

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2025] NZERA 117
3285619

BETWEEN

ALISTAR BROWN
Applicant

AND

TIMBER TOWN
HARVESTING LIMITED
Respondent

Member of Authority: Natasha Szeto

Representatives: Dave Cain, advocate for the Applicant
Ruth Wormald, counsel for the Respondent

Investigation Meeting: 20 November 2024 in Masterton

Submissions and further information received: 21 and 29 November 2024 from Applicant
21 November and 6 December 2024 from Respondent

Date of determination: 27 February 2025

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

[1] Alistar Brown was employed by Timber Town Harvesting Limited (TTH) as a forestry worker, until he was summarily dismissed for serious misconduct for not wearing a hard hat while refuelling a digger below where tree felling was being carried out.

[2] Mr Brown says his dismissal was not procedurally or substantively justified. TTH relied on an incident that had happened almost three weeks prior to his dismissal to allege his behaviour was wilful or deliberate. However, he says he was not told it was serious misconduct at the time, he was never given warnings and TTH did not follow any process in dismissing him.

[3] TTH says Mr Brown's conduct was serious misconduct and it was justified in dismissing him for serious health and safety concerns. It raises counter-claims against Mr Brown for damage to its vehicles and machinery.

The Authority's Investigation

[4] The Authority received written witness statements from Mr Brown and his mother Lynette Harper, in support. The three witnesses for TTH were: Shane Campbell-Wilson, Director; Crystal Wilson, Mr Campbell-Wilson's wife; and Dennis Kelly, Health and Safety Manager with Farman Turkington Forestry (FTF). All witnesses attended the Investigation Meeting, and answered questions under oath or affirmation.

[5] 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

[6] The issues for the Authority to resolve are:

- (i) Whether Mr Brown was unjustifiably dismissed from his employment.
- (ii) Whether TTH breached s 130 of the Act by failing to provide wages and time records.
- (iii) If Mr Brown is found to have a personal grievance, whether he should be awarded compensation under s 123(1)(c)(i) of the Act of \$25,000.
- (iv) If Mr Brown is found to have a personal grievance, whether he should be reimbursed for any wages or money lost as a result of the grievance under s 123(1)(b) of the Act.
- (v) Whether any remedies for personal grievances should be reduced for contribution (s 124 of the Act).

[7] TTH raised a counter-claim for damages in excess of \$100,000.00 relating to damage to machinery and vehicles it says Mr Brown caused due to his negligence or lack of care. TTH says these damages are recoverable from Mr Brown under a clause he signed up to in his employee handbook.

Relevant background

[8] Timber Town Harvesting Limited (TTH) is a forestry company and was first registered on 22 April 2021. Shane Campbell-Wilson is the sole director and shareholder of TTH. He started TTH because he had attained a four-month contract with Farman Turkington Forestry (FTF) and when TTH started he was one of only three workers. TTH contracted through FTF and all of its work was essentially controlled by FTF, including that it was subject to FTF's health and safety policies.

[9] Alistar Brown had a one-day trial for TTH on 25 July 2022 and started working for the company on 27 July 2022. His role was a Forestry Worker or machine operator. Mr Brown did not have an individual employment agreement when he first started his employment, but around a week later he was given a template individual employment agreement and a copy of the employee handbook. He signed and dated the employee handbook and returned it to Mr Campbell-Wilson on 5 August 2022 but he did not sign and return his employment agreement to Mr Campbell-Wilson until 30 September 2022. This was because the agreement had gaps in it, which he highlighted to Mr Campbell-Wilson. Mr Campbell-Wilson acknowledges Mr Brown did not have a signed employment agreement in place at the start of his employment and his current agreement was missing terms. His intention was to negotiate or discuss the terms with Mr Brown and for the agreement to be assessed on a six-monthly basis but that did not eventuate.

[10] Mr Brown enjoyed his work. He usually worked 45 hours per week over five days between 6:00am and 4:00pm. He was provided with a vehicle for work travel and was paid for his travel. At other times when working in remote locations, accommodation was provided during the working week.

