

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2023] NZERA 55
3144221

BETWEEN	TOVIO UGONE Applicant
AND	STAR MOVING LIMITED Respondent

Member of Authority:	Rowan Anderson
Representatives:	Matthew Croymans, counsel for the Applicant Stuart Biggs for the Respondent
Investigation Meeting:	2 September 2022 at Wellington
Submissions received:	At the investigation meeting and on 17 September from Applicant At the investigation meeting and on 9 September from Respondent
Determination:	3 February 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Tovio Ugone was employed by Star Moving Limited (Star Moving) as an Operations Manager based at its Wellington Depot. Mr Ugone suffered a knee injury at work in June 2020. After seeing a doctor on approximately 24 June 2020 he made a claim through the Accident Compensation Corporation (ACC) and was unable to return in any capacity until 13 August 2020.

[2] In April 2020, after providing Star Moving with a letter confirming that he could return to work on restricted, sedentary, duties, Mr Ugone was provided a letter stating that due to his extended absence and a restructuring of the Wellington Depot, that Star Moving had decided to disestablish his role as Operations Manager.

[3] Mr Ugone claims that he was unjustifiably dismissed from his employment and that Star Moving should be ordered to pay him compensation for lost wages and for hurt and humiliation. He also claims that Star Moving breached s 64(3) of the Employment Relations Act 2000 (the Act) by failing to provide him a copy of his Individual Employment Agreement (IEA) and that penalties should be imposed upon Star Moving.

[4] An investigation meeting was convened on 2 September 2022. Sole Director and Shareholder of Star Moving, Mr Stuart Biggs, attended on behalf of Star Moving. Both Mr Biggs and Mr Ugone gave evidence under affirmation.

[5] At the investigation meeting, Star Moving sought leave to reply or respond to the application. Notwithstanding limited participation from Star Moving prior to the investigation meeting, including a failure to lodge a statement in reply or to comply with directions for the lodgement of statements, I granted the leave sought.

[6] I am satisfied that Star Moving were appropriately served with all relevant documents, and that it had ample opportunity to engage a representative had it wished to do so. At the investigation meeting, Mr Biggs confirmed that he was representing Star Moving, and that he was content for the investigation meeting to proceed.

[7] In order to determine this matter, I must consider the following issues:

- (a) Was Mr Ugone dismissed from his employment?
- (b) Were Star Moving's actions in dismissing Mr Ugone justifiable?
- (c) Is Mr Ugone entitled to compensation?
- (d) Has Star Moving breached s 64(3) of the Act, and if so, should a penalty be imposed?

[8] As permitted by s 174E of 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.

[9] As permitted by s174C(4) of the Act, the Chief of the Authority has decided that exceptional circumstances exist such as to allow this determination to be issued outside of the three month timeframe required by s 174C(3) of the Act.

Was Mr Ugone dismissed from his employment?

[10] Mr Ugone was initially employed by Star Moving as a Driver in 2017. His evidence was that Mr Biggs approached him, approximately six to nine months later, to take on the role of Operations Manager. That followed the departure of the employee who had previously held that position. Mr Ugone's IEA records that he started work as Operations Manager on 2 July 2018.

[11] Star Moving did not contest the fact of dismissal until the day of the investigation meeting. Mr Biggs denied that Star Moving dismissed Mr Ugone from his employment. Instead, Mr Biggs variously claimed that Mr Ugone's role was 'disestablished', that there was a redundancy, and that Mr Ugone was not dismissed and couldn't work because of an injury.

[12] Mr Ugone was, upon attending the workplace on 17 August 2020, given a letter advising him that his role had been disestablished. The letter, which was dated 14 August 2020, read as follows:

Hi Vio

Due to your extended absence and restructuring the branch we decided to disestablish your position as Operations Manager.

We would like you to consider a new role as Class 2 driver and look forward to your feedback.

We would also like an indication of when you may return to work in full health please?

Please return the company phone to our office this week.

