

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2025] NZERA 472
3280439

BETWEEN

JEROME LAZARO
Applicant

AND

WAIMEA CONTRACT CARRIERS
LIMITED
Respondent

Member of Authority: Peter van Keulen

Representatives: Michael Boskett, advocate for the Applicant, for the investigation meeting and first written submissions
Chris Fernando, counsel for the Applicant for second written submissions
Simon England, advocate for the Respondent

Investigation Meeting: 5 and 13 February 2025 in Blenheim

Submissions Received: 13 March 2025 and 14 May 2025 from the Applicant
17 April 2025 from the Respondent

Date of Determination: 5 August 2025

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Jerome Lazaro accepted a role as a driver of logging trucks with Waimea Contract Carriers Limited (WCC) whilst he was in the Philippines. After Mr Lazaro obtained the necessary work visa, WCC paid for his move to New Zealand so he could commence his employment.

[2] Mr Lazaro started his employment on 18 September 2023. He was initially based in Nelson so he could undertake driver training. Mr Lazaro then moved to Blenheim, where his role was based, and he undertook further driver training there.

[3] During Mr Lazaro's training WCC had concerns about his ability to drive and his ability to do his job because of previously undisclosed health issues.

[4] In the end Mr Lazaro never successfully completed his training and he did not start his driving role. Matters came to a head at the start of December 2023 when Mr Lazaro was told to return to Nelson to undertake further training.

[5] Mr Lazaro says that in a meeting on 4 December 2023 WCC dismissed him. WCC says it did not dismiss Mr Lazaro, but it did discuss with him the limited options available given his need for further training and it suspended him on full pay until Mr Lazaro considered the options and advised what he wished to do.

[6] Mr Lazaro never returned to work for WCC claiming he was dismissed on 4 December 2023. WCC says he was dismissed by it, but this was on 15 December 2023 by which time Mr Lazaro had refused to return to work to undergo further training.

[7] As well as being dismissed by WCC, Mr Lazaro alleges he was harassed during the time he worked there; he says that Filipino colleagues abused him and the WCC trainers harassed him. WCC refutes that there was any harassment of Mr Lazaro.

The Authority's investigation

[8] I investigated this employment relationship problem by receiving written evidence and documents, holding an investigation meeting on 5 February 2025 and 13 February 2025 and assessing the written submissions of the parties' representatives.

[9] In my investigation meeting, under oath or affirmation, witnesses who had provided written statements confirmed their statement and gave oral evidence in answer to questions from myself and the parties' representatives. After the investigation meeting I received written submissions from the parties' representatives.

[10] As permitted by s 174E of the Employment Relations Act 2000 (the Act) I have not recorded all the evidence and submissions received, in this determination; I have set out my findings of fact and law, then based on this I have expressed conclusions on issues as necessary to dispose of the matter, and then I have specified the orders made as a result.

What happened?

[11] WCC was an Accredited Employer for the Accredited Employer Work Visa scheme.

[12] In December 2022 WCC travelled to the Philippines to recruit drivers for its Nelson and Blenheim based driving work.

[13] Mr Lazaro was one of the successful applicants in WCC's December 2022 recruitment programme. As well as having good driving experience, Mr Lazaro presented with good English skills and the limited driving testing done by WCC as part of the recruitment evidenced adequate driving ability.

[14] Through 2023 Mr Lazaro completed a medical examination, signed an employment agreement and then obtained the necessary Accredited Employer Work Visa. WCC facilitated Mr Lazaro's compliance with these requirements and paid the costs associated with them.

[15] WCC then paid for Mr Lazaro's flights to New Zealand and provided him with accommodation in Nelson, where Mr Lazaro undertook his initial driver training.

[16] Mr Lazaro's training commenced on 19 September 2023 with Andrew Hunter, a Driver Trainer for WCC. In the first four weeks of his training Mr Lazaro received training on the New Zealand Road Code, WCC Standard Operating procedures, WCC Safe Operational procedures, the use of a truck, work locations, and other work-related protocols. Mr Lazaro also had use of a WCC Ute so he could practice driving on New Zealand roads.

[17] During this time Mr Lazaro's training also included driving the Ute on roads to check his compliance with New Zealand Road Code and his ability. Mr Lazaro's training then expanded to observing the driving of logging trucks and assisting with loading i.e., observing and participating in what would be his daily job functions.

[18] In late September 2023 whilst assisting with loading a logging truck Mr Lazaro had difficulty throwing chains over a load to secure it. Mr Lazaro then complained of chest pains and had to return to the WCC yard.

