

**NOTE: An order in paragraph [2] of this determination prohibits publication of certain information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKAURAU ROHE**

[2023] NZERA 380  
3147704

BETWEEN                      NHW  
   Applicant  
  
AND                                SBK  
   Respondent

Member of Authority:      Robin Arthur  
  
Representatives:            David Cain, advocate for the Applicant  
   The directors of the Respondent  
  
Investigation Meeting:     11 November 2022 in Whangārei  
  
Determination:              18 July 2023

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**DETERMINATION OF THE AUTHORITY**

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- A. SBK acted unjustifiably in dismissing NHW.**
- B. In settlement of his personal grievance, and within 28 days of the date of this determination, SBK must pay NHW the following sums, which have been reduced due to actions by NHW which contributed to the situation giving rise to his grievance:**
- (i) \$9,706 (less any applicable tax) as lost wages; and**
  - (ii) \$8,000 (without deduction) as compensation for humiliation, loss of dignity and injury to his feelings.**
- C. Costs are reserved with a timetable set if an Authority determination of costs is needed.**

## **Employment relationship problem**

[1] This determination concerns a personal grievance raised after the respondent, a registered company operating a small family-run and staffed business, dismissed the applicant on 11 December 2020. The directors of the respondent are the applicant's mother and stepfather. They dismissed him because they were concerned that problems between family members had made the employment relationship unworkable.

## **Order prohibiting publication of the names of the parties and witnesses**

[2] For reasons relating to the mental health and history of the applicant, the names of the parties, witnesses and other family members referred to in this determination are prohibited from publication.<sup>1</sup> This determination confirms an interim order made at the end of the Authority investigation meeting and extends the scope of the order, made now on an ongoing permanent basis, to include witnesses and other family members as using their names would readily identify the parties. The respondent company name uses the family surname.

[3] In this determination the applicant is referred to as NHW and the respondent company is referred to as SBK. Its two directors are referred to as Ms A and Mr Z. NHW's partner is referred to as Ms B, his sisters as Ms C and Ms D and his brother as Mr Y. The letters used are randomly selected and unrelated to their actual names.

## **The Authority's investigation**

[4] NHW, Ms B, Mr Z and Ms A attended the Authority investigation meeting. The first three witnesses confirmed written statements they had provided in advance. Along with Ms A they also gave oral evidence by answering questions under oath or affirmation. At the end of the meeting the representatives gave oral closing submissions.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received. This determination has been issued outside the

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<sup>1</sup> Employment Relations Act 2000, Schedule 2, clause 10 and *Erceg v Erceg* [2016] NZSC 135 at [3] and [13].

usual statutory period as the Chief of Authority decided exceptional circumstances existed for the delay.<sup>2</sup>

### **How the employment relationship problem arose**

[6] SBK operated a pole maintenance business under service contracts with local lines companies. Mr Z, Mr Y and NHW carried out the maintenance work in the field. Ms A dealt with its administration. NHW's sisters, Ms C and Ms D, did not work for the company.

[7] While NHW had done some part-time work for the business previously, he was formally employed on a full-time basis in July 2019. In his written employment agreement his position was described as a driver and plant operator who was also required to carry out work as a linesman and related duties.

[8] Mr Z and Ms A had arranged for NHW to work full-time for SBK after he had returned to their family home a few months earlier. At that time he was experiencing some mental health difficulties and had moved out of the accommodation he shared with his partner, Ms B. He returned to living with Ms B later in his employment.

[9] Events during the 18 months of NHW's employment by SBK occurred in the context of ongoing psychological distress for him resulting from sexual abuse he was subjected to during his childhood. The abuse occurred when he was away from his family home. Evidence in the Authority investigation, including about discussions held and messages exchanged, showed NHW had deeply felt views that Ms A and Mr Z were responsible for putting him in the situation where he suffered that abuse. He referred to being "sent away" on three occasions and not being believed when he initially told Ms A about the abuse. He also resented what he saw as his siblings having had easier lives, not understanding what he experienced and being favoured in their interactions with Ms A and Mr Z.

[10] In his oral evidence NHW described working for SBK as the best job he ever had. He described the hours as low and the leave as lenient. He said they were all keen golfers and "it was all work and golf".

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<sup>2</sup> Employment Relations Act 2000, s 174C(4).

[11] The evidence of Ms A and Mr Z canvassed instances of NHW requesting and being given annual or sick leave when he was upset about family matters or feeling low. Leave was readily granted to give him what Ms A described as time to calm down.

