Group accepts that Mr Alfiorovas worked before his work visa was approved without payment, however, says that he requested to work and did so by agreement as a volunteer. Annex Group says that the work visa took longer to be approved because Mr Alfiorovas had provided incorrect information to Immigration NZ. It says that its process in respect of a final written warning and dismissal was what a fair and reasonable employer could have done in the circumstances and that there was a substantive basis for the disciplinary actions.

The Authority investigation

[5] The Authority held an investigation meeting in Hamilton on 10 February 2022. It heard evidence as part of its investigation from Mr Alfiorovas, Matthias Polzleitner the sole director and working manager of Annex Group, Kyle Harris production manager and Lynda White office manager who was a receptionist at the material time.

[6] The Authority did not hear from the Annex Group business manager who attended the meetings on behalf of Annex Group that resulted in the final written warning and dismissal. I shall refer to him as HC. Mr Polzleitner advised that HC no longer works for Annex Group.

The issues

[7] The Authority needs to determine issues about the nature of the relationship when Mr Alfiorovas undertook work for Annex Group without payment. The other issues that require resolution will be considered as a continuum of events commencing with a meeting in late January 2020, the raising of concerns by Mr Alfiorovas in late February 2020, a final written

warning dated 3 April 2020 and dismissal on 5 May 2020. Personal grievances were raised in the statement of problem lodged on 10 June 2020.

[8] The issues for determination are as follows:

- (a) Was Mr Alfiorovas an employee or volunteer for Annex Group when he undertook work before his work visa was approved?
- (b) If Mr Alfiorovas undertook work as an employee, is he owed wages for work undertaken over this period and if so in what amount?
- (c) What are the material clauses in Mr Alfiorovas' employment agreement?
- (d) What does the test of justification require?
- (e) Was Mr Alfiorovas given a verbal warning in late January 2020?
- (f) Was reliance placed on an earlier verbal warning in the issuing of a final written warning?
- (g) Was there investigation of Mr Alfiorovas' concerns raised by him with Annex Group in a letter of 2 March 2020?
- (h) What were the reasons for the final written warning issued on 3 April 2020?
- (i) Was the process that resulted in the final written warning fair and reasonable?
- (j) Was the final written warning justifiable?
- (k) What were the reasons for dismissal?
- (l) Was there a full and fair investigation into the reason for dismissal at the conclusion of which a fair and reasonable employer could conclude there was serious misconduct?
- (m) Was Mr Alfiorovas justifiably dismissed?
- (n) If there were actions that were unjustified and disadvantaged Mr Alfiorovas and/or his dismissal was unjustified then what remedies is he entitled to and are there issues of mitigation and contribution.
- (o) Was there a failure to provide information and corresponding breach of good faith?

- (p) Should there be a penalty awarded for a breach of good faith?

Was Mr Alfiorovas carrying out work as a volunteer or an employee before his work visa was approved?

Offer of work with Annex Group whilst working in Iceland

[9] Mr Alfiorovas was working in Iceland when he became aware that his signwriting occupation was in demand in New Zealand. He went through jobs listed on Trade Me and applied for a senior signwriter role with Annex Group. He was offered the role. Annex Group agreed to be Mr Alfiorovas' sponsor.

Arrival in New Zealand

[10] Text messages between Mr Polzleitner and Mr Alfiorovas in October 2018 support Annex Group were keen to have Mr Alfiorovas in New Zealand as they were busy. One sent on 17 October 2018 from Mr Polzleitner to Mr Alfiorovas provided as follow:

Hi Andrew,

I know you have been working hard on getting the visa through, we are starting to get snowed under being one man down. Is it possible for you to come to nz as soon as you can (holiday visa) and we can dot the i and cross the t's once you get here.

Work visa initially declined

[11] Mr Alfiorovas applied for a work visa on 28 November 2018 from Iceland. He travelled to New Zealand before he was advised whether his work visa had been approved, on a visitor's visa, arriving on 11 December 2018.

[12] A letter from New Zealand Immigration (NZ Immigration) dated 4 February 2019 states his application for a work visa was declined because NZ Immigration was not satisfied that Mr Alfiorovas was suitably qualified or experienced for the role, or that Annex Group had made genuine attempts to recruit New Zealanders.

[13] Annex Group was of the view that Mr Alfiorovas had supplied false information to NZ Immigration resulting in the failed application. Mr Alfiorovas did not accept that.

Second application for a work visa

[14] Annex Group assisted Mr Alfiorovas with reconsideration of a work visa on 7 March 2019 and the associated costs. Annex Group provided a letter of support setting out steps they had taken to obtain a skilled senior sign writer. The letter stated that four advertisements on Trade Me from February to November 2018 had resulted in no New Zealand applications for the senior sign writer position. On 14 February 2019 they then advertised the role again and two applicants responded including Mr Alfiorovas who was the only applicant with five years' experience.

Employment agreement

[15] Mr Alfiorovas signed an employment agreement with Annex Group on 6 March 2019. The employment agreement provided that he was being employed as a signage installer and applicator. The employment agreement provided that the nature and term of the agreement was of "ongoing and indefinite duration." The employment was set out to commence "TBC."

[16] There was a trial period in the employment agreement. Mr Alfiorovas was to be paid \$27.50 per hour for his work.

Mr Alfiorovas undertook work for Annex Group before work visa approved

[17] After the investigation meeting Mr Halse supplied to the Authority and Annex Group a copy of the approved work visa. The work visa was approved from 10 June 2019. The Authority asked Mr Polzleitner to confirm the date that Mr Alfiorovas was first paid from. In a letter dated 5 April 2022 he advised that Mr Alfiorovas was entered into the pay system and received his first pay on 21 May 2019. It was on that day confirmation of the work visa was received together with an IRD number and bank account details. There is no dispute that Mr Alfiorovas undertook work without payment for Annex Group prior to being paid on 21 May 2019. There is a dispute as to whether he did so as a volunteer or an employee.

[18] Annex Group says that it was Mr Alfiorovas' choice to work as a volunteer whilst he was waiting for the second visa application to be approved, otherwise he would be sitting at home doing nothing. Mr Polzleitner said that there was agreement to operate on that basis and that Annex Group supported Mr Alfiorovas in many ways. It helped him with his relocation costs by paying for his flights, gave him use of a company vehicle until he was able to afford

to purchase his own vehicle, assisted with finding him accommodation and provided him with tools, cell phone and laptop. Further that a “little extra” was added into fortnightly pays after 21 May 2019, as a bonus to show appreciation for the volunteer work.

[19] Mr Alfiorovas said that while he was waiting for a work visa he was asked to start work without payment as there was a backlog of jobs. In his written evidence, he stated he felt there was some threat Annex Group may give his position to someone else and he therefore agreed to work without pay between approximately 12 December 2018 and May 2019. Mr Alfiorovas referred to living off his own savings from Iceland until he was paid.

