IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2022] NZERA 125
3107534

	BETWEEN	PAUL TULAFONO Applicant
	AND	COMBINED ROAD AND TRAFFIC SERVICES LIMITED Respondent

Member of Authority:	Claire English
Representatives:	Dave Cain, advocate for the Applicant Dean Lewis and Cheryl Te Kani-McQueen, for the Respondent
Investigation Meeting:	18 January 2022 at Rotorua
Submissions received:	28 January 2022 and 15 February 2022 from Applicant 14 February 2022 from Respondent
Determination:	04 April 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr Tulafono, had worked for the respondent in its road marking team for some 17 months before he had a vehicle accident while driving the company vehicle. The respondent carried out an investigatory and disciplinary process before issuing him with a written warning. At the same time, the applicant was not provided with any work, and was issued a letter terminating his employment on the grounds that his employment was for a fixed term.

[2] The applicant raises claims of unjustified dismissal, unjustified disadvantage, and claims for penalties in relation to the way his employment came to an end and the weeks without pay leading up to the ending of his employment.

[3] The respondent says that Mr Tulafono was not dismissed, rather his employment ended because of the fixed term provision in his employment agreement combined with a lack of work. The employer also suggested that Mr Tulafono resigned his employment.

The Authority's investigation

[4] For the Authority's investigation a written witness statement was lodged from Mr Tulafono. A response was also lodged on behalf of the respondent, and Mr Dean Lewis, Director, and Ms Cheryl Te Kani-McQueen, Contracts Manager – Road Marking, attended the investigation meeting on behalf of the respondent. All witnesses answered questions under affirmation from me and the parties' representatives. The parties also gave written 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.

The issues

[6] The issues requiring investigation and determination were:

(a) Was Mr Tulafono unjustifiably dismissed?

(b) Was Mr Tulafono unjustifiably disadvantaged?

(c) If the respondent's actions were not justified (in respect of disadvantage and/or dismissal), what remedies should be awarded, considering:

- Lost wages (subject to evidence of reasonable endeavours to mitigate loss); and
- Compensation under s123(1)(c)(i) of the Act

(d) Should any penalties be awarded?

(e) Should either party contribute to the costs of representation of the other party?

Background

[7] The applicant, Mr Paul Tulafono, was employed by the respondent (Combined) as a roadmarking assistant and driver.

[8] He signed an employment agreement in January 2018. The employment agreement stated his employment would continue until the end of the employer's "season". The agreement did not state what the season was in relation to or when it would end precisely, but it did state that the season usually ended at the beginning of winter[1].

[9] Mr Tulafono received no notice from Combined terminating his employment. He continued working and his employment did not come to an end.

[10] Instead, Mr Tulafono continued working for Combined without a break for some 17 months, until on 23 May 2019, he was given a letter titled "14 Days Written Notice of Termination of Contract". The letter stated that:

> our road marking season is coming to an end, [and]…and
> as per your contract, your casual/fixed term season appointment with Combined Road and Traffic Services must be terminated. Your last working day with us will be Friday 7th June 2019.

[11] Nothing came of this, because on 4 June 2019, Mr Tulafono was offered a "variation to individual employment agreement", to extend his fixed term contract due to end on 4 June 2019[2] up to 30 June 2019.

[12] Mr Tulafono signed this document, and continued to work. He explained he was not surprised by this as he had expected to continue working as he had the previous year.

[13] On 28 June 2019, Mr Tulafono was issued with a character reference, headed "to whom it may concern". The reference was positive, describing Mr Tulafono as "consistently hardworking, honest and reliable" and as a person who was "always

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[1] This was explained at the investigation meeting to be around May each year.
[2] Combined explained that this date was probably a typographical error, and was probably intended to refer to the previously stated date of 7 June.

willing to work and didn't leave the dirty jobs to someone else". The reference ends by inviting the reader to contact the author for any further information.

