

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2022] NZERA 483  
3145821

BETWEEN PETER WAINE CARRINGTON  
Applicant

AND ARMOURGUARD SECURITY  
Respondent

Member of Authority: Helen Doyle

Representatives: James Hobcraft, advocate for the Applicant  
Matthew McGoldrick, counsel for the Respondent

Investigation Meeting: 18 and 19 May 2022 at Christchurch

Submissions Received: 19 May 2022 from the Applicant  
19 May 2022 from the Respondent

Further information received: 22 June 2022 from the Respondent

Date of Determination: 23 September 2022

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Peter Carrington commenced employment with Armourguard Security on or about 13 March 2018 as a Cash Transit Driver.

[2] Armourguard Security is a registered New Zealand unlimited company carrying on the business of security. The ultimate holding company, Evergreen International NZLLC, is registered in America. I shall refer to the company from hereon as Armourguard.

[3] Mr Carrington raised concerns during his employment. Armourguard entered into discussions and correspondence with him. There was a lengthy meeting on 28 August 2018.

[4] Mr Carrington remained dissatisfied, including with a written warning that had been provided to him on 6 September 2018 but was dated 30 August 2018.

[5] On 10 October 2018, Mr Hobcraft raised personal grievances in a lengthy letter to Armourguard and referred amongst other matters to the potential for penalty actions for alleged breaches of statutory obligations.

[6] On 13 November 2018 Mr McGoldrick responded to Mr Hobcraft.

[7] Mr Carrington indicated his intention to resign on 5 June 2019. His letter of resignation provided as follows:

I am Peter Carrington employee. I give notice of my resignation as I can no longer tolerate this work environment.

Armourguard continues to be in total breach of driver safety and is an issue I can no longer ignore or justify.

I have brought these safety issues to your attention many times yet nothing changes.

You continue to interfere with my wages and timesheets in breach of New Zealand laws which I consider an ongoing fraud against my earnings.

Further I have never received the promised pay increase following the 90 day trial period.

I feel that I am discriminated because I am not an Indian national and I alone have complained about health, safety issues and lack of driver rest time.

Having diligently worked over the past year in the hope of change I now release (sic) there will no change. Enough is enough.

[8] On 2 September 2019 Mr Hobcraft raised a grievance for constructive dismissal.

[9] The employment relationship problems that require resolution include alleged disadvantage claims for accounting for unpaid meal breaks, omission to provide a copy of the collective agreement and job description at the time of the offer of employment, reduction in shifts after complaints, unfair disciplinary process and disparity of treatment, breach of the Land Transport Act 1998 rules and requirements (the LTA) and dangerous and unsafe work environments.

[10] There is also an alleged unjustified constructive dismissal.

[11] Mr Carrington seeks an award of lost wages and compensation in the sum of at least \$25,000. Further, a finding that there was no written employment agreement, a penalty for failing to provide a written employment agreement, a finding that there were unilateral and

unlawful deductions from wages and an order for repayment of the deducted amounts with leave entitlements and costs.

[12] Armourguard denies that Mr Carrington was unjustifiably constructively dismissed or disadvantaged. It denies that it breaches its statutory obligations regarding his wages and doesn't accept there are any grounds for penalties. It seeks costs.

[13] The parties attended mediation but the issues between the parties were not resolved.

### **The investigation process**

[14] The Authority heard evidence from Mr Carrington and from Ashley Burkhart who is no longer with Armourguard but was at the time of Mr Carrington's employment a national logistics manager cash operations based in Auckland. In that role Mr Burkhart was responsible for overseeing the cash operations of Armourguard. The Authority also heard from Denise Dabinette who is employed by Armourguard as national cash operations manager with responsibility for all cash processing centres in New Zealand.

[15] Unfortunately, in or about late July/August 2018 Mr Carrington's manager who I shall refer to as NH, passed away.

[16] On the second day of the investigation meeting after evidence concluded the Authority heard submissions. The Authority advised Armourguard that it would be assisted by the provision of timesheets.

[17] Ms Dabinette was able to recover timesheets from Armourguard's archives. Mr McGoldrick in a memorandum to the Authority dated 21 June 2022 advised that Ms Dabinette had sorted through physical archive boxes to locate a timesheet for Mr Carrington for each week during his employment and had ordered the timesheets chronologically. She had also located any other relevant paperwork relating to the timesheets and had not altered or written on them in any way.

[18] The Authority wrote to Mr Hobcraft and asked whether there was any comment about this new information. Initially the Authority was advised that Mr Carrington was on leave. Nothing further was heard from Mr Hobcraft despite further requests as to whether a response was likely. The Authority ultimately advised that if it did not hear anything further it would proceed to determine the matter and now does.

**The issues**

[19] The Authority needs to determine the following issues in this matter:

- (a) How did Mr Carrington's employment commence with Armourguard?
- (b) What was the nature of his employment agreement?
- (c) Was Mr Carrington provided with a copy of the collective agreement that covered the work he was employed to undertake?
- (d) Did the bargaining and individual employment agreement comply with the requirements in the Employment Relations Act 2000 (the Act) at that time?
- (e) Are penalties available for any breach?
- (f) What issues did Mr Carrington raise with Armourguard throughout his employment?
- (g) What did Armourguard do in response?
- (h) What statutory and/or employment agreement provisions governed the taking of meal breaks?
- (i) Was there the ability to take a meal break?
- (j) Was Armourguard in accounting in the payment of wages for a meal break a breach of the Wages Protection Act?
- (k) Did Armourguard breach its obligations under the LTA?
- (l) Was Mr Carrington placed in dangerous or unsafe work situations?
- (m) Was Mr Carrington required to do work that was not consistent with the offer of employment and was adequate training available?
- (n) Were Mr Carrington's hours unilaterally reduced when he raised concerns?
- (o) Were hours after 28 August 2018 offered at the agreed level?
- (p) Was a written warning dated 30 August 2018 provided to Mr Carrington on 6 September 2018 justified?
- (q) Was there a breach or breaches of duty by Armourguard that led to Mr Carrington's resignation?