Stuart Biggs
Managing Director

[13] In *Wellington Clerical Union v Greenwich*¹ Judge Williamson referred to the terminology used in ILO Convention 158 (22/6/82) in defining "dismissal" as "the termination of employment at the initiative of the employer". Judge Williamson also noted that dismissal is a word with wide meaning, should not be construed narrowly and that a dismissal is a "sending apart" or "sending away" or "sending forth".²

[14] I find that the letter provided to Mr Ugone on 17 August 2020 amounted to a sending away. Whilst it purported to seek feedback as to an alternate position, it did so

¹ *Wellington Clerical Union v Greenwich* [1983] ACJ 965 (AC) at 974.

² *Wellington Clerical Union v Greenwich* [1983] ACJ 965 (AC) at 973.

in the context of having, absent any consultation, advised Mr Ugone that his role had been disestablished. The letter also sought the return of Star Moving's property in the form of a 'company phone'. Mr Ugone considered he had been dismissed, and I consider that is what a reasonable person would have taken from the letter.

[15] In response to questions from both the Authority and counsel for Mr Ugone, Mr Biggs was unable to explain in what role Mr Ugone was said to have been employed following the letter being issued. Mr Biggs was also unable to satisfactorily explain why he or Star Moving made no attempt to contact Mr Ugone, despite his not attending the workplace following the letter being issued to him. Indeed, there was no follow up whatsoever by Mr Biggs or Star Moving.

[16] I find Mr Biggs's explanations implausible. Although there was a vague offer made as to the possibility of an alternate role, Star Moving clearly ended the employment relationship at their initiative by advising Mr Ugone that his role had been disestablished and in asking him to return the company phone.

[17] I do not accept that the reference to returning to work contained in the letter means that Mr Ugone was not dismissed. Instead, I find that reference relates to the possibility of Mr Ugone accepting the new "Class 2 driver" role, which would have been substantially different from Mr Ugone's role. The offer, such as it was, did not have the effect of maintaining the existing employment relationship.

[18] Mr Biggs knew that Mr Ugone could not perform the Class 2 driver role at that time. That was evident from an ACC Medical Certificate Mr Ugone provided to Star Moving on 13 August 2020 advising that he could perform only limited duties of a sedentary nature.

[19] At the investigation meeting, Mr Biggs said that Star Moving made it clear to Mr Ugone that it would accommodate him in another role without financial disadvantage. When questioned about that issue, and the absence of any reference to maintaining terms and conditions in the dismissal letter, Mr Biggs said that they were discussions that he "wanted to have" with Mr Ugone. He also said that he had asked another employee in Wellington (that I will refer to as the "Assistant Manager", noting that there was some dispute as to their actual role) to contact Mr Ugone to tell him there would be no disadvantage. He said that the discussion with the Assistant Manager occurred sometime after 14 August 2020. I do not accept that there was any such

communication with Mr Ugone, at the least until after the dismissal had already occurred.

[20] Mr Ugone gave evidence that he was never provided any further information about the supposed alternate position. There was no discussion about pay and he was not provided with a draft individual employment agreement or any other documentation relating to the role.

[21] Upon being given the dismissal letter on 17 August 2020, Mr Ugone no longer had a role with Star Moving. His position at Star Moving had been disestablished and he was not employed in any alternative role.

[22] I find that Mr Ugone was dismissed from his employment on 17 August 2020.

Were Star Moving's actions in dismissing Mr Ugone justifiable?

[23] I have found that Mr Ugone was dismissed from his employment. As such, the onus turns to Star Moving to justify its actions.

[24] Section 103A of the Act sets out the relevant test for justification, that being whether the employer's actions, and how the employer acted, were what a reasonable employer could have done in all of the circumstances at the time the dismissal or other action occurred.³ In applying the test of justification, I must consider the factors listed at s 103A(3) of the Act that, in a non-exhaustive manner, set out procedural considerations.

The question of justification applies in two parts, to the process adopted by the employer and the substantive justification. In this case those two parts apply to both the decision to restructure and the decision (or lack of decision) around not offering Mr Ugone alternative work.