[12] In mid-November 2020 Ms A and Mr Z were out of town on holiday. Before leaving they had arranged the hire of another worker to work with NHW on what was described as “the wood job” at SBK’s yard on 16 November. On 15 November NHW asked Ms A by text message if he could have 16 November off as he wanted to watch a major golf tournament instead. Ms A was reluctant to agree because of the arrangement made for another worker to help NHW that day but said she had agreed to his request because she felt things “could turn ugly” if she said no.

[13] On 20 November 2020, a Friday, Mr Z and NHW had returned to SBK’s yard around midday after finishing other tasks set for the day. Mr Z began work on the wood job NHW had not completed on 16 November. Although NHW was paid for the full work hours for each day, he was annoyed at having to stay on during the afternoon rather than following the usual practice of stopping work once the day’s planned tasks were completed. NHW said he had told Mr Z earlier that week he would come back and finish ‘the wood job’ over the weekend. He felt it was an instance of Mr Z not listening to him.

[14] After waiting in the work truck for some time NHW decided to take the truck and drive home. He did not tell Mr Z that he was leaving or explain why. Mr Z had no other means of transport to get home.

[15] When NHW got home he told Ms A and his sister Ms C that someone would have to drive out and pick up Mr Z. He was angry about what he considered to be poor communication by Mr Z and told them that he had left in the truck as he would otherwise have “smashed” Mr Z.

[16] On 23 November Ms A and Mr Z met with NHW to discuss the 20 November event. Mr Z and NHW exchanged their views on communication and work arrangements. NHW said he had arranged to attend a local church-based programme for men addressing family relationship issues.

[17] After NHW attended a session of that programme later in the week an organiser posted a picture of him on the programme’s Facebook page. Ms C, who saw the picture,

posted a comment to which NHW took offence. Although NHW, in his evidence at the Authority investigation meeting, could not recall what her comment had said, he considered its tone was making fun of him.

[18] NHW said he had responded with a comment on the programme's FaceBook page but the page administrator had removed it because the language he used was not consistent with the programme's values.

[19] NHW then posted the following comment on a group chat page used by whanau members on the social media application, Viber:

Thanks [Ms C] for being a f\*\*ken bitch on my ... post. Try get some help then my so called sister comes in with her negative shit. Some social worker you are gona be aye. Just so you know ill threaten any motherf\*\*ker that f\*\*ks with me not just mum and dad you stupid fat bitch.

[20] Ms D, his other sister, posted a comment asking "Honestly, how can you speak like this to ur sister." NHW responded "get f\*\*ked". Ms D replied to that message: "Hope you are ok, we are all here to help you".

[21] NHW responded:

Nah f\*\*k you [family surname] mother\*\*kers acting like you f\*\*ken perfect all sweep shit under the rug and never fix anything.

[22] NHW then asked Ms A by text message for the following day off work saying "my mental health is just killing me". Ms A approved the leave.

[23] NHW was still on paid leave on 3 December 2020, a Thursday, when Ms A sent NHW a text calling him to a meeting four days later:

Kia ora [NHW]  
Dad & I have timed a meeting with you for 8am this coming Monday. Bring a support person if you wish.  
Mum

[24] Early on the morning of the meeting, on 7 December, NHW replied: "Ok am I getting fired". He received no response and attended the meeting.

[25] Ms A, as was her usual practice for their whanau and work meetings, recorded the discussion she and Mr Z had with NHW in the meeting. The recording was available for the Authority's investigation.

[26] In their meeting Ms A asked NHW to explain his social media messages and his concerns. NHW then questioned whether the meeting was about family matters or work matters. When Ms A said it had “ended up being a work meeting even though this was a personal, whanau thing” NHW responded that what he put on the Viber family page was nothing to do with work. Ms A said his use of the phrase “[family surname] motherf\*\*kers” in those messages affected their business and her, Mr Z, and Mr Y as part of the work team.

[27] Ms A then talked about NHW not being happy with work, whanau and friends in recent months. She referred to “verbal and threatening abuse” from him to her and Mr Z. She said she was trying to keep them working as a team.

[28] They then argued about the Facebook comment made by Ms C and whether Ms A had taken Ms C’s “side” over the concerns NHW had expressed. NHW then angrily referred to the circumstances in which he had been abused as a child, described that as happening because he had been sent away by Ms A and repeatedly called her a “f\*\*king bitch”. He described his siblings as “self-entitled” and “living the dream” because nothing had happened to them. The meeting ended with NHW banging the table, knocking over a cup off the table and leaving.