[20] Mr Alfiorovas did not dispute that he was given small bonuses after his work visa was approved but they were not of an amount to compensate him for the work he undertook. He agrees that there was some, but not all the help of the type described by Annex Group provided to him.

Legal framework

[21] Section 6 of the Employment Relations Act 2000 (the Act) provides for the meaning of employee as below:

6. Meaning of employee

- (1) In this Act, unless the context otherwise requires, **employee**—
 - (a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and
 - (b) includes-
 - (i) a homemaker; or
 - (ii) a person intending to work; but
 - (c) excludes a volunteer who –
 - (i) does not expect to be rewarded for work to be performed as a volunteer; and
 - (ii) receives no reward for work performed as a volunteer.
- (2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them.
- (3) For the purposes of subsection (2), the court or the Authority—

- (a) must consider all relevant matters, including any matters that indicate the intention of the persons; and
 - (b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.
- ...

[22] An assessment as to whether a person does or does not expect to be rewarded for work to be performed as a volunteer must be carried out objectively. The same principles apply in determining whether there is an employment agreement, contract or whether an individual is a volunteer because the enquiry may be related to the alternative possibility that the individual is an employee.¹

Conclusion

[23] Mr Alfiorovas came to New Zealand to work for Annex Group as an employee. Annex Group paid for his flights to New Zealand and sponsored him in his application. The parties entered into a written employment agreement on 6 March 2019, with the commencement date to be confirmed. It is likely that an employment agreement and a letter of offer was supplied earlier to NZ Immigration with the first application for a work visa, however the only employment agreement disclosed to the Authority and to Mr Halse when he asked for one during the disciplinary meeting was dated 6 March 2019.

[24] Mr Alfiorovas carried out tasks before 21 May 2019 that were of benefit to Annex Group in its commercial business and consistent with the type of work that he understood he was employed to undertake and paid for, from 21 May 2019. His understanding that he was an employee before that time is reflected in an accident report he signed on 22 March 2019. He was described in that form as an injured employee and described his employment status as permanent. The form was signed off by the health and safety officer.

[25] Mr Alfiorovas was not familiar with New Zealand or its employment laws. There was an inherent power imbalance in the relationship. A conclusion cannot be reached safely on an objective assessment about the parties reaching an agreement that Mr Alfiorovas' work as a volunteer without reward and not an employee before his work visa was approved, in those circumstances. In so concluding I have weighed all matters including the length of time that Mr Alfiorovas worked without payment.

¹ *Kirby v New Zealand China Friendship Society* [2015] NZEmpC 189 at [14].

[26] The lawfulness of work carried out before a work visa was approved was considered in the Employment Court judgment of *Talbot Agriculture v Wate*. It was stated in that judgment that the issue is not the lawfulness of the work, but whether the employee worked as an employee during that time.²

[27] I am not satisfied that Mr Alfiorovas worked as a volunteer for Annex Group for the period of about five months between 12 December 2018 and when he received his first pay on 21 May 2019. I find that Mr Alfiorovas undertook work for Annex Group for that period as an employee.

What is Mr Alfiorovas owed for work undertaken for which he was not paid?

[28] There is an estimate in the statement of problem that Mr Alfiorovas worked 450 hours without pay for Annex Group. In submissions lodged after the Authority investigation the claim was for an estimated 250 hours.

[29] There was no information provided by Annex Group about the hours worked and a focus instead on the voluntary nature of the work undertaken.

[30] I am satisfied from the evidence that Mr Alfiorovas worked at least 250 hours without pay for Annex Group and that it is appropriate that he be reimbursed for his work. Mr Alfiorovas' evidence was that he essentially worked full time.

[31] The hourly rate in the employment agreement signed on 6 March 2019 is \$27.50 per hour. There is no reason to conclude that differed from any offer and/or employment agreement provided to NZ Immigration at an earlier stage, when the application for a work visa was initially lodged in November 2018.

[32] Annex Group is to pay Mr Alfiorovas the sum of \$6,875 gross (\$27.50 multiplied by 250 hours) being reimbursement for the unpaid hours he worked between late December 2018 and May 2019.

Material provisions of the employment agreement signed on 6 March 2019

[33] Clause 4 of the employment agreement sets out obligations of the employer and employee. Annex Group agreed to act as a good employer and deal with Mr Alfiorovas in

² *Talbot Agriculture Limited v Wate* 16 NZELR 713 at [36].

good faith. This included taking all practicable steps to provide him with a safe and healthy workplace.

[34] Mr Alfiorovas agreed to comply with reasonable and lawful instructions, perform duties with reasonable skill and diligence in the best interest of Annex Group and comply with all policies and procedures. He was also required to take all practicable steps to perform the job in a way that was healthy and safe for himself and fellow employees.

[35] Clause 6 of the employment agreement concerns hours of work. Mr Alfiorovas' hours of work were set out as 40 hours per week on Monday to Friday between the hours of 8.30am – 5pm. He was entitled to a 30-minute lunch break and 10 minute tea breaks at 10am and at 3pm.

[36] Clause 10 provides for general health and safety obligations.

[37] Clause 13 is concerned with termination of employment. Clause 13.3 provided for termination for serious misconduct and that the employer may terminate the agreement summarily and without notice for serious misconduct. Examples of serious misconduct are set out as:

- (i) theft;
- (ii) dishonesty;
- (iii) harassment of a work colleague or customer;
- (iv) serious or repeated failure to follow a reasonable instruction;
- (v) deliberate destruction of any property belonging to the Employer;
- (vi) actions which seriously damage the Employer's reputation.

Test of justification

[38] The test of justification is in s 103A of the Employment Relations Act 2000 (the Act). The test provides the question of whether a dismissal or action is justified must be determined by the Authority on an objective basis. This is done by considering whether the employer's actions and how the employer acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[39] In applying the test the Authority must consider the four procedural fairness factors set out in s 103A(3) of the Act. These are whether the allegations against Mr Alfiorovas were sufficiently investigated, whether concerns were raised with him, whether he had a reasonable opportunity to respond to them, and whether his explanations were considered genuinely by Annex Group before his dismissal.

[40] The Authority may consider other factors as appropriate and must not determine a dismissal to be unjustified solely because of defects in the process if they were minor and did not result in Mr Alfiorovas being treated unfairly. Annex Group could also be expected as a fair and reasonable employer to comply with the good faith obligations which are set out in section 4 of the Act.

Was Mr Alfiorovas given a verbal warning?

Letter dated 21 January 2020

[41] Mr Alfiorovas was provided with a letter dated 21 January 2020 from Mr Harris inviting him to a meeting on 23 January to discuss an employment issue. The concerns to be discussed were expressed as behavioural issues. The issues were broad as set out below:

- (a) Not following instructions: failure to perform tasks when and where instructed to do so.
- (b) Behaving unprofessionally: Constantly off task resulting in poor performance, distracting other staff members and work not being completed on time.

