

Issue

[4] The issue requiring investigation is whether or not Mr Wirihana was unjustifiably dismissed by AML.

Background

[5] AML is a national concrete supplier with 50 ready mix plants throughout New Zealand, including in Avondale, Auckland, where Mr Wirihana was engaged to work.

[6] AML trades as Allied Concrete Limited (ACL). Both AML and ACL are part of the HWR Group of companies, and HWR Group policies apply to AML.

[7] Mr Arthur Hayden, Driver Trainer Upper North Island, said that he was responsible for regularly assessing the competency of, and conducting training sessions for, the drivers. This involved quarterly assessments, completing inductions, logbook and fatigue training, and safe on-site practices.

[8] Mr Hayden said that in AML drivers are driving 30 tonne trucks on busy and dangerous roads. As a consequence strict restrictions are placed on how long a driver of a commercial or heavy motor vehicle can work before they must take a break with the intention of preventing driver fatigue. Managing driver fatigue is a serious hazard for AML and consequently ensuring drivers are complying with work-time and logbook requirements is essential.

[9] Logbooks are the written record of driver's work-time hours. Logbooks enable AML to identify possible areas of driver fatigue and enable New Zealand Government enforcement officers to check compliance with the work-time rules.

[10] Mr David Barker, National Sales and Marketing Manager, said that completion of logbooks are part of AML's commitment to the safety of the general driving public, and a legal requirement under the Land Transport Act 1998.

[11] Incorrect logbook entries put an employee at risk of fines up to \$2,500.00, and AML at risk of fines up to \$25,000.00.

Mr Wirihana

[12] Mr Wirihana commenced employment with AML on 10 April 2017 initially on a casual basis, and at the time of his dismissal his position was a Ready Mix Concrete Driver.

[13] Mr Wirihana was a member and delegate of First Union Incorporated (the Union) and was covered by the terms of the collective agreement between: "AML Limited T/A Allied

Concrete or Holcim Concrete and First Union Incorporated (First Union)” for the term 1 March 2016 – 28 February 2018 (the Collective Agreement).

[14] At clause 16 the Collective Agreement set out the disciplinary process to be followed by AML in incidences of a breach of conduct. It stated clause 16.1.1:

16.1.1. The following transgressions/actions are examples of what might be deemed misconduct. They are for guidance only and are not exhaustive. In cases of serious misconduct, the employer shall have the right to dismiss the employee summarily.

...

(b) Falsifying of information on timesheets or any other employer record.

...

(g) Acting in a way that is in conflict with the commercial or legal interests of the company.

[15] Mr Wirihana said that upon commencing employment he had received an induction which had included safety policies, health and safety procedures, and how to fill in a logbook and timesheets to meet the legal requirements.

[16] He confirmed at the Investigation Meeting that he had been aware of the legal requirements in regard to logbook entry.

Final Written Warning January 2018

[17] On 11 December 2017 AML had conducted a random drug test on Mr Wirihana which returned a non-negative result. Subsequent confirmation testing revealed that Mr Wirihana had produced a positive test for cannabinoids. Following a disciplinary meeting held on 10 January 2018, Mr Wirihana had been issued with a final written warning in addition to being subject to AML conducting periodic testing thereafter.

[18] The ‘Record of Disciplinary Investigation Meeting’ confirmed the outcome, stating:

Warning to be issued

Final Written warning for the use of cannabis

The Final written warning for the breach of the HWR Drug and Alcohol Policy as well as the Collective Employment Agreement Clause 16.1.1 (C) will remain on file indefinitely.

Reoccurrence of the above may result if (sic) a Summary Dismissal.

[19] Mr Wirihana had signed the Record of Disciplinary Investigation Meeting.

Union negotiations July 2018

[20] On 31 December 2017 First Union initiated collective bargaining and bargaining meetings commenced. After its commencement Mr Wirihana became a delegate of First Union and was later appointed to the bargaining team.

[21] Mr Wirihana said that on the evening of 5 July 2018 he received a call from Mr Bryce Hamilton, Union Organiser, who told him that there would be a collective bargaining meeting held at Burger King, Sylvia Park, the next morning, 6 July 2018, to prepare for bargaining that day with AML.