[11] In his first year of employment, Mr Brown did not receive any formal warnings and he was not called into any disciplinary meetings. Incidents or perceived issues were sometimes addressed informally, such as through toolbox meetings with the whole team, or Mr Campbell-Wilson verbally telling Mr Brown he would have to "pick things up". However nothing was ever formal or recorded in writing. Mr Brown says he was never told he was committing misconduct and he was never told his job could be at risk until August 2023.

The 25 August 2023 incident

[12] On Friday 25 August 2023 Mr Brown was driving a digger. He got out of the cab of the digger to refuel and forgot to put on his hard hat. Mr Campbell-Wilson was felling trees in the vicinity. When Mr Campbell-Wilson saw Mr Brown not wearing his hard hat, the two men got into an argument. There was some back-and-forth and both men say they were angry. The incident concluded with Mr Campbell-Wilson telling Mr Brown that if his accommodation was not cleaned by the end of the day, his job would be at risk. Mr Brown returned to the accommodation and cleaned it as he had been told to. There was no further conversation between the men that day.

[13] Two days later on Sunday 27 August, Mr Brown asked Mr Campbell-Wilson via text message whether he still had a job and Mr Campbell-Wilson's response was that Mr Brown still had a job, but he would need to improve a few things or "you'll leave me with no choice but to let you go".

[14] Mr Brown says the issue was not raised again. Mr Campbell-Wilson however, says he had a meeting with Mr Brown the following Monday 28 August. Mr Campbell-Wilson says at the regular toolbox meeting, he reinforced to everyone that they were responsible for health and safety and afterwards he asked Mr Brown to stay behind to discuss the incident and what needed to happen. Mr Campbell-Wilson says he told Mr Brown it was serious misconduct to not wear his personal protective equipment (PPE). He mentioned the failure to wear hi-visibility (hi-vis) gear and walking a machine into a digger. He gave Mr Brown a chance to respond by bringing up anything he was concerned about. The outcome of that meeting was that Mr Brown would carry on working and would be monitored.

[15] Mr Brown says he feels like the 25 August incident was never dealt with and there was a difference in his relationship with Mr Campbell-Wilson afterwards. Over the next few weeks, Mr Brown continued with his work and there was no mention of serious misconduct, formal disciplinary investigation meetings, potential disciplinary actions or any other incidents.

[16] Mr Campbell-Wilson says in the ensuing three weeks, there were two further incidents of misconduct where Mr Brown damaged a native tree due to slewing a machine and where Mr Brown was sitting in the cab of a machine on his phone.

The dismissal

[17] On 12 September, Mr Brown was digging out (widening) a track at a site with native trees. Mr Campbell-Wilson was talking to the site foreman for around 15 minutes and observed Mr Brown on his phone, and appearing not to be doing any work. Mr Campbell-Wilson was angry and approached Mr Brown. Mr Brown was playing music on his phone in the cab of the digger when Mr Campbell-Wilson told him: “you’re not doing any work and you’re getting a final warning”. From Mr Campbell-Wilson’s perspective Mr Brown had been on a warning since he sent Mr Brown the text on Sunday 27 August following the 25 August incident. Mr Brown, however, says this was the first time he heard he was on a warning. Mr Campbell-Wilson asked Mr Brown if he wanted to respond and he said “no, I’ve got nothing to say”. Mr Brown says he did not understand why he was being accused of not working because he was just taking his time going slowly and cautiously.

[18] That Friday 15 September, Mr Campbell-Wilson asked Mr Brown to leave the work vehicle he would usually take home with another worker for the weekend and Mr Brown was dropped home. Mr Brown says he and the worker joked about the fact that he was probably going to be sacked. In retrospect, Mr Brown thinks Mr Campbell-Wilson had made the decision to dismiss him on 15 September and was ensuring he did not have a work vehicle at home.

[19] Two days later on Sunday 17 September, Mr Campbell-Wilson sent Mr Brown an email terminating his employment (termination letter). The termination letter contained the following:

Termination of your employment – dismissal without notice

This letter confirms my advice to you that you are dismissed without notice. This means that your employment ends immediately.

On the 25/8/2023 I discussed with you on the skid site, the serious misconduct where on the 24/8/2023 you did not wear your correct PPE whilst refueling the SH240 below where tree felling was being conducted.