[42] The statement in reply referred to Mr Alfiorovas receiving a verbal warning on 27 January 2020. Mr Alfiorovas denied he was given a verbal warning. Mr Harris attended the meeting on 23 January 2020 on behalf of Annex Group. In his oral evidence at the Authority investigation meeting he said a verbal warning was not issued to Mr Alfiorovas. His evidence was that “the incident was dropped, and nothing came of this.” That evidence was consistent with that of Mr Alfiorovas.

[43] I am unable to conclude from the evidence that Mr Alfiorovas was issued with a verbal warning.

Was reliance placed on a verbal warning having been given?

[44] Mr Halse represented Mr Alfiorovas from early April 2020 when there were disciplinary meetings held about the allegations that resulted in his dismissal. The meetings

were held by Zoom because of the lockdown. Transcripts from the Zoom meetings was provided. The evidence supported that until the Authority investigation, meeting Mr Alfiorovas and Mr Halse were advised that a verbal warning had been given to Mr Alfiorovas.

[45] HC was present at the disciplinary meetings together with a solicitor who I shall call Ms T. Mr Alfiorovas attended the disciplinary meetings from early April with Mr Halse.

[46] The first disciplinary meeting about the allegations that led to dismissal was held on 9 April 2020. At the bottom of page 12 of the transcript from that meeting HC refers to the potential of dismissal if the allegations are substantiated. He refers to the issue of a “couple of warnings”. One being the final written warning which he describes as “based on a previous warning that you received in February for a different series of events as well.” Mr Alfiorovas responds from the transcript at page 13 that he knew about one of the warnings. HC responds on the same page of the transcript that one might have been around 20 and 21 January. He referred again to that being the reason why Mr Alfiorovas was issued with a final written warning.

[47] Mr Halse asked for details relating to the warnings. Ms T sent an email to Mr Halse dated 1 May 2020 in which she wrote that she had taken instruction from HC about the first warning and that a first warning (verbal) was given to Mr Alfiorovas on 27 January 2020. She wrote that the first warning was not relevant to the disciplinary investigation that Mr Alfiorovas is going through and had not been considered when arriving at the preliminary decision to dismiss. Apart from the letter inviting Mr Alfiorovas to a meeting dated 21 January 2020 no further information, such as meeting notes and what it may relate to, was provided.

[48] I conclude it more likely than not that Annex Group maintained that it had relied on a verbal warning in arriving at the decision to issue a final written warning. The Authority was unable to conclude whether Annex Group maintaining that there was a verbal warning given to Mr Alfiorovas in January 2020 was the result of a genuine misunderstanding about the January 2020 meeting. The Authority would, in any event, have required evidence of a clear and unequivocal verbal warning and that was not available.

Mr Alfiorovas raises concerns in a letter of 2 March 2020

[49] On 2 March 2020, Mr Alfiorovas wrote a letter to the company that contained three concerns.

[50] The first related to a situation on Friday 28 February 2020 when Mr Alfiorovas was working. He wrote that it was 30 degrees Celsius, and he had overheated and had symptoms of a “dizzy head”, losing balance, being “dark in the eyes” and he took his Hi-Vis off to cool down. He stated that he was ill working through the heat for the rest of the day and at home all evening he was suffering and shaking and struggled to sleep.

[51] Annex Group provided for the Authority investigation meeting a weather chart for that day that recorded it was 25 degrees and not 30 degrees Celsius that day. Mr Alfiorovas said that that was still a hot day for him.

[52] Mr Harris had telephoned another employee to find out why Mr Alfiorovas was not wearing his high visibility clothing (Hi-Vis). The employee, Tom, explained what was happening with Mr Alfiorovas. Mr Alfiorovas wrote that Mr Harris told the other employee that he [Mr Alfiorovas] should find a job in an accountant’s office if he could not handle the heat.

[53] The second concern was broader. It was about health and safety concerns including being able to stop work and recover and suggested that there was a lack of care about health and safety.

[54] The third concern was that because of his work visa Mr Alfiorovas felt that he had been pushed to work harder than anyone else and:

I’d like to be equal with everyone and don’t want to receive any bad attitude from Kyle Harris. His always blaming me for my attitude which it caused by his mood, then i get frustrated and cant concentrate at work and do more mistakes ...

Please review my concerns.

....

[55] Mr Alfiorovas said that he gave his letter to Ms White at Annex Group and asked her to photocopy it and provide a copy to HC. Ms White duly attended to that.

[56] Mr Alfiorovas said on the same day the letter was provided he was approached by Mr Harris and HC who asked him to leave his employment. Mr Alfiorovas said that he asked for a few months to reapply for a new work visa. Mr Harris did not accept that there was a discussion that Mr Alfiorovas leave or that the conversation about the accountant was presented in its proper context.

[57] When the Authority objectively assesses an employment relationship problem there is often a point at which if the parties had communicated properly the relationship could have been improved and strengthened. This was such a point.

[58] Annex Group felt strongly about wearing Hi-Vis because the client for whom work was being undertaken normally permitted them to work only after hours. On this day they had been allowed to work during the day provided all safety precautions were taken. When they heard a concern from the client about the Hi-Vis not being worn it was concerning.

[59] Mr Harris did not talk directly to Mr Alfiorovas that day, despite being on site that day to see what was happening, and talking to another co-worker about Mr Alfiorovas' failure to wear a Hi-Vis. I asked Mr Harris if he had ever talked to Mr Alfiorovas about his concerns raised in the letter. He said that he was sure there would have been some discussion. This was an aspect that Mr Halse referred to many times during the disciplinary process at which HC was present. HC did not state those concerns had been addressed or discussed earlier. I cannot be satisfied that they were. Just before dismissal, HC undertook some investigation into the concerns but it was too late to have any impact because Mr Alfiorovas was then dismissed.

[60] I could not be satisfied from the evidence that there was investigation of Mr Alfiorovas' concerns as expressed in the letter, before the final written warning was issued.

Reasons for a final written warning

[61] Mr Alfiorovas was advised in a letter dated 20 March 2020 that he was required to attend a disciplinary meeting on 23 March to discuss two allegations. The allegations were ultimately upheld and formed the basis of the final written warning although the second allegation was modified to reflect that Mr Alfiorovas left the site at 2.21pm not 2pm.

[62] The final written warning was for:

- (a) Failure to wear the required PPE as part of a client install on 28 February 2020;
- (b) Failure to follow work instructions and leaving at 2.21 instead of 3pm.

Was there a fair process before the final written warning was issued?

Ability to be represented

[63] There were two meetings about the issues of concern that gave rise to the final written warning on 23 and 27 March 2020. Mr Harris was on parental leave from 23 March and another senior employee attended the meetings with HC. Mr Alfiorovas attended the disciplinary meetings alone although was encouraged to bring a representative to the meeting. He was advised that the allegations were of a serious nature and disciplinary action up to and including summary dismissal may be taken.