[22] Mr Wirihana was due to commence work at 6.45 a.m. on 6 July 2018. At approximately 6.15 a.m. Mr Wirihana said he telephoned the Batcher/Dispatcher at AML and said that he was attending First Union meeting and would not be in to work as expected.

[23] Mr Wirihana said he went to Burger King Sylvia Park at 7.30 a.m. Two other AML delegates arrived about 9.00 a.m. or possibly later, and Mr Hamilton arrived between 9.00 and 9.30 a.m.

[24] The bargaining meeting with AML commenced at 11 a.m. at the Penrose Yard location. Mr Wirihana said he arrived at Penrose Yard before 11.00 a.m., the negotiations started just after their arrival and continued all day. He said he had left the Penrose Yard between 4.30 and 4.45 p.m.

[25] Before he left Mr Wirihana said he had filled in his log book and timesheet for that day. These were completed as follows:

Timesheet

From 0730 to 1600
Union Negotiations
Penrose Yard
Yard duties
No Driving

Logbook Entry

6.00 Start
07.30 Penrose Yard Auckland
Union Negotiations
1300 Break
1330 Penrose yard Auckland
Union negotiations
1600 Penrose yard Auckland
No driving yard duties
NZTA Ref 28842213
Logbook ref 014646 - 20

[26] Mr Glen Jujnovich who was the Avondale/Silverdale Branch Manager in July 2018, said he processed timesheets on a Monday to meet payroll requirements. On 9 July 2018 he noticed that Mr Wirihana's timesheet had not been provided to him and he asked Mr Wirihana for it. When he received the timesheet he noticed that Mr Wirihana had recorded that he had worked on 6 July 2018 from 7.30 a.m. to 4.00 p.m. on the timesheet.

Informal Meeting 12 July 2018

[27] Mr Jujnovich said he was aware from Mr Barker that he had seen Mr Wirihana arriving at the Penrose Yard at 10.50 a.m. and leaving at 5.00 p.m. on 6 July 2018, so when he saw Mr Wirihana in the lunchroom on 12 July 2018, he had asked him to attend an informal meeting in his office.

[28] Mr Jujnovich said that he had asked Mr Wirihana if there was anything he wished to change on his timesheet. Mr Wirihana had replied that it was the day he had been at First Union meetings. Mr Jujnovich said he had again queried the times entered on Mr Wirihana's timesheet and commented that First Union meeting had started at 11.00 a.m. and asked Mr Wirihana if he had made a mistake on his timesheet.

[29] At that point Mr Wirihana had left the meeting. Upon his return to Mr Jujnovich's office he had handed his mobile telephone to Mr Jujnovich. Mr Hamilton was on the telephone and he told Mr Jujnovich that what was recorded on Mr Wirihana's timesheet was time he had been in bargaining, and that any meeting had to be held on a formal basis. Mr Jujnovich had therefore ended the meeting with Mr Wirihana.

Disciplinary Process July 2018

[30] Mr Jujnovich wrote to Mr Wirihana by letter dated 13 July 2018 which was hand delivered. The letter noted that Mr Jujnovich had spoken to Mr Wirihana on 12 July 2018: "to check if you had made a mistake recording your start and finish times on your timesheet and log book entry which was dated 6th July 2018."

[31] The letter which was headed " Re: Allegation of serious misconduct" set out the allegations against Mr Wirihana as:

It is alleged that: On Friday the 6th of July 2018 you rang in at approximately 6.15 am to inform the batcher at Avondale that you were unavailable to start at your scheduled start time of 6.45 am due to a union meeting. This meant that the customer that you were scheduled to deliver to was forced to wait and this created a cascading effect of slowing deliveries that day. This disadvantages the company and your work colleagues. The company scheduled for you to make deliveries in the morning and for you to arrive at the negotiations in a company vehicle, namely your truck.

You were seen arriving at Penrose at 11.00 am with Bryce Hamilton on Friday 6th of July and you left at 5.00 pm. on that date.

