

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2023] NZERA 406
3173324

BETWEEN LINDA JANE BULLEN
 Applicant

AND FLIWAY TRANSPORT LIMITED
 Respondent

Member of Authority: Philip Cheyne

Representatives: Simon Pankhurst and Karen Glass, advocates for the
 Applicant
 Daniel Erickson, counsel for the Respondent

Investigation Meeting: 4 and 5 April 2023 in Christchurch

Submissions Received: 17 April and 1 May 2023 from the Applicant
 20 April 2023 from the Respondent

Date of Determination: 31 July 2023

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Linda Bullen was employed by Fliway Transport Limited (Fliway).

[2] Fliway introduced a policy under which persons employed in specified positions, including Mrs Bullen’s position, were required to be fully vaccinated for Covid-19 by specified dates. The policy also provided that employees who refused to provide evidence of their vaccination status would be deemed as “unvaccinated”.

[3] Mrs Bullen declined to disclose her vaccination status. Fliway gave Mrs Bullen one month's notice of termination of her employment, effective on Friday 25 February 2022.

[4] Mrs Bullen raised her personal grievance claim of unjustified dismissal. By her statement of problem, Mrs Bullen seeks compensation for lost wages from 25 February 2022 to the date of her intended retirement. Mrs Bullen also claims compensation for humiliation, loss of dignity and injury to her feelings.

[5] In its reply, Fliway says that its decision to dismiss Mrs Bullen was justified, that it acted as a fair and reasonable employer could in all the circumstances and that it complied with obligations under the Employment Relations Act 2000 (the ERA) and the Health and Safety at Work Act 2015 (HSWA).

[6] In her statement of problem, Mrs Bullen said she was "locked out" of her workplace. I take that as meaning that Mrs Bullen could not attend the workplace, as a result of Fliway's policy. As it eventuated, Mrs Bullen was certified medically unfit for work from the date the policy would have affected her until her employment was terminated. No separate personal grievance arises.

[7] Despite mediation, matters were not resolved.

The Authority's Investigation

[8] Relevant documents were included with the statement of problem. Fliway later provided a bundle in preparation for the investigation meeting, which included some additional documents.

[9] Mrs Bullen gave evidence and answered questions.

[10] Kate Bacchus was Fliway's GM People at relevant times. Anne Hill is Fliway's branch Administration Manager, and was Mrs Bullen's direct manager. They gave evidence and answered questions.

[11] Submissions were made for Mrs Bullen and for Fliway in support of the respective positions.

[12] In this determination, I will state relevant factual findings, state and explain relevant legal findings, and express conclusions on issues necessary to conclude the matter and set out any orders.

[13] It is first useful to set out more of the context in which the problem arose, before setting out and resolving the necessary issues.

Context in which the problem arose

[14] Fliway is a transport and logistics business involved with international freight, third party warehousing and domestic and commercial delivery of freight. It operates nationwide, and one of its warehouse facilities is in Christchurch.

[15] Mrs Bullen was employed part-time (40 hours per fortnight) on a job-share basis from May 2017 as an administration assistant at Fliway's Christchurch facility. Mrs Bullen worked during ordinary business hours three days (Monday – Wednesday) one week and two days (Thursday – Friday) every second week.

[16] There was a comprehensive written individual employment agreement and position description. Clause 4.2 set the main place of work as the Christchurch facility. Fliway could after consultation amend the position description and duties, but not so as to substantially change the position. By clause 10 Mrs Bullen agreed to current conditions of employment and permitted Fliway to add to or amend those conditions. Clause 14 committed Fliway to provide a safe and healthy work environment for employees and visitors. Mrs Bullen had to comply with Fliway's rules and procedures. Clause 31.1 required Mrs Bullen to observe Fliway's policies and permitted it to introduce new policies or amend policies at its discretion on reasonable notice to Mrs Bullen.

[17] Fliway developed a Covid-19 vaccination policy proposal. Fliway circulated a consultation pack to employees including Mrs Bullen, on or about 25 November 2021.

