IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2021] NZERA 52
3112372

	BETWEEN	MURRAY COUSENS Applicant
	AND	STAR NELSON HOLDINGS LIMITED Respondent

Member of Authority:	David G Beck
Representatives:	Paul Mathews, advocate for the Applicant No appearance for the Respondent,
Investigation Meeting:	3 February 2021
Submissions Received:	3 February 2021 from the Applicant None from the Respondent
Date of Determination:	15 February 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Murray Cousens was employed by Star Nelson Holdings Limited (Star Nelson Holdings), as a full-time driver/packer from 25 November 2019 until he left his position on 7 May 2020 due to dispute over Star Nelson Holding's failure to pass on to him the government Covid-19 wage subsidy and an alleged attempt by Star Nelson Holdings to impose a casual employment agreement. Up to this point in time, Mr Cousens' employment was not the subject of a written employment agreement.

[2] Mr Cousens raised a personal grievance by letter of 8 May 2020 from his advocate alleging that the failure to pay him during the Covid lockdown period and provide him with ongoing work except on a casual basis, constituted an unjustified action that also amounted to an unjustified dismissal.

[3] Mr Cousens made an application to the Authority of 20 July 2020 claiming an unjustified dismissal and unjustified disadvantage. He sought remedial compensatory measures including penalty actions against Star Nelson Holdings for failing to provide him with an employment agreement, breaches of good faith obligations and a breach of the Wages Protection Act 1983.

[4] The parties were directed to mediation but Star Nelson Holdings refused to make themselves available for such, filed no statement in reply, did not participate in a case management conference, failed to provide a brief of evidence as directed and did not, without explanation, participate in the investigation meeting. I am satisfied that Star Nelson Holdings have had proceedings served upon them and received a notice of the investigation meeting by registered mail.

The Authority's investigation

[5] Pursuant to s 174E of the Employment Relations Act 2000 ("the Act"), I make findings of fact and law and outline conclusions to resolve the disputed issues and make orders but I do not record all evidence. I have likewise, carefully considered the submission received from Mr Cousens' advocate. I heard evidence at the investigation meeting from Murray Cousens and his partner Christine Cousens.

Issues

[6] The broad issues to be decided are:

(a) Was Mr Cousens a casual employee with no expectation of ongoing regular employment and if so, did the employment end as a result of this categorisation?

(b) If not a casual employee, was Mr Cousens unjustifiably dismissed?

(c) If I do find Mr Cousens was not a casual employee – were Star Nelson Holdings obliged to pay Mr Cousens during the period of an externally imposed lockdown when they also accepted a Covid-19 wage subsidy from the Government?

(d) If an unjustified dismissal is found what remedies should be awarded considering Mr Cousens' claims for:

i. Lost wages (including during the Covid-19 lockdown period); and

ii. Compensation under s 123(1)(c)(i) of the Act of $23,000 for hurt and humiliation caused by an alleged unjustified dismissal and $8,000 under the same provision for an unjustified disadvantage.

iii. Unpaid holiday pay.

(e) If Mr Cousens is successful in all or any elements of his personal grievance should the Authority reduce any remedies granted as a result of any contributory conduct?

(f) If I consider any penalty actions are made out what is an appropriate level of penalty and should any portion of this be awarded to Mr Cousens?

(g) An assessment of the level of costs to be awarded to the successful party.

What caused the employment relationship problem?

[7] Star Nelson Holdings Limited, a company registered with a Nelson address, had at the date it claimed a wage subsidy, thirty seven employees and one director, Stuart Dale Biggs. The company is designated a 'management consultancy service' that operates to pay employees engaged by Mr Bigg's other registered companies Star Moving Limited and Scott Haulage (2010) Limited (trucking/furniture removal companies).

[8] Mr Cousens recalled responding to a SEEK advert for a driver/packer and being interviewed in Christchurch by the company's regional manager. He was told once appointed that he was to be involved with household removal and delivering of manufactured items, packing, loading and driving throughout the South Island. No employment agreement was provided and days to be worked were Monday – Sunday with hours of work indicated on a day by day basis. A pattern emerged from Mr Cousens starting work on 25 November 2019, of 7:30 am starts and finishing between 4:30 and 6 pm. Mr Cousens recalled there being 5-6 other drivers working similar hours or more than him, out of the company's Hornby depot and that the demand for hours was constant apart from the Christmas/New Year break.