Your timesheet and logbook states you began work at 7.30am at Penrose and finished at 4.00 pm. While your representative explained on the phone that these were the hours you worked. This is in fact incorrect as you rang in to Avondale saying you weren't available, and you were not at Penrose at 7.30 am.

The company alleges you have provided false information on your timesheet and logbook which was handed in by you as a record of employment and payment for Friday 6th July 2018.

The above is a potential breach of your AML Collective Employment Agreement.

Specifically section 16.0 Disciplinary Procedure

- Clause 16.1.1 (a) Falsifying of information on timesheets or any other employee records.
(g) Acting in a way that is in conflict with the commercial or legal interests of the Company.

This is potentially a very serious matter and, if proven, in the absence of adequate explanations, could result in disciplinary action being taken against you, up to and including your summary dismissal.

[32] The letter concluded by asking Mr Wirihana, accompanied by a representative, to attend a meeting to be held on 17 July 2018. Enclosed with the letter were a number of attachments including an email from Mr Alan Clark, Manager, stating that he had witnessed Mr Wirihana arriving at the Penrose Yard at 10.50 a.m.

Meeting 25 July 2018

[33] The proposed meeting with Mr Wirihana took place on 25 July 2018. Mr Barker was copied into the 13 July 2018 letter and as Interim Regional Manager, he assumed responsibility from that point and was the decision maker for the process.

[34] Mr Hamilton was not available to attend the meeting and so Mr Wirihana had been accompanied by an alternative representative of First Union, Mr Bill Bradford.

[35] Mr Barker said that he had prepared pre-arranged questions for Mr Wirihana to answer, and had also asked further questions during the meeting to clarify what had been discussed.

[36] Mr Barker said Mr Wirihana had stated that: (i) he was instructed to attend a union meeting by Mr Hamilton which was to commence at 7.30 a.m. at Burger King; (ii) he was instructed by Mr Hamilton to fill in an 8 hour working day for the day and that Mr Arthur Hayden who was the On Job Trainer had instructed him to write 'Yard Duties' on his timesheet; and (iii) he did not recall what time he had arrived at the Penrose Yard.

[37] Mr Wirihana said that AML would not engage with him during the meeting, and that it would not listen to his explanation. However during the Investigation Meeting Mr Wirihana confirmed that he did have the opportunity to provide a full explanation during the meeting held on 25 July 2018. Mr Wirihana also said that he had been anticipating dismissal because he had experienced: "the same situation" at Atlas Concrete.

[38] Mr Barker said that Mr Wirihana was disinterested in engaging with AML during the meeting, and that he proceeded to scroll through his phone during the meeting. At one point Mr Wirihana had received a telephone call and had motioned as if to leave the meeting. He said Mr Wirihana declined to answer some questions stating that Mr Bradford would answer them. As a result it was difficult to obtain a detailed information on the events of 6 July 2018.

[39] Following the meeting Mr Barker said he had considered the responses he had received and carried out further investigation, which involved meeting with the other union delegates and speaking to Mr Hayden.

[40] The signed statements provided by the other union delegates who had attended their respective work places prior to First Union meeting on 6 July 2018 confirmed that they had not been asked to attend a 7.30 a.m. meeting at Burger King, with one statement referring to a meeting held at 9.00 a.m. and the other a meeting held at 10.00 a.m.

[41] Mr Hayden provided a statement to Mr Barker in which he denied having spoken to Mr Wirihana about how to complete the timesheet by entering 'Yard Duties' after attending a meeting.

[42] In the Investigation Meeting Mr Hayden said that he had not told Mr Wirihana to write "Yard Duties" on his timesheet or logbook entry, and explained that he had told some employees to write 'Yard Duties' when they had been on light duties and performing tasks some days in the premises yards.

[43] Mr Barker said he had also written to Mr Hamilton by email dated 27 July 2018. In the email Mr Barker stated that Mr Wirihana had explained that he (Mr Hamilton) had contacted him during the evening of 5 July 2018 to inform him he was required to attend a meeting at Burger King at 7.30 a.m. the following morning, and asked for confirmation this was correct.