- (r) If there were breaches of duty by Armourguard then were they of a serious nature that would mean it was reasonably foreseeable that he would not be prepared to continue to work for Armourguard?
- (s) Alternatively, was there a course of conduct with the deliberate and dominate purpose of coercing Mr Carrington to resign?
- (t) If there was a constructive dismissal then was it justified?
- (u) If Mr Carrington is entitled to remedies because it is appropriate to make monetary awards or because he has made out his personal grievance or grievances, what remedies should be awarded in respect of his personal grievances?
- (v) Are there issues of contribution and mitigation?

#### **How did Mr Carrington's employment commence with Armourguard?**

[20] Prior to employment with Armourguard Mr Carrington had a 40-year career as a policeman. At the time there were discussions about him working for Armourguard, Mr Carrington said he was told by NH there were concerns about an inexperienced driving team for the West Coast run especially driving the alpine passes. Mr Carrington is an experienced driver.

[21] The documentation supplied leading up to the signing of an offer of employment was comprehensive. Mr Carrington completed an application form on 6 March 2018 and signed several consent documents for police, credit, and driver checks.

[22] On or about 12 March 2018, Mr Carrington was offered a part-time position with Armourguard Christchurch with variable hours as a city cash security officer.

#### **What was the nature of his employment agreement with Armourguard?**

[23] The letter that offered Mr Carrington employment included advice that the work he was undertaking was covered by a collective agreement between Armourguard and Service and Food Workers Union Nga Ringa Tota (the union). The letter referred to a copy of that collective agreement and job description being attached although Mr Carrington denies receiving either of these documents.

[24] The offer referred to some specific or additional terms of Mr Carrington's employment. The commencement wage for Mr Carrington was \$17 per hour. There was reference to a trial period. Hours of work were stated to be variable to meet the need of the business. There were no guaranteed minimum number of hours.

[25] The letter of offer advised that Mr Carrington was entitled to seek independent advice about the proposed agreement prior to signing. If he wished to accept the position, he was asked to sign the attached copy of the letter and return it to NH by 21 March 2018. If there was anything he was unclear about, disagreed with or wished to discuss, he was advised to contact NH.

[26] There was advice in the letter that Mr Carrington had the right to join the union. If he chose not to join the union during the first 30 days of employment Mr Carrington's minimum terms and conditions of employment were those outlined in the collective agreement together with the other terms set out in the letter under specific or additional terms of employment.

[27] After 30 days the letter stated if he had not joined the union then the same terms and conditions of employment would apply and would be regarded as an individual employment agreement, which could be varied by mutual agreement but if not varied then his terms would continue unaltered

[28] On 13 March 2018 Mr Carrington signed the following acceptance:

I have read this letter and I accept employment on the terms and conditions set out above.

I acknowledge that before signing this letter I was provided with a copy of this letter and the collective agreement, and acknowledge that I have had the opportunity to take independent advice about the terms and conditions and to consider the terms and conditions set out in this letter before signing it.

[29] Mr Carrington consented to the union being informed that he had entered into the agreement.

[30] There is an issue about the nature of the employment agreement. Mr Carrington was party to an individual employment agreement with Armourguard based on the terms and conditions in the collective agreement together with specific or additional terms of employment in the letter of offer.

**Was Mr Carrington provided with a copy of the collective agreement with his letter of offer?**

[31] Mr Carrington denied being provided with a copy of the collective agreement or a job description. Although NH undertook the employment of Mr Carrington, Mr Burkhart gave evidence that Armourguard has standard employment documentation, and the standard process was to provide a collective agreement and job description. Mr Burkhart said that he was surprised that Mr Carrington had not received a copy of the collective agreement and a job description. The information on the file for Mr Carrington appeared to support that he had been provided with all the documents because it included the collective agreement and the job description.

[32] In his evidence Mr Carrington said that he noticed at the time that the collective agreement was not attached to the offer but did not worry about it then. He said he only saw the collective agreement and the position description when Mr Hobcraft on requesting the same obtained a copy from Armourguard in or about November 2018.

[33] Mr Carrington acknowledged when he signed the copy of the letter of offer that he had received a copy of the collective employment agreement. He was invited to raise any questions or concerns with NH. I do not find that Armourguard was alerted to any issue about provision of the collective agreement or job description until in or about September 2018.

[34] Further documentation supplied during the investigation meeting supported that the first request by Mr Carrington for a copy of the collective agreement was in an email to Ms Dabinette dated 3 September 2018. In that email Mr Carrington states that his advisor said it seemed there was a collective agreement in force at the time he started but that he had not seen it. He asks Armourguard to confirm that a collective agreement was in force and the name of the union. He referred to the Armourguard documentation as “confusing”. On 4 September, Mr Carrington sent a further follow-up email to Ms Dabinette asking for a copy of the collective agreement and on 13 September in an email to Mr Burkhart requested a copy again.