As discussed during that meeting, your conduct during that incident:

- was wilful or deliberate behaviour by you that is inconsistent with your employment continuing: After being warned by myself and FTF supervisors several times, and on several occasions that this is against company policy and serious

misconduct to not wear correct PPE whilst been outside of a machine in a serious hazardous environment.

- caused a serious and imminent risk to the health and safety of yourself, by standing on the side of a machine whilst refueling it with no helmet on while trees were being felled above the skid site.

I notified you that my preliminary view was that I consider your actions to be a serious misconduct justifying your summary dismissal (dismissal without notice) in which you did not respond. I have taken your feedback into consideration and have decided that it is appropriate to dismiss you without notice on the basis of your serious misconduct. This letter is formal notice that your employment is terminated as of the date of this letter...

[20] Mr Brown responded by email the same day:

...if me getting out of the digger without a hard hat was a big problem and it was really serious misconduct you shouldve stood me down or even sacked me when that shit happened but you knew you stuffed up when you were felling trees right there while i was loading a truck 2 tree lengths within the skid, youve literally pre meditated firing me because you allready knew on Friday thats why you wanted josh to drop me off home without haveing proper meetings or anything prior too dismissing me!

I admit I made an error, but why was this not dealt with properly at the time eg incident reports or a disciplinery? I thought it was all a thing of the past but algood, and can you send me a copy of my contract that i have requested asap!!

[21] Mr Brown raised a personal grievance for unjustified dismissal on 25 September 2023.

Was Mr Brown unjustifiably dismissed?

What is the law?

[22] 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 TTH'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.

[23] 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.¹

[24] I need to assess whether the decision Mr Campbell-Wilson made on TTH's behalf to dismiss Mr Brown, and how Mr Campbell-Wilson reached that decision were what a fair and reasonable employer could have done in all the circumstances at the time including whether:

- a. TTH fully and fairly investigated the allegations against Mr Brown before dismissing him;
- b. TTH raised the concerns it had with Mr Brown (including giving him relevant information) before dismissing him;
- c. TTH gave Mr Brown a reasonable opportunity to respond to its concerns before dismissing him;
- d. TTH genuinely considered Mr Brown's explanations before dismissing him (the decision was made without predetermination).

[25] 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.² While adequate consideration of alternatives to dismissal are not one of the specific statutory factors to 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?

[26] Mr Brown accepts when he got out of the digger, he was not wearing his PPE and he should have been. PPE is a critical part of forestry work and was part of the regular conversation with every worker on the forestry site. Mr Brown says everyone forgets to wear their PPE from time to time but it is completely unfounded for TTH to

¹ Employment Relations Act, section 4(1A).

² Employment Relations Act, section 103A(5).

say he intentionally disobeyed lawful and reasonable instructions or deliberately placed himself or other employees in danger.

[27] Mr Brown says his dismissal came as a complete surprise to him. Mr Brown says he did not receive any formal warnings, and there was no disciplinary meeting on Monday 28 August 2023. He says even Mr Campbell-Wilson acknowledges it was not a formal meeting, it was not documented, and the outcome of the meeting was an agreement to move past the incident of 25 August. Mr Brown is adamant Mr Campbell-Wilson never used the term “serious misconduct” with him before his dismissal.

[28] TTH says in the period February to September 2023, Mr Brown engaged in serious misconduct by repeatedly failing to wear PPE and engaging in intentionally reckless behaviour which caused damage to company machinery. Mr Campbell-Wilson says he raised issues with Mr Brown verbally, especially relating to damage to machinery. TTH accepts that nothing was in writing and it did not issue Mr Brown with formal warnings but when issues were brought to its attention by FTF, they were then raised with Mr Brown. Mr Campbell-Wilson says he experienced months and months of Mr Brown not wearing correct PPE and not taking responsibility or being accountable for his actions and he could not have been more frank with Mr Brown, or clear about his expectations.