[64] There was evidence that at the earlier meeting in January 2020 Mr Alfiorovas had been advised that he was not allowed to take another employee, Tom, with him as a support person. Mr Harris said he had checked with HC whether Mr Alfiorovas could bring Tom to that meeting and was told he couldn't because of issues of confidentiality and privacy.

[65] I conclude it likely from the evidence that Mr Alfiorovas felt constrained because of what was said about Tom attending the earlier meeting about who he could bring for support. Tom was the employee who had advised Mr Harris on 28 February 2020 that Mr Alfiorovas was suffering from the heat. His support could have assisted. The reference to Mr Alfiorovas confirming that he was happy to proceed without a support person in a letter dated 25 March 2020 following the first meeting, likely overstates the position.

Letter of 25 March 2020

[66] No minutes were provided from the first meeting. The letter dated 25 March 2020 to Mr Alfiorovas inviting him to a further disciplinary meeting sets out his responses.

[67] In respect of the first allegation the letter of 25 March 2020 states that Mr Alfiorovas admitted failing to wear the correct site PPE on 28 February 2020.

[68] In respect of the second allegation an adjournment was requested as more time to collect information was required. A second disciplinary meeting was scheduled to take place on 27 March 2020.

27 March 2020 meeting referred to in letter of same date together with new allegations

[69] No minutes of this meeting were provided however there was a letter provided to Mr Alfiorovas of the same date. It addressed the following issues:

- (a) A summary of responses to the allegations.
- (b) The outcome of further investigations.
- (c) Our preliminary view on the allegations; and
- (d) New allegations.

[70] The summary of the response to the allegation of the failure to wear a Hi Vis vest on site on 28 February was that Mr Alfiorovas agreed with the allegation.

[71] The response to the failure to follow a work instruction was set out. It was that Mr Alfiorovas believed that the tasks were completed, and he was entitled to finish earlier and that he left the site at 2.21pm. Further investigation with the reporting manager when Mr Alfiorovas was working in New Plymouth resulted in the view that Mr Alfiorovas had failed to work onsite until the task were completed and left earlier than instructed.

[72] The preliminary view was that the allegations were substantiated and breached health and safety policy and Mr Alfiorovas' obligations.

New allegations are raised as part of the process in the letter

[73] Further allegations were set out in the letter dated 27 March 2020 under a heading "new allegations." There was reference to poor work performance over the same two-day period as the leaving early allegation. There was reference to failure to attend work at the assigned start and finishing times and having extended breaks without permission from the reporting manager or delegated supervisor. Mr Alfiorovas was invited to another Zoom meeting on 31 March 2020 to discuss these new allegations.

Final written warning in letter dated 3 April 2020 contains new allegations

[74] The final written warning was given in a letter dated 3 April 2020 for the two reasons set out above. There was no mention of reliance on an earlier verbal warning in the letter.

New allegations

[75] The letter of 3 April containing the final written warning also referred to four new allegations including those discussed at the 31 March 2020 meeting. The four new allegations were:

- (a) **Damage and/or loss to clients, suppliers, Annex Group's or employees' property, plant, equipment, or assets.** On or about the 10th February whilst returning a hire trailer from "The Base" to Hirepool Te Rapa, you left the trailer brakes in the "park" position while in transit. This action required the brake callipers, seals, and pistons to be replaced and/or repaired. Annex received an invoice for costs of replacement and repair for \$339.25 inc GST. In addition to the damage to the hire trailer you did not complete an incident report or inform your reporting manager, Kyle Harris of the incident. A copy of the invoice for repair costs is attached.
- (b) **Failure to follow work instructions, completion of tasks in line with Annex Groups' quality standards, or complete tasks within the time frames issued.** On 12th and 13th of March you were required to travel to New Plymouth to perform installation work. While in New Plymouth you were assigned work to complete. It is alleged that at times, you failed to complete the assigned tasks to the quality standard expected, within the timeframes required or that you completed these tasks in an unreasonable timeframe. Details of such examples are detailed in the table attached.
- (c) **Failure to wear required PPE while operating plant or equipment.** On the 20th March when completing an assigned job, you failed to wear the appropriate PPE while using the "vertical panel saw" machine. You were approached by Lynda White why you were not wearing the correct PPE while operating the machine. You provided an excuse; "it was not available" as to why you were not wearing the correct PPE while operating the equipment, even though it was available. A copy of the "near miss" is attached to this letter.
- (d) **Falsifying timesheets.** On the 25th March after returning from an assigned job, you left for lunch at approx. 12pm and did not return to the depot to start your next assigned job until approx. 1.30pm. Your timesheet was completed and signed off with a half hour lunch break. Details of the timesheet submitted for the 27th March are attached.

[76] There was advice that the allegations were serious and could amount to a breach of the employee rules and other company policies. These were set out as obligations of the employee, quality assurance and control objectives, health and safety policy and hours of work.

[77] A date was given for a meeting by Zoom to discuss the new allegations of 6 April 2020. It was stated that the new allegations were in addition to the previous substantiated allegations and were of a serious nature and disciplinary action up and including dismissal could take place. Two of the allegations (b) and (d) set out above had been referred to in broad terms in the letter sent to Mr Alfiorovas before the final written warning was issued.

Was the final written warning justified?

[78] The reason Mr Alfiorovas advanced for not wearing a Hi-Vis was set out in his letter of 2 March 2020. It was a matter that required some investigation and weighing. The absence of any reference to it during the disciplinary process that resulted in the final written warning means the Authority cannot be satisfied it was investigated and weighed. This could mean there was not a reasonable opportunity for Mr Alfiorovas to respond to that allegation and/or

that his response was genuinely considered before the warning was issued. It could also indicate a closed mind to a reason for not wearing the Hi Vis at times when working on that day. I cannot be satisfied that the procedural fairness factors in section s103A(3)(c) and/or (d) of the Act are satisfied as a result about that allegation.

[79] The Authority cannot be satisfied that the second allegation of failing to follow work instructions would by itself have resulted in a final written warning within the reasonable range of responses. Mr Alfiorovas explained that he believed that he could leave early when he had completed the task. His supervisor had a different view. It appeared on its face a performance issue. I could not rule out some unfairness in separating this matter from new allegations about performance over the same two-day period which were dealt with as part of the second disciplinary process but not substantiated. Had they both been dealt with together then a fuller picture would have been available and would have been fairer.

[80] The absence of a support person is likely to have impacted on Mr Alfiorovas' ability to make sure his explanations were properly considered and weighed. The possibility that the earlier refusal for him to bring a support person of his choice influenced his decision to attend without support cannot be ruled out. As a migrant or foreign worker Mr Alfiorovas was more vulnerable. He would have put more reliance on what he was told about being able to bring a support person.

[81] There is also an issue about reliance being placed on a verbal warning in imposing a disciplinary outcome of a final written warning, when a verbal warning had not in fact been given to Mr Alfiorovas.