[29] The following day NHW sent a text message to Ms A asking when he could come back to work.

[30] A day later NHW sent another message to Ms A, this time about her being in contact with a son he had by another relationship. He referred to his family as “f\*\*king false motherf\*\*kers” and said he wished she had been raped as a child so she “could even have a slight understanding of how psychological pain works”. He wrote that he wished she would die in a painful way and called her a “f\*\*king snake bitch”.

[31] On 10 December Mr Z sent NHW a text message:

Kia ora [NHW]

Just an update on our meeting on Monday. The directors are still investigating an outcome and will keep you informed. Your still on paid stand down pending an outcome.

[32] Meanwhile Mr Z and Ms A had contacted the Employment New Zealand call centre seeking information about what to do and had talked to other family members about the situation. Mr Z said he knew there was a process that should be followed but

he and Ms A were fearful of holding a further meeting with NHW after his behaviour at the 7 December meeting. Ms A said she and Mr Z felt they had “no choice” but to end NHW’s employment. They decided to do so without any further meeting with him or providing any opportunity for written comment or feedback about the prospect of dismissal.

[33] On 11 December Mr Z sent the following letter of dismissal to NHW:

It saddens me to inform you that your employment with [SBK] has been terminated.

Due to ongoing verbal abuse and threatening behaviour towards the company directors, [Ms A and Mr Z], we considered your actions to be of serious misconduct and over the last 3 days after our meeting on the 7<sup>th</sup> Dec 202, we have been deliberating and asking for advice. The last 2 weeks have been a stressful time for [Ms A] and myself and it was not an easy decision nor the outcome we wanted to make, but we had to think about the relationship between us as a working team and the business.

The directors of [SBK] would have scheduled another meeting with you as with any disciplinary process, but after your behaviour at Monday’s meeting, we were unsure of how you would react, and did not want to be put through more verbal abuse again. We find it more comfortable to communicate to you by either email or in writing which we have been advised to do.

[details about final pay and returning some equipment]

I would like to thank you for your work over the last 18 months and wish you only the best.

[34] A fortnight later NHW raised a personal grievance for unjustified disadvantage and unjustified dismissal.

### **The issues**

[35] The issues for determination were:

- (a) Did SBK act unjustifiably by suspending NHW from his employment?
- (b) Did SBK act unjustifiably by dismissing NHW and how it made the decision to do so?
- (c) If SBK is found to have acted unjustifiably (by disadvantaging and/or dismissing NHW, what remedies should be awarded to him, considering:
  - Lost wages (subject to evidence of reasonable endeavours by him to mitigate his loss during the period for which the loss is claimed); and
  - Compensation under s123(1)(c)(i) of the Employment Relations Act 2000 (the Act)?

- (d) If any remedies were awarded, should they be reduced (under s124 of the Act) for any blameworthy conduct by NHW that contributed to the situation giving rise to his grievance?
- (e) Should either party be required to contribute to any costs of representation incurred by the other party?

### **The test of justification**

[36] In assessing NHW's personal grievance application, the Authority is required to apply the statutory test of justification. This test asks whether what SBK did when addressing concerns with NHW's behaviour, and how it did so, were "what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred".<sup>3</sup> The reference to what "could have been done" allows for a range of responses, provided what was actually done in any particular case was fairly and reasonably open to the particular employer at the time.

[37] This test includes considering whether, having regard to the resources available to it, the employer sufficiently investigated its concerns, gave the employee a reasonable opportunity to respond and genuinely considered the employee's response before making a decision. Any other factors may also be considered if the Authority considers it appropriate to do so.<sup>4</sup>

### **Ongoing paid leave was not a suspension**

[38] NHW submitted he was unjustifiably suspended after the 7 December meeting without SBK first following the usual legal requirement of asking him to comment on the prospect of the suspension. That requirement is, however, subject to the particular circumstances.<sup>5</sup> In this case, at the time of the 7 December meeting, NHW was effectively on ongoing paid sick leave, granted at his request. Following that meeting, which he had left before discussions about what might happen next could be completed, he continued to be paid in the same way. Mr Z's 10 December text stating NHW was "still on paid stand down pending an outcome" could reasonably be read and understood as confirming that situation. Objectively assessed, it was not intended to be suspension in the sense that a person knowledgeable and experienced in employment law matters might have described it.