Analysis – dismissal not substantively justified

[29] TTH stated in its termination letter that Mr Brown was summarily dismissed for serious misconduct relating to his failure to wear correct PPE on 25 August. The letter says Mr Brown’s behaviour was wilful or deliberate because Mr Brown had been warned by Mr Campbell-Wilson and FTF supervisors several times. Based on evidence before the Authority, it is clear that TTH felt justified in its decision to dismiss Mr Brown because of what it considered to be a pattern of serious misconduct behaviour over many months, which it had advised Mr Brown about, and which was not improving. Mr Campbell-Wilson also told the Authority he viewed the situation on 25 August as being the most dangerous example of risk because he was felling trees and Mr Brown moved his machine into a dangerous area.

[30] However, TTH has not acted as a fair and reasonable employer because the reasons it gave Mr Brown for his dismissal in the termination letter were not accurate. While the 25 August 2023 incident may have been the catalyst for Mr Brown’s eventual

dismissal, Mr Campbell-Wilson was quite clear that this was not just about one incident and he was building up a story about how many verbal warnings Mr Brown would receive before he was going to be stood down and take accountability for his own actions. Mr Campbell-Wilson says he waited two to three weeks to see some improvement from Mr Brown, but it was more of the same behaviour.

[31] Further, the termination letter categorises Mr Brown's failure to wear his hard hat on 25 August 2023 as "wilful or deliberate behaviour" which it says was discussed with Mr Brown during the 28 August meeting about the serious misconduct. Putting to one side that Mr Brown disputes there was a meeting, Mr Campbell-Wilson also later categorised Mr Brown's failure to wear his hard hat as "refusal" to wear his PPE (which was a breach of the Employee Handbook (15.4), the Health and Safety at Work Act and the WorkSafe Best Practice Guidelines for Forestry Workers). However, based on the evidence before the Authority, I find Mr Brown was aware of the requirement to wear his hard hat when exiting the digger and he simply forgot. It was a genuine mistake. In submissions, TTH says Mr Brown's ongoing carelessness could not be tolerated, and it is immaterial whether he forgot to wear his gear or was defiant as to TTH's instructions. I cannot accept this submission. Instead I conclude that Mr Brown was careless but his failure to put his hard hat on was not wilfully or deliberately defiant of his employer's instructions.

[32] In its dismissal letter, TTH also justifies Mr Brown's dismissal by referring to past warnings. However, TTH did not provide any specific details about when the warnings were given, and what they allegedly related to. Mr Brown disputes he was given any warning or ever told he had committed serious misconduct, apart from the verbal warning on 12 September when Mr Campbell-Wilson accused Mr Brown of being on his phone and not doing any work. This was unrelated to wearing PPE.

[33] Mr Campbell-Wilson did tell Mr Brown in a text on 27 August that he would need to "improve a few things over the next few weeks", or TTH "would have no choice but to let him go". Although the text may have put Mr Brown on notice that his employment was at risk, it was ambiguous and did not fully and fairly inform Mr Brown of what he would need to do to maintain his employment. TTH did not refer to the text message in the termination letter, and it is unclear how much reliance Mr Campbell-Wilson placed on the text message as being a final warning.

[34] TTH allowed Mr Brown to continue to work his usual hours without restriction for three weeks between the 25 August 2023 incident and his dismissal which was inconsistent with his misconduct being so serious TTH believed it justified his summary dismissal. Although TTH says there were further incidents after the 25 August 2023 incident that damaged its trust and confidence in Mr Brown, including on 12 September, these incidents were not relied on in the dismissal letter.

[35] For all these reasons, I find the termination letter sent on 17 September, which was the only record of Mr Campbell-Wilson's thought process at the time he made his decision to dismiss Mr Brown, did not accurately reflect the actual reasons for Mr Brown's dismissal. TTH should not have relied on the 25 August 2023 incident and disputed warnings to provide substantive justification for Mr Brown's summary dismissal. TTH has not acted as a fair and reasonable employer could and Mr Brown's dismissal was not substantively justified.

Dismissal was not procedurally justified

[36] TTH says it met with Mr Brown, investigated the facts, communicated its concerns to Mr Brown, gave him a reasonable opportunity to respond and then following a non-response from Mr Brown, decided to dismiss him. The reason Mr Campbell-Wilson sent Mr Brown the termination letter on a Sunday was because he was calm and cool and had thought about it over the weekend. He wanted the letter to be the record of his decision. Mr Campbell-Wilson says he had not made the decision to dismiss Mr Brown prior to 17 September, and the story relating to the work vehicle had nothing to do with Mr Brown.