[82] Viewed objectively the procedural unfairness overlaps with and weakens any substantive basis for the final written warning as does the absence of any earlier warning. It is not unfairness of a minor nature.

[83] The letter containing the final written warning does not refer to any improvements required on the part of Mr Alfiorovas or consequences to employment if there is a repeat of the conduct found to be misconduct. Even if these matters could be implied the purpose of a warning is for an employee to clearly understand concerns and make improvements to conduct going forward.

[84] Annex Group has not been able to satisfy the requirements of the test of justification in 103A of the Act that its action in issuing a final written warning is what a fair and reasonable employer could have done in all the circumstances.

[85] The final written warning is unjustified.

Reasons for the dismissal

Letter of dismissal dated 5 May 2020

[86] Mr Alfiorovas was advised that he had been summarily dismissed in a letter dated 5 May 2020 following a process involving Zoom meetings. The letter was signed by Mr Polzleitner.

[87] Three of the four allegations set out in the final warning letter were found made out and formed the reasons for dismissal. The allegation about work performance was not sustained based on the responses and feedback.

Was the final written warning considered in the disciplinary outcome

[88] It was set out in the letter that the final written warning was considered in forming a preliminary view that the appropriate disciplinary action was summary dismissal. The preliminary view did not change. I conclude that the final written warning was considered in the decision making to dismiss.

Preliminary view to dismiss

[89] There was reference in the letter to the absence of comment to the preliminary view in person or in writing, despite offers of the same by Annex Group. The letter stated that Mr Halse alleged he had not been provided with the relevant information although was unable to advise specifically what he had not been provided with. Further, that there had been an accusation from him that Annex Group had acted in bad faith and litigation was threatened together with intended public denouncement on Facebook.

[90] The letter of dismissal set out that in deciding what disciplinary action to take, representations from Mr Halse had been considered in respect of two matters. One was the verbal warning. The letter stated that the January 2020 verbal warning was not considered in coming to the preliminary decision and has not influenced the final decision. In respect of

concerns raised about a refusal to investigate the bullying complaint it was stated that further information had been received only recently and it was a separate investigation from the disciplinary matter and that Annex Group was in the process of obtaining statements from key people before making a decision about the scope and nature of any investigation.

Statements in the letter about appropriate disciplinary outcome

[91] In addition to that information the letter provided there was also consideration whether summary dismissal was appropriate. It was concluded it was on the basis set out:

This is because your conduct (including repeated conduct) has irreparably affected our trust and confidence in your ability to perform your work safely and efficiently.

[92] Employment was terminated effective from 5 May 2020.

[93] The Authority needs to objectively consider the reasons for dismissal and whether, as Annex Group concluded, they were such to “irreparably affect trust and confidence in his ability to perform his work safely and efficiently.” The existence of a warning can also impact on how subsequent conduct is viewed as to its seriousness, although in this case there was no verbal warning and I have found the final written warning to be unjustified.

Was there a full and fair investigation at the end of which it could be concluded there was conduct that could be regarded as serious misconduct?

A new disciplinary process for conduct known of before the final written warning was issued

[94] Initially it appeared as if the new allegations would be dealt with as part of the process that resulted in the final written warning. Some of the new allegations were raised as part of that process and Mr Alfiorovas was required to respond to these. When the final written warning was provided it was clear that a new process for the allegations raised in the final written warning document itself would take place.

[95] A fair and reasonable employer could and should have dealt with them as part of the same process, particularly given the subsequent reliance placed on the final written warning.

[96] Unfairness resulted from the decision to proceed in that way. The new allegations were about conduct that predated the final written warning which was then relied on in reaching the decision to dismiss.

[97] The Authority has concluded for reasons set out earlier that the final written warning was not procedurally or substantively justified. The basis therefore for concluding some conduct justified dismissal because of the final written warning was flawed.

Ability to be heard by the decision maker

[98] Mr Polzleitner said in his evidence that he had made the decision to dismiss Mr Alfiorovas. As set out earlier the Authority did not hear from HC. Mr Polzleitner had no engagement with Mr Alfiorovas during the disciplinary process leading to the dismissal, although he did sign the letter of dismissal. It was not stated in the correspondence that it was intended he would be at any meeting to discuss the preliminary views.

[99] This raises issues whether Mr Alfiorovas had a right to be heard by the decision maker. It could be a serious procedural failing if he did not. I raised this with Mr Polzleitner who was representing Annex Group in his capacity as director without the benefit of legal advice on a matter that is not without some legal complexity. I have focused on other aspects of the process.

Investigation and conclusions reached about the three allegations

The trailer incident

[100] Deliberate destruction of property belonging to the employer is an example of serious misconduct in Mr Alfiorovas' employment agreement but there was no finding that the incident with the trailer was deliberate. The focus of the substantiated finding was that he had not told his manager about the incident and had not completed an incident report.

[101] Mr Alfiorovas' explanation was that he had told his manager Mr Harris what happened on the day of the incident at 4pm. He said that the Hirepool were going to send an invoice and they would talk then. In terms of the failure to provide an incident report he explained that he was not aware that he had to complete an incident report for incidents that did not relate to a personal injury and that Mr Harris did not tell him to fill in such a form or he would have. A previous incident report that he had filled in for a personal injury was referred to and relied on by Annex Group that he had knowledge that an incident form needed to be filled out for the trailer incident. Mr Alfiorovas offered to pay for the full amount invoiced or half of it.

[102] Mr Alfiorovas advanced several reasons why Mr Harris may not have recalled the discussion he had with him about the trailer on the day of the incident. There was reference to Mr Harris being very busy. Mr Alfiorovas said that may have affected his memory and that he may have forgotten the matter being raised. There was reference to it not being in writing. Mr Halse also referred to the letter of complaint and that Mr Harris may have been trying to make “life difficult” for Mr Alfiorovas.

[103] There were no written notes provided about any discussion HC may have had with Mr Harris about the matter. Mr Alfiorovas was quite specific when the conversation took place on 10 February at 4pm and explained that afterwards they shut the site and went home. There did not appear to be any investigation of timesheets and hours of work that day and whether that supported or not the possibility of such a conversation.

[104] Mr Harris provided an email of 16 April 2020 stating that Mr Alfiorovas did not tell him anything about the damage to the trailer. Mr Harris wrote in his email that the first he knew about the incident was when HC told him about it “last week.” That timing of that though is not consistent with the allegation in the final written warning letter of 3 April 2020 that Mr Alfiorovas did not inform his manager about the trailer damage. That suggests Mr Harris had been asked about the incident before 3 April 2020.

[105] Ultimately it was simply concluded that it was more likely that the incident was not reported to Mr Harris without further elaboration. More could be expected of a fair and reasonable employer investigating fairly and with an open mind when there were explanations as to why Mr Harris may not have remembered the discussion.