[9] Mr Cousens produced payslips from Star Holdings Ltd (likely shorthand for Star Nelson Holdings Limited as no company of the former name is registered with Mr Biggs as director). The payslips indicate a regular pattern of hours worked from 1 December 2019 to 22 March 2020 of forty hours plus per week. The payslips denote Kiwisaver and PAYE deductions and have the term "Casual Holiday Pay" under the heading "Taxable Allowances". When put to Mr Cousens that this was an indicator of his employer perceiving him to be casual as it indicated an 8% 'pay as you go' holiday provision, Mr Cousens said he had not noticed this and believed he was just a full-time permanent employee.

[10] Mr Cousens indicated all was well until the Level 4 Covid-19 Lockdown occurred on 23 March 2020. Mr Cousens was immediately 'stood down' from work but not paid from this point in time and was unable to get any clear information from the regional manager. In frustration, Mr Cousens said he rang and texted Stuart Dale Biggs advising of his predicament and was reassured by him that he would look into the matter – a text of 9 April from Mr Biggs was cordial indicating: "Hey Murray, we think there's been some miscommunication which I'll be trying to sort out next week".

[11] Upon not hearing anything the following week and further unanswered texts to Mr Biggs, Mr Cousens sought help from Work and Income New Zealand and was emailed evidence from the Ministry of Social Development, which he has provided to the Authority, confirming that Star Nelson Holdings had applied for and had been granted a wage subsidy

describing Mr Cousens as “Full Time” and citing his IRD number. However, the wage subsidy was not paid to Mr Cousens and he was unable to get clarity from his employer as to why not. During the level 4 lockdown period Mr Cousens received no income from his employer and had to rely on emergency funding from WINZ.

[12] At level 3 lockdown Star Nelson Holdings had permission to continue operating. Mr Cousens returned to work on Monday 27 April and worked a full week without receiving an adequate explanation as to why he was not paid the wage subsidy.

[13] On Monday 5 May 2020, the regional manager provided Mr Cousens with a casual employment agreement retrospectively backdated to 25 November 2019 with Star Nelson Holdings Ltd as the employer party for a position designated “Driver”. Mr Cousens recalls being encouraged to take the agreement home to read and bring back the next day - signed.

[14] Mr Cousens related that he returned the next day after seeking advice to the effect not to sign the employment agreement as it had no guaranteed hours and being told by the regional manager that “it was all the same, it had to be that”. Mr Cousens then pressed the manager and recalls initially being advised he would be offered a full time agreement once Covid restrictions ended and to just sign the casual agreement in the interim. Mr Cousens worked to the end of 6 May without signing the agreement.

[15] After refusing to sign the agreement at a meeting on the morning of the next day (7 May), Mr Cousens says he was told by the regional manager that the company could not have him on the premises as it would leave them uninsured. The manager then suggested Mr Cousens finish the week off and end his employment but Mr Cousens’ decided to leave his employment ‘there and then’ saying he was upset at not being paid during the lockdown, was unconvinced about the insurance issue and annoyed about the refusal to confirm his permanent status. No further communication was forthcoming from the regional manager.

[16] On Friday 8 May 2020 Mr Cousens’ advocate emailed Mr Biggs setting out a personal grievance.

[17] Mr Biggs responded by return email on the same day claiming a ‘distorted view” had been given and that Mr Cousens was “given two casual employment agreements and offered

a permanent contract and he refused to sign any". Mr Biggs then went on to claim "he walked off the job and resigned of his own free will". Mr Biggs did not provide a copy of the alleged offer of a permanent employment agreement or any documented offer to re-employ Mr Cousens.

[18] The matter remained unresolved and Mr Cousens was paid up until 3 May 2020.

[19] Mr Cousens secured alternative employment as a driver at another company commencing on 25 May 2020.

Was the employment casual?

[20] I examine whether the employment relationship was casual from both the onset of the relationship and at the time of dismissal.

[21] In the absence of the original job advert and employment agreement at the onset of the relationship and no evidence to suggest the concept was discussed, a significant indicator that the relationship was intended as casual was the 8% on top of the employee's earnings as a 'pay as you go' arrangement instead of an entitlement to paid leave.