[14] Mr Tulafono accepts that he asked to be provided with this reference, "just in case" he needed to look for other jobs. However, he did not look for other jobs, and continued working as normal beyond the stated end date of 30 June 2019, and into the first week of July 2019, as he had the previous year. He continued to be paid as normal.

[15] On Saturday 6 July 2019, Mr Tulafono was driving a company vehicle. He had been advised that his mother was severely ill and in hospital, and he was returning the vehicle to the company, in preparation for urgently travelling to Auckland with his partner in her car. He was involved in an accident where he crashed into another car. He reported this to police, who attended the scene. He did not continue his journey, as he was as he put it, quite shook up. He attempted to contact his most recent team lead (Shona), and his usual team lead (Andy), and in the end, was able to contact Ms Cheryl Te Kani-McQueen (who was the Contracts Manager for the Road Marking team of which Mr Tulafono was a part) and advise that an accident had occurred.

[16] On the morning of Monday 8 July 2019, he attended the local police station as he had been asked to do by the police attending the scene, to complete an accident and police report. He took these documents in to work, and gave them to his team lead, Shona, and then went up to Auckland to visit his mother.

[17] On Tuesday 9 July, he returned home. He was contacted by Ms Te Kani-McQueen, who asked him to take a drug and alcohol test as this was company policy whenever there was an accident.

[18] Mr Tulafono refused, pointing out that it had been some time since the accident. This was reluctantly accepted by Combined.

[19] Mr Tulafono states that during this conversation, Ms Te Kani-McQueen told him not to attend work because there was a disciplinary investigation underway. Specifically, he states that Ms Te Kani-McQueen said "there was no point him coming into work pending investigation". He understood this to be an instruction to stay away from work, and so he stayed at home.

[20] On Tuesday 9 July, Mr Tulafono was issued with a letter inviting him to a disciplinary meeting. This was originally scheduled for 11 July, but was postponed until 16 July to give Mr Tulafono more time to prepare.

[21] Mr Tulafono continued to stay at home unpaid in the lead up to this meeting.

[22] Towards the end of that meeting on 16 July, Mr Tulafono asked if he had been "stood down". The meeting notes confirm that Ms Te Kani-McQueen advised he was not stood down, it was just that there was no work available as it was "that time of year where everything's slowed right down".

[23] On 22 July, Ms Te Kani-McQueen attempted to contact Mr Tulafono to offer him some work that was available. He did not answer his phone, and by the time he returned her call on the following day, the job had been given to someone else.

[24] Mr Tulafono continued to wait on the outcome of his disciplinary meeting at home and unpaid.

[25] He says that he contacted the office some 4 or 5 times, to ask if there was any work going. He was told that his disciplinary investigation was still pending. He understood this as an instruction not to return to work until he was told to do so. He was not able to be specific about who he had spoken to.

[26] Combined rejects this, and says that Mr Tulafono was contacted several times about work that was available, but that he did not reply. When asked to detail the several times that Mr Tulafono had been contacted, Ms Te Kani-McQueen clarified that this was in reference to her phone call to Mr Tulafono on 22 July, and to a text message on 12 August about a health and safety meeting that Combined expected Mr Tulafono to attend.

[27] Combined was highly critical of Mr Tulafono for not being responsive to its phone calls and for not actively seeking out work. When questioned further, Combined clarified that it was again referring to the instance on 22 July when Mr Tulafono had responded to a call the next day. In addition, Mr Lewis and Ms Te Kani-McQueen said they personally were not aware of the phone calls that Mr Tulafono said he had made to the office, which was why they believed he had not sought out work.

[28] On 31 July 2019, Mr Tulafono was sent another letter titled "14 Days Written Notice of Termination of Contract". The letter stated that:

> our road marking season is coming to an end", and "as per the terms agreed to in your contract (and variations thereof), your fixed term appointment with Combined Road and Traffic Services Ltd must also be terminated. Your last day of employment with us will be Sunday 17th August 2019.