Fliway's proposal was to change its position from "strongly encouraging" vaccination, to "a goal of being a fully vaccinated business". Its risk assessment classified Mrs Bullen's position as "Category 2 – High Risk" with a 1st vaccination required by 24 December 2021 and a 2nd vaccination by 16 January 2022. Employees were asked to provide feedback by 9.00am on Wednesday 8 December. Fliway foreshadowed a decision about the policy by 10 December.

[18] On 26 November, Mrs Bullen asked to meet Ms Bacchus, together with several other employees, to give feedback. Ms Bacchus declined the joint meeting request and offered to meet separately with Mrs Bullen.

[19] Mrs Bullen did not take up the invitation to meet with Ms Bacchus.

[20] Mrs Bullen requested copies of Fliway's risk assessment questionnaire and answers. Fliway provided the material on 3 December 2021.

[21] On 7 December Mrs Bullen responded to Fliway's Covid-19 vaccination policy proposal through a "SurveyMonkey" process. Mrs Bullen stated that the risk assessment for her position would be lowered to "0" if she worked from home, something that she considered could be achieved without disruption to the business by a swap of two of her "minor duties" within the team. Mrs Bullen considered that was better than being coerced into taking part in a "medical trial" and noted that Fliway had not included risks of the vaccine in its information. Mrs Bullen considered and requested confirmation that Fliway would be liable for adverse reactions, if it insisted employees be vaccinated to keep their jobs. Mrs Bullen did not see any benefit of being vaccinated, as there would be the same risk of contracting and transmitting the virus. Mrs Bullen noted that the industry was not mandated and it was Fliway's choice to insist employees (under duress) were vaccinated.

[22] On 10 December Fliway advised staff (including Mrs Bullen) that it had delayed its decision on the vaccination policy proposal.

[23] Ms Bacchus sought further details from Mrs Bullen on her work from home proposal. Mrs Bullen replied on 14 December. Ms Bacchus copied that to Ms Hill (Administration

Manager) who replied to Ms Bacchus the same day with comments on the proposal. Ms Hill's comments were not sent to Mrs Bullen.

[24] Fliway sent staff (including Mrs Bullen) a letter dated 16 December. Fliway announced its decision to require those working onsite at Fliway to be fully vaccinated, with a 1st vaccination by 9 January 2022 and a 2nd vaccination by 31 January 2022. The letter summarised the consultation feedback, both supportive of and against the proposal. Fliway also circulated its formal policy.

[25] Fliway also sent Mrs Bullen a letter in response to her feedback. Fliway referred to Ministry of Health (MoH) guidance as to vaccine side effects, confirmed it would not compensate Mrs Bullen for any adverse reaction but would provide additional leave of up to one day if an employee was not able to work due to side effects. Fliway repeated the MoH guidance about the vaccine's provisional status, in response to Mrs Bullen's characterisation of it as a "medical trial" vaccine. Fliway confirmed that Mrs Bullen's position was not risk assessed as a permanent work from home position but said it would consider that if Mrs Bullen chose not to be vaccinated. Mrs Bullen was instructed not to attend work on 10 January 2022 if she had not received a first vaccination or a medical exemption before then. Fliway foreshadowed a meeting in that event to consider options for Mrs Bullen's continued employment.

[26] Mrs Bullen was certified medically unfit for work, initially for five days from 15 December 2021 and then for 20 days from 29 December 2021.

[27] Mrs Bullen phoned Ms Hill on 5 January 2022. Arrangements for a meeting later in January were mentioned.

[28] Ms Hill sent Mrs Bullen an invite to meet on 20 January via Teams to discuss her vaccination decision, the company policy and what that meant for Mrs Bullen. Mrs Bullen attended with support. Mrs Bullen declined to disclose her vaccination status. There was some discussion about whether Mrs Bullen could work from home. The meeting was to reconvene the following week.