[37] Mr Brown disputes there were any formal meetings. He denies he was told he was committing serious misconduct.

[38] Looking at the process TTH followed, I conclude it did not raise the concerns it had with Mr Brown before dismissing him, or if it did, it did not raise them in a way that ensured Mr Brown understood the gravity of its concerns, and how he needed to improve to ensure his continued employment. In relation to the proposal to dismiss, TTH did not give Mr Brown the opportunity to respond and then genuinely consider his feedback. TTH relies on a meeting that allegedly occurred on 28 August 2023, but acknowledges Mr Brown was not invited to a formal meeting, or told this was a disciplinary meeting. It also accepts that the outcome was Mr Brown would be

monitored and TTH would keep an eye on things. TTH did not give Mr Brown any opportunity to respond to the proposal to terminate his employment.

[39] Based on the evidence before the Authority, there were other considerations in Mr Campbell-Wilson's mind when he made the decision to dismiss, including what he described as patterns of behaviour and failure to take responsibility and accountability, that were never put to Mr Brown. TTH should have raised these concerns with Mr Brown and given him an opportunity to respond, if it intended to rely on these matters to justify Mr Brown's dismissal. There is also no evidence that TTH considered alternatives to dismissal.

[40] Mr Campbell-Wilson is a sole director and had started TTH effectively as a contractor to FTF. I take into account that TTH is a small business with more limited resources than a large corporate organisation. However, looked at objectively, TTH has made procedural errors that were more than mere minor or technical matters. These errors have resulted in Mr Brown being treated unfairly. For all these reasons, I find TTH has not acted as a fair and reasonable employer could.

[41] Mr Brown's dismissal was not substantively or procedurally justified in the circumstances and he was therefore unjustifiably dismissed.

Remedies

[42] I have found Mr Brown was unjustifiably dismissed from his employment and he is therefore entitled to an assessment of remedies.

[43] Mr Brown seeks:

- (a) Compensation under s 123(1)(c) of the Act for humiliation, loss of confidence, loss of dignity and injury to his feelings.
- (b) Reimbursement of lost wages under s 123 (1)(b).
- (c) Reimbursement of other money lost as a result of the grievance under s 123(1)(b).

[44] Mr Brown says he did not give any feedback on his dismissal because he felt angry. He had been back at work for just under two months after taking some time off for personal reasons and he says his sudden dismissal made things worse for him both mentally and financially. Mr Brown says his summary dismissal was embarrassing.

He struggled financially and the stress and worry strained his relationships. Mr Brown says that the lack of acceptance of wrongdoing by TTH has “added insult to injury” and the baseless counterclaim is a cynical and spiteful response to his legitimate grievance and deliberately intended to maximise his hurt and humiliation. He says \$25,000.00 would not be an unwarranted award given the particularly callous actions of TTH.

[45] I have considered the general range of compensation awards in other cases. Based on the evidence of emotional impact on Mr Brown as expressed in his statement and the statement of his mother, and standing back to objectively assess the impact as best I can, I consider an appropriate award of compensation under s 123(1)(c)(i) of the Act is \$15,000.00, subject to contribution.

Lost wages

[46] Under s 123(1)(b) of the Act, the Authority is able to order that the 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 of the Act provides that 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, although there is a discretionary power in s 128(3) of the Act to award a greater sum.

[47] When assessing the appropriate award for lost remuneration, the applicable principles are that full financial losses set the upper limit on an award of compensation, and there is no automatic entitlement to full compensation. Moderation is required. Precision is difficult and awards of compensation “will inevitably involve a broad brush approach”.³

[48] Mr Brown says although he was proactive in applying for other employment, he did not obtain regular employment until he got a job on 8 November as a loader operator. By his estimate, Mr Brown says he went to five or six potential employers looking for work. He joined a recruitment network in Wellington to do casual work which he estimates as being one day a week. Mr Brown says he was without regular employment for 7.42 weeks, and consequently claims \$10,017.00 (gross) in lost wages based on a 45-hour working week at \$30.00 per hour.