[29] On 8 August, Mr Tulafono was invited to a final disciplinary meeting, where he was issued with a written warning. On the face of it, this appeared to be the end of that matter.

[30] Despite this, Mr Lewis expressed during the investigation meeting that he was, and continued to be "livid" about Mr Tulafono causing an accident. He used the words "theft" and "conversion" when describing how he felt on learning that Mr Tulafono was driving the company vehicle on a Saturday, despite appearing to accept that Mr Tulafono was bringing the vehicle and the tools in it, to the yard to be held more securely in Mr Tulafono's planned absence from his home over the weekend. Despite the passing of time, the director remained visibly upset that, in his view, Mr Tulafono had brought the company into disrepute by having an accident, and said that the accident could impact on the company's "good standing" in terms of its health and safety record. He stated that despite the company's decision to issue Mr Tulafono with a written warning rather than dismissing him, he simply would not hire Mr Tulafono again.

[31] Throughout this time, Mr Tulafono did not attend work and was unpaid.

[32] There is a dispute between the parties about why. Combined says it had a limited number of days of casual work available during this time, and although it had tried to contact Mr Tulafono by phone to offer this work to him, he did not respond in a timely way, and nor did he report for work in the morning as usual.

[33] Mr Tulafono says that he did not come to work because he had been told not to while the "investigation was pending". Ms Te Kani-McQueen in particular denies that she ever told him specifically "not to attend work".

[34] It remains possible that someone else in the office told Mr Tulafono this when he called. No evidence was put forward by Combined to rebut this possibility.

[35] I was shown a text message from Mr Tulafono to Ms Te Kani-McQueen dated 25 July 2019. Mr Tulafono texted: "Hi Cherul would u think there maybe anything going this week?". Ms Te Kani-McQueen replied "Hi Paul Regarding the accident investigation is still pending Kind regards Cheryl".

[36] When this message was put to her, Ms Te Kani-McQueen said that this text did not actually say that Mr Tulafono should not come to work in those words, and she didn't accept that her text message could be read that way, but was only a reference to the investigation.

[37] She was unable to explain why she didn't then respond to Mr Tulafono's question about the availability of work.

[38] Mr Tulafono was the main breadwinner for his family, and as he was not earning, he had received some annual leave payments in the last 3 weeks of July.

[39] He continued to be otherwise unpaid, and offered no work. Even after the disciplinary process had concluded on 8 August, he was not provided with work, or asked to come in to work.

[40] Accordingly, following the disciplinary meeting on 8 August, he sought to have his remaining leave paid out as he needed the income for rent and bills.

[41] He spoke with an HR representative of Combined named Kelly. On Monday 12 August Kelly emailed Mr Tulafono, saying:

> there genuinely has only been work available for you on one occasion since the accident on the 6th of August [sic]. This occasion was the one you mentioned to me; the 22nd of July when Cheryl called you. As you said, you missed that initial call. The job needed to be filled urgently, so an alternative staff member was called in to work, when you couldn't be reached. ….We do not feel it is appropriate to re-instate the nine annual leave days you used during this time…However, we can transfer your sick leave balance (you have 6 days owing) to annual leave)…

[42] Mr Tulafono accepted this, and Kelly told him by email "I will sort that out for you in this week's payroll".

[43] Mr Tulafono then received a text message reminder to attend a health and safety representative's meeting. This is the text message of 12 August already referred to

above. He replied to the HR representative by text saying "unfortunately I am unable to make it as I will be leaving CRTS as of today, and will pursue another Employment."

[44] Mr Tulafono explained he was frustrated that he was neither being paid or offered more work, and needed to earn an income as he was the main breadwinner for his family.

[45] On 13 August, Ms Te Kani-McQueen emailed Mr Tulafono, saying that she had been advised by a member of her team that Mr Tulafono had resigned by text. She asked "would you please complete the attached resignation form and return asap."