[29] The meeting reconvened on 25 January via Teams. Mrs Bullen again declined to disclose her vaccination status. Fliway confirmed that under its policy Mrs Bullen would be regarded as unvaccinated. As Mrs Bullen was unable to perform her role working from home, her employment would be terminated on notice.

[30] Brent Barry is Fliway's branch manager. He was part of the 25 January meeting. After the meeting, Mr Barry sent Mrs Bullen a letter giving one month's notice. Mrs Bullen was not required to report to work during the notice period. Mrs Bullen was asked to contact Ms Hill if she chose to confirm her vaccination status before the end of the notice period.

[31] Mrs Bullen wrote to Fliway on 10 March 2022 to advise that she would apply to the Employment Relations Authority to claim compensation and damages.

Penalty

[32] Through her representative's submissions on 1 May 2023, Mrs Bullen sought a penalty for breaches of good faith, with regard to the alleged failure to comply with the Health and Safety at Work Act 2015 (HSWA).

[33] There are several problems with the claim. Raising it in submissions in reply falls short of properly commencing an action for the recovery of a penalty in accordance with s 135 of the ERA. In any event, there would have been a limitation issue. Any cause of action must have been known to Mrs Bullen prior to her dismissal, so an attempt to commence a penalty action on 1 May 2023¹ based on pre-dismissal events would be prevented by s 135(5) of the ERA. As will be explained, a failure to comply with the Health and Safety at Work Act 2015 does not necessarily mean that there was a breach of good faith under the ERA. Mrs Bullen has not established that Fliway breached any obligation owed to her under that Act. For reasons to be explained, Fliway did breach s 4(1A)(c) of the ERA, but not so as to make Fliway liable to a penalty under s 4A of the ERA.

¹ Or even by the initial submissions on 17 April 2023.

Mrs Bullen's "causes of action"

[34] I am asked to consider five "causes of action" advanced for Mrs Bullen.

[35] I will briefly deal with several of these "causes of action" before I determine whether Fliway's decision to dismiss Mrs Bullen was justified.

Dismissed pursuant to raising a health and safety concern

[36] It is submitted that Mrs Bullen was dismissed for raising a health and safety concern "consistent with provisions at s 110A of the ERA".

[37] That section must be read with s 103(1)(j) of the Employment Relations Act 2000 (ERA). Section 103(1)(j)(i) states that a personal grievance includes a claim that the employee's employer has, in relation to the employee, engaged in adverse conduct for a prohibited health and safety reason. Adverse conduct includes dismissal. Prohibited health and safety reasons are those described in s 89 of the HSWA.

[38] Section 89 of the HSWA protects employees who are health and safety representatives, hold roles under the HSWA, who exercise powers under the HSWA or who raise a concern about health and safety with the PCBU (or others). Employees are protected against retaliatory actions such as dismissal.

[39] Mrs Bullen raised her views and concerns about risks of being vaccinated. However, there was no causative connection between Mrs Bullen raising her concerns and Fliway's decision to dismiss her. Mrs Bullen was dismissed because she did not disclose her vaccination status, not because she raised concerns about vaccine risks.

[40] Sections 103(1)(j)(1) and 110A of the ERA and s 89 of the HSWA do not apply here.

Coercion or inducement

[41] Section 103(1)(j)(ii) of the ERA is advanced in another submission. Subsection (ii) states that a personal grievance includes a claim that the employer has, in relation to the employee, contravened s 92 of the Health and Safety at Work Act 2015.

[42] In substance, s 92 of the HSWA prohibits a person from acting against another person with the intent of coercing or inducing them to perform HSWA functions (or not), to exercise HSWA powers (or not) or to prevent them from taking a role under the HSWA. Inducement and coercion are both argued here.

[43] There is evidence about a Fliway promotion in November and December 2021. Employees were offered a chance to win prizes if they were fully vaccinated and if they provided evidence of that to the company. The submission is that this was an action with intent to induce Mrs Bullen under the HSWA.

[44] The submission is misconceived. Fliway did not attempt to get Mrs Bullen to perform (or not) a HSWA function, exercise (or not) a HSWA power or refrain from taking an HSWA role by its prize promotion. Additionally, the promotion was not an “action against another person” caught by s 92(1) of the HSWA.