[19] It turned out that Mr Lazaro had a health condition that required medication – this had not been disclosed by Mr Lazaro at the time of his application for the driving role with WCC as Mr Lazaro was not aware of it at that time, but he was aware of it when he commenced work at WCC. Whilst WCC was concerned about the non-disclosure of his medical condition by Mr Lazaro it supported him to continue working by assisting in obtaining the necessary medication and providing him with additional equipment to aid him with using the chains to secure loads.

[20] Then, on 11 October 2023, Mr Lazaro commenced driving a logging truck with mixed results. In response to this Mr Lazaro refused to drive the logging truck over the next two days. Mr Lazaro did drive again on 16 October, but Mr Hunter was concerned about the driving lines he was keeping with the truck.

[21] After four weeks of driver training in Nelson, with Mr Hunter, Mr Lazaro moved to Blenheim where his role was based. Once there Mr Lazaro undertook further driver training with Timothy Pupich, a Driver Trainer for WCC. This training commenced on 20 October 2023.

[22] On starting his training in Blenheim Mr Lazaro appeared to have limited knowledge of New Zealand driving rules, was not confident in his driving and was not a competent driver. So first the first two weeks in Blenheim Mr Lazaro was a passenger in WCC trucks so he could observe and learn.

[23] On 9 November 2023 Mr Lazaro began driving, doing a small amount of driving with an empty truck. During this driving Mr Pupich was concerned that Mr Lazaro did not seem to follow instructions, which Mr Pupich noted had been apparent from the outset of Mr Lazaro's training in Blenheim.

[24] Mr Lazaro continued to drive an empty truck until 14 November 2023 when he drove a loaded truck with Mr Pupich. Mr Pupich observed a continued failure to follow instructions. Mr Lazaro showed some improvement on 15 November but then regressed again in the period 16 to 23 November.

[25] On 24 November 2023, Mr Lazaro had a full day driving solo with Mr Pupich following him. During this driving Mr Pupich observed that Mr Lazaro continually crossed the centre line and had to be told to keep left. This driving continued in the period 27 – 30 November and Mr Pupich observed Mr Lazaro crossing the centre line and not following instructions. When Mr Pupich discussed his concerns with Mr Lazaro, Mr Lazaro became argumentative and showed no acceptance of the issues or a desire to improve.

[26] By the end of November 2023 Mr Pupich had formed a view that Mr Lazaro was not safe to drive for WCC. So, Mr Pupich spoke to his manager, James Ruffle WCC's Marlborough Area Manager. Mr Pupich told Mr Ruffle about his concerns with Mr Lazaro's driving and importantly his observation that Mr Lazaro was not improving under his training; he told Mr Ruffle that he had done as much as he could with Mr Lazaro, and he suggested that someone else needed to train or work with Mr Lazaro to get him up to the required driving standards.

[27] In response to this Mr Ruffle, Ms McIntyre and Mr Pupich discussed what to do with Mr Lazaro and agreed on a plan for another effort to get Mr Lazaro's driving to the required standard for WCC. Mr Lazaro was to return Nelson for four weeks, where he would undertake driving instruction with an external provider who would assess if Mr Lazaro had the skills and ability to drive trucks in New Zealand (even if he was not operating at the required level) and advise WCC what further training it should do with Mr Lazaro to get him to the necessary standard of driving.

[28] Having agreed this plan, Mr Pupich told Mr Lazaro to take his work gear and move back to Nelson to reside in WCC provided accommodation for four weeks so he could undertake the planned instruction and training.

[29] Mr Lazaro travelled to Nelson in the morning of 4 December 2023.

[30] In evidence Mr Lazaro said that when he turned up at the Nelson site on 4 December 2023 no one gave him any instructions on what to do and he simply waited for two hours until Ms McIntyre called him into her office for a meeting.

[31] In her evidence Ms McIntyre said that on the morning of 4 December 2023 at around 10:00 am she was told that Mr Lazaro was on site, but he was refusing to do any work. So, Ms

McIntyre decided to meet with him and explain that he needed to undertake the proposed training as WCC did not, at that time, consider he was safe to drive its trucks.

[32] Either way Mr Lazaro was called to a meeting on 4 December 2023 with Ms McIntyre.