[35] If the collective agreement had not been supplied with the letter of offer, then Mr McGoldrick supplied copies of the collective agreement and job description with his letter of 13 November 2018 just a little over two months from the first request for a copy of the collective agreement.

[36] For completeness because it has been raised as an omission that caused disadvantage, I am not satisfied there was any evidence to support that the collective agreement and the job description had deliberately not been attached to the letter of offer. If there was a failure to provide the collective agreement and job description at the time of the offer I do not conclude it was deliberate and otherwise reached the level of being able to be considered unjustified.

**Did the bargaining and individual employment agreement comply with the requirements of the Employment Relations Act 2000?**

[37] Mr Carrington signed the letter of offer the day after he received it on 13 March 2018. That was the date it was proposed in the letter that Mr Carrington start his employment. The letter stated a signed copy should be received by 21 March 2018 and that Mr Carrington could obtain independent advice. In the letter from Mr Hobcraft dated 10 October 2018 raising grievances and referring to penalties he referred to this as an erroneous request. On its face, the letter gave Mr Carrington a reasonable opportunity to obtain advice if he wanted to do that.

[38] I am satisfied that the process of informing Mr Carrington that there was a collective employment agreement that covered that work he was to do, and the information about how to contact the union was lawful.

[39] Mr Hobcraft submits that the letter of offer did not meet the requirements of s 65(2)(a) of the Employment Relations Act 2000 (the Act) for an individual employment agreement. Further, that there should have been further negotiation after 30 days had expired.

[40] The individual employment agreement was in writing. The name of the employer and employee was clear. There was a description of the work Mr Carrington was to do in the letter of offer and the wage he was to receive. The hours of work were specified as variable with an expectation to be available outside of core business hours. There were no guaranteed minimum hours. I accept that this may not have reflected the requirements of s (2)(a)(iv) of the Act. The collective agreement referred to hours worked each shift not to exceed 12 and to be set by a roster provided at least one week in advance. The collective agreement was negotiated before s (2)(a)(iv) of the Act was amended from 1 April 2016. I did not receive in-depth submissions about this.

[41] The fact that parties did not negotiate further after Mr Carrington did not join the union and 30 days had expired was not a breach of the Act. Bargaining is a mutual action. Mr

Carrington only raised issues about bargaining and new terms and conditions from late June 2018 and purported in doing so to represent other drivers.

**Are penalties available for any breach of obligations with respect to employment agreements and bargaining?**

[42] If the hours of work provision did not comply with the requirements of s 65(2) of the Act I do not find a penalty is available under s 65(4) of the Act. That is because no penalty action was commenced within 12 months as required in s 135(5) of the Act from when the cause of action first became known to the person or should reasonably have become known. The correctness of the form and content of the individual employment agreement was raised by Mr Hobcraft in the letter of 10 October 2018. The statement of problem was not lodged with the Authority until 19 July 2021.

[43] Any penalty for the failure to supply a collective agreement is also time barred. For completeness, any penalty awards are time barred.

**What issues did Mr Carrington raise with Armourguard?**

[44] Mr Carrington raised many issues with Armourguard in letters dated 30 June and 10 July 2018. He referred to the communications being on behalf of other drivers and in the second letter purported to represent drivers with a view to negotiating new employment agreements. One of the significant issues for Mr Carrington was a concern that money was deducted from his wages for a meal break, and that he had not given any consent to that deduction under the Wages Protection Act 1983 (WPA). He wanted a full refund of all money deducted for reason of a meal break. He also referred to breaches of the LTA because there were no logbooks and drivers were working excessive hours. He referred to some of the vehicles have exposed wiring, ripped floor mates and faulty air conditioning. Later there was a concern in that his hours had been reduced and this was for retaliatory reasons. I have focussed in the main on the issues that need to be resolved as employment relationship problems.

**What did Armourguard do in response?**

[45] Mr Carrington was of the view that there was no reply to the letters. Having considered the evidence and communication, Ms Dabinette took the following steps. She explored the issues raised with NH and Mr Burkhart. NH advised amongst other matters that when the issue

of meal breaks was raised with him he had made Mr Carrington aware that he needs a meal break. Further that Mr Carrington had seen the policy some months ago that meal breaks, and rest breaks must be taken and the conditions under which this could take place.

[46] Ms Dabinette planned to have an earlier meeting shortly after Mr Carrington's July letter as supported by an email. That did not go ahead perhaps because NH was not available. Ms Dabinette was adamant however there was a discussion with Mr Carrington about his concerns. She said she could recall explaining that he could not add time to his timesheet and needed to take his meal breaks. Given the passage of time and an email from Mr Carrington dated 13 August 2018 in which he states that he has not heard from management for over 28 days, I cannot safely make conclusions about that. I weigh however that NH's death in or about late July 2018 was unexpected, and the focus would have reasonably moved to dealing with this sad event.

[47] In his email of 13 August 2018 Mr Carrington set out what he described as conditions drivers wanted in a new document called "individual employment agreement."

[48] Ms Dabinette requested signed authority from the drivers Mr Carrington was representing. These were never provided.

[49] There were emails in August 2018 between Ms Dabinette and Mr Carrington about his issues. Mr Carrington requested his timesheets and remained concerned that as he saw it, 30 minutes for shifts of five or more hours were being deducted for unpaid meal breaks. I am satisfied that when requested Ms Dabinette supplied the timesheets. It is likely that at or about that time, Ms Dabinette reiterated the requirement to take a meal break. There were also concerns raised that hours offered were reduced and Ms Dabinette asked Mr Carrington to contact her with rostering issues.