[25] Mr Biggs gave evidence that he had sought to contact Mr Ugone to discuss the restructuring. I do not accept Mr Biggs's evidence. Had Mr Biggs tried to contact Mr Ugone then he would have been able to. Mr Ugone maintained regular contact with the Wellington Depot throughout his absence from work. If Mr Biggs had wanted to provide him with information as to any restructuring proposal, he could have. At the

³ Employment Relations Act 2000, s 103A(2).

very least, he could have arranged for such information to be provided via the Wellington Depot (which is what occurred with the dismissal letter). No records have been produced by Star Moving evidencing any relevant attempts to contact Mr Ugone, nor were any such attempts mentioned when Mr Ugone was dismissed.

[26] Star Moving also seeks to have the Authority believe that it wanted to engage with Mr Ugone about concerns with his absence from work. Mr Biggs said that he made fair and reasonable attempts to do just that, and that he tried contacting Mr Ugone on several occasions. However, Star Moving produced no records of such communications or attempts to call or contact Mr Ugone. Star Moving had every opportunity to provide such evidence to the Authority but did not do so. Mr Biggs's evidence, to put it bluntly, does not stack up.

[27] Mr Biggs could not explain in any meaningful way why, if he had wanted to discuss the issues with Mr Ugone and could not get hold of him by phone, he did not try communicating with him in the same way he delivered the dismissal letter.

[28] Mr Biggs accepted that Mr Ugone's absence was part of the reason for Star Moving's actions and said that "[the Assistant Manager] was available and Vio was not". I questioned Mr Biggs directly at the investigation meeting as to whether I understood his evidence correctly in that if Mr Ugone had been in full health that he would have been retained him rather him the Assistant Manager. Mr Biggs confirmed that was his evidence.

[29] Illness or injury may justify an employee's dismissal in circumstances where the employee is prevented from carrying out their duties for an indefinite period.⁴ However, such circumstances do not change the test of justification to be applied at s 103A of the Act. In other words, an indefinite injury or illness of an employee does not absolve an employer of its responsibility to act as a fair and reasonable employer, including by giving the employee a reasonable opportunity to recover, making appropriate inquiries about the prospect of a return to work, and considering any response from the employee.⁵

⁴ *Canterbury Clerical Union v Andrew and Bevan* [1983] ACJ 875, Judge Castle.

⁵ *Lal v The Warehouse Ltd* [2017] NZEmpC 66.

[30] Mr Ugone kept Star Moving up to date with his progress, including by providing information from medical practitioners and ACC. Mr Ugone's evidence, which I accept, was that the Assistant Manager told him that there were no light duties that he could perform. Mr Ugone, in response, told the Assistant Manager that he would need confirmation of that for ACC.

[31] Star Moving did not seek, for example, further medical information as to the expected recovery time or a date on which Mr Ugone might be expected to return to work on full duties. Indeed, I find that if Star Moving had taken appropriate steps, it would have been clear that Mr Ugone could have returned to work and performed, at the least, most of his duties.

[32] Mr Biggs sent an email containing the dismissal letter (the letter itself being dated 14 August 2020) to the Assistant Manager at 12.06pm on 13 August 2020. It is of note that the email to which the letter was attached requested that the Assistant Manager provide the letter to Mr Ugone "ASAP".

[33] Counsel for Mr Ugone submits that he could not have provided the ACC Medical Certificate on 17 August 2020, including because a separate letter provided to Mr Ugone by the Assistant Manager on 17 August 2020 already contained the reference number found on the earlier medical certificate.

[34] Whilst there was some degree of confusion on Mr Ugone's part as to the relevant dates, and having weighed all the evidence, I find that Mr Ugone provided the ACC Medical Certificate to Star Moving prior to Mr Biggs drafting and sending the email on 13 August 2020.

[35] I find that that dismissal letter was constructed and sent as a result of Mr Biggs being made aware that Mr Ugone could perform "sedentary" duties and that he was in a position to return to work on that basis. I find that the dismissal was a reaction to Mr Ugone's provision of the ACC Medical Certificate on 13 August 2020.