[45] It is also submitted that the introduction of the vaccine policy was an action with intent to coerce Mrs Bullen, contrary to s 92(1) of the HSWA. The coercion identified was the risk of dismissal for non-compliance with the policy. The submission is also misconceived.

[46] The argument is that that Fliway introduced a “function” with which it required its employees to comply, when it introduced its vaccination “requirement”. Use of the word “function” in the submission is intended to invoke s 92(1)(a) of the HSWA, the prohibition on actions to coerce the performance of a function under the HSWA. However, promulgating a vaccination policy applicable to employees did not amount to requiring those employees to perform a function under the HSWA. If requiring compliance with a workplace policy introduced to manage health and safety risks amounted to the performance of a “function” for the purposes of s 92(1), an employer would breach s 92 just by insisting on the use of

protective equipment such as earmuffs. That demonstrates that requiring compliance with a health and safety policy does not equate to coercion to perform a function under the HSWA.

[47] In further submissions, it is said that Mrs Bullen performed a role as a worker, under s 92(1)(c) of the HSWA. The fact that Mrs Bullen was an employee, without more, is not a “role under this Act”. It is not sufficient to engage s 92 of the HSWA.

[48] I was referred to *Sandanam v ADT Security Limited* in support.² There I said that the gist of s 103(1)(j) of the ERA was that workers have access to a personal grievance claim if they suffer detriment in their employment because they exercise powers or functions under the Health and Safety in Employment Act 2015. The employee in that case had not exercised those powers and functions. Mrs Bullen is no different.

[49] Section 103(1)(j)(ii) of the ERA and s 92 of the HSWA do not apply here.

Good faith – nexus with the Health and Safety at Work Act 2015

[50] I am referred to s 61(3)(g) of the HSWA. To paraphrase, the section requires a PCBU to have practices that provide a reasonable opportunity for workers to participate in improving their health and safety at work. A person who contravenes the provision is liable, on conviction, to a fine. The statutory duty of good faith under the ERA is a relevant factor if assessing whether reasonable opportunities have been provided, for the purpose for considering whether an offence has been committed.

[51] It is submitted that a breach of duty under the HSWA is necessarily a breach of good faith under the ERA. However, including good faith as a relevant factor when assessing criminal liability under s 61 of the HSWA does not mean that every breach of the HSWA must be a breach of good faith for the purposes of the ERA.

[52] In any event, in the present case, no breach of duty owed to Mrs Bullen under the HSWA has been established. This “cause of action” adds nothing to the issue of justification for the dismissal.

² *Sandanam v ADT Security Limited* [2021] NZERA 292.

Justification for the dismissal

[53] Whether the dismissal was justifiable must be determined on an objective basis by assessing whether Fliway's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time.

[54] A fair and reasonable employer will comply with the statutory good faith duty and its contractual obligations. Good faith requires an employer, who is proposing to make a decision that is likely to have an adverse effect on the continuation of an employee's employment, to provide the employee with access to relevant information and an opportunity to comment before the decision is made.

[55] I must consider whether Fliway sufficiently investigated the matter considering its available resources; whether Fliway raised the matter with Mrs Bullen before deciding to dismiss her; whether Fliway gave Mrs Bullen a reasonable opportunity to respond to the matter before dismissing her; and whether Fliway genuinely considered Mrs Bullen's responses before deciding to dismiss her. I may consider other factors, if appropriate.

[56] I must also consider the provisions set out at Schedule 3A of the Employment Relations Act 2000. Clause 3 of the Schedule applies because Fliway determined that employees such as Mrs Bullen be vaccinated to carry out their work.

Fliway's investigation - Policy

[57] Fliway is a substantial business with access to sufficient resources to support it to conduct comprehensive investigations into matters affecting employees in the workplace.

[58] I accept the evidence that Fliway undertook its Covid-19 Health and Safety risk assessment for its employees' roles based on the government interim guidelines issued by WorkSafe.