[50] On 19 August 2018 Ms Dabinette emailed Mr Carrington and advised she was working through the list of issues and needed to get him trained as he had said he had training to do. She asked him whether he had done his practical and had that signed off. Mr Carrington responded and advised he did not agree to doing the practical as it was not in the document he had signed.

[51] On 27 August 2018 there was an incident with another employee who was a dispatch supervisor. The dispatch supervisor had advised Mr Carrington that he had to reduce his time

recording by 30 minutes for a meal break. Mr Carrington raised his voice and this incident was the subject of the written warning that was issued.

#### *Meeting 28 August 2018*

[52] Prior to the 27 August 2018 incident there was a plan that Mr Burkhart would travel to attend a meeting with Mr Carrington and Ms Dabinette to talk about the issues raised. There was also agreement the incident on 27 August would be discussed.

[53] Mr Carrington attended with his wife, and Ms Dabinette attended with Mr Burkhart and took notes.

[54] At the meeting on 28 August, there were several issues discussed. Mr Carrington was concerned how a manager had spoken to an employee during an adjournment of the meeting. He raised this concern at the meeting and afterwards in writing as a complaint. There was also some discussion about the incident the previous day with raised voices.

#### *Mr Carrington remains unhappy*

[55] Mr Carrington remained unhappy after the meeting and sent some emails to that effect.

#### *Outcome letter provided from the meeting*

[56] On 5 September 2018 Mr Burkhart wrote to Mr Carrington to summarise the outcome from the meeting on 28 August 2018. I will set out the way different issues were addressed below.

#### *Compensation for cancellation of late shift*

[57] It was agreed that 16 hours would be paid out to Mr Carrington to compensate him for cancellation of shifts at late notice. The matter was rectified internally as well.

#### *Reduced hours*

[58] Mr Burkhart set out at some length the discussion about this. The short point was that it was agreed that a minimum of 35 hours per week would be offered going forward.

#### *Deduction of lunch and rest breaks*

[59] Mr Burkhart set out that the crew must stop for a 30-minute unpaid break. The view of Armourguard as set out was that the practice was legal and consistent with current legislation. Mr Carrington's view that it was illegal was set out. Further that he claimed there was 126 occasions where a lunch break had been deducted and he would come back about that. It was set out that it was agreed the company would continue with the practice until there was advice contrary to the policy. It was also set out that any breach where crews did not stop for a break for 30 minutes after five hours was unacceptable and illegal. There was to be no movement on that.

#### *Inaccurate time sheets*

[60] There was reference to inaccurate time sheet filling in with time added. Mr Burkhart set out that he would be investigating this further although there is no evidence this occurred.

#### *Vehicles*

[61] Mr Carrington's view that the condition of some vehicles was poor when he started his employment was set out. He had rated the fleet condition as 5/10. It was set out that Armourguard had employed a person to manage the maintenance of vehicles and keep on top of any issues. Mr Carrington agreed that there had been improvement and now the rating was 7/10. It was set out that it was the driver's responsibility to advise of vehicle issues by filling out the vehicle check list forms that need to be filled out daily before the vehicle leaves the yard. There was also a responsibility for drivers to advise on returning about any issues. If the vehicle is not safe to drive then it was set out that it should not be, and a manager should be informed. Mr Burkhart set out that if issues were not raised through the correct channels, then they cannot be addressed, and it is a health and safety issue that Armourguard would not move on.

#### *General conduct*

[62] It was set out that Mr Carrington accepted his behaviour in raising his voice was unacceptable. Further this matter and that which was the subject of Mr Carrington's complaint would be investigated. Ms Dabinette, it was stated would be completing the investigation and would return to him for any further action.

#### *What happened then*

[63] Mr Carrington advised that matters were with Mr Hobcraft and would be discussed in the Authority. Mr Burkhart attempted to identify what the issues could be to see if they could be resolved. A lengthy letter from Mr Hobcraft was then provided on 10 October 2018 and responded to on 13 November by Mr McGoldrick. By that time the written warning had been issued.

[64] After 13 November 2018 nothing further about Mr Carrington was escalated to Mr Burkhart that he could recall.

**What statutory and/or employment agreement provisions governed the taking of meal breaks?**

[65] Rest breaks and meal breaks as prescribed in the LTA and the Act can be taken to effectively co-exist.<sup>1</sup> The LTA Rules provide rest breaks must be taken after 5½ hours of continuous work time. Rest break is further defined as time that is not work time and at least 30 minutes of duration and is not spent in a moving vehicle associated with work.

[66] Section 69ZD of the Act did not have the detailed break requirements at the material time that it did from 6 May 2019. The requirements for most of the time Mr Carrington was employed was the employer must provide the employee with rest breaks and meal breaks that:

- (a) provide the employer with a reasonable opportunity during the employee's work period for rest, refreshment and attention to personal matters; and
- (b) are appropriate for the duration of the employee's work period.

[67] The collective agreement specified an entitlement to breaks that was in line with the subsequent 6 May 2019 amendment to the Act.

[68] The provisions in the collective agreement in clause 5.4 provided as follows:

- 5.4 The employer's entitlement to breaks will be based on the length of time worked on each shift as follows:
  - (a) Two or more hours, but less than four, one ten minute rest break.
  - (b) More than four hours, but less than six, one ten minute rest break and one 30 minute unpaid meal break.

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<sup>1</sup> *Derbie v Tranzurban Hutt Valley Limited* [2019] NZEmpC 37.