[44] Mr Barker also asked Mr Hamilton to confirm that Mr Wirihana had asked him for advice about the hours he should enter on the timesheet for 6 July 2018 when attending bargaining, and what hours he had advised Mr Wirihana to enter on the timesheet. He further asked Mr Hamilton to confirm when and how he contacted the delegates to advise of the bargaining.

[45] Mr Bradford responded to the email stating that Mr Hamilton had made two telephone calls to Mr Wirihana on 5 July 2018, one at 11:46:15 and the other at 18.38.13 and would have reminded Mr Wirihana of the meeting at Burger King on both calls.

[46] Mr Bradford stated in relation to the query about timesheet completion advice that Mr Hamilton could not remember having such a conversation with Mr Wirihana but he may have done so.

[47] Mr Barker responded by asking Mr Hamilton to answer his questions directly, but did not receive a response.

[48] Mr Barker said he had considered all the information received, and reached the preliminary decision that the appropriate disciplinary outcome was the termination of Mr Wirihana's employment with AML. This was confirmed in a letter dated 6 August 2018 which set out the allegations of providing false information on the timesheet and logbook investigation findings as being:

7. Your response to this allegation was that you were instructed to attend a union meeting by Bryce Hamilton of First Union. This was to be at 7.30 am at Burger King Sylvia Park. The Company does not accept this as a reason for absence from work on the following grounds:

1. No notice of any union meeting prior to 11 am negotiation meeting was given to the company by Mr Hamilton.

2. Statements from the other three union delegates show no knowledge of any meeting organised for 7.30am for delegates. The other delegates all started work at their agreed start times on 6th July, and were available at Penrose by 10am for the 11 am meeting start.

8. You have stated that you were instructed by Bryce Hamilton of First Union to fill in an 8 hour work day for the day. You also said that Arthur (driver trainer Avondale) instructed you to write 'Yard Duties' on your timesheet. The company does not accept these explanations for the following reasons:

1. You are employed by Allied Concrete, not by First Union. There is no reason for you to accept instruction from first union in filling in a timesheet at any time.

2. Arthur Hayton had provided a statement that he did not – and has never-instructed you to fill in yard duties on a timesheet when not at work.

9. You have stated in the investigation that you don't recall what time you arrived at Penrose. Alan Clark Branch Manager witnessed yourself and Bryce Hamilton arriving at 10.45am. This is not 7.30 as recorded on your timesheet.

10. You have stated on your timesheet that you left Penrose at 4pm. I witnessed you leaving the negotiation meeting without notice, and signing out at 5pm.

11. Your logbook entry mirrors the incorrect timesheet and puts you at the risk for fines up to \$2500, and the company at risk of fines up to \$25,000 for providing a false logbook record. You did not dispute this false record at the investigation meeting.

[49] The letter confirmed a preliminary decision as being that: "the appropriate disciplinary sanction is: 'termination of your employment without notice for serious misconduct per clause 16.1.1 (b) and 16.1.1 (g) of your AML Collective employment agreement.'"

[50] Mr Bradford provided a response to the preliminary decision on behalf of Mr Wirihana by letter dated 15 August 2018 outlining that there had been a high degree of confusion on the part of the delegates, but that all had attended a meeting at Burger King on 6 July 2018, and that Mr Wirihana had not said that he had taken instructions about how to fill in his timesheet and logbook from Mr Hamilton rather than AML, but that: "he thought it was the right thing to do and thought he had heard it from Arthur or Bryce."

[51] It was acknowledged that Mr Wirihana had made a mistake in not checking how he should have completed his timesheet.

[52] The letter concluded by highlighting that Mr Barker had said Mr Wirihana was a valued employee, there was no reason to think the mistake would be repeated, and urged Mr Barker to reconsider the decision to terminate Mr Wirihana's employment.