[59] I agree with counsel's submission that the validity of the risk assessment was not affected by the fact it was developed shortly before 26 November 2021, the effective date of amendments to the COVID-19 Public Health Response Act 2020 which empowered the

Minister to make regulations prescribing a risk assessment tool and permitted PCBU's to use that tool.

[60] There is reference to the absence of a mandate and to other retail and service operations that operated without vaccination pass requirements. The submission is that these other situations are relevant to an assessment of Fliway's health and safety risk. I disagree. Fliway was entitled to assess its risks, despite what was or had been in place in other industries.

[61] Based on its use of the risk assessment tool, Fliway's proposed vaccine policy was a lawful response to its primary duty under the HSWA.

[62] For Mrs Bullen, there is a submission that Fliway transferred its duties under that Act to others, contrary to s 31 of the HSWA. I disagree. Fliway was entitled to have regard to Ministry of Health advice and information as to the risks of Covid-19 and the risks of vaccination in developing its policy. However, Fliway's duties under the HSWA owed to employees were not thereby transferred.

[63] Fliway was entitled to introduce new company policies with reasonable notice, with or without Mrs Bullen's consent.

[64] I find that Fliway consulted with Mrs Bullen appropriately on developing its Covid-19 Vaccination policy. Mrs Bullen had a reasonable opportunity then to comment on the risk assessment attributed to her position and to the draft policy. Mrs Bullen did not challenge the risk assessment, other than to note it would drop to zero if she worked from home. Mrs Bullen's response was directed at the vaccine, her view of its status, its risks and its efficacy.

[65] Fliway decided to adopt the proposed policy, having regard to MoH advice and information as to the vaccine. That action was what a fair and reasonable employer could do in the circumstances at the time.

Fliway's investigation – application of the policy to Mrs Bullen

[66] Fliway wrote individually to Mrs Bullen on 16 December. It explained that it assessed the risks and benefits of the vaccine based on Ministry of Health advice and guidance and provided a link to the material. Mrs Bullen had characterised it as a “medical trial vaccine”, which Fliway understood to be a reference to the provisional registration of the vaccine in New Zealand. Fliway provided a link to the MoH guidance on the point. Fliway confirmed that Mrs Bullen’s role was not a permanent work from home position. That meant that she was not to attend work on Monday 10 January 2022 unless she had received her first vaccination dose (or held a medical exemption). Some tasks would be allocated to Mrs Bullen so she could work from home temporarily. A meeting would be arranged to talk through future options.

[67] Mrs Bullen was medically unfit for work following the letter. Arrangements were agreed for a remote meeting on 20 January 2022.

[68] At the meeting, Ms Bacchus confirmed that Mrs Bullen would not disclose her vaccination status, so in accordance with the policy she could not attend work. Ms Bacchus said there was limited work available, if working from home. Ms Hill outlined three main areas of Mrs Bullen’s work: office-based customer reception, subcontractors and covering for annual leave. Ms Hill doubted reception and subcontractors face to face contact could be covered from home. Mr Berry explained his concerns about a work from home arrangement. Ms Hill said that the majority of Mrs Bullen’s role was face to face with customers. Mrs Bullen would not be able to come into the office to cover leave, resources would be stretched with only two in the office and work could be missed. Mrs Bullen considered that the face-to-face requirement was only about 15% of her role, while phone calls 35% and sub-contractors about 50% which could be done remotely.

[69] There was agreement to meet again the next week. That remote meeting was on 25 January 2022.

[70] Mrs Bullen confirmed that she would not disclose her vaccination status. Fliway referred to the policy requirement for proof of vaccination or a medical exemption to attend work. Fliway summarised Mrs Bullen's role as before. Ms Hill assessed the subcontractor part of the role would count for about 35-40% of a workday. Ms Hill also considered working from home would cause some double-handling and inefficiencies. Fliway intended to cover increased home delivery work with an additional office-based position, so that was not work that could be reassigned to Mrs Bullen. Fliway considered that Mrs Bullen's job-share administrator role could not be performed from home.