- (c) More than six hours, but not more than eight, two ten minute rest breaks and one 30 minute unpaid meal break.
- (d) Greater than eight hours the entitlement to breaks is repeated again as through (a) to (c). The employee agrees that rest breaks and unpaid meal breaks shall be taken at times directed by their manager.

[69] Mr Burkhart said in his evidence that the expectation was that the two-person crew would self-manage exactly the time at which they would take a break. The expectation however was that the crew would take all breaks they were required to have by law after four hours worked and before six hours and record on their timesheets that they had done so.

[70] The position that Armourguard took about its breaks for meals of 30 minutes where a shift exceeded four hours was consistent with the requirements of the Act and the collective agreement. It was not inconsistent with the LTA requirements. Neither the LTA nor the Act required payment for meal breaks.

#### **Was there the ability to take a meal break?**

[71] I shall summarise the process as it was at the material time in the policy for taking a meal break. This will ensure that disclosure of the exact detail of the policy does not place any current employees at risk. If crews were taking meal breaks where they could return to the branch, then they were asked to take meal and rest breaks at the branch. If returning to the branch was not an option then crews were permitted to stop at an area which met certain requirements and the van could be under surveillance.

[72] Several matters were raised by Mr Carrington at different times about the ability to take a break. At one point he said it was not a break if he had to stay with the van. The policy however did not require that the employee stay in the van or rest in a moving van. Another issue Armourguard could recall being raised was that there would be a welfare check every hour on Armourguard drivers by phone. I am not satisfied that a welfare check was an unreasonable or unnecessary restriction with respect to the work that Mr Carrington was required to carry out which required a certain degree of risk and danger. Another aspect raised by Mr Carrington that frequently his co-driver or crew member wanted to get back earlier and was not agreeable to take breaks. There was no evidence however that Mr Carrington gave details about that to Armourguard so that they could deal with those concerns. From late August 2018 included on the timesheets was a statement that staff must take a 30-minute unpaid break unless approved by managers. That made the requirement very clear.

[73] Mr Carrington explained in his evidence what he did when he was on a lunch break in the branch. He would eat, have a hot drink, and use the bathroom. He would have been able to undertake similar activities in a break away from the branch. Initially it appeared that Mr Carrington stated that the breaks should be paid under the Act. It does not require payment for a meal break.

[74] The policy contained a process for a meal break that enabled rest, refreshment, and the use of the bathroom when crews could not return to the branch. I am satisfied that Mr Carrington had the ability to take a meal break.

### **Was Armourguard in accounting for an unpaid meal break a breach of the WPA?**

[75] Mr Carrington is correct that the WPA requires that an employer shall pay to a worker the entire amount of their wages.<sup>2</sup> An exception to this is where there is written consent to a deduction.<sup>3</sup> Mr Hobcraft in submission seeks to apply the provisions of the WPA in the accounting for a meal break.

[76] Mr Carrington concluded that it was a deduction because he had not included an unpaid meal break in his timesheet and therefore received less by way of wages. I find that what occurred was an accounting for unpaid meal breaks. It was not a deduction of wages under the WPA.

[77] Armourguard was entitled to require Mr Carrington to take meal and rest breaks for the reasons set out above. There is no basis on which the Authority can conclude meal breaks should be paid. Mr Carrington is not entitled to reimbursement for meal breaks. There is no unjustified action on the part of Armourguard about the meal breaks. Accounting for them was not a breach of the WPA.

### **Did Armourguard breach its obligations under the LTA?**

[78] From the initial period when Mr Carrington began to raise issues with Armourguard on 30 June and 10 July 2018, he referred to breaches of the LTA particularly that there were no driver logbooks. In his letter of 10 July 2018 to Ms Dabinette, he advised that the company faced the possibility of significant penalties including for individual drivers because of this

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<sup>2</sup> Section 4 Wages Protection Act 1983.

<sup>3</sup> Section 5 Wages Protection Act 1983.

breach. There was also reference to drivers driving excessive hours. Unjustified actions on the part of Armourguard because of breaches of the LTA are alleged.

[79] Mr McGoldrick refers the Authority to the work time provision in Part 4B of the LTA and s 30ZB that addresses work time requirements. He accepts because Armourguard drivers are required to drive vehicles that “carry goods for hire or reward” under s 30ZB(1)(c) the worktime requirements apply. He submits that Armourguard driver shifts do not exceed the limit on work time set out in s 30ZC of 13 hours of work time in a cumulative workday. The collective agreement limits ordinary hours per day in clause 5.1(i) to 12 hours. Section 30ZD requires the keeping of records and this would inform compliance with s 30ZC. I accept that this is complied with by Armourguard by the keeping of time and wage records and employment records.

[80] There was no evidence to support that Mr Carrington had been required to drive for excessive hours. There was one incident referred to by Mr Burkhart said drivers were put up overnight to overcome any risk excessive driving hours. A risk of excessive driving hours is also reduced by having a co-driver who can share the driving in the vans.

[81] The other issue that was raised was the logbooks. Armourguard say it is not subject to logbook requirements under s 30ZE in subpart 2 of part 4B. Mr Carrington is adamant that the keeping of logbooks are required.

[82] Mr Carrington refers the Authority to s 30ZE(1)(b) of the LTA that is about logbooks and the application of that section. He says that subpart 2 of 4B applies because Armourguard drivers drive a vehicle used in a transport service or where it must or ought to be operated under a transport service licence.