[36] Star Moving did not consult at all with Mr Ugone as to the purported restructuring, nor did it consult at all with Mr Ugone as to the proposed alternate role. Indeed, there was no notification at all of Star Moving's intentions until the dismissal letter was provided.

[37] It is abundantly clear that Star Moving treated Mr Ugone in a procedurally unfair and unjustifiable manner. No concerns were raised with Mr Ugone prior to the dismissal, no opportunity was provided to Mr Ugone to respond to Star Moving's purported concerns as to his absence from work, and there was absolutely no consultation or notice given to Mr Ugone that his position might be disestablished. These were significant failings and because of them, Mr Ugone was not able to provide feedback on any proposal nor to have any possible feedback considered by Star Moving.

[38] Star Moving, following the investigation meeting, produced to the Authority a document purporting to show a decline in sales at, and immediately prior to, the dismissal. That was provided as evidence in support of what was said to be a genuine need to restructure. I do not accept that evidence is sufficient to establish that there was a genuine basis for the restructuring and consider that in any event the dismissal was substantially motivated by other improper considerations. The document produced related to a single customer and I find that Star Moving has not established that there was a genuine basis for the dismissal or restructuring.

[39] The s 103A test of justification applies in a redundancy or restructuring context. So far as Star Moving assert that its actions related to a genuine restructuring process, I do not accept that to be the case. The supposed disestablishment of Mr Ugone's role was disingenuous, he was dismissed from his employment without consultation, and that dismissal was both substantively and procedurally unfair.

[40] I find that Star Moving unjustifiably dismissed Mr Ugone.

Is Mr Ugone entitled to compensation?

Lost wages

[41] Counsel for Mr Ugone submitted that lost wages should be awarded, and that Mr Ugone should be compensated for any additional holiday pay on lost wages (at 8%) and Kiwisaver contributions at the rate of 3%.

[42] I do not accept that Mr Ugone's position was genuinely disestablished. Additionally, I consider that, but for the dismissal, Mr Ugone would have been able to perform at least most of his duties as Operations Manager. Star Moving took no real steps to ascertain whether Mr Ugone could perform the role for which he was employed, that of Operations Manager.

[43] I have considered the relevant medical reports and other evidence available. That includes the ACC Medical Certificate which provides that Mr Ugone was “fit for some work” as opposed to “fit to return to work”. I have also considered the report provided by Medicine at Work Ltd on 25 February 2022.

[44] I accept the submissions made on behalf of Mr Ugone that Mr Ugone may have been able to perform his role and resume ordinary pay as of 17 August 2020. Any assertions to the contrary made by Star Moving were made without any consideration as to the actual injury, medical information, or the duties required of the role. I accept Mr Ugone’s evidence that he could have returned to the role of Operations Manager and that he was told by the Assistant Manager that “there’s no need for two of us”.⁶

[45] I consider it appropriate to make an award for lost wages under s 123(1)(b) of the Act. I do so notwithstanding Mr Ugone was receiving payments from ACC. In making such order I leave any matter of potential of reimbursement for ACC and Mr Ugone to consider⁷.

[46] I order that, under s 123(b) and s 128(2) of the Act, Star Moving Limited pay Mr Ugone \$13,090.32 for wages lost as a result of the grievance.

[47] The Authority may, at its discretion, order an employer to pay compensation for remuneration lost in excess of 3 month’s ordinary time remuneration.⁸ The principles applicable to the exercise of such discretion were discussed by the Court of appeal in *Telecom New Zealand Ltd v Nutter*,⁹ including that there is no automatic entitlement to compensation reflecting the balance of the expected working career, and that allowance must be made for contingencies.¹⁰

[48] This is not a case involving a finding of unjustified dismissal on procedural grounds alone. Additionally, I find that Mr Ugone’s role continued to be performed by another employee, the Assistant Manager, and that but for the actions of Star Moving in dismissing Mr Ugone, he would have continued in employment for a significant period of time. I consider that Mr Ugone suffered significant loss as a result of the

⁶ Brief of Evidence of Tovia Ugone dated 27 May 2022, at [16].