[22] Mr Cousens claims that he did not notice the 8% provision and therefore did not raise it with his employer and says given the relatively short period of employment it was unlikely he would be alert to the fact that he had no entitlement to take leave. Further, the arrangement of hours of work being allocated on a daily basis instead of a roster could point to a casual relationship but Mr Cousens indicated this was so, for all drivers and I had no evidence from Star Nelson Holdings to explain the practice. I suspect no roster existed due to the nature of the work being 'assignment based' but Mr Cousens' payslips and his evidence demonstrated to my satisfaction, that he was provided with regular work not indicative of a casual relationship.

[23] The relationship was thus not operationally clear cut. One typical feature suggesting a casual relationship would be if Mr Cousens had been temporarily "on call" to provide relief cover for an occasionally absent driver – this was not the case.

[24] The Act provides no definition of 'casual employment' but useful guidance on determining what is a genuine casual relationship is found in the Court decision *Jinkinson v Oceania Gold (NZ) Ltd* [1] identifying the following relevant factors:

a) The number of hours worked each week.

b) Whether work is allocated in advance by a roster.

c) Whether there is a regular pattern of work.

d) Whether there is a mutual expectation of continuity of employment.

e) Whether the employer requires notice before an employee is absent or on leave.

f) Whether the employee works to consistent starting and finish times.

[25] Looking at it broadly, it would appear that Star Nelson Holdings' needs flowed from available client demand and in setting staffing levels they had to balance out such demand but the work organisation was relatively informal. In the absence of any background information from Star Nelson Holdings, including no employment agreement, I am however, restricted in gaining any perspective of their staffing situation.

[26] By contrast, Mr Cousens' payslips showed his actual hours of work were regular and beyond what would normally be considered full-time, forty hours per week. I also note in claiming the Covid-19 wage subsidy Star Nelson Holdings describe Mr Cousens as "Full-time".

[27] I find overall that the engagement of Mr Cousens as casual, as evidenced by how his holiday pay was treated, did not accurately describe the real nature of the employment relationship under s 6 of the Act. [2] I find the relationship was of permanent full-time employment at the outset and the attempt by Star Nelson Holdings to impose a casual employment agreement was an opportunistic and crude attempt to impose a flexible 'zero hours' agreement which was unconnected to Mr Cousens' hours of work pattern.

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[1] *Jinkinson v Oceania Gold (NZ) Ltd* [2009] ERNZ 225 at [47].

[2] An approach taken in *Jinkinson* above note 1, with Couch J indicating that an assessment of employment status (whether 'casual' or not) needs to examine the real nature of the relationship under s 6 Employment Relations Act 2000 with the parties' description of the relationship in an employment agreement not being determinative.

Was Mr Cousens dismissed, constructively or otherwise?

[28] The leading definition of "dismissal" is "termination of employment at the initiative of the employer"[3]. Whilst such must flow from an unequivocal act, this can include a "sending away" that is also considered an element of a constructive dismissal. [4]

[29] In assessing the situation and perception of Mr Cousens that he was dismissed, a useful approach is the test outlined recently by Judge Holden who posited that:

> The test is an objective one; was it reasonable for somebody in Mr Gildenhuys' position to have considered that his or her employment had been terminated? [5]

[30] The question that follows is - was the insistence that Mr Cousens sign a casual employment agreement before being allowed to continue working an unequivocal act bringing the employment to an end?

[31] From the evidence I have heard I am satisfied that the dilemma facing Mr Cousens was as described above and that the insistence that he could not return to work or continue working beyond the end of the week without signing a casual employment agreement amounted to a 'sending away' and a dismissal. The parties had hitherto operated the employment relationship pursuant to an oral agreement that was ongoing and as I have found above, of a permanent nature with regular hours. The attempt to portray the reason for the need to have an employment agreement (for insurance purposes) was also misleading and in breach of good faith obligations owed. Put another way, Mr Cousens was already employed and the attempt to force him to sign a casual employment agreement was a unilateral variation of his terms and conditions not possible without agreement. Star Nelson Holdings' assertion that the absence of an employment agreement was unlawful and that this allowed them to effectively suspend Mr Cousens without pay was both a "pretext' and "wrong" in terms of obligations detailed in ss 60A, 63A and 65 of the Act. [6]