[53] By letter dated 27 August 2018 AML referred to the final written warning issued for serious misconduct in failing a drug test and stated that: "the two considered together increases our tendency to proceed with terminating your employment." It concluded:

Decision

Given my view regarding the allegations above, I have reached the decision that the appropriate disciplinary sanction is termination of your employment without notice for serious misconduct per clauses 16.1.1 (b) and 16.1.1 (g) of your AML Collective employment agreement. In summary this is because you have submitted false information on your timesheet and in the logbook as described above, and because this is in conflict with our commercial and legal interests – as advised, you put yourself and the company at risk of a fine by your actions regarding the log book.

[54] Mr Wirihana's employment was terminated with immediate effect on 27 August 2018.

Was Mr Wirihana unjustifiably dismissed by AML?

[55] Mr Wirihana was dismissed on 27 August 2018 for serious misconduct. Justification for dismissal is stated in the Employment Relations Act 2000 (the Act), which at s 103A sets out the Test of Justification as being:

S103A Test of Justification

- (1) For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).
- (2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[56] The Test of Justification requires that the employer acted in a manner that was substantively and procedurally fair. An employer must establish that the dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

[57] The process carried out by AML I find to have been procedurally fair: Mr Wirihana was notified of the allegations in advance of the meeting and provided with supporting documentation; Mr Wirihana confirmed that he was provided with the opportunity during the meeting held on 25 July 2018 to offer an explanation in response to the allegations, and Mr

Barker undertook further investigations and considered genuinely all the information provided during the process.

[58] Turning to consider whether or not there was substantive justification and whether AML acted as a fair and reasonable employer I consider the following to be relevant.

Final written warning

[59] In reaching its decision to dismiss, the letter dated 27 August 2018 states that the final written warning in respect of a positive drug test was a factor in AML making the decision to dismiss. The letter states that it: “increases our tendency to proceed with terminating your employment.” Mr Barker confirmed at the Investigation Meeting that it had been a relevant consideration in reaching the decision to dismiss.

[60] Prior to this letter, there had been no reference to the final written warning being taken into consideration during the disciplinary process into allegations of documentation falsification.

[61] AML submits that Mr Wirihana was aware of the written warning and on notice that a further incident of misconduct could give rise to dismissal.

[62] I find that the wording of the Record of Disciplinary Investigation Meeting does not support Mr Wirihana having been aware that a further incident of misconduct could give rise to misconduct.

[63] The wording opens with a reference to the written warning being: “for the use of cannabis” and the paragraph concludes that: “Reoccurrence of the above may result in a Summary Dismissal”. I find that this wording indicates that a summary dismissal will result if there is a reoccurrence of the above i.e. use of cannabis.

[64] On that basis I consider that Mr Wirihana would not have been on notice that the warning for illegal drug use would have been taken into consideration in relation to allegations of an unrelated matter.

[65] AML submits that the substantive process would have been the same irrespective of whether or not Mr Wirihana had the opportunity to comment on the warning because of the seriousness of his conduct.

Seriousness of the conduct.

[66] The letter dated 27 August 2018 stated that the decision to dismiss Mr Wirihana was made upon the basis of serious misconduct pursuant to clauses 16.1.1 (b) and 16.1.1 (g) of the Collective Agreement.

[67] These clauses refer to examples of misconduct, namely falsifying of information on timesheets or other employee records, and acting in a way that is in conflict with the commercial and legal interests of the company.

[68] Whilst these are examples of what AML considered to be misconduct, I accept that the Collective Agreement in clause 16.1.1 refers to serious misconduct and that it was open to AML to consider these matters as being of serious misconduct.