[33] Mr Lazaro's evidence of what occurred in the meeting on 4 December 2023 is that:

- (a) Ms McIntyre told him that he had been rejected by three trainers and now he was terminated – a reference to his employment being terminated.
- (b) In response he asked to be given a chance suggesting he could clean trucks or help the mechanics. Ms McIntyre said no to this as his visa was for him to be a driver.
- (c) He then begged to have one month to stay in the house – the Nelson accommodation – to find another job.
- (d) Ms McIntyre agreed and said if he could not find a job WCC would pay for his flight to the Philippines.
- (e) Ms McIntyre did not mention any further training during the meeting.

[34] In contrast Ms McIntyre's evidence of the meeting on 4 December 2023 is:

- (a) She started by explaining the training proposal to Mr Lazaro.
- (b) Mr Lazaro shook his head in response to the training proposal, indicating he did not want to do any more training.
- (c) She went on to explain to Mr Lazaro that if he did not do the proposed training then there would not be a role for him, and she would have to terminate his employment. He was not safe to drive at present and would kill himself or someone else if WCC let him drive – without further training.
- (d) She then asked Mr Lazaro what he wanted to do; did he want to go home, did he want to look for another job, which she would help him with or would he do the training.

(e) She then ended the meeting as she had another meeting to go to and asked Mr Lazaro to go to the house – in her mind she thought he could consider what he wanted to do, and she would speak to him later in the day.

[35] Mr Lazaro then left Ms McIntyre's office and went to the house – the Nelson accommodation. Whilst he was in the house Mr Lazaro called Mylen Gorit.¹ Mr Lazaro told Ms Gorit that he had been terminated. Ms Gorit spoke to Mr Boskett about this, and Mr Boskett told Ms Gorit to tell Mr Lazaro to return to Blenheim, which she did.

[36] In response to Ms Gorit's advice that he return to Blenheim, Mr Lazaro said he returned the WCC PPE gear that he had with him and then drove back to Blenheim.

[37] Around lunchtime on 4 December 2023, Mr Boskett called Ms McIntyre. Mr Boskett said he called to clarify if Mr Lazaro had been terminated as he thought Mr Lazaro may have misunderstood what was happening.

[38] Mr Boskett said that in this call Ms McIntyre told him she could not take any chances with Mr Lazaro, and she had terminated Mr Lazaro.

[39] Ms McIntyre said that when she spoke to Mr Boskett, she did not know who he was, that he was aggressive on the phone to her and made out that he was a lawyer. Despite this she said she explained to him that she could not take any chances with Mr Lazaro, and he needed to undertake further training. She also said she explained to Mr Boskett if Mr Lazaro refused to do the training, then his employment would probably be terminated as he was not safe to drive and there were no other roles for him.

[40] In the evening of 4 December 2023 Mr Bosket sent an email to Ms McIntyre. He advised Ms McIntyre that Mr Lazaro was willing for him to advocate on his behalf. And then he stated:

To keep you up-to-date [Mr Lazaro] does not wish to take up your offer of one months free accommodation, he has decided to return to his accommodation in Blenheim where he is based. [Mr Lazaro] left your accommodation house this afternoon and also returned all property belonging to [WCC]. He noted that an unknown group of people arrived at that house just before he left.

¹ Mr Lazaro lived with Ms Gorit and Mr Boskett in Blenheim.

We would appreciate knowing his present status. No formal notice of dismissal was given, only verbal, nor did you follow the correct process as is required by New Zealand Employment Law regarding termination. Obviously this will be an employment matter that will have to be referred to the employment court and Immigration New Zealand. There is also matter relating to one of the instructors abusing and threatening [Mr Lazaro] with a broom.

[41] Ms McIntyre responded to this email with a letter the next day, 5 December 2023. In this letter Ms McIntyre set out fully what WCC had experienced with Mr Lazaro's training, his health issues, that WCC had invested over \$44,000 on Mr Lazaro and his training and that it had reached the point where WCC had almost exhausted all its options with Mr Lazaro. Ms McIntyre then set out the training proposal – involving the external instruction and then further specific training flowing from the instructor's assessment. Ms McIntyre concluded her letter with:

We believe that [Mr Lazaro] will need to seriously think about his willingness to contribute to the additional training we are offering, with a readiness to listen to and obey instructions and rules.

It is our preference that [Mr Lazaro] become a contributing and valued member of our staff.

Please review the information provided and discuss this with [Mr Lazaro]. Our offer of resolution requires a response and a formal agreement by Friday 8th Dec to enable us to book in what is required. In the meantime, we will pay [Mr Lazaro] 40 hours per week whilst he is stood down from normal duties.