[83] A transport service is defined in s 2 of the LTA as meaning any goods service, passenger service, rental service or vehicle recovery service. Goods service is the only type of transport service that could apply to the business of Armourguard. Goods service is defined in s 2 to mean the carriage of goods on any road whether for hire or reward by means of a motor vehicle whose gross vehicle mass is 6000 kg or more. Mr Burkhart’s evidence is that Armourguard’s vehicles do not exceed 3,500 kg.

[84] I accept Mr McGoldrick’s submission that s 30ZE(1)(a) does not apply to Armourguard because drivers only require class 1 licences to drive the vehicles for its business. Section

30ZE(1)(c) does not apply because it refers to a heavy motor vehicle which is defined in s 2 as having a gross vehicle mass exceeding 3,500kg.

[85] Mr Carrington also referred to s 30ZE(2)(a) and (b). The definition of a goods service vehicle in s (2)(b) is defined as a motor vehicle used or capable of being used in a good service for the carriage of goods. Goods service as already set out is defined as a vehicle whose gross mass is 6000 kg or more. The evidence is that the gross mass of Armourguard vehicles is less than 6000 kg as set out above.

[86] I am not satisfied at the material time that Armourguard breached the LTA because it did not require its drivers to maintain logbooks. The reasons for this were explained to Mr Carrington at the meeting on 28 August 2018 and he recalls being given a pamphlet about this matter at the time. It was not a situation where Armourguard simply ignored Mr Carrington. There was engagement about the matter. Mr Hobcraft in his letter of 10 October 2018 raising grievances emphasised this matter as still an issue and said he was instructed to lodge investigation requests with the New Zealand Transport Association about this. It is unclear if this occurred.

[87] For reasons however as set out above it follows that there were no unjustified actions on the part of Armourguard about logbooks or requiring the driving of excessive hours established.

### **Dangerous and unsafe work environment**

[88] Mr Carrington raised issues about the conditions of vehicles. These were discussed at the meeting on 28 August 2018. Mr Burkhart wrote in his letter of 5 September 2018 that any issues must be raised through the vehicle check list forms to be filled out daily before leaving the yard. If the vehicle was unsafe then Mr Carrington was to stop and talk to a manager. Mr Carrington accepted that after he raised issues they were fixed, although I accept perhaps not as quickly as he would have liked. For example, mats were put in the van so that wiring was not exposed. Mr Burkhart could not recall any vehicle issues being escalated to him. There had also been a person engaged to look after vehicle maintenance so that issues could be kept on top of.

[89] There were photographs produced in the bundle to illustrate concerns from Mr Carrington. These were provided without any foundation being laid as to when the photographs

had been taken, whether the issue had been escalated and fixed. Little weight can be put on them. Mr Burkhart referred to the key accountabilities in the position description for cash transit drivers such as Mr Carrington to check the vehicle at commencement of shift and report any defects immediately. If there was an issue, then it should have been recorded and if required the vehicle would be off the road until the issue was fixed.

[90] Whist accepting that Mr Carrington found the vehicle conditions problematic on occasions when he did raise issues they were attended to and matters improved after a person was engaged for vehicle maintenance.

[91] I am not satisfied that Armourguard breached its health and safety obligations to Mr Carrington.

**Was Mr Carrington required to do work inconsistent with the offer of employment and was adequate training available?**

[92] It is somewhat unclear if this was raised as a grievance. Nevertheless, many issues were raised at various times and I will deal with it. Mr Carrington completed an induction process and there was training available to him. He did not remain solely on the run from Christchurch to West Coast, but the letter of offer and his position description did not support he was solely employed for that run. Mr Burkhart said that it was company policy that no employee remains on one run for the duration of employment because this creates potential or security issues. Drivers are therefore rotated on the various runs to ensure familiarity with the different areas.

[93] I am satisfied that appropriate training was available for aspects of the work if required.

[94] No unjustified action with respect to the nature of the work Mr Carrington was offered including loading and unloading of automatic teller machines or training is established. The position description provides this is part of the duties a cash transit driver could be required to undertake.

**Were Mr Carrington's hours unilaterally reduced when he raised concerns?**

[95] I am not satisfied from the evidence and the additional timesheet information provided after the Authority investigation that Mr Carrington's hours offered were reduced in July/August 2018 because of his complaints. Rather, I find that it more likely than not that

when Mr Carrington commenced employment there were staff shortages resulting in more hours being offered and worked by him. More staff were employed in July/August 2018 and the rosters were changed to reflect this. Accordingly, fewer hours were offered to Mr Carrington.

[96] The object of the Act is to build productive employment relationships through the promotion of good faith. One of the ways that this is undertaken is by reducing the need for judicial intervention. The parties met and discussed this concern which accorded with good faith obligations to be responsive and communicative. It was agreed from the meeting on 28 August 2018 that a minimum of 35 hours per week would be offered to Mr Carrington.

[97] In conclusion, I do not find the evidence supports the reason for the reduction in hours was retaliatory because Mr Carrington raised concerns. Rather it was more likely than not because there were more staff employed. Importantly the parties then came to an agreement about hours going forward and the focus turns to that. There is no grievance made out about reduction of hours for retaliatory reasons.

#### **Were hours after 28 August 2018 offered at the agreed level?**

[98] Mr Hobcraft provided a list of weeks and hours offered compiled from the wage and time records at the investigation meeting for the period after the agreement about hours was reached.

[99] An analysis of this with the subsequently provided timesheets shows that for the forty two weeks that followed the agreement at least thirty five hours were offered to Mr Carrington for twenty five weeks. For another nine weeks Mr Carrington has either expressed his unavailability for work for a period, was on leave or there were public holidays.