[69] Mr Wirihana's position was that he accepted he had made a mistake, but that he had thought it the right thing to do i.e. a genuine mistake. The Employment Court in *Hines v Eastland Port Limited* stated:

As noted by this Court in *Minhinnick v New Zealand Steel Ltd*, the correct approach is that stated in the Court of Appeal in *Chief Executive of the Department of Inland Revenue v Buchanan*. That approach means that even one-off acts of inadvertence, oversight or negligence can, depending on the overall circumstances, amount to serious misconduct justifying dismissal. The Court is to stand back and consider the factual findings and evaluate whether a fair and reasonable employer would characterise that conduct as deeply impairing, or destructive of, the basic confidence or trust essential to the employment relationship, this justifying dismissal. What must be evaluated is the nature of the obligations imposed on the employee by the employment contract, the nature of the breach that has occurred, and the circumstances of the breach. Thus, a careless act can lead to dismissal for serious misconduct, but the case needs to be considered in light of all the circumstances and ultimately must revert back to the primary consideration to be made under s103A of the Act.¹

[70] The relevant circumstances in regard to Mr Wirihana's situation include the fact that he was aware of the legal requirements in regard to logbook and timesheets entries and had received both induction training and quarterly update training on the documentation completion.

[71] As a result Mr Wirihana would have been aware of the health and safety basis underpinning the importance of accurate logbook and timesheet documentation, and the implications for AML of his failing to do so.

[72] Mr Wirihana stated on the Timesheet and the Logbook that from: "0730 to 1600" he was attending union negotiations at the Penrose Yard. Whilst this is not totally accurate in that

¹ *Hines v Eastland Port Limited* [2018] NZEmpC 79 at [78]

he was not at the Penrose Yard for the full period of time, First Union had confirmed that Mr Wirihana had been involved in union meetings during the period.

[73] As regards the start time, although the other delegates did not attend a meeting at Burger King Sylvia Park until later than 7.30 a.m., First Union corroborated that Mr Wirihana had been asked to attend a meeting at Burger King by Mr Hamilton and that Mr Hamilton would have reminded Mr Wirihana of the time of the meeting.

[74] Mr Wirihana had advised AML before the meeting on 6 July 2018 that he would be attending a union meeting and therefore unable to come into work as planned.

[75] Further the evidence supports there having been a level of confusion between the delegates, First Union and AML on the day of the meeting on 6 July 2018.

[76] It appears that this arose from First Union not having informed AML of any meetings other than the bargaining which was due to start at 11.00 a.m. on 6 July 2018. Had this occurred it is possible that the subsequent events involving Mr Wirihana may have been avoided.

[77] Mr Wirihana also entered that he had been performing Yard Duties on the timesheet, which he claimed was a mistake but based on his genuine belief that that was what he had been told, possibly by Mr Hayden, although Mr Hayden's evidence did not support this having been the case.

[78] I find that there is no evidence of fraudulent intent on Mr Wirihana's part.

Putting AML at risk of a fine

[79] AML's decision to dismiss arose from the perception that Mr Wirihana's completion of the timesheet and logbook had: 'put yourself and the company at risk of a fine by your actions regarding the logbook'.

[80] Section s 79R of the Land Transport Act 1998 states:

79R Offences and proceedings concerning logbooks

- (1) Every person commits an offence who-
 - a) ...
 - b) Makes or causes to be made any false statement in a logbook or allows any omission to occur in the logbook.

[81] Mr Wirihana, whether or not unintentionally, had made a false statement in a logbook and would therefore have been at risk of a fine. However AML's liability is further subject to s79T of the Land Transport Act 1998 which states:

79T Offence to cause or require driver to breach speed limits, maximum work time, or rest time requirements

Every person commits an offence, and is liable on conviction to a fine not exceeding \$25,000, who, by act or omission, directly or indirectly causes or requires (whether or not the sole cause) a driver to –

- a) ...
- b) ...
- c) ...
- d) Fail to maintain a logbook in the prescribed manner if that person knew, or should have known, that the failure to maintain the logbook would contravene subpart 2 of Part B.

[82] AML did not either cause or require Mr Wirihana to make a false statement in his logbook and had not caused him to do so. On that basis the possibility of AML being fined was minimal, a fact which should have been known to AML, and I find not a reasonable basis for the dismissal decision.

[83] I find that the dismissal of Mr Wirihana was not a decision that AML, acting as a fair and reasonable employer, could have made in all the circumstances at the relevant time.

[84] I determine that Mr Wirihana was unjustifiably dismissed by AML.

Remedies

[85] Mr Wirihana was unjustifiably dismissed and is entitled to remedies.