⁷ See *Judea Tavern Limited v Patricia Jesson* [2017] NZEmpC 82, at [40].

⁸ Employment Relations Act 2000, s 128(3).

⁹ [2004] 1 ERNZ 315 (CA) at [70] to [79].

¹⁰ *Ibid*, at [78] and [81].

dismissal, particularly given the circumstances in which his ability to take on other work may have been compromised by his injury.

[49] I consider it appropriate to exercise my discretion under s 128(3) of the Act and order that Star Moving Limited pay Mr Ugone an additional sum of \$13,090.32, that being the equivalent of an additional three months' ordinary time remuneration.

[50] Star Moving Limited is ordered to pay Mr Ugone under s 123(1)(b) of the Act, within 28 days, the total sum of \$28,275.09 gross (inclusive of holiday pay). It must also pay 3% Kiwisaver contributions on gross wages, being \$848.25.

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

[51] Mr Ugone was dismissed without any consultation or notice. The dismissal was affected by way of letter handed to him by the Assistant Manager. It came as a surprise and the purported basis for the dismissal, in that the letter referenced Mr Ugone's "extended absence", in effect blamed Mr Ugone. The reference to restructuring also came without notice and in the absence of any consultative process, despite Mr Ugone having attended the workplace a matter of days prior to the dismissal.

[52] Mr Ugone's evidence was that he felt Star Moving had taken advantage of the situation, that there was no explanation provided as to the reasons for the 'disestablishment' of this role, and that he was "gobsmacked" when he read the letter. Such a reaction was entirely understandable.

[53] Because of the dismissal, Mr Ugone was taken off ACC's Stay at Work programme. Mr Ugone's evidence was that he was shattered by the dismissal, felt undervalued, and felt like he had lost himself.

[54] Mr Ugone had enjoyed his work greatly and following the dismissal he felt depressed and unappreciated. His evidence was that the dismissal led to a strain in his family relationships and significant stress as a result of the consequential financial pressures. Mr Ugone was referred to a psychologist to deal with his depression and stress.

[55] I accept Mr Ugone's evidence and find that he suffered a severe impact to his self-esteem, confidence, and self-worth. Mr Ugone was devalued, and the impact was more pronounced having regard to the purported reasons given for the dismissal and

the absence of any notice or consultative process. Mr Ugone was blamed for having to take time off work to recover from a workplace injury. This was so despite the accompanying disingenuous restructuring explanation given by Star Moving. The approach taken by Star Moving caused a significant detriment to Mr Ugone and significantly impacted his self-worth and dignity.

[56] Mr Biggs, in adopting as evidence the content of an email he sent to the Authority on 16 August 2022, sought to paint Mr Ugone as paranoid. Additionally, spurious allegations about substance abuse and alleged impropriety by Mr Ugone were made without any reasonable basis for such claims.

[57] I found Mr Ugone's evidence as to the impacts of Star Moving's actions to be compelling, honest, and genuine. He has suffered significant harm because of Star Moving's actions. It was clear from Mr Ugone's evidence that he has been severely impacted. The significant impact felt by Mr Ugone is also supported by a report prepared for ACC purposes¹¹, noting that he had reported "...low self-worth attached to his loss of income and subsequent financial struggles to provide for his family".

[58] This is not a case where the dismissal was the result of a genuine redundancy process and unjustifiable based on procedural defects alone. Instead, this is a case where the dismissal was both substantively and procedurally unjustifiable, and one which unjustifiably attached a significant element of blame to the employee on account of an absence from work resulting from a workplace injury. I consider the impacts on Mr Ugone to have been exacerbated by Star Moving's ongoing actions, which have included unfounded accusations seeking to cast Mr Ugone as "paranoid", as having acted in bad faith.¹²

[59] Having considered the impact that the dismissal and actions of Star Moving had on Mr Ugone, and having regard to generally comparable cases, I consider that an appropriate award of compensation is \$27,500.