[32] I record that I would also have found that Mr Cousens was constructively dismissed as in context, including the suspension of the employment agreement without pay during the

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[3] *Wellington Taranaki and Marlborough Clerical IUOW v Greenwich (t/a Greenwich and Assocs Employment Agency and Complete Fitness Centre* (1983) ERNZ Sel Cas 95 (AC) at 103.
[4] *Actors IUOW v Auckland Theatre Trust Inc* [1989] 2 NZILR 154, (1989) ERNZ Sel Cas 247 (CA).
[5] *Cornish Trucks & Van Ltd v Gildenhuys* [2019] NZEmpC 6 at [45].
[6] See example of similar circumstances in *Houghton v The Perfect Food Co Ltd* ERA Christchurch CA1/09, 6 January 2009.

lockdown period, Star Nelson Holdings by their actions and omissions, irreparably breached the implied obligation of trust and confidence owed at the point they insisted Mr Cousens had to sign a casual employment agreement as a condition of his ongoing employment.

Was the dismissal justified?

[33] Having found that Mr Cousens was dismissed, s 103A of the Act requires the Authority to assess on an objective basis, whether an employer's actions were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. A dismissal must be effected in a procedurally fair manner with good faith obligations applying as set out in s 4 of the Act.

Applying factors identified by the Act

[34] I have to first assess the resources and experience available to the company when they embarked upon the action of insisting Mr Cousens sign a casual employment agreement. My initial finding is that Star Nelson Holdings Limited is a well-established company with enough experience to know or ought to know, that legal advice should have been sought before trying to essentially force Mr Cousens into a 'take it or leave it' offer of ongoing employment.

Procedural fairness?

[35] In applying s 103A (b) – (d) of the act to assess procedural fairness, I am conscious that the factors detailed that constitute a "Test of Justification" apply to conventional dismissal situations involving disciplinary and/or performance concerns and none of those factors feature in Mr Cousens' case. However, s 103A (4) allows that "the Authority or Court may consider any other factors it thinks appropriate". Therefore, when I turn to considering procedural fairness and what good faith obligations were owed to Mr Cousens, I do so having in mind that this being an 'imposed bargaining' situation.

[36] In the context of bargaining for what was a variation in an already existing employment relationship, I easily find that the decision to exclude Mr Cousens from the workplace until he signed an employment agreement was not a decision open to a fair and reasonable employer in all the circumstances. I do find that a fair and reasonable employer

could have approached this more fairly and paused to consider wider factors before making the decision to insist upon Mr Cousens signing a casual employment agreement. Central to this was simply a failure to examine Mr Cousens' pattern of employment up to the point the employer sought to impose a casual agreement, to decide if it could genuinely be described as a casual arrangement.

[37] Star Nelson Holdings could also have suggested given the obvious impasse, that the parties attend mediation and then sought to get consensus on the need to have an employment agreement in place and the content of such once it became apparent that Mr Cousens had what were objectively reasonable concerns about his job security.

[38] I also find that the defects in process were not minor as envisaged in s 103A(5) of the Act and they did result in Mr Cousens being treated unfairly.

[39] I find that Mr Cousens was unjustifiably dismissed.

Unjustified disadvantage – the unpaid Covid-19 lockdown

[40] I find that for the period of the Covid-19 lockdown, Star Nelson Holdings failed to communicate adequately with Mr Cousens and advanced no explanation why, having successfully applied for a wage subsidy on the ground of rightly portraying Mr Cousens as a full-time employee, they did not continue to pay Mr Cousens for at least 40 hours per week. I was provided with no information from Star Nelson Holdings on the wage subsidy and timing of their application. A search of MSD's website revealed that the company obtained a wage subsidy of $260,095.20 relating to 37 employees.

[41] Mr Cousens provided confirmation from MSD that his IRD number had been used in the subsidy application and he was identified as a full-time employee. MSD stated obligations placed on employers claiming the wage subsidy that was designed for employers committed to retaining employees, included:

- You will only use the subsidy for the purpose of meeting your named employees ordinary wages and salary and your obligations in relation to this subsidy
- You will for the period you receive the subsidy:

- use your best endeavours to pay at least 80 per cent of each named employee's ordinary wages or salary; and
- pay at least the full amount of the subsidy to the employee; but
- where the ordinary wages or salary of an employee named in your application was lawfully below the amount of the subsidy before the impact of COVID-19, pay the employee that amount.