Reimbursement of Lost Wages

[86] Mr Wirihana said that he diligently sought permanent alternative work following the termination of his employment, however this was difficult since the industry is small and he believed he had been blacklisted. However he managed to obtain casual intermittent work.

[87] In particular Mr Wirihana said he had applied for a job at another firm and passed all the tests including driving and drug tests, but he claimed the company had contacted AML and as a result did not employ him. I note that there is no evidence that this was the case.

[88] I accept that Mr Wirihana did take steps to find alternative employment.

[89] I also accept based on the bank statements provided by Mr Wirihana that in the six months prior to the termination of his employment he worked an average of 50 hours per week, based on a working week of 40 hours at T1 \$970.40 and 10 hours at T1.5 \$333.60, earning an average of \$1,304.00 gross a week.

[90] During the period following the termination of his employment Mr Wirihana obtained casual intermittent employment. It is submitted on behalf of Mr Wirihana that during the six months following the termination of his employment, Mr Wirihana earned \$24,500 gross.

[91] Pursuant to s128 (1) of the Act I find that Mr Wirihana has a personal grievance and has lost remuneration as a result.

[92] Pursuant to s 128 (2) of the Act I award Mr Wirihana lost wages for the 3 months following the date of termination of his employment.

[93] Mr Wirihana obtained alternative employment during that period and therefore there is a shortfall between what he would have earned had his employment at AML continued after 27August 2020, and what he actually earned by way of casual intermittent work following the termination of his employment. The amount earned from the casual employment I calculate to be \$12,250.00 based on the submission by counsel on behalf of Mr Wirihana.

[94] On that basis I find that during the 13 weeks following the termination of his employment with AML Mr Wirihana would have earned \$16,952.00 (calculated as 13 weeks at \$1,304.00 gross) from which is to be deducted the sum of \$12,250.00, resulting in a loss to him of \$4,702.00.

[95] I order that AML pay Mr Wirihana the sum of \$4,702.00 pursuant to s 128(2) of the Act.

Compensation for Hurt and Humiliation under s 123 (1) (c) (i).

[96] Mr Wirihana is also entitled to compensation for humiliation and distress caused by the loss of his job, which presented as a sense of abandonment, distress, difficulty sleeping and depression.

[97] I note that Mr Wirihana was also suffering stress and distress from sources external to AML at the time of the termination of his employment associated with his father's unveiling and death of another family member.

[98] Whilst I accept AML was not responsible for these external causes of stress, the coincidence of his dismissal will have heightened this pre-existing stress.

[99] I order AML to pay Mr Wirihana the sum of \$15,000.00 for humiliation, loss of dignity and injury to feelings, pursuant to s 123 (1) (c) (i) of the Act.

Contribution

[100] I have considered the matter of contribution as I am required to do under s124 of the Act. Mr Wirihana had received full training from AML in respect of documentation completion.

[101] He received regular training from Mr Hayden, and could therefore have approached Mr Hayden had he been unsure how to complete his timesheet and logbook for 6 July 2018. He failed to do so.

[102] Mr Jujnovich informally met with Mr Wirihana on 12 July 2018 and asked him if he had made a mistake on the timesheet. Rather than taking the opportunity to engage with Mr Jujnovich and resolve any misunderstanding at that point, Mr Wirihana telephoned Mr Hamilton who insisted that any meeting been on a formal basis. The action of Mr Wirihana in telephoning Mr Hamilton I found to have prevented any misunderstanding about completion of the documentation being resolved at an informal basis.

[103] Mr Wirihana was also referred to his anticipating dismissal as an outcome because he had experience the 'same situation' at a previous employer. This should have also made him aware of the importance of accurate timesheet and logbook entries, and to have motivated him to seek assistance from AML if he had any concerns about completion.

[104] I find contribution on the part of Mr Wirihana and reduce the remedies ordered by 30%.

Costs

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

[106] If they are not able to do so and an Authority determination on costs is needed the applicant 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 the respondent 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.

[107] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[108] 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.²

Eleanor Robinson
Member of the Employment Relations Authority

² *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].