[106] I questioned Mr Polzleitner why this matter was not raised with Mr Alfiorovas earlier, as the company would have received the invoice for the damage shortly after 13 February 2020. Payment was due for the sum of \$339.25 on the 20 March 2020 but it was not raised with Mr Alfiorovas until 3 April 2020 as an allegation that was serious and potentially could result in an outcome of dismissal. Mr Polzleitner said that the company received many invoices, and no particular attention can be paid to them.

[107] I accept that, however it is somewhat surprising that this invoice was not picked up earlier. The reference at the top of the invoice was Mr Alfiorovas and the ID was Mr Harris. The notes on the invoice stated:

Customer damage charge was for the trailer being returned with the brakes on. The brakes were smoking & there was a small fire when the trailer came to a stop.

[108] A conclusion was reached by Annex Group in the letter of dismissal that Mr Alfiorovas acknowledged the need to complete an incident report in the 9 April meeting and failed to complete an incident report. The Authority had not been provided with a transcript of the 9 April meeting at the time of its investigation meeting, but Mr Halse provided a copy of the transcript subsequently. A reading of that transcript does not support that Annex Group's conclusion was available.

[109] There was a slightly confused response at the bottom of page 2 of the transcript. English is not Mr Alfiorovas' first language. Reading that passage in full Mr Alfiorovas goes on to explain that if he was told he would fill out an incident report. He then makes it clear on page 3 of the transcript from the 9 April meeting in answer to a question from HC, that Mr Harris did not tell him about the "report paper" and that he did not know. He states that he just told Mr Harris about the incident.

[110] The importance of filling in an incident report was again emphasised during the disciplinary meeting on 21 April. Mr Alfiorovas explained at that meeting he was "a foreigner" and needed things explained. The transcript from the recording of the meeting on 21 April 2020 provides he goes on to say about the incident report as follows:

..you go somewhere else and then you going to start work, you have no idea how it works and um, you know, If your saying to the manager, the manager is supposed to say, that you have to fill out some kind of form, and that's it, I would do that straight away, but he said, yup ok, we going to wait, then we split. So he is my main manager that need to tell him and no one else cause he is the main guy at my department who is responsible for us.

[111] No weight appeared to have been given to that explanation. A fair and reasonable employer could have been expected to weigh that. As a foreign worker Mr Alfiorovas would be less familiar with incident report requirements particularly where there was damage to equipment as opposed to a personal injury.

[112] Annex Group placed weight on an earlier incident report to conclude knowledge, but that incident report referred to during the process and in the letter of dismissal as having been completed on 22 March 2020 was in fact was completed on 22 March 2019 for an injury to Mr Alfiorovas' finger. He explained that he viewed that as a different type of situation. Of more

recent times there was no evidence to support that Mr Alfiorovas was asked to complete an incident report after he complained about overheating on 28 February 2019. There was no dispute that Mr Harris received a copy of the letter about that. Weight also seemed to have been placed on Mr Alfiorovas not telling other people about the trailer incident, by HC, however he explained why he told Mr Harris only.

[113] Objectively assessed there was not a fair and full investigation with a sufficiently open mind into whether Mr Alfiorovas told Mr Harris about the trailer incident and whether he knew that he should have filled out an incident form.

Failure to wear PPE while operating equipment and plant

[114] Mr Alfiorovas accepted that he was told by Ms White to wear earmuffs and safety glasses and immediately put them on. Mr Alfiorovas explained that he was wearing ear plugs only but said by way of explanation that Ms White was “probably right”, and he put on the ear muffs for the rest of the job. His written response was that the vertical panel saw had some protection already from flying particles for the operator but not for those who walk past.

[115] The evidence did not support that Ms White was interviewed again as part of the process. She had completed a near miss report on 20 March 2020 about the incident that occurred on 19 March 2020 and provided an undated witness statement about it.

[116] In her evidence at the Authority investigation meeting, Ms White did not accept that Mr Alfiorovas was wearing ear plugs when she talked to him and said that Mr Alfiorovas had commented that the safety glasses were not great and there were some scratches. That was consistent with his explanation that with them on he could not read the small number on the ruler on the cutting saw. Ms White said that she found the best pair of the three glasses available for him to wear and ordered some more.

[117] A fair and reasonable employer could conclude that Mr Alfiorovas should have been wearing the PPE when he was operating the machine and that it was available to him in a cupboard within a few steps of where he was working. It was appropriate for Ms White to intervene. Her intervention resulted in him putting the safety gear on. It was not a situation where he refused to wear the safety gear after being directed to do so.

[118] It appeared the final written warning was relied on to elevate the seriousness of his conduct in this respect. I have not found that final written warning was justifiable and in any event this was conduct that occurred before it was issued. It was not repeated conduct following an earlier warning and Mr Alfiorovas was compliant with the request to wear the PPE. It was not conduct that a fair and reasonable employer could conclude after a full and fair investigation to be serious misconduct that irreparably affected trust and confidence.

Falsification of time sheet

[119] It was found that Mr Alfiorovas took a lunch break longer than half an hour on 25 March 2020 than half an hour, and that his timesheet was falsified because he signed it off for a half hour lunch break. The nationwide lockdown in New Zealand commenced on 25 March 2020 at 11.59pm.

[120] The transcript from the disciplinary meeting on 9 April 2020 provides some background to events that day. HC had called Mr Alfiorovas to come to work on 25 March 2020 as there had been a lack of clear advice that Annex Group was an essential service. Mr Alfiorovas attended at work at 8.40 am as recorded on the timesheet. There were no difficulties with that. The issue then became that some people including Mr Polzleitner observed Mr Alfiorovas had had a longer lunch break. Mr Polzleitner advised HC that on checking the timesheet he established that the extended lunch break was not recorded.

[121] The preliminary decision letter dated 28 April 2020 refers to Mr Alfiorovas being given a further opportunity to respond to written statements of Mr Polzleitner and the other employees on 21 April. The letter provided that the statements all stated that Mr Alfiorovas took his lunch break from 2.30pm to approximately 4pm. Mr Alfiorovas is recorded to have responded on 21 April 2020 that he had lunch between 2.30 and was back by 3pm.

[122] The first time this concern was raised with Mr Alfiorovas was in very broad terms as a new allegation during the process that resulted in the final written warning in a letter dated 27 March 2020. It was set out Mr Alfiorovas had extended break periods without permission from his reporting manager or delegated supervisor. Although more than one break was suggested, the only allegation investigated and found substantiated was about the lunch period on 25 March 2020.

[123] There was a meeting to discuss the extended lunch break before the final written warning was issued on 31 March. There is no record of what was said about this allegation or how Mr Alfiorovas responded at that time. He was unrepresented. I could not be satisfied that he was provided with anything in writing about the allegation at that time. The accounts from various employees were not provided at that time. The electronic time sheet was not provided until the letter containing the final written warning dated 3 April 2020.