- The ordinary wages or salary of an employee are:
  - as specified in the employee's employment agreement as at 26 March 2020. [7]

[42] Whilst there is a paucity of information available to the Authority, it was apparent that Star Nelson Holdings did not communicate to Mr Cousens any intention to end the employment relationship during the lockdown and for a brief period between 27 April and 3 May 2020 the relationship resumed. No adequate explanation was provided why Mr Cousens was not paid for the period inclusive of 25 March - 24 April (four weeks and two days) and Mr Biggs when requested, did not address why the wage subsidy had not been paid to Mr Cousens.

Finding

[43] I find that not paying Mr Cousens during the lockdown period and not securing an agreement to temporarily alter his wage structure was a unilateral breach of contractual obligations owed to him by Star Nelson Holdings. Section 63(2) of the Act only provides for a variation of an employee's terms and conditions by "mutual agreement" and none was present here. The wages owed fall due. I also find that the inactions of Star Nelson Holdings caused Mr Cousens distress and he has made out an unjustified disadvantage claim.

Conclusion

[44] Having made a finding of unjustified dismissal and unjustified disadvantage on procedural and substantive grounds Mr Cousens is successful in his personal grievances and is entitled to remedies.

Remedies

Lost wages

[7] *Workandincome.govt.nz/online-services/covid19/wage-subsidy-dclartion.html.*

[45] Section 123(1)(b) of the Act provides for the reimbursement of the whole or any part of wages lost by Mr Cousens should I find that he has established a personal grievance and s 128(2) mandates that this sum be the lesser of a sum equal to his lost remuneration or three months' ordinary time remuneration.

[46] Here I find Mr Cousens lost remuneration was attributed to the personal grievances and that includes the period during the lockdown when his employment agreement was suspended and Star Nelson Holdings inexplicably did not apply the government provided wage subsidy that they had secured to 'top up' Mr Cousens' wages. I observe that Mr Cousens is also able to recover wages owed under s 11 Wages Protection Act 1983 as the non-payment of wages during the lockdown arguably breaches s 4 Wages Protection Act 1983 as, unless specifically allowed to statutorily or contractually deduct, it provides that "an employer shall, when any wages become payable to a worker, pay the entire amount to that worker without deduction".

Finding

[47] Given the above and reflecting on the unfortunate circumstances of the unjustified dismissal, I consider that overall justice is served by awarding Mr Cousens seven weeks' lost wages at an average of 43.84 hours per week. This amounts to a sum of $6,138 gross.

Compensation for Hurt and Humiliation

[48] Mr Cousens and his partner gave evidence of the significant impact of the suspension of employment without pay during the lockdown and the financial uncertainty it created at a difficult time, including the lack of communication as to why he was not paid the government wage subsidy.

[49] Mr Cousens described the negative impact upon his general mental well-being and family relationships including that he had difficulty sleeping and was distressed about his inability to provide for his family. He also described the humiliation of being forced to seek an emergency assistance grant from MSD and an inability to meet mortgage payments and other outgoings at a time when he also had to cope with Covid issues.

[50] On the dismissal, it was evident that Mr Cousens suffered humiliation and his dignity was impinged by his former employer's deceptive actions and Mr Cousens' level of anxiety was increased.

[51] In giving evidence Mr Cousens struck me as a proud individual not prone to exaggeration and he has a stoic personality.

[52] Mr Cousens' advocate sought $23,000 compensation for the impact of the dismissal and $8,000 for the impact of the failure to pay Mr Cousens during the COVID lockdown period.

Finding

[53] Taking into account the evidence proffered and awards made by the Authority and Court in similar situations and surveying cases brought to my attention in submissions, I consider Mr Cousens' evidence warrants overall compensation of $25,000 under s 123(1)(c)(i) of the Act for both the established disadvantage action and unjustified dismissal claims. [8]

Breaches

[54] I am satisfied, in the unusual context of a government imposed lockdown that Star Nelson Holdings did not turn their minds to a conscious breach of the Wages Protection Act and no penalty threshold has been met. However, I consider that Mr Cousens' claim that Star Nelson Holdings breached specific good faith obligations when he returned to work has some significant traction.