[71] Mrs Bullen had no response and queried the notice period. Mr Barry confirmed Mrs Bullen's last day would be 25 February 2022. He confirmed that Fliway proposed terminating Mrs Bullen's employment on notice and that she would not be required to attend work during the notice period. Mrs Bullen asked if this would be put in writing and Mr Barry confirmed it would.

[72] Written notice of dismissal dated 25 January 2022 followed. It is not necessary to set out the content.

[73] Fliway's counsel accepts that Ms Hill's email to Ms Bacchus with specific responses to the detailed work from home proposal that Mrs Bullen earlier sent to Mrs Bacchus should have been provided to Mrs Bullen. Counsel's further submission is that Ms Hill's views set out in the email were raised with Mrs Bullen at the 20 January and 25 January meetings, so that Fliway in substance complied with the good faith obligation to provide Mrs Bullen with access to information relevant to its decision about her continued employment, and an opportunity to comment, prior to the decision.

[74] However, I disagree. The summary responses given at the two meetings fell well short of communicating Ms Hill's specific views on Mrs Bullen's 21-point proposal that her role could be accommodated on a work from home basis.

[75] Counsel also submits that not providing Ms Hill's specific responses as set out in the email was a minor defect in its process which did not result in Mrs Bullen being treated unfairly.

[76] Again, I disagree. Mrs Bullen was entitled to an opportunity to respond to Ms Hill's views task by task that they could not be managed efficiently on a work from home basis, that the reassignment of responsibilities was not an equal swap and that her colleagues would be unhappy about that. Not providing that opportunity was not minor and Mrs Bullen was treated unfairly as a result.

[77] I find that Fliway did not properly raise its view that Mrs Bullen's role (with minor adjustments) could not be performed on a working from home basis.

[78] Fliway was obliged to ensure that all other reasonable alternatives that would not lead to the termination of Mrs Bullen's employment had been exhausted, before giving her notice of dismissal.³ I note that Fliway had intended to assign some tasks for Mrs Bullen temporarily to perform from home following the adoption of the policy, while it addressed the effect of the policy for Mrs Bullen. That did not happen, presumably because Mrs Bullen was certified medically unfit for work. Taking the original intention alongside the dispute about the extent of Mrs Bullen's tasks that required her to be on-site, there was scope for a trial work from home arrangement to assess whether a permanent work from home arrangement was a reasonable alternative to the termination of Mrs Bullen's employment.

[79] For the foregoing reasons, I find that Fliway's decision to dismiss Mrs Bullen was not what a fair and reasonable employer could have done in the circumstances. Mrs Bullen was unjustifiably dismissed and has a personal grievance against Fliway.

[80] Information was provided about the consent status of the vaccine, in support of the contention that Fliway required Mrs Bullen to participate in a medical trial. It is not necessary to describe the information or make any findings about the information, even assuming the Authority has jurisdiction to do so. The information does not affect the question of

³ Employment Relations Act 2000, clause 3(4) Schedule 3A.

justification. The vaccine was subject to the Minister's consent in accordance with the Medicines Act 1981. Fliway was entitled to take that at face value at the time. Even the passage of time does not call that into question.

Remedies for the unjustified dismissal

[81] There is a claim for reimbursement of lost remuneration. In settling a personal grievance, the Authority has power to order the reimbursement of a sum equal to the whole or any part of the wages lost as a result of the grievance.⁴ If I determine that Mrs Bullen has lost remuneration as a result of the personal grievance, I must order Fliway to pay the lesser of the sum equal to that lost remuneration or 3 months' ordinary time remuneration.⁵ By effect of s 128(3) of the Employment Relations Act 2000, I have a discretion to order Fliway to pay a greater sum than the amount that I am required to order under s 128(2), to reimburse loss.

[82] Mrs Bullen's claim is for compensation for loss of wages from 25 February 2022 to her intended retirement date.