³ *Sam’s Fukuyama Food Services Ltd v Zhang* [2011] NZCA 608, para 36.

[49] TTH says Mr Brown did not make honest attempts to mitigate his losses because in a three week period, he only applied to five or six places, and he only signed up to a temporary recruitment agency and not a permanent one. It also says his earnings were not reflected in his IRD record.

[50] In the circumstances, I find no reason to depart from the default position that an employee should be reimbursed their actual lost remuneration or three months' ordinary time remuneration. Mr Brown claims \$10,017.00 (gross) which is significantly less than three months' ordinary time remuneration. I consider that an appropriate award, subject to contribution.

Contribution

[51] In deciding the nature and extent of remedies for any personal grievance, I must consider the extent to which Mr Brown may have acted in a way that contributed to the situation that gave rise to his grievance.⁴

[52] TTH says Mr Brown's contributory conduct cancels out any award made to him. In particular, it says Mr Brown:

- (i) Knew and admitted he should have been wearing correct PPE.
- (ii) Was warned multiple times and warned of the potential for dismissal.
- (iii) Should have been aware of health and safety requirements given his experience in forestry work.
- (iv) Breached legal health and safety obligations.
- (v) Acted recklessly and negligently in relation to work vehicles.
- (vi) Refused to accept responsibility.
- (vii) Made consistently reckless choices.
- (viii) Chose not to respond to allegations of serious misconduct and continued to engage in misconduct after the meeting on 28 August.

[53] Mr Brown says the termination letter suggests the sole reason for his dismissal was his failure to put his hard hat on which was the result of an innocent mistake. There was no conduct that was culpable or blameworthy contributory conduct. To the extent

⁴ Section 124 of the Act.

that other alleged unsubstantiated incidents were taken into consideration in his dismissal, any element of contribution would be negligible.

[54] The Employment Court has recently succinctly summarised the key principles relating to contribution as follows:⁵

- (i) 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
- (ii) Second, an assessment of whether the employee's actions "require" a reduction in the remedies that would otherwise have been awarded.

[55] The Court also stated:⁶

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

[56] 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.

[57] I have already concluded that Mr Brown's failure to wear his hard hat on 25 August 2023 was a genuine mistake and could not be characterised as wilful and deliberate behaviour. Therefore to the extent that this incident was the reason or main reason for his dismissal, he has not contributed to it. In terms of the history between the parties prior to the 25 August 2023 incident including alleged prior warnings, and the alleged incidents that occurred after 25 August 2023, I have concluded that TTH did not fully and fairly inform Mr Brown of what he needed to do to improve and maintain his employment. I find Mr Brown did not contribute to the situation giving rise to his dismissal. Accordingly, there is no evidence of contribution such that remedies would be required to be reduced, and no reduction in remedies is appropriate.

Breach of s 130

[58] Under s 130(4) of the Act, the Authority may impose a penalty on an employer who has failed to comply with the requirements of the section including to provide an employee with access to their wages and time records.

⁵ *Keighran v Kensington Tavern Limited* [2024] NZEmpC 28; see also *Maddigan v Director General of Conservation* [2019] NZEmpC 190 at [71] – [76].

⁶ *Keighran v Kensington Tavern Limited* [2024] NZEmpC 28 at [17].

[59] The law in respect of quantification is well established given s 133A of the Act and requires that regard is given to the object of the Act; the nature and extent of any breach; whether it was intentional, inadvertent or negligent; the nature and extent of any loss or damage, steps taken to mitigate the effects of the breach, circumstances of the breach, including vulnerability of the employee; and previous conduct. This is a non-exhaustive list of considerations. The purpose of penalties is punitive. They are not imposed to remedy a loss, but to punish the person who has breached a duty under the Act and to condemn that behaviour.

[60] Mr Brown says there has been a clear and unambiguous breach of s 130 of the Act because he requested wages and time records on 25 September 2023 and TTH did not provide them until 11 June 2024. Mr Brown submits a single statutory breach in isolation may result in a penalty of up to \$20,000 against a company, but in this case a penalty in the region of \$1,000 to \$2,000 would be typical, and asks for half the penalty to be paid to him.