[55] I find that s 4(1A) of the Act was breached generally by Star Nelson Holdings failure to be communicative and responsive over the Covid-19 subsidy issue and specifically they deceived and misled Mr Cousens in regard to insisting he sign a casual employment agreement before returning to work. Star Nelson Holdings actions undermined the employment relationship and I consider this was more likely than not a deliberate act to gain an advantage over an employee in a vulnerable bargaining position.

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[8] See summary of compensatory approaches in comparable cases in *Richora Group Ltd v Cheng* [2018] ERNZ 337 at [65] – [66].

[56] In addition, a failure to provide an employment agreement at the commencement of employment is a breach of s 63A (2) of the Act but I am not satisfied a penalty is warranted.

[57] Under s 4A of the Act I have to consider whether the breach of good faith was "deliberate, serious and sustained" and have regard to matters set out in s 133A of the Act.

[58] In the circumstances, I can see no reason not to impose a penalty as Star Nelson Holdings had ample opportunities to remedy the significant breaches of good faith I have identified and thus I can by implication, draw a reasonable conclusion that the breaches were not inadvertent and they were sustained over a reasonably lengthy period. As to the level of seriousness I have to look at the impact on Mr Cousens and the nature of the conduct of Star Nelson Holdings. I find it was a serious breach of good faith to mislead and deceive Mr Cousens over his return to work.

Level of penalty

[59] Factors I need to consider and have done, in setting the level of a penalty are set out in s 133A of the Act and the full Court decision of *Borsboom v Preet PVT Limited.* [9]

[60] In addition, I need to have regard to s 3(a) of the Act that sets out relevant 'aspirational' matters including the need to "build productive employment relationships through the promotion of good faith in all aspects of the employment environment" and acknowledging and addressing "the inherent inequality of power in employment relationships". The maximum penalty available to a company under s 135(2)(b) of the Act is $20,000.

[61] In all of the circumstances, despite there being no mitigating factors advanced by Star Nelson Holdings, I set a penalty at the proportionate and modest level of $4,000 as an appropriate deterrent and one reflective of the seriousness of the breach of good faith with $2,000 being apportioned to Mr Cousens and $2,000 to the Crown.

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[9] *Borsboom v Preet PVT Limited* [2016] NZEmpC 43.

Contribution

[62] Section 124 of the Act states that I must consider the extent to which, if at all, Mr Cousens' actions contributed to the situation that gave rise to his personal grievance and then assess whether any calculated remedy should be reduced. To assess whether the remedy should be reduced I have considered the relevant factors recently summarised by the Employment Court in *Maddigan v Director General of Conservation*[10].

[63] I find that Mr Cousens adopted an objectively reasonable position in relation to refusing to sign a casual employment agreement that did not reflect the reality of his employment situation.

Finding

[64] On balance, given Mr Cousens' lack of contribution in the events that led up to his dismissal I find no reduction is warranted to any of his awarded remedies.

Costs

[65] Costs are at the discretion of the Authority and here Mr Cousens was successful in his claim of unjustified dismissal and unjustified disadvantage and has obtained compensatory remedies in an investigation meeting that took half a day at which he was represented. In the circumstances I award Mr Cousens a contribution to costs in the amount of $3,000.

Summary

[66] **I have found that Murray Cousens was unjustifiably dismissed and unjustifiably disadvantaged by Star Nelson Holdings Limited, who also breached owed good faith obligations sufficient to incur a penalty action. As a result Star Nelson Holdings Limited must pay:**

i. **$6,138.12 gross to Murray Cousens for lost wages pursuant to s 123(1)(b) of the Act;**

[10] *Maddigan v Director General of Conservation* [2019] NZEmpC 190 at [71] – [76].

ii. **$25,000 compensation to Murray Cousens pursuant to s 123(1)(c)(i) of the Act.**

iii. **A penalty of $4,000 of which $2,000 is to be paid to Murray Cousens and $2000 is to be paid to the Crown**

iv. **$3,000 to Murray Cousens as a contribution to legal costs.**

David Beck
Member of the Employment Relations Authority