

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2022] NZERA 379
3136180

BETWEEN CARL GRAEME MATHIESON
Applicant

AND STAR MOVING LIMITED
Respondent

Member of Authority: Philip Cheyne

Representatives: Carl Graeme Mathieson, the Applicant
No appearance for the Respondent

Investigation Meeting: 9 August 2022 at Nelson

Date of Determination: 10 August 2022

DETERMINATION OF THE AUTHORITY

- A. Star Moving Limited is to pay Carl Graeme Mathieson \$20,000.00 (without deduction), pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000.**
- B. Star Moving Limited is to pay Carl Graeme Mathieson \$40,480.00 (gross), pursuant to s 123(1)(b) of the Employment Relations Act 2000.**
- C. Star Moving Limited is to pay Carl Graeme Mathieson costs of \$71.56.**

Employment relationship problem

[1] Star Moving Limited employed Carl Mathieson as a driver from about January 2019. In January 2020, Mr Mathieson became a permanent fulltime employee of the company. There is a written employment agreement dated in January 2020.

[2] The sole director of Star Moving Limited (Star Moving) is Stuart Biggs. The company trades as “Star Moving & Distribution”, the business in which Mr Mathieson worked.

[3] A Covid-19 Alert level system was introduced in New Zealand on 21 March 2020. New Zealand was placed at Alert Level 2, was moved to Alert Level 3 on 23 March 2020 and to Alert Level 4 just before midnight on 25 March 2020. Star Moving was affected by these rules. The Government also introduced an employer wage subsidy to assist businesses to retain people in employment. Star Moving applied for and received Covid-19 wage subsidies.

[4] Mr Mathieson received an email on 28 March 2020. Attached was a letter dated 27 March 2020 from Mr Biggs saying, “Effective immediately your position has been disestablished and you will need to find alternative employment”.

[5] Mr Mathieson says he was unjustifiably dismissed. His claim is for compensation. This application was lodged in the Authority in April 2021.

[6] Mr Biggs replied to service of the proceedings by email. I treat that as a statement in reply, as suggested by Mr Biggs. Mr Biggs says that the matter is out of time and that “the letter from Community” did not constitute a personal grievance. Mr Biggs nonetheless outlined a reason for what had happened, by reference to COVID-19.

[7] The matter was referred to mediation but was not resolved.

The Authority’s investigation

[8] Star Moving did not appear at the case management conference. Directions were made for Star Moving to lodge wage and time records for Mr Mathieson, but that did not happen. Mr Mathieson was directed to lodge some information and did so. A date for an investigation meeting was set.

[9] I am satisfied from the file that the statement of problem, Directions of the Authority (19 April 2022) and Notice of Investigation Meeting were served on Star Moving.

[10] Star Moving did not appear at the time set for the investigation meeting. I deferred starting but there was still no appearance when the company was called in the public area at Nelson District Court, the investigation meeting venue.

[11] Mr Mathieson appeared and gave evidence. Star Moving did not appear during the investigation meeting.

[12] This determination follows from the oral indication I gave at the end of the investigation meeting.

Was a grievance raised in time?

[13] Mr Mathieson sought assistance from Community Law in Nelson. Community Law wrote to Star Moving on 9 April 2020.

[14] The letter's subject line is "TERMINATION OF EMPLOYMENT – CARL MATHIESON". I will paraphrase its content. It opens with a reference to the notice of termination dated 27 March 2020. It explains that, despite "extraordinary times", the wage subsidy scheme means that "redundancy is simply not necessary at this point" for most businesses. If necessary, it should be a "last resort" following consultation. The letter says that Star Moving had acted with "inappropriate haste", terminating Mr Mathieson's employment. There might be a need for Mr Mathieson to make "some concessions" regarding hours or pay. Otherwise, the employer might then have no option other than redundancy. Discussions about this would need to be held in good faith. Star Moving was "urge[d]" to revoke the redundancy, reinstate Mr Mathieson, apply for the Covid-19 wage subsidy (if not already done) and engage in discussions in good faith with Mr Mathieson about remuneration for the foreseeable future. A "mutually acceptable position" would at least allow Mr Mathieson time to adjust his affairs.

[15] In its statement in reply, Star Moving says that the letter does not "constitute a PG and simply suggests actions which were impossible to action during COVID19". I take from this that Mr Biggs received the 9 April letter, and he asserts that it was not sufficient to raise Mr Mathieson's personal grievance in accordance with s 114 of the Employment Relations Act 2000.

[16] The Employment Court summarised principles arising from earlier cases on point in *Chief Executive of Manakau Institute of Technology v Zivaljevic* as follows (omitting references):¹

¹ *Chief Executive of Manakau Institute of Technology v Zivaljevic* [2019] NZEmpC 132.