[42] Mr Boskett replied to this letter with a letter of 7 December 2023. Mr Boskett stated:

We discussed your offer to re-employ [Mr Lazaro], he was grateful for a further opportunity to be re-employed as a log truck driver and to do further training. He said for the last 2 days of his employment with you he was driving a truck and trailer solo and felt more confident even though he was having to psychologically deal with his reactions to the accident that occurred with another driver who was his friend and flatmate, this is quite understandable.

With regard to confidentiality, apparently other staff had previous knowledge that he was going to be dismissed before he was required to go to Nelson, in the guise it was for further training.

I am also concerned that I something I wrote in my confidential letter to you, regarding [Mr Pupich] the trainer, threatening [Mr Lazaro] with a broom, this has now become public, Jerome has been receiving abusive calls, from some of your drivers, these included reference to this instance, one person saying something along the lines that “[Mr Lazaro] deserved to be hit with the broom”

and that he should go back to the Philippines. Quite frankly [Mr Lazaro] is scared.

Due to the circumstances relating to how [Mr Lazaro] was dismissed and now this threatening abuse and pressure from some of your other drivers and staff [Mr Lazaro] has decided NOT to take up your offer of reemployment and further training.

[43] On 7 December 2023 Ms McIntyre then sent an email directly to Mr Lazaro. In this email Ms McIntyre stated:

I thought I would contact you directly as [Mr Boskett] who you have representing you, your landlord, appears to be looking after his own interests not yours.

...

The information that your landlord is claiming is incorrect and he is in no position to represent you or command that anything is confidential.

One thing I do know is, [Mr Pupich] who has worked for us for 20 years, would not hit you with a broom or threaten you with a broom. Any frustration he did have, was a reflection of his concern with you, not following instructions and the dire consequences of this period.

You will appreciate we have spent a considerable amount of money bringing you here and training, the best outcome is for us is for you to be employed by us. However, our concerns with your driving that you are going to hurt yourself or someone else. You are not dismissed you are stood down while we work through this impasse. [WCC] is still paying you.

[44] Mr Boskett then responded to Ms McIntyre's email on 7 December 2023. In an email sent that evening he stated:

You have consented to [Mr Lazaro's] request for me to Advocate on his behalf, and I will continue to do this as is his right, we have the copy of your text reply. You cannot demand that he is not represented.

I have nothing to gain from helping [Mr Lazaro]. It is fortunate that he has someone in this country that understands NZ employment law.

Prior to calling you I did contact Employment New Zealand and received advice from them.

I assume you have now realised the seriousness of your actions and the consequences.

You did dismiss [Mr Lazaro] from your employment [Mr Lazaro] very clear about this, as you yourself said, he does understand English well.

Also confirmed to me that [Mr Lazaro] was dismissed as per the transcript of the call that I made to you in the first instance, there is no point in denying this.

You only offered him one months accommodation, nothing else. He returned to Blenheim to where he lives with his fellow Filipinos, he was very upset, as you must recall him crying after you told him he was fired.

[Mr Lazaro] is definite that he does not wish to return to work for you after what has happened.

[45] After this email exchange WCC instructed its lawyer and there were attempts to resolve the impasse without success. As Mr Lazaro had made it clear he considered he had been dismissed and would not return to work to undertake the proposed training, WCC treated him as having abandoned his work and terminated his employment.

Analysis - Unjustifiable dismissal

The test for dismissal

[46] The first issue I need to determine for Mr Lazaro's unjustifiable dismissal personal grievance is, was he dismissed on 4 December 2023?

[47] Dismissal is the termination of employment at the initiative of the employer, being an unequivocal act that amounts to a sending away.² And the onus of proving there was a dismissal rests with Mr Lazaro.

[48] There is also a second element to dismissal. In some cases, an employer may say it did not intend to dismiss an employee, and the language used in an exchange with an employee is equivocal as to whether there is a sending away – this can still amount to a dismissal.³ The assessment of whether the employer's statement is a sending away, when it was not intended to be by the employer and is not an unequivocal sending away, is a question of fact based on an analysis of not just the statement but also the circumstances giving rise to it. As stated by Judge Holden in *Cornish Truck & Van Limited v Gildenhuis*:⁴

² *Wellington Clerical Union v Greenwich* [1983] ACJ 965 (AC).

³ See for example, *No 1 Autohaus Ltd v Wrigley* EmpC Auckland AEC75/97, 18 July 1997 where the words "Good God, look at you, you can just go" were held to be a dismissal.