[100] That leaves eight weeks where there is no apparent reason why the minimum hours were not offered. One of those weeks no work at all appears to have been offered for the period ended 20 January 2019. The week before was taken as leave without pay. I am unable to be satisfied that there wasn't a good reason that no work was offered for that week. I do not therefor include that week.

[101] An agreement should be kept. There was no apparent justifiable reason why thirty five hours was not offered for the following weeks:

- (a) 9/09/18
- (b) 16/09/18
- (c) 23/09/18
- (d) 21/10/18
- (e) 3/02/19,
- (f) 2/06/19
- (g) 9/06/19

[102] Mr McGoldrick submitted more hours were offered than agreed averaged out. I accept that but the agreement was weekly not one of averaging. I find the failure to comply with the agreement was unjustifiable and it caused disadvantage. The appropriate remedy is reimbursement for the shortfall in offered hours for the weeks set out above in accordance with the document Mr Hobcraft provided.

[103] If there is some disagreement with this analysis, then either party may return to the Authority within 10 days on notice to the other.

**Was a written warning dated 30 August 2018 and provided to Mr Carrington on 6 September 2018 justified?**

[104] On 30 August 2018 Mr Carrington was issued with a written warning for a period of 12 months about an incident on 27 August 2018 during which Mr Carrington had raised his voice at the dispatch supervisor. The dispatch supervisor had spoken to him about timesheets and recording meal breaks.

[105] The letter of invitation to a disciplinary meeting referred to it being a matter of seriousness if Mr Carrington had not followed the reasonable instruction given to him and that it could be deemed serious misconduct. The meeting was to have been scheduled for 16 November 2018 with Ms Dabinette and Mr Burkhart. As Mr Burkhart was going to meet with Mr Carrington on 28 August it was put on the agenda to be discussed at that time. Mr Carrington said that it was only discussed briefly at the meeting.

[106] On 30 August 2018 after the meeting, Ms Dabinette asked by email if she could meet with Mr Carrington and discuss a shortfall in wages issues and the Monday meeting. Mr Carrington responded that there was no point as mediation was rejected and the matter was in the hands of the Authority.

[107] The written warning dated 30 August was then provided to Mr Carrington on 6 September. It set out Mr Carrington's explanation that he was wound up by what was said and felt that the dispatch supervisor had raised his voice. Further, that he had said that he had phoned the supervisor and apologised. The letter set out that the dispatch supervisor and a manager said he did not raise his voice to Mr Carrington. The dispatch supervisor was recorded as saying that he had not heard from Mr Carrington since the incident. It referred to a company expectation about behaviour, bullying and making false statements.

[108] Mr McGoldrick submits that any procedural deficient were minor and did not cause unfairness. The initial allegation appeared to be a failure to follow instructions, but the warning was about behaviour (raised voices), bullying and making false statements. The false statement allegations were not put or at least not clearly. I cannot be satisfied that Mr Carrington was clearly advised of the concerns and/or that he had a proper opportunity to answer them and have his responses genuinely considered. It is unclear what matters were considered in the issue of the warning and what the warning was for. It was unclear for example how the explanation that Mr Carrington was wound up about the meal break issue which was a significant issue for him was weighed.

[109] I do not find that these were minor procedural matters that did not cause unfairness. They were such to overlap with substantive justification and caused unfairness.

[110] The warning was unjustified.

### **Disparity of treatment**

[111] Disparity of treatment in cases that are alike can make an action or dismissal unjustified. Mr Carrington observed a raised voice incident involving a manager and an employee during an adjournment of the meeting on 28 August 2018. He raised a complaint. He says that the manager was treated differently to him. I understand that Mr Carrington would see any difference in treatment was unfair.

[112] Armourguard says it investigated the complaint Mr Carrington made and the circumstances were such to mean a different outcome was justified. In this matter I have found the warning was unjustified. Effectively that resolves the employment relationship problem about the warning without needing to examine further whether Armourguard's explanation was adequate in the circumstances.

### **Was Mr Carrington constructively dismissed?**

[113] In some circumstances a resignation may amount to a dismissal. As was stated in the Court of Appeal Judgment in *Wellington Clerical Union v Greenwich* by Judge Williamson:<sup>4</sup>

There is no substantial difference between the case of an employer who, intending to terminate the employment, dismisses the employee, and the case of the employer who, by conduct, compels the employee to leave the employment.

[114] There were three situations listed by the Court of Appeal in *Auckland Shop Employees Union v Woolworths (NZ) Limited* where a constructive dismissal might occur. These situations are not exhaustive:<sup>5</sup>

- (1) Where the employee is given a choice of resignation or dismissal;
- (2) Where the employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign; and
- (3) Where a breach of duty by the employer leaves a worker to resign.

[115] It was stated by the Court of Appeal that the conduct complained of must amount to a repudiation of the contract rather than just be unreasonable. Conduct can also be a breach of an express or an implied term not to act in a manner calculated to destroy or damage the relationship of trust and confidence between an employer and employee.

[116] I have taken Mr Carrington to have relied on the second and third situation as described by the Court of Appeal in *Woolworths*.<sup>6</sup>

[117] The Court of Appeal in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW INC* held that the correct approach in constructive dismissal

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<sup>4</sup> *Wellington Clerical Union v Greenwich* [1983] ACJ 965 at 975.

<sup>5</sup> *Auckland Shop Employees Union v Woolworths (NZ) Limited* [1985] 2 NZLR 37 (CA) at 374.