[46] Mr Tulafono replied to Ms Te Kani-McQueen by text the same day, saying:

> Um not sure whether I need to fill that application out Cherly [sic] as already hve [sic] a letter of termination both for the fix/casual contract and the CRTS Termination letter with me…cheers

[47] Ms Te Kani-McQueen replied, saying:

> Hi Paul It is the standard resignation form not an application because you are resigning before the 17 August which was to be your end of season date as stated in the letter you are referring to. We can pay everything owing to you this week when I receive the resignation form back.

[48] On 14 August, Mr Tulafono texted:

> Hi Cherly it wasn't a resignation I was letting her know as it appears that bcoz yous say theres no work it appears therefore we have to seek employment elsewhere in which I'm doing and hve done…however, Kelly and I had already made arrangements that I get that money this week before ur txt saying no resignation no pay…therefore I will sign it cheers.

[49] Mr Tulafono decided not to fill out the resignation form.

[50] On Monday 18 August, he received his final pay, being the payment of 6 days annual leave as discussed with Kelly, albeit made to him in a special payment, rather than being part of the usual pay run. Mr Tulafono then raised a personal grievance claim.

Findings

Status of Employment

[51] Mr Tulafono was a permanent employee.

[52] Although his employment agreement stated that his employment would end "at the commencement of winter", this is not what in fact occurred. Mr Tulafono continued to work on a full-time basis for the employer, regardless of the season. Although Combined initially retained to itself the option to bring Mr Tulafono's employment to an end, it chose not to do so. Mr Tulafono's employment continued without a break.

[53] In 2019, after Mr Tulafono had been employed continuously on a full time basis for some 17 months, Combined purported to terminate Mr Tulafono's employment by way of the letter dated 23 May 2019, but again, gave Mr Tulafono reason to believe this was essentially meaningless, by presenting him with a variation extending his employment beyond the supposed termination date.

[54] As he was asked to do, Mr Tulafono signed that variation which continued his employment until 30 June 2019.

[55] The date of 30 June 2019 came and went, and Mr Tulafono continued to work and be paid. Combined took no steps to end his employment in practice, or to act in reliance on its own fixed term provision, or notices of termination, in any way.

[56] Having consistently treated Mr Tulafono as a permanent full time employee, and received the benefit of his labour and loyalty in return, it is not now open to Combined to try to rely on the fixed term provision as a defence to his claim for unjustified dismissal.

[57] In fact, Mr Tulafono only stopped being offered work after a disciplinary process was commenced in relation to his accident.

[58] It is significant that Mr Tulafono was issued a second letter purporting to terminate his employment on the grounds it was fixed term employment, on 31 July 2019, an entire month after the supposed expiry of his previous signed variation of contract, and when the disciplinary process against him was well underway.

[59] The 31 July 2019 letter stated that: "I am writing to inform you that our contracting season is coming to an end."

[60] This statement was not correct. The roadmarking season for that year had already ended in May. The end of the roadmarking season had not impacted on Mr Tulafono's work, either in the 2019 year, or in the previous year.

[61] The only thing that had changed was that Mr Tulafono had had a vehicle accident, and the director of the company was "livid" (to use his own word) that Mr Tulafono had had this accident.

[62] For all the above reasons, I find that the true nature of Mr Tulafono's employment was that of a permanent employee. It was not open to Combined to dismiss Mr Tulafono by way of the 31 July 2019 letter as it did[3].

[63] For completeness, I need to address some other comments raised by Combined around the nature of Mr Tulafono's employment. Combined suggested that the fixed term provision in Mr Tulafono's employment agreement should be interpreted as coming into effect automatically. In its submission, the Authority should find that Mr Tulafono's fixed term employment commencing in January 2018, came to an end sometime in or around May 2018 (the exact date being unspecified), and that from that point onwards, Mr Tulafono was a "casual" employee.