[61] Mr Campbell-Wilson says he had limited access to Xero, and his accountant along with his lawyer was responsible for passing on records on behalf of TTH. Mr Campbell-Wilson says when he became aware the records had been requested, he provided them without delay.

[62] TTH has technically failed to comply with its requirement to provide wages and time records. The breach by TTH is inconsistent with the object of the Act to promote the effective enforcement of employment standards. However, although there has unequivocally been a delay in TTH providing records, I am not persuaded it is appropriate to impose a penalty. This is because the breach was not at the most serious end of the scale, it was not intentional, and Mr Brown has not suffered loss or damage as a result. The impact on Mr Brown - including his ability to progress his claim before the Authority - has been negligible because Mr Brown did not have a wage arrears or holiday pay claim before the Authority and the records were provided months prior to the investigation meeting. Once he realised the records had not been provided, Mr Campbell-Wilson says he took steps to ensure they were provided such that any adverse effects were mitigated. There is no claim of prior conduct by TTH of which I am aware.

[63] Considering all the circumstances, and for the reasons given above, I am not persuaded it is appropriate to impose a penalty and accordingly, I decline to do so.

Counter-claims

[64] TTH raised counter-claims for damage to company machinery and vehicles in its statement in reply. It then filed an amended statement in reply further particularising and expanding on the claims. Mr Campbell-Wilson says Mr Brown was not looking after company gear and not following company protocol and the damage Mr Brown did to TTH's machinery was not reasonable. In addition, Mr Brown never apologised or offered to help fix the equipment.

[65] TTH's claims relate to the following incidents:

- (i) \$3,705.72 damage caused to a skidder when it hit a parked machine.
- (ii) \$84,841.74 front differential break to skidder (11 May 2023, invoice 21 June 2023).
- (iii) \$3,229.20 transport costs for the skidder (Invoice 7 June 2023).
- (iv) \$4,515.00 damage caused to SH4040 scraping along stacked logs (incident December 2022, invoice 26 April 2024).
- (v) \$1,500.00 excess payment for total loss of work vehicle in a crash (17 February 2023).

[66] A claim in relation to repairs to the 240 tonne digger (SH240) for \$3,705.72 was withdrawn at the investigation meeting.

[67] TTH says it can claim these costs from Mr Brown because the damage was caused by his negligent operation of company vehicles or machinery, was uninsurable and has resulted in significant losses to TTH. TTH relies on the employee handbook which it says was an extension of the clauses within Mr Brown's employment agreement. In particular, TTH relies on clause 9.10 of the employee handbook. That clause provides:

In the event of an at fault accident whilst driving one of the employer's vehicles or where any damage to an employer vehicle is due to your negligence or lack of care, the employer reserves the right to insist that you rectify the damage at your own expense or pay the excess part of any claim. Your involvement in an at fault incident may result in disciplinary action / and or the use of employer vehicles being withdrawn.

[68] Mr Brown says the counterclaims are cynical and spiteful. The alleged incidents date back to December 2022, some nine months prior to Mr Brown's dismissal. Mr Brown has given evidence that in his time working for TTH there were often up to five employees operating the same digger every day and submits that TTH is attempting to attribute normal wear and tear or machinery failures to him. At no stage did TTH request payment or invite him to fix the damage under the terms of the employee handbook until the counter-claims were raised in the statement in reply. Mr Brown says the rationale for the counter-claims is fundamentally flawed because any agreement was contained in the individual employment agreement or employee handbook, the terms of which were unfairly bargained for, and the claims were first made by TTH many months after the employment relationship had ended. Mr Brown also denies he carried out the conduct TTH relies on, and says there is insufficient supporting evidence for the Authority to make orders.

Relevant background to the claimed losses

[69] TTH says the damage to the differential of the skidder occurred on 11 May 2023 and that Mr Brown continued to negligently use the skidder after it was damaged. Mr Campbell-Wilson says the continuing use caused the bulk of the damage and resulted in a repair bill of close to \$90,000 plus \$3,000 in transport fees. TTH says the skidder actually failed on 13 May 2023 and Mr Brown was the last operator to use it. TTH says it was advised by his insurance broker that damage to the skidder was not claimable and it did not make a claim. Mr Brown says he operated the skidder on 11 May 2023 and heard a strange noise, stopped and examined it with a co-worker. They could not see anything out of the ordinary and he was able to re-start the skidder. Mr Brown says the differential actually failed a full two weeks later when he was off work.