[124] Rather than continuing to deal with the allegation as part of the existing process there was a new process and a different allegation about the absence on 25 March 2020 that Mr Alfiorovas had falsified timesheets. I have already concluded a new process was not what a fair and reasonable employer could have done. It was unfair.

[125] There was then a change to the way the allegation was framed to a more serious allegation arising from the same circumstances. Mr Polzleitner from his evidence said he regarded it as “theft.” If there is a concern about an action of an employee, then it should be brought to an employee’s attention when it arises or as soon as possible thereafter and not stored up. Mr Alfiorovas could have been approached and asked about his whereabouts on the day when he returned to site on 25 March 2020 because at least three employees and Mr Polzleitner paid attention to his leaving the site and return that day.

[126] A written concern was put on 27 March 2020 that Mr Alfiorovas had a longer lunch break without permission. He attended a meeting about that. To then reframe the concern as a more serious allegation of falsification of timesheets, without explanation or transparency for the change, was unfair.

[127] The timesheet provided for 25 March was electronic. It provided for “check in” and “check out” with a standard lunch break duration of 30 minutes which was deducted. Mr Halse stated at one point in the disciplinary process that there did not seem to be the ability to change the lunch hour duration on the time recording because it was a standard 30-minute deduction. That did not appear to have been responded to.

[128] What Mr Alfiorovas should have done, or failed to do, to record an extended lunch break on his timesheet on 25 March was fundamental. It was not clear between checking in and checking out how an extended break in the middle could be recorded or whether it needed to be discussed and an adjustment made that way. In an investigation undertaken with an open mind, that should have been made clear.

[129] Little investigation appeared to have been done about the period of unauthorised absence. The allegation in the 3 April 2020 letter incorrectly stated that the period of unaccounted absence was between 12 pm and 1.30pm. During the disciplinary process considerable time was spent by Mr Alfiorovas using photographs of completed work and records of jobs to establish that he returned to site from working in Huntly at 2.30pm and then had his half an hour lunch break off site.

[130] Written statements from other employees and Mr Polzleitner about their observations were then provided. The preliminary decision letter dated 28 April 2020 concluded these were consistent but that is not in fact correct as will be apparent from what is set out.

[131] Greg who had worked some of that day undertaking an installation with Mr Alfiorovas in Huntly noted in his statement that he arrived back on site and had a lunch break at the same time as Mr Alfiorovas at about 2.29pm. He saw Mr Alfiorovas leave the site in his car. He wrote in his statement that he believed Mr Alfiorovas “re-appeared” just before 4pm and they then carried on working together until about 6.30pm.

[132] Mr Polzleitner wrote that he saw Greg, Mr Alfiorovas and another employee arrive back about 2.20pm and then saw Mr Alfiorovas leave the site in his car. After about 30 minutes he asked the signage team “where he had gone and nobody knew”. He wrote that Mr Alfiorovas returned at approximately 3.30pm to 3.45pm.

[133] Another employee Monique wrote that she was with Ms White and Mr Polzleitner when they saw Mr Alfiorovas drive off. She thought it was about 2pm and that she did not see him again until about 4pm “from memory.”

[134] Ms White wrote that on 25 March Mr Alfiorovas returned after doing a job and left without saying anything to anyone. He then returned an hour and a half later. She thought it was 1.30pm and then she wrote that he went “down the back” but not for very long. She wrote that the lunch breaks are 30 minutes and if he needed a longer lunch break he should have asked.

[135] It was not until the disciplinary meeting on 20 April 2022 that the absence was narrowed to between 3pm and 4pm. Mr Alfiorovas was able to provide some information that at 3:50pm he was at work and that was not inconsistent with Mr Polzleitner’s statement that Mr Alfiorovas returned to site at approximately 3.30pm to 3.45pm. Although the letter of dismissal referred

to the statements generally from those who had observed Mr Alfiorovas that day, a fair and reasonable employer could have considered Mr Polzleitner's statement to be more accurate because he was paying more careful attention.

[136] I could not be satisfied that the period of the extended break was sufficiently investigated with an open mind taking the explanations into account. Mr Alfiorovas referred during the disciplinary process, to taking a 10-minute break that his employment agreement entitled him to, at 3pm. There was no reference to this in any conclusions reached. I could not be satisfied that a fair and full investigation could have concluded the extended lunch break was as long as an hour.

[137] Objectively assessed the process was unfair. The defects in the process were not minor and they did cause unfairness. The dismissal was unjustified.

Substantive justification

[138] Mr Polzleitner, in evidence and final submissions, stated that Mr Alfiorovas had an answer for every question and that he changed his answers to suit himself. He said that responses were inconsistent with evidence and the truth. He referred to Mr Alfiorovas' actions in being unable to account for the absence on 25 March as "stealing from the company" which as a small company they were not able to afford. He focussed on Annex Group being able to prove the conduct it alleged occurred.

[139] A fair and reasonable employer could conclude Mr Alfiorovas was unable to explain his whereabouts after lunch and an afternoon break for about 30 to 40 minutes on 25 March 2020 but that he was paid for that time. There was however significant procedural unfairness in investigating this matter, including the commencement of a new process when it was conduct that was known of and predated the final written warning. There was no evidence to support there had been other instances of extended lunch breaks or payment for periods not worked. Mr Alfiorovas, had as set out earlier, worked time for which he was not paid.

[140] Objectively assessed I could not be satisfied that there was substantive justification for the dismissal of Mr Alfiorovas for the reasons relied on, either cumulatively or separately. Not all conduct by an employee even if it is admitted and/or established, is conduct that justifies dismissal. It needs to be conduct that undermines essential trust and confidence in the relationship or where there have been previous warnings.

[141] A fair and reasonable employer could not have justifiably reached the decision to dismiss Mr Alfiorovas. Mr Alfiorovas has made out his grievance that he had been unjustifiably dismissed and he is entitled to an assessment of remedies.

[142] Separate findings have been made about other grievances alleged but I intend to approach remedies globally because failure to take steps to deal with the complaint, the final written warning and the unjustified dismissal are inextricably linked.

Remedies

Lost wages

[143] Mr Alfiorovas' work visa required that he only undertake work for Annex Group. Although his skills were in high demand his work visa to work for his new employer was not approved until 26 August 2020 and then he commenced work with his new employer on 31 August 2020. Lost wages are sought between 5 May 2020 and 31 August 2020 which is a period of 16 weeks and 3 days.

[144] The Authority is required under s 128(2) of the Act to order the payment to the employee of the lesser of a sum equal to lost remuneration or to 3 months' ordinary time remuneration. Under s 128(3) the Authority may, in its discretion, order payment of a sum greater than that in subs 2.

[145] I intend to exercise my discretion and make an award greater than that in s 128(2) of the Act. It was known that Mr Alfiorovas had a work visa that was attached to Annex Group and a variation of that to enable him to work for a new employer would be required. The relationship had been tested however I could not conclude with any degree of certainty that it would have ended within four months but for the dismissal.