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<sup>3</sup> Employment Relations Act 2000, s 103A.

<sup>4</sup> Section 103A(4).

<sup>5</sup> *Sefo v Sealord Shellfish Limited* (EC Christchurch, CC 4A/08, 17 April 2008) at [33].

[39] Even if that were not correct, NHW would likely have agreed to continuing that arrangement if he had been asked at the time, given the state of mind he had reported and the leave request he had made earlier. He continued to be paid and was, in that way, not treated unfairly.

### **Failures of fairness in the disciplinary process and the decision to dismiss**

[40] The objective test of considering whether a particular employer acted as a fair and reasonable employer could have done applies whether the employee is a family member or a stranger. A family member or a friend working for an employer could not reasonably be held to have fewer rights than other employees would have in the same situation. Equally, a family member or a friend has no fewer obligations to their employer than other employees.

[41] The test's reference to "all the circumstances" and the scope to consider "other factors" where appropriate does, however, allow for some account to be taken of complexities that might arise in family members working together.

[42] In this case those circumstances and factors included NHW's mental health issues and the ongoing distress he expressed, the small and family nature of SBK's business and the efforts made to accommodate his needs.

[43] NHW's conduct on 20 November, by driving away in the work truck and leaving Mr Z stranded and suggesting he would punch or 'smash' Mr Z, was a reason that a fair and reasonable employer could have called him to a disciplinary meeting.

[44] His angry messages on the whanau's Viber page in the following days were a less clear-cut reason to take that approach. Ms C was not an employee of the business, so not part of the employment relationships NHW had with SBK, Ms A, Mr Z and Mr Y. However it would be highly artificial to hold that the abusive content of his messages, directed at Ms C, Ms A and the family generally would not affect those employment relationships. The potential effect was something that a fair and reasonable employer could have addressed with him in a formal employment process.

[45] The fact Ms A and Mr Z had accommodated NHW's health needs, including his sometimes volatile moods, by readily granting him leave when he felt he needed it, did not oblige them to necessarily accept how he behaved in every instance.

[46] It was clear they had become frustrated that their heartfelt efforts to support him were not appreciated and they felt at a loss over what to do about it. As a small business, effectively employing only a husband and wife and two sons, they also had limited resources to resolving the conflict with NHW, both as an employee and a family member with ongoing mental health issues.

[47] However, having arranged a meeting with him that was called using the language of a disciplinary meeting and which eventually led to the most severe of disciplinary outcomes, they had to do more to meet the minimum standards of fairness required in employment, particularly when they took the steps to consider and decide on dismissal.

[48] NHW did have an inkling that his employment could be terminated. This was clear from the text he sent before the 7 December meeting to ask if he was “getting fired”. While that may not have been in contemplation by Ms A and Mr Z before the meeting, it clearly was afterwards. Given how the meeting ended, SBK should have formally advised NHW of that prospect before Ms A and Mr Z made their decision sometime before the 11 December letter of termination was prepared and sent.

[49] Mr Z, as he accepted in his candid oral evidence, was aware that something more was required by way of process. Even accepting he and Ms A were genuinely fearful for their emotional or physical safety, given NHW’s behaviour and messages, they could have sent a letter, email or text asking for his comment before confirming a final decision. It would have been an opportunity for NHW to consider his own position, possibly get legal or other professional advice and to propose some alternative that may have addressed their legitimate concerns about his conduct and to draw clearer lines about what was reasonably expected of him in his working relationships with them. Because NHW did not get that opportunity, the failures in the process SBK followed had resulted in him being treated unfairly. It was more than a minor defect in the process followed. As a result, NHW established that he had a personal grievance for unjustified dismissal.

## **Remedies**

[50] NHW sought an order for lost wages for up to seven months and a distress compensation award of \$20,000.

### *Lost wages*

[51] NHW did not gain new employment until August 2021. He did not seek Work and Income assistance in searching for a new job until July 2021. He said his search was delayed because his mental health “spiralled” after his dismissal and he was admitted to hospital in January 2021 after a suicide attempt.

[52] While it could be inferred that NHW needed some time for recovery after his release from hospital, no satisfactory evidence was provided to clearly explain why he did not seek work for more than six months after his dismissal. There was no information from any registered health professional to suggest that he was unable to do so for the entirety of that period. He had previously, while employed by SBK, been able to work while dealing with the mental health issues he experienced.