¹¹ ACC Training for Independence Report, dated 11 July 2022, at page 2.

¹² "Brief of Evidence" of Mr Stuart Biggs as emailed to the Authority on 1 September 2022.

Contribution

[60] There is no evidence before me suggesting that Mr Ugone's conduct was in any way relevant to the dismissal. I find that there were no actions by Mr Ugone requiring a reduction in remedies.

Has Star Moving breached s 64(3) of the Act, and if so, should a penalty be imposed?

[61] Mr Ugone claims that Star Moving breached s 64(3) of the Act in that it failed to provide, upon request, a copy of Mr Ugone's IEA. The request for a copy of the IEA was first made by email via Mr Ugone's counsel on 10 November 2020 and was repeated on 12 November 2020. Star Moving did not provide a copy of the IEA until 27 April 2022, and Mr Ugone submits that what was eventually received was not the full IEA. It is correct to say that Star Moving did not provide Mr Ugone with, at least in full and in a timely manner, a copy of his IEA when requested.

[62] Mr Ugone, at the time the first request was made, was no longer an employee of Star Moving. Counsel for Mr Ugone submits that penalties are available despite the requests being made after the employment relationship ended, noted the discretionary nature of penalties, and submitted that the absence of such liability on employers might lead to deliberate attempts to withhold such information. In submissions, counsel for Mr Ugone referred to the determination of the Authority in *Rewha v Simply Girls Painters and Decorators Ltd*¹³ where penalties were imposed in circumstances where a s 64(3) request was made post dismissal.¹⁴

[63] I find that s 64(3) has application in the circumstances. The meaning of the legislation must be ascertained from its text and in light of its purpose and its context.¹⁵ I find s 64(3) has application in relation to the requests made by Mr Ugone having regard to the use of the term 'employee' throughout the Act to describe a person that would be a former employee¹⁶, ss 64 and 65 as concerning important obligations as to the retention and production of written individual employment agreements, and the objects of the Act including as to the enforcement of employment standards.

¹³ *Rewha v Simply Girls Painters and Decorators Ltd* [2022] NZERA 360.

¹⁴ *Ibid*, at [21] to [23], [71], [72] and [84].

¹⁵ Legislation Act 2019, s 10.

¹⁶ Including, for example, in the context of personal grievances at s 103(1)(a).

[64] I find that s 64(3) of the Act has been breached, and consequentially I turn to consider whether a penalty should be imposed upon Star Moving.

[65] The Authority has jurisdiction to award the penalties for the breaches claimed.¹⁷ I must consider whether in each case a penalty is warranted. The considerations in regard to penalties¹⁸ are as follows:

- (a) The object of the Act – the object of the ER Act includes recognition and the promotion of good faith behaviour, acknowledging and addressing the inherent inequality of bargaining power in employment relationships, and the promotion and effective enforcement of employment standards. The object of the ER Act supports the imposition of an appropriate penalty in this case.
- (b) The nature and extent of the breach – the breach is significant in its nature in that Star Moving failed to comply with an important employment standard. That involved a failure to provide a copy of Mr Ugone’s written employment agreement, at least in full, despite a number of requests being made;
- (c) Whether the breach was intentional, inadvertent, or negligent – I consider the breach was more than inadvertent. The request made on behalf of Mr Ugone was repeated, but effectively ignored. Star Moving were on notice that active steps were required to locate and provide a copy of the IEA, but failed to take those steps;
- (d) The nature and extent of any loss or damage – the applicant was deprived of a full copy of his IEA for a considerable period. I accept that this would have caused some damage to Mr Ugone in the context where he was seeking to pursue other remedies against Star Moving, and that it would have led to difficulties in obtaining advice and pursuing those remedies;
- (e) Compensation or other steps in mitigation – Star Moving ultimately provided a copy of at least part of Mr Ugone’s IEA. The provision of that information was significantly delayed. However, I consider that,

¹⁷ Employment Relations Act s 161(1)(m).