[146] Subject to any issue about contribution, Mr Alfiorovas is entitled to be reimbursed lost wages for the period until he obtained new employment.

[147] The employment agreement provided for 40 hours of work each week between Monday to Friday. The pay rate specified is \$27.50 per hour. One week's pay calculated based on \$27.50 multiplied by 40 is \$1,100 gross. The daily pay rate is \$220 being \$1,100 divided by 5 days. For 16 weeks the lost wages are \$17,600 gross and for three days the lost wages are \$660 gross. Adding both together there is a total for lost wages of \$18,260 gross.

[148] Subject to any issue of contribution Mr Alfiorovas is entitled to be paid the sum of \$18,260 gross for lost wages.

Compensation

[149] I am satisfied from the evidence that the lack of discussion and response to Mr Alfiorovas' concerns, the extended process of disciplinary meetings, final written warning and dismissal impacted significantly on Mr Alfiorovas. He said he felt very stressed because of the link between the work visa and his job. He described himself in his oral evidence as "emotionally dead" and had to see a psychologist to get his emotions and mood to normal. He referred to having 14 weekly sessions until he felt better and now only goes once a month. Financially, he was required to live off his savings and look for a new job during the Covid lockdown. He would only eat once or twice a day and lost more than 10 kilograms. Mr Alfiorovas said that he still has trust issues even though he is now working in a good environment.

[150] The impact on Mr Alfiorovas was significant and in line with similar cases I am satisfied that an award which is both fair and just subject to any issues as to contribution is \$20,000 compensation.

Contribution

[151] The Authority must under s 124 of the Act in deciding the nature and the extent of the remedies to be provided in respect of a personal grievance consider the extent to which Mr Alfiorovas contributed to towards the situation that gave rise to his personal grievance. The first issue for the Authority is whether Mr Alfiorovas' actions were blameworthy and contributed to the final written warning or the dismissal.

[152] I start with the two issues about wearing safety equipment. I conclude from the evidence on the balance of probabilities that there was a reason for the removing the Hi-Vis because Mr Alfiorovas was over heating and unwell. His actions in removing his Hi-Vis could not be classified as blameworthy conduct giving rise to a final written warning. He put the Hi-Vis back on after Mr Harris had spoken to Tom and instructed him to tell Mr Alfiorovas to do that. Mr Alfiorovas put safety equipment on when directed to by Ms White. I do not find that there was blameworthy conduct on that occasion that created or contributed to the dismissal.

[153] I could not be satisfied that there was blameworthy conduct about the failing to comply with a work instruction issue that contributed to the final written warning. Mr Alfiorovas said that he considered he had completed the job and could leave, and a misunderstanding could not be ruled out.

[154] Mr Alfiorovas knew when the trailer incident occurred that Annex Group would be invoiced and knowledge of the incident was unavoidable. I conclude it more likely that he did tell Mr Harris about the trailer incident and there was agreement to talk again once the invoice was received. Mr Harris was clearly under some stress around that time and more likely to have forgotten the discussion. It would have been sensible for him to have completed an incident report which was a requirement of Annex Group. I could not conclude on the balance of probabilities that Mr Alfiorovas knew that he was supposed to do that for all incidents, not just those causing injury. Mr Alfiorovas said that he would pay the full amount of the invoice or half of it. I do not find blameworthy conduct that gave rise to the dismissal.

[155] I conclude that it was more likely than not that Mr Alfiorovas had an extended lunch break on 25 March 2020 of perhaps 30 to 40 minutes. Mr Alfiorovas said that he was down the back of the work site, but his movements were under scrutiny that day. If he had been on site then it would have been more likely than not he would have been seen.

[156] I was not able to reach clear conclusions about how the time sheet was completed. I do conclude some blameworthy conduct because Mr Alfiorovas was not straightforward ultimately when the period of absence was clarified that he had had an extended lunch time beyond his unpaid 30 minutes and paid afternoon break and return to work. Had he been straightforward that he had an extended lunch break, the reasons for that could have been weighed and assessed on a day when New Zealanders were facing very stressful circumstances they had never faced before with lockdown. Good faith obligations require both parties in an employment relationship to be communicative and responsive. I do weigh with this that Mr Alfiorovas was not responsible for the procedural unfairness in respect of this matter.

[157] I have considered the statements by the Employment Court judgment in *Maddigan v Director -General of Conservation* about contribution.³ In that case there were more serious instances of failing to communicate in a satisfactory manner over a more extended period than

³ *Fraser Maddigan v Director -General* [2019] NZEmpC 190 at [74] to [76].

this matter. Contribution of 20% was found justified. I consider in this matter a reduction of 10% for contribution is appropriate.

Was there a failure to provide information and corresponding breach of good faith?

[158] A penalty has been claimed for a breach of good faith. There was a failure to provide correct information about the verbal warning and other information to Mr Halse on request, that overlapped with this. There was a breach of good faith obligations by Annex Group because it was misleading in maintaining that one had been issued but not supplying information about its nature.

[159] Whilst the breach was serious and sustained, I could not be satisfied, as set out earlier, that it was a deliberate breach. All three criteria must be present for a penalty for a breach of good faith. The fact there was no verbal warning has been a factor in some of the findings made.

[160] I do not award a penalty.

Summary of findings and orders made

[161] Mr Alfiorovas worked for Annex Group Limited as an employee and not a volunteer between late December 2018 and May 2019.

[162] Annex Group Limited is ordered to pay to Andrejus Alfiorovas wages for working over this period in the sum of \$6,875 gross.

[163] Mr Alfiorovas did not receive a verbal warning.

[164] There was no timely investigation into his concerns raised in a letter of 2 March 2020.

[165] The final written warning was unjustified.

[166] Mr Alfiorovas was unjustifiably dismissed.

[167] Contribution has been assessed at 10%.

[168] No penalty has been awarded for a breach of good faith.

[169] Annex Group Limited are ordered to pay Andrejus Alfiorovas the following sums taking contribution into account:

- (a) \$16,434 gross under s123 (1)(b) of the Act for reimbursement of lost wages.
- (b) \$18,000 without deduction under s 123(1)(c)(i) of the Act for compensation.

Costs

[170] I reserve the issue of costs.

[171] If costs cannot be resolved, then Mr Halse may lodge and serve a costs submission within 14 days from the date of this determination. Mr Polzleitner then has a further 14 days from receipt of this submission to lodge and serve a submission as to costs in reply. Costs will not be considered outside of that period unless prior leave to do so is sought and granted.

[172] The Authority usually determines costs on its national daily rate unless circumstances require an upward or downward adjustment of the tariff.⁴

Helen Doyle
Member of the Employment Relations Authority

⁴ Please note the Authority has issued an updated Practice Note on costs, effective from 2 May, available at <https://www.era.govt.nz/assets/Uploads/practice-note-2.pdf>