[83] Mrs Bullen provided little evidence of steps taken by her to mitigate her loss, except to say that she worked part-time from December 2022 initially to the end of March 2023. Mrs Bullen relies on the general proposition that people in her age group encounter significant difficulty in securing new employment, due to their age.

[84] I find that Mrs Bullen's loss of remuneration from the date of dismissal to the present time exceeds 3 months' ordinary time remuneration. I am required by s 128(2) of the ERA to order Fliway to pay Mrs Bullen 3 months' ordinary time remuneration. Mrs Bullen was paid \$21.70 per hour for an average of 20 hours per week. Three months' ordinary time remuneration equates to \$5,642.00. There will be an order for that sum.

[85] Mrs Bullen has not established any proper basis for the exercise of the discretion under s 128(3) of the ERA. Mrs Bullen secured some part-time employment, which suggests that she was able to obtain alternative employment. In the absence of specific evidence about

⁴ Employment Relations Act 2000 s 123(1)(b).

⁵ Employment Relations Act 2000 s 128(2).

her unsuccessful attempts to secure replacement employment, there is no basis to attribute the loss exceeding 3 months' ordinary time remuneration to her unjustified dismissal.

[86] For the same reason, I also decline the compensation claim to the extent it is for future loss.

[87] There is a claim for compensation for humiliation, loss of dignity and injury to feelings suffered by Mrs Bullen as a result of her personal grievance.

[88] I am referred to the principles in *Richora Group Limited v Cheng*.⁶

[89] There is some evidence to establish the extent of loss suffered by Mrs Bullen. Mrs Bullen says that she has been priced out of the housing market, was not able to afford to attend functions with or to travel to see family and friends, has lost independence and the strain has affected her relationship with her husband. Mrs Bullen says she felt isolated, alone and depressed. There is no medical or professional evidence or other supporting evidence on these points. I also note that when questioned, Mrs Bullen elaborated on her housing situation, so that her lost income was not a material cause of that circumstance. In addition, Mrs Bullen had managed to travel in family circumstances on a specific occasion. Overall, Mrs Bullen has established loss around the top of the lower level of harm.

[90] For Mrs Bullen, the submission is that the dismissal was "unceremonious, sudden and unexpected". It is said that Mrs Bullen remains "deeply traumatised", that Fliway "so flagrantly and recklessly disregard[ed] her concerns" and that the impact of the sale of her house was "egregious and debilitating". The evidence falls well short of these submissions. Fliway adopted a measured approach to the adoption of the policy, it responded reasonably to Mrs Bullen's concerns and Mrs Bullen has not established that the possibility of her dismissal was a factor in the decision to sell her property.

[91] I agree with counsel that the proven loss for Mrs Bullen is similar to the applicant's loss in *Laursen v Coldrite Refrigeration & Air Conditioning Limited*.⁷ \$10,000.00 compensation was ordered in that case. There will be an order for that sum.

⁶ *Richora Group Limited v Cheng* [2017] NZEmpC 132.

[92] Mrs Bullen did not contribute in a blameworthy way to the circumstances giving rise to her personal grievance. Section 124 of the ERA does not apply.

Summary

[93] Mrs Bullen was unjustifiably dismissed so has a personal grievance against Fliway. Mrs Bullen's other claims fail.

[94] To settle the personal grievance, Fliway Transport Limited is to pay Linda Bullen the following sums by no later than Friday 25 August 2023:

- (a) compensation of \$10,000.00, pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000; and
- (b) reimbursement of \$5,642.00, pursuant to s 123(1)(b) of the Employment Relations Act 2000.

[95] Costs are reserved. A claim for costs may be made by lodging and serving supporting submissions within 14 days of this determination. The other party may lodge and serve submissions in reply within a further 14 days. I will then determine costs, taking account of those submissions in the context of the Authority's standard approach to costs.

Philip Cheyne

Member of the Employment Relations Authority

⁷ *Laursen v Coldrite Refrigeration & Air Conditioning Limited* [2023] NZERA 56.