¹⁸ *Nicholson v Ford* [2018] NZEmpC 132.

despite that delay, the eventual provision of information to be somewhat of a mitigating factor;

- (f) The circumstances of the breach, including the applicant's vulnerability – Mr Ugone was in a position where he was unable to otherwise obtain a copy of his IEA. Star Moving's non-compliance placed Mr Ugone at a disadvantage;
- (g) Any similar conduct – Counsel for Mr Ugone referred the Authority to other determinations relating to Star Moving or other entities in which Mr Biggs is involved.¹⁹ I consider that those determinations show what appears an inadequate approach to record keeping and compliance with employment standards. However, I do not consider the cases referred to as significant given the timing of the relevant events and circumstances of each case;
- (h) Deterrence – there is a need for deterrence on a general and specific basis;
- (i) Degree of culpability – Star Moving, by providing what it says it could of the IEA, albeit belatedly, might have shown some degree of acknowledgement. However, it is of note that Mr Biggs and Star Moving sought to blame Mr Ugone for the delay even at a late stage in the proceedings. This included by asserting that Mr Ugone was responsible for the IEA being absent from Star Moving's files. I do not accept that and instead prefer the evidence of Mr Ugone that the signed IEA was returned by him via email;
- (j) Consistency – I have taken into account comparable penalty cases and consider this in the mid-range;
- (k) Ability to pay – Star Moving has not provided any evidence as to an inability to pay.

[66] I now turn to the application of the four-step consideration of penalties as outlined by the Full Court in *Borsboom (Labour Inspector) v Preet PVT Ltd*²⁰. In doing so, I have taken into account the relevant factors detailed above.

¹⁹ Including *Murray Cousens v Star Nelson Holdings Limited* [2021] NZERA 52 and *Carl Graeme Mathieson v Star Moving Limited* [2022] NZERA 379.

²⁰ [2016] NZEmpC 143.

Nature and number of breaches (Step 1)

[67] The maximum penalty for a single breach \$20,000.²¹

Assessment of severity of breach (Step 2)

[68] As to Step 2 of the *Preet* test, having weighed the aggravating and mitigating factors, including the seriousness of the breach, Star Moving's inadequate approach to record keeping and compliance with employment standards, and the, albeit late, provision of the IEA, I consider the starting point to be 75 per cent.

[69] On that basis, I find the provisional penalties having considered severity, to be \$15,000.

Financial circumstances of the respondent (Step 3)

[70] In relation to the financial circumstances of Star Moving, no evidence of any inability to pay has been provided by Star Moving. I make no reduction as to financial capacity. As such, in terms of Step 3 of the *Preet* test, the provisional penalties remain at \$15,000.

Proportionality of outcome (Step 4)

[71] Applying the proportionality or totality test I consider a penalty of \$6,000 to be appropriate, consistent, and proportionate.

[72] Taking all the above matters into account, Star Moving Limited is ordered to pay penalties totalling \$6,000. I order that \$4,000 of the penalty be paid to the Crown account via the Authority, and the other \$2,000 be paid to Mr Ugone.

Costs

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

²¹ Relations Act, s 135(2)(b).

[74] If they are not able to do so and an Authority determination on costs is needed Mr Ugone 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 Star Moving 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.

[75] 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.²²

Summary of orders

[76] Star Moving Limited is ordered, within 28 days of the date of this determination, to make payment of:

- (a) \$28,275.09 Mr Ugone as compensation for lost wages under s 123(1)(b) of the Act;
- (b) \$842.25 for the employer Kiwisaver contribution on the lost remuneration pursuant to s 123(1)(b) of the Act;
- (c) \$27,500 to Mr Ugone as compensation for hurt and humiliation under s 123(1)(c)(i) of the Act;
- (d) \$6,000 in penalties, \$4,000 of which is to be paid into the Crown account via the Authority, and \$2,000 to be paid to Mr Ugone;
- (e) Reimbursement of the filing fee to Mr Ugone in the amount of \$71.55.

Rowan Anderson
Member of the Employment Relations Authority

²² For further information about the factors considered in assessing costs, see www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.