⁴ *Cornish Truck & Van Limited v Gildenhuis* [2019] NZEmpC 6 at [45].

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

[49] Applying these two elements of dismissal, I must determine what was said in the meeting on 4 December 2023 and based on this decide:

- (a) if Mr Lazaro has established that this was an unequivocal sending away by WCC; or, if not
- (b) were the actions of WCC such that it would be reasonable for a person in Mr Lazaro's position to interpret that as a sending away.

Conflicting evidence about the 4 December 2023 meeting

[50] Clearly the evidence from Mr Lazaro and Ms McIntyre about the 4 December 2023 meeting is conflicting. As I have done in the past when assessing conflicting evidence, to establish which evidence I prefer, I have relied on the guidance provided by Judge Harding in the District Court in *R v Biddle* that was cited with approval on appeal to the High Court.⁵ And I have relied on the guidance from the Employment Court in *Lawson v New Zealand Transport Agency* and *Cornish Truck & Van Limited v Gildenuys*.⁶

[51] The key aspects of this guidance for this employment relationship problem are:

- (a) How plausible is the version of events that the witness's evidence portrays – asking, overall, how reasonable, plausible or probable the witness's evidence was; and whether the witness's evidence hangs together and has a degree of truth or is persuasive.
- (b) Whether the witness's evidence was consistent including with other evidence and how reliable the witness appears to be.

How plausible is each version of the 4 December 2023 meeting?

⁵ *R v Biddle* [2015] NZDC 8992; and *Biddle v R* [2015] NZHC 2673 at [21].

⁶ *Lawson v New Zealand Transport Agency* [2016] NZEmpC 165; and *Cornish Truck & Van Limited v Gildenuys* [2019] NZEmpC 6.

[52] For my assessment of the evidence, I will start with the plausibility of each witness's evidence - assessing how realistic the events described in each witness's evidence are based on the circumstances and objectively what that means for how the parties acted. From my perspective I think this aspect is compelling.

[53] Mr Lazaro's case is that WCC formed a view that he could not drive and did not want him to drive so it decided to terminate his employment. WCC did this by telling him he needed further training – Mr Lazaro accepted in his evidence that Mr Pupich had told him he needed to go to Nelson for further training - and made him bring all his work gear to Nelson then dismissed him without any consultation.

[54] The alternative scenario is that notwithstanding the agreed plan for Mr Lazaro's training Ms McIntyre went ahead and terminated his employment, presumably out of frustration or because she did not agree with the proposed plan for Mr Lazaro's training.

[55] Put simply, Mr Lazaro's version of events requires me to conclude that on 4 December 2023 WCC had already decided to dismiss him, and he was in Nelson under the guise of more training so that Ms McIntyre could dismiss him. Or alternatively that on 4 December, despite the plan to offer instruction and further training to Mr Lazaro, Ms McIntyre decided that she would dismiss Mr Lazaro.

[56] WCC accepts that throughout Mr Lazaro's training it had significant concerns:

- (a) Mr Lazaro had very low-level truck driving skills, failing to show basic skills such as driving the correct line and manoeuvring the trailer correctly. In short, his driving was dangerous to himself and other road users.
- (b) Mr Lazaro did not carry out his job functions within the WCC standard operating and safety procedures; he refused to follow WCC procedures and continually refused to follow instructions.
- (c) Mr Lazaro displayed a clear lack of willingness to drive, including refusing to drive on occasion and he showed no desire to improve.

[57] However, the evidence also shows that:

- (a) WCC had invested over \$44,000 in recruiting Mr Lazaro, completing the necessary immigration and visa requirements, relocating Mr Lazaro to New Zealand, providing accommodation for him in Nelson and undertaking a significant amount of training (more than other Filipino drivers required). WCC did not want Mr Lazaro to fail as a driver as they needed drivers and had invested too much time and money into Mr Lazaro to simply give up on him.
- (b) WCC had a credible plan to try and get Mr Lazaro up to the driving standards required; a plan that three witnesses confirmed in evidence and a plan that made sense in terms of the circumstances at the time.
- (c) Ms McIntyre had enough of an understanding about New Zealand employment law to know that terminating an employee's employment required a process to be undertaken in which the employee would have an opportunity to answer any concerns before a decision was made.