<sup>6</sup> Above n 2.

cases where breaches are alleged is to firstly conclude whether the resignation has been caused by a breach of duty on the part of the employer.<sup>7</sup> In determining that matter, all the circumstances of the resignation must be examined, not simply the communication of the resignation. The Authority needs to assess whether the breach of duty, if one is found by the employer, was of sufficient seriousness to make resignation reasonably foreseeable.

[118] Mr Carrington has the burden of establishing that the resignation was a dismissal.

### **What were the reasons Mr Carrington resigned?**

[119] Mr Carrington confirmed that the reasons for his resignation were those set out in his letter of resignation. He also had a health issue at the time.

### **Was there a breach of duty by Armourguard that led to Mr Carrington's resignation?**

[120] There was no evidence to support any significant issues between November 2018 and the date of resignation on 5 June 2019 were brought to the attention of Armourguard. The first matters in the notice of resignation of driver safety and the meal break accounting have been the subject of separate analysis and breaches have not been concluded on the part of Armourguard.

[121] Mr Carrington in his evidence referred to the driving ability of some of the drivers. The evidence supports that to the extent these concerns were escalated the driver trainer undertook an assessment with the driver and it may be that there were other actions. That is a matter between Armourguard and its employee or employees.

[122] In the letter raising the grievance of constructive dismissal of 2 September 2019 Mr Hobcraft raised several vehicle issues including the deactivation of emergency help button and removal of communication radios. There was also evidence about the air conditioning failing in the Armourguard vans at times which are sealed for security reasons. This resulted in extremely high or low temperatures. There was no evidence before the Authority as to when this occurred and what steps were taken to bring these to the attention of Armourguard and what it did or didn't do in response. Mr Carrington accepted issues he had raised had been

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<sup>7</sup> *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 1 ERNZ 168.

resolved even if not as quickly as he would have liked. He had been told at the 28 August meeting how to escalate concern using the vehicle check list.

[123] Mr Carrington referred to Armourguard not reviewing GPS data that would show he had not taken a 30-minute break when his co-driver put the meal break on their timesheets. I do not find that to be a breach on the part of Armourguard. Reviewing the GPS data was not going to advance the matter. Mr Carrington was still required to take a meal break.

[124] Mr Hobcraft referred in the letter to other disciplinary processes. There was an issue raised in November 2018 with Mr Carrington when he connected with another vehicle in the van. Although it was stated that could have been serious misconduct there was no disciplinary outcome. Matters seemed to have been resolved when he explained the situation. There was no evidence of anything else.

[125] I have not found breaches of the LTA as set out earlier.

[126] Mr Hobcraft raised a concern that Mr Carrington felt “mild discrimination” when his co-workers and supervisors were speaking in a foreign language when communicating about work involving him. He felt left out. Armourguard was surprised about this and its response was that it did not want to discourage employees speaking any language they wished. The view was that Mr Carrington could ask for information about the discussion if required. I do not find a breach in that regard.

[127] Finally, there was no evidence to support Mr Carrington was entitled to a pay increase after his trial period.

**If there were breaches of duty by Armourguard then were they of a serious nature that would mean it was reasonably foreseeable that he would not be prepared to continue to work for Armourguard?**

[128] I have not found there to have been breaches of duty but for completeness I do not find it would have been foreseeable to Armourguard that any of the matters that occurred after November 2018 were separately or cumulatively likely to result in Mr Carrington resigning.

**Was there a course of conduct with the deliberate and dominant purpose of coercing Mr Carrington to resign?**

[129] There was no evidence of a course of conduct by Armourguard to coerce Mr Carrington to resign.

#### *Conclusion about constructive dismissal claim*

[130] Mr Carrington was unhappy in his work with Armourguard and he had some health issues at the time of his resignation. I am not satisfied that he has been able to establish that he was dismissed. Rather I find he resigned. His grievance of constructive dismissal is not made out.

#### **Remedies**

[131] The Authority has found two unjustified actions that caused disadvantage. The first is that for some weeks after Armourguard agreed Mr Carrington would be offered 35 hours per week this did not occur.

[132] The second issue is the warning which has been found to be unjustified. There was limited evidence about any humiliation, loss of dignity and injury to feelings about that.

[133] I conclude a compensatory award of \$2,500 subject to any issue of contribution is appropriate for the unjustified warning.

[134] In terms of contribution Mr Carrington accepted that he had raised his voice and on receipt of the warning responded to the effect it would not happen again. There was some blameworthy conduct but the procedural deficiencies were quite significant. A reduction of 10% is appropriate.

#### **Orders made**

[135] Armourguard Security is to pay to Peter Carrington the sum of \$2,250 without deduction being compensation under s 123(c)(i) of the Act.

[136] Mr Carrington is to be reimbursed for the shortfall in hours where without apparent good reason Mr Carrington was not offered 35 hours work after the agreement of do so. These are set out above at paragraph [100]. Mr Hobcraft and Mr McGoldrick may, if necessary, return to the Authority within ten days about this matter.

#### **Costs**

[137] I reserve the issue of costs.

[138] If costs cannot be resolved, then Mr Hobcraft may lodge and serve a costs submission within 14 days from the date of this determination.

[139] Mr McGoldrick will have a further 14 days from receipt of the submission to lodge and serve a reply submission as to costs.

[140] Costs will not be considered outside of that period unless prior leave to do so is sought and granted.

[141] The Authority usually determines costs on its national daily rate unless circumstances require an upward or downward adjustment of the tariff.<sup>8</sup>

**Helen Doyle**  
**Member of the Employment Relations Authority**

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<sup>8</sup> 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>