[64] Combined was not able to produce any documentation in support of this proposition. Instead, Ms Te Kani-McQueen said that ideally, Combined would issue letters in about the month of May each year, bringing its fixed term contracts to an end. Most of those employees would in fact leave the business, but some would be offered casual work as it arose over winter. Then, in around September each year, Combined would again offer fixed term employment agreements for road marking work. Previous employees, including casual workers, would often apply, and might well be offered a new fixed term road-marking contract particularly if they were considered reliable workers.

[65] Combined says that this is what should have happened to Mr Tulafono. His original employment agreement should have been terminated sometime in or around May 2018, and he should have been offered a casual employment agreement from then onwards.

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[3] See for example *Shortland v Alexander Construction Company Ltd,* [2010] NZEmpC 41, which requires a fixed term provision to be specific.

[66] Combined admitted that none of this occurred. Mr Tulafono's agreement was not terminated in or around May 2018, and he was never offered a casual employment agreement. His employment continued without a break up until 17 August 2019. The only employment agreement was the one he had signed in January 2018.

[67] It does not advance Combined's position to talk about things that it says "should have" happened, but which did not in fact happen.

[68] If Combined had wanted or intended to terminate Mr Tulafono's employment agreement in or around May 2018, in reliance on the fixed term provision in his employment agreement, then presumably it could have done so then. However, Combined chose not to do this. All indications are that this was because Mr Tulafono was a reliable worker, and Combined had work available for him to perform and wished to continue his employment. Combined is not now able to re-write what actually occurred, and retrospectively change Mr Tulafono's status to suit itself.

[69] The fixed term provision in Mr Tulafono's employment agreement did not automatically come into effect in or around May 2018 and bring his employment to an end[4].

[70] This is because (a), Mr Tulafono's employment continued unbroken; and (b) the plain words of the relevant contractual provision do not allow for this.

[71] The fixed term in Mr Tulafono's employment agreement states that his employment will end "when the current road marking work for the season is completed, which will usually co-incide with the commencement of winter. (the Termination Date). The Employer will notify the employee of the actual Termination Date…"

[72] There is no fixed date provided, and Combined chose not to activate this clause by notifying Mr Tulafono of the termination date, which it was required to do.

[73] For completeness, I also find that Mr Tulafono did not automatically become a "casual" employee at any point during his employment with Combined. There is no documentation suggesting that Mr Tulafono was ever offered or accepted employment

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[4] See *O'Neill v Victoria University of Wellington*, Employment Court, Wellington, 11/12/1996, Goddard Chief Judge, WEC82/96, W111/95, where the Court found the appellant's fixed term contract did not automatically expire. This was for a variety of reasons including because the employer had taken action to extend the employment beyond the initial fixed term.

on a casual basis. Combined accepts this, but again suggests that ideally, it "should have" offered Mr Tulafono a casual employment agreement at some point. Mr Tulafono worked on a full time basis, not on an intermittent or irregular basis. There are no grounds for finding that he was a "casual" employee.

Was Mr Tulafono's dismissal unjustified?

[74] Having established Mr Tulafono's status as a permanent employee, I must now consider if he was unjustifiably dismissed.

[75] The test of justification is set out at paragraph 103A of the Act.

[76] 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.

[77] In reaching my conclusion, I must consider:

a. did Combined sufficiently investigate before taking action;
b. did Combined raise concerns that it had with Mr Tulafono before taking action;
c. did Mr Tulafono have a reasonable opportunity to respond;
d. did Combined genuinely consider Mr Tulafono's explanation or comments.

[78] I may also take into account any other factors I think are appropriate.

[79] Combined dismissed Mr Tulafono by way of the letter dated 31 July 2019.

[80] That letter sets out Combined's position, which was that Mr Tulafono's "last day of employment with us will be Sunday 17 August 2019". The letter further stated that:

> Our contracting season is coming to an end. As per the terms agreed to in your contract (and variations thereof), your fixed term appointment with Combined Road and Traffic Services Ltd must also be terminated.

[81] The letter of 31 July 2019 advised Mr Tulafono of