[58] Assessing all of this it seems most likely that WCC had agreed a plan for Mr Lazaro's training based on WCC's need, with input from key personnel. Therefore, WCC did not intend to dismiss Mr Lazaro when it told him to travel to Nelson for further training. If WCC intended to dismiss Mr Lazaro, without following any process, then there was no reason for WCC to insist on him travelling to Nelson for a 10-minute meeting with Ms McIntyre.

[59] I cannot conclude that WCC intended to dismiss Mr Lazaro, and the training plan for Mr Lazaro was just a ruse.

[60] Alternatively, that Ms McIntyre would change the WCC decision regarding Mr Lazaro's training, effectively making a unilateral decision on what was best for WCC, and terminating Mr Lazaro's employment without any process, does not stack up. It requires me to find that Ms McIntyre had been disingenuous with Mr Ruffle and Mr Pupich in agreeing the training plan and had decided to follow her own agenda of dismissing Mr Lazaro – noting here she had had very little contact with Mr Lazaro so would have had no basis to make her own assessment of Mr Lazaro's skills and utility to WCC. Or that despite agreeing to Mr Lazaro's

training plan Ms McIntyre became so annoyed by Mr Lazaro on 4 December 2023 that she just dismissed him. There is no evidential foundation for either scenario.

[61] Based on this assessment Mr Lazaro's version of events seems less credible and less likely. The most plausible scenario is WCC had agreed to implement the proposed training plan for Mr Lazaro, and he was in Nelson for that purpose. Ms McIntyre met with him to explain that he had to undertake the training and WCC did not intend to dismiss him.

Consistency of the evidence and reliability of the witnesses

[62] Next, turning to consistency and reliability of witness evidence, WCC's evidence about the training plan for Mr Lazaro was consistent across three witnesses: Ms McIntyre, Mr Ruffle and Mr Pupich. I note here that I found Mr Pupich's evidence in particular to be credible and persuasive – he was sincere and direct and portrayed genuine concern for both WCC and Mr Lazaro and was instrumental in the formulation of the training plan for Mr Lazaro.

[63] Ms McIntyre's evidence about what occurred in the meeting on 4 December 2023 was realistic and made sense and she was consistent throughout her written evidence and in answering questions. She appeared reliable in her recall of what happened and had clear and sound explanations for what she told Mr Lazaro. Ms McIntyre also made appropriate admissions, accepting on occasion she could not recall the exact words she used.

[64] Another key point is that Ms McIntyre's actions following 4 December 2023 supported her evidence of what she said to Mr Lazaro in the meeting of 4 December. In her letter of 5 December Ms McIntyre set out clearly the concerns with Mr Lazaro, the proposed training plan and that Mr Lazaro needed to undertake the training to drive trucks for WCC. Importantly Ms McIntyre also made it clear that she had not terminated Mr Lazaro's employment, and he remained employed. Significantly, Ms McIntyre was so concerned that Mr Boskett was misrepresenting what she had told him had happened that she wrote directly to Mr Lazaro telling him this in her email of 7 December 2023.

[65] So, Ms McIntyre's contemporaneous actions and communications support her evidence of what she said in the meeting of 4 December 2023. And her evidence is supported in part by two other WCC witnesses.

[66] Mr Lazaro's evidence that his employment had been terminated by Ms McIntyre on 4 December 2023 was also consistent. However, there were some inconsistencies in his recollection of what was said and further inconsistencies in his evidence about what happened after the meeting on 4 December.

[67] As, an example, the evidence provided by Mr Lazaro - and Mr Boskett and Ms Gorit – was inconsistent over the timing of his return to Blenheim. On one version Mr Lazaro stayed at the WCC house in Nelson for several hours and only returned his PPE gear and left for Blenheim late in the day arriving in Blenheim around 7:30 pm. On another version Mr Lazaro left shortly after speaking to Ms Gorit – so before lunchtime - and was back in Blenheim in the early afternoon.

[68] Overall, I found Mr Lazaro's evidence to be unreliable and he was not a credible witness. He was contradictory on several points and then changed his evidence when this appeared to suit his version of events.

[69] An example was that he insisted that Ms McIntyre had not told him about the training plan – he referred to this as special training – in the 4 December 2023 meeting, but he did accept she told him about the training plan at some point, suggesting this was later in January by telephone and then by email; this recollection is wrong based on accepted evidence.

[70] Another example is Mr Lazaro contradicted himself in his evidence about staying in the WCC house in Nelson – he stated that he did not want to stay there when answering questions yet he also said that in the 4 December 2023 meeting he begged Ms McIntyre to allow him to stay in the house for one month so he could look for other work.

[71] Turning to the two other witnesses who gave evidence about the 4 December 2023 meeting – Ms Gorit and Mr Boskett – I start by noting the obvious point, their evidence about the 4 December meeting was based on what they said they were told had happened in the meeting. Mr Gorit's evidence was based on what she said Mr Lazaro told her in her phone call with him on 4 December after the meeting. Mr Boskett's evidence was based on what Ms Gorit told him she had been told by Mr Lazaro and what he said Ms McIntyre told him in his call with her on 4 December, after the meeting.

[72] Ms Gorit's evidence that Mr Lazaro told her that Ms McIntyre had terminated his employment was consistent with his evidence. I accept that in the phone call with Ms Gorit after the 4 December 2023 meeting, Mr Lazaro told Ms Gorit that he had been terminated. I also accept that Ms Gorit told Mr Boskett this and Mr Boskett then called Ms McIntyre.

[73] In terms of Mr Boskett's evidence about his telephone call with Ms McIntyre I have some concerns. I did not find Mr Boskett to be particularly reliable as a witness. While giving evidence and advocating for Mr Lazaro Mr Boskett demonstrated an inability to concede any points contrary to his own narrative.

[74] A very clear example of this was an exchange I had with Mr Boskett about Mr Lazaro's employment agreement containing a 90-day trial period. Mr Boskett had formed a view that Mr Lazaro's employment agreement with WCC contained a 90-day trial period provision and that this was a breach by WCC and unfair to Mr Lazaro. I pointed out to Mr Boskett that the clause he was referring to was not a 90-day trial period clause but a probationary period clause, which is quite different. Mr Boskett would simply not accept this and spent considerable time reiterating his point that it was a 90-day clause, and it was unfair. In the end he said regardless of what the clause was it was illegal and unfair to Mr Lazaro. And, then in his written submission Mr Boskett referred to a 90-day trial period provision being relied on by WCC to dismiss Mr Lazaro, which was not allowed under New Zealand law at the time – again there was no 90-day trial period provision in Mr Lazaro's employment agreement and WCC did not rely on or purport to rely on a 90-day trial period.

[75] I conclude that Mr Boskett did not approach his telephone call with Ms McIntyre with an open mind. I believe he had formed the view that Mr Lazaro's employment had been terminated, based on what he had been told, and the purpose of his call was to confirm this himself so he could support Mr Lazaro with a claim. Mr Boskett's memory of the call with Ms McIntyre was informed by his view and his purpose for calling – he simply did not listen to what Ms McIntyre said and held strong to his view on termination. Tellingly in his evidence about the call with Ms McIntyre Mr Boskett consistently referred to Ms McIntyre confirming that she had dismissed Mr Lazaro.

[76] Mr Boskett's strongly held view of termination and lack of objective assessment of what he was being told carried through into the correspondence, which is further evidence to support my views. As an example, when Ms McIntyre pointed out in her letter of 5 December 2023 that Mr Lazaro was still employed, he refused to accept that and simply referred to Mr Lazaro as having been dismissed.

[77] Overall, I find that the WCC witnesses were more credible, and their evidence was more consistent.

Based on this assessment of the evidence, what happened in the 4 December 2023 meeting and after this meeting?

[78] For all the reasons set out above I prefer the evidence of Ms McIntyre and WCC: the WCC version of what occurred made more sense and was realistic and probable given the circumstances; and the WCC witnesses were credible, and their evidence showed consistency and appeared reliable.

[79] I find the following occurred:

- (a) WCC had formulated a training plan for Mr Lazaro that consisted of him travelling to Nelson to undertake an assessment of his driving with a third-party instructor and then further specific training.
- (b) On the morning of 4 December 2023 there was some confusion about what Mr Lazaro should be doing, which was taken as refusal to work by WCC.
- (c) Mr Lazaro was called to Ms McIntyre's office so she could explain to him that he needed to undertake the instruction and training.
- (d) In the course of Ms McIntyre explaining the training plan to Mr Lazaro he indicated he did not want to do the training.
- (e) Ms McIntyre then explained to Mr Lazaro that he had to do the training and if he did not then he could not drive trucks for WCC. And if he could not drive

then WCC would have to terminate his employment as he could not do any other work for it.

- (f) Ms McIntyre then asked Mr Lazaro what he wanted to do – did he want to do the training, did he want to look for another job, or did he want to go back to the Philippines. There was discussion about Mr Lazaro staying in the WCC house for a month if he wanted to look for another job or WCC paying for his flight to the Philippines if he wanted to go home.⁷
- (g) The meeting ended at this point as Ms McIntyre had another meeting to go to. She told Mr Lazaro to go to the WCC house, expecting that he would wait there until she had more time to discuss matters with him.
- (h) Mr Lazaro went to the house and after reflecting on what had happened, he decided his employment had been terminated by Ms McIntyre – which he expressed as Ms McIntyre “terminate me”. This misunderstanding was informed by a number of things - he did not want to drive trucks for WCC, he had been told that if he did not drive trucks, he could not work for WCC, and he was being offered an opportunity to look for other work or have his flight back to the Philippines paid for. This became his memory of the 4 December 2023 meeting.
- (i) Mr Lazaro called Ms Gorit and told her that Ms McIntyre had terminated him. After discussing this with Mr Boskett, Ms Gorit told Mr Lazaro to return to Blenheim, which he did.
- (j) Mr Boskett then called Ms McIntyre. Ms McIntyre did not tell Mr Boskett that she had terminated Mr Lazaro’s employment, but Mr Boskett believed she had confirmed that to him.

⁷ I note here that there was never any claim of constructive dismissal based on an ultimatum being given by Ms McIntyre. In any event, I record that I do not see this as an ultimatum of do the training or you will be dismissed, rather it was a clear expression that if Mr Lazaro was not going to do the training, then WCC and Mr Lazaro would have to work out what to do.

[80] What followed in terms of the correspondence speaks for itself. It is unfortunate that Mr Lazaro's view that his employment had been terminated was strongly reinforced by Mr Boskett and he was funnelled into pursuing a claim against WCC. This only reinforced his view that Ms McIntyre had terminated his employment.

Conclusion on dismissal

[81] I conclude that WCC did not intend to dismiss Mr Lazaro and there was no unequivocal sending away of Mr Lazaro by Ms McIntyre in the 4 December 2023 meeting. Further it was not reasonable for somebody in Mr Lazaro's position to have considered that their employment had been terminated by Ms McIntyre in the 4 December meeting. Ms McIntyre's advice to Mr Lazaro could not reasonably be interpreted as a dismissal, it was blunt but clear - if you do not do the proposed training then you cannot drive for WCC and we will need to work out what to do.

[82] WCC did not dismiss Mr Lazaro. As a result, Mr Lazaro cannot establish a personal grievance for unjustified dismissal.

Analysis - Harassment

[83] The harassment Mr Lazaro complained of is neither racial harassment nor sexual harassment.⁸ This complaint is best dealt with as a personal grievance of unjustified action causing disadvantage to Mr Lazaro's employment where the actions complained of amount to an alleged failure by WCC to provide a safe workplace.

[84] WCC can only be said to have failed to provide a safe workplace if the unsafe events complained of by Mr Lazaro occurred and WCC was aware of them or should have been aware of them and did not do enough to protect Mr Lazaro.

[85] I do not need to analyse the evidence in the same detail as the unjustified dismissal grievance. Put simply I am not satisfied that the events complained of by Mr Lazaro occurred. Mr Lazaro's evidence on the unsafe events lacked any detail, had no corroboration from known facts or events or contemporaneous documents other than the emails written by Mr Boskett –

⁸ Employment Relations Act 2000, ss 103(d) and 103 (e)

so for example, he did not complain about the events at the time they supposedly occurred, no other employees spoke of any of the events occurring and there is no contemporaneous records or known events to support what Mr Lazaro says.

[86] The only event Mr Lazaro complained of for which he provided specific details in evidence was Mr Pupich threatening him with a broom; this was denied by Mr Pupich. My analysis of the conflicting written and verbal evidence was resolved in favour of Mr Pupich's denial, which was succinct, accurate and credible.

[87] Considering all the available evidence I am not satisfied that the unsafe events Mr Lazaro complained of occurred. Therefore, Mr Lazaro cannot establish a personal grievance for unjustified action causing disadvantage to his employment.

Summary

[88] WCC did not unjustifiably dismiss Mr Lazaro. WCC did not fail to provide a safe workplace for Mr Lazaro. This employment relationship problem is resolved in favour of WCC.

Costs

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

[90] If the parties are unable to resolve costs, and an Authority determination on costs is needed, WCC may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum Mr Lazaro will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[91] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.⁹

Peter van Keulen
Member of the Employment Relations Authority

⁹ For further information about the factors considered in assessing costs see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1