[70] TTH says the damage to the SH4040 (40 tonne digger) occurred when Mr Brown slewed the machine intentionally. TTH's claim is for the cost to repair the paint and sticker. Because the excess on an insurance claim was \$7,000 and higher than the cost of repairs, TTH did not make a claim. Mr Brown admits he slewed a machine into log stacks, but this was an honest mistake and it was only paint that was scraped off.

[71] The ute was involved in a "total loss" accident. The amount claimed by TTH is the insurance excess amount of \$1,500 as confirmed by TTH's insurance broker in an email. Mr Brown admits the accident happened, but attributes it to fatigue and falling asleep at the wheel while he had Covid-19 and was required to work. He says it was a

genuine accident and there was nothing deliberate about it. TTH denies it knew Mr Brown had Covid-19 and says Mr Brown should not have been at work.

Analysis of the counter-claims

[72] TTH has not provided sufficient evidence to show that Mr Brown was responsible for damage to the skidder and the SH4040. In relation to the skidder, TTH did not provide any evidence in the form of commentary on the repairs, expert evidence from the engineers who repaired it, or even witness evidence from its own employees to support its submission that Mr Brown knew the skidder was broken and negligently continued to operate it, and this is what caused the differential to break. On the evidence provided, I am not satisfied on the balance of probabilities that damage done to the skidder was due to Mr Brown's negligence or lack of care. Although Mr Brown has admitted to causing some damage to the paintwork on the SH4040, he says it was a genuine accident. The date on which Mr Brown says he scraped the SH4040 does not align with the date on the invoice allegedly rectifying the damage. Again, I am not satisfied on the balance of probabilities that TTH has shown the damage to the SH4040 was due to Mr Brown's negligence or lack of care and was not just due to normal wear and tear.

[73] Mr Brown has admitted he was in the accident that resulted in the total loss of the work vehicle (ute). TTH did not make claims against its insurance policies for machinery or vehicles other than the ute. I am therefore not satisfied that it made genuine attempts to mitigate its own losses.

[74] However, more fundamentally, TTH did not raise these claims - which relate to damage potentially going back to December 2022 – with Mr Brown at an earlier stage. To the extent that TTH could have exercised its purported rights under the employee handbook to insist on Mr Brown either rectifying the damage or paying the excess of any claim, it should have raised the issue with him when it became aware of the behaviour or conduct it now attributes to him. There has been a significant passage of time since Mr Brown's actions allegedly caused the damage. This, along with Mr Brown's dismissal in the intervening period means he has been denied the opportunity to obtain evidence in his defence.

[75] The Authority is an equity and good conscience jurisdiction. Stepping back to consider matters overall, I cannot be satisfied on the balance of probabilities that the

clause in the employee handbook applies to Mr Brown, because TTH has not persuaded me that damage to its machinery or vehicles was caused by Mr Brown's negligence or lack of care, as opposed to being caused by another operator, or being normal wear and tear on its machinery. TTH has not persuaded me any subsequent losses it suffered were directly attributable to Mr Brown, as opposed to being due to its actions in not pursuing insurance claims. The counter-claims are not substantiated on the evidence and accordingly do not succeed.

Orders

[76] I have found Mr Brown was unjustifiably dismissed by Timber Town Harvesting Limited and he is therefore entitled to remedies.

[77] I order that within 28 days of the date of this determination Timber Town Harvesting Limited is to pay Alistar Brown:

- (i) Compensation for humiliation, loss of dignity and injury to feelings under s 123(1)(c)(i) of the Act in the amount of \$15,000.00.
- (ii) Reimbursement of lost wages under s 123(1)(b) and s 128 of the Act in the amount of \$10,017.00 (gross).

Costs

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

[79] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Mr Brown 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 TTH 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.

[80] 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.⁷

Natasha Szeto
Member of the Employment Relations Authority

⁷ For further information about the factors considered in assessing costs see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1