[36] The grievance process is designed to be informal and accessible. A personal grievance may be raised orally or in writing. There is no particular formula of words that must be used. Where there has been a series of communications, ... the totality of those communications might also constitute raising the grievance.

[37] It does not matter what an employee intended his or her complaint to be, or his or her preferred process for dealing with it in the first instance. It also does not matter whether the employer recognised the complaint as a personal grievance. The issues are whether the nature of the complaint was a personal grievance within the meaning of s 103 of the Act and, if so, whether the employee's communications complied with s 114(2) of the Act by conveying the substance of the complaint to the employer.

[38] It is insufficient for an employee simply to advise an employer that the employee considers that he or she has a personal grievance, or even specifying the statutory type of grievance. The employer must know what it is responding to; it must be given sufficient information to address the grievance, that is to respond to it on its merits with a view to resolving it soon and informally, at least in the first instance.

[17] Having regard to these principles, I find that Mr Mathieson raised his personal grievance claim within time by effect of the 9 April 2020 letter. Mr Mathieson was challenging the termination of his employment for redundancy and sought reinstatement, pending good faith discussions about the longer-term future of his employment. Star Moving knew what to respond to and had sufficient information to respond to the grievance on its merits with a view to resolving it promptly.

[18] It is not necessary to review other steps by and for Mr Mathieson, including by way of follow-up. However, there is no reason to doubt Mr Mathieson's evidence about those steps. The 2 June 2020 correspondence by Community Law was sent to the same address as the 9 April letter. The 9 April letter on its own raised Mr Mathieson's grievance, but it was also repeated in these further communications, all within time.

Unjustified dismissal

[19] The dismissal without notice was in breach of the employment agreement. Clause 15.1 provided for termination by two weeks written notice. Mr Mathieson was given no notice and was not paid in lieu of notice.

[20] Clause 15.4 obliged Star Moving to act in accordance with good faith and mutual trust and confidence. Star Moving did not do so, in breach of the employment agreement.

[21] Star Moving's actions and how it acted were not those of a fair and reasonable employer in all the circumstances at this time of the dismissal. Community Law in its 9 April letter drew attention to good faith failings. I agree with those views. Applying the statutory test, Star Moving's dismissal of Mr Mathieson was unjustified.

[22] Mr Mathieson has now been advised by the Ministry of Social Development (MSD) that Star Nelson Holdings Limited received the 2020 Covid-19 Wage Subsidy, using his Inland Revenue number. An on-line search show that both Star Moving Limited and Star Nelson Holdings Limited received the Wage Subsidy. The companies are associated. Mr Biggs is a shareholder in and the only director of them both. It is unclear why Star Nelson Holdings Limited would have applied for and received a wage subsidy for Mr Mathieson, when the January 2020 employment agreement records Star Moving Limited as the employer. Regardless, payment of a wage subsidy for Mr Mathieson was made in the expectation that the subsidy would help retain Mr Mathieson in employment. Star Moving (or its associated company) received the money but Star Moving did nothing to meet that expectation. This is an additional factor that is relevant. No fair and reasonable employer could have conducted itself that way.

[23] I find that the dismissal was unjustified. Mr Mathieson has a personal grievance.

Remedies

[24] There is a claim for \$20,000.00 compensation for humiliation, injured feelings and lost dignity. I accept Mr Mathieson's evidence that he was shocked, insulted and harmed by his employer's actions. I fix \$20,000.00 as the sum of compensation required to restore that harm.

[25] There is a claim for reimbursement of lost remuneration. Mr Mathieson was unable to finding replacement employment in the Nelson region and eventually moved elsewhere in the country to take up replacement employment. That was in February 2021. I accept Mr Mathieson's evidence that he had no income from work following his dismissal until then. Mr Mathieson did not give me a precise date so I fix the period of lost income from 27 March 2020 to 31 January 2021.

[26] I have discretion to order an employer to pay more than 3 months' ordinary time remuneration, if a greater period of loss is proven. Here, it is appropriate to exercise that

discretion. I accept Mr Mathieson's evidence that another person was employed to replace him before the end of April 2020. The person had previously worked for one of the companies of which Mr Biggs is the principal. I find that the position held by Mr Mathieson was not superfluous to the employer's business needs.

[27] The employment agreement entitled Mr Mathieson payment for 40 hours a week ordinary time Monday to Friday at \$23.00 per hour, a total of \$920.00. For the 44 working weeks between Monday 30 March 2020 and Friday 29 January 2021, Mr Mathieson lost at least \$40,480.00 (gross) in wages. There will be an order against Star Moving for that amount.

[28] Mr Mathieson did not contribute in any way to the circumstances giving rise to the personal grievance.

[29] Mr Mathieson is entitled to an order for costs. The only cost incurred was the lodgement fee of \$71.56.

[30] This determination is accompanied by a certificate of determination. Mr Mathieson may enforce the orders immediately.

Philip Cheyne
Member of the Employment Relations Authority