[53] On that basis there were limited grounds to support an extension of the order for lost wages much beyond the three-month minimum period. Allowing for four months, at the \$21 an hour rate NHW was being paid by the end of his employment, lost monthly ordinary time remuneration totalled \$14,560. This is the amount awarded under s 123(1)(b) and s 128 of the Act. Subject to reduction of any amount applied under s 124 of the Act, SBK must pay the lost remuneration awarded to NHW within 28 days of the date of this determination.

### *Compensation for humiliation, loss of dignity, and injury to feelings*

[54] NHW was, as established by his evidence, deeply distressed by the termination of his employment with SBK and how that came about. In closing submissions the effect on him was described as “almost catastrophic”.

[55] In considering compensation to NHW for the effect of being unjustifiably dismissed by SBK, careful consideration was needed to avoid conflating distress from matters to do with the family relationships with what was related to the employment relationship. For NHW, Ms A and Mr Z those relationships are inextricably intertwined. The reality of everyday life for them does not follow neat or abstract lines that might be drawn in a legal textbook. However the Authority cannot address or remedy the hurt or anguish experienced before or outside the employment relationship. Compensation is limited to the distress arising from the personal grievance.

[56] NHW was more susceptible to injury to his feelings than others who had not endured the events in his childhood that continued to undermine his mental health. Because he was working in a family business, his employer was aware of that vulnerability. SBK, through the endeavours of Ms A and Mr Z, had clearly hoped to help him to rebuild his life. However, given his previous experience and vulnerability, NHW keenly felt the effect of losing his job in the way that he did.

[57] Again there was no evidence from a registered health professional that may have assisted in making an assessment of the level and nature of the distress that could appropriately be awarded for the aspects of his distress that related to the end of the employment relationship and how that happened.

[58] Relying on the evidence of NHW and Ms B about the effects of his dismissal on him, and the general range of awards in similar matters, \$12,000 was an appropriate amount to order be paid to NHW as compensation for humiliation, loss of dignity and injury to his feelings caused by his dismissal. It is an appropriately modest amount which, consistent with the limits of the employment jurisdiction, does not address whatever wrong and distress he experienced in relation to matters outside the scope of what the Authority may address.

[59] Subject to reduction of any amount applied under s 124 of the Act, SBK must pay the award of compensation to NHW within 28 days of the date of this determination.

### **Reduction of remedies required for conduct contributing to grievance**

[60] Under s 124 of the Act the Authority must consider whether any blameworthy conduct by NHW contributed to the situation giving rise to his grievance and, if so, whether remedies awarded should be reduced due to that conduct.

[61] The evidence established NHW had contributed substantially to the circumstances which led to his personal grievance. For the following reasons, a reduction of one third of the remedies awarded was appropriate.

[62] Firstly, SBK had grounds to initiate a disciplinary process after NHW drove away from the worksite on 20 November, leaving Mr Z without transport and without assistance to complete a work task NHW had been assigned to do on 16 November. The work day was not over and completion of the task was not unreasonable.

[63] Secondly, NHK's communication with Ms A was abusive and extreme. While he considered what he wrote and said to her related only to family matters, he was also communicating with her over leave requests related to the same matters. His behaviour in the abusive messages he sent her contributed directly to the situation that gave rise to his personal grievance.

[64] Thirdly, as NHW said in his oral evidence in answer to questions, he was responsible for his words and behaviour on 7 December and the lack of respect shown towards his parents. He said that he could see termination of his employment was a possibility from that meeting. With that awareness, how he dealt with the meeting contributed directly to the situation giving rise to his grievance. It would be a disproportionate and unjust outcome if, SBK having been found liable for his grievance, NHW's own behaviour was not also acknowledged by a reduction of remedies relating to that liability.

[65] The reduction of one third applies to both remedies, reducing the lost wages award to \$9,706 (less any applicable tax) and the compensation award to \$8,000 (without further deduction).

### **Costs**

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

[67] If they are not able to do so and an Authority determination on costs is needed NHW may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum, SBK would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[68] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>6</sup>

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<sup>6</sup> See [www.era.govt.nz/determinations/awarding-costs-remedies..](http://www.era.govt.nz/determinations/awarding-costs-remedies..)

[69] As a preliminary indication, it may assist the parties to resolve costs between themselves to know that for this particular investigation meeting, finished by 3.30pm, the starting point for an assessment of costs solely on a tariff basis would be \$3,500.

Robin Arthur  
Member of the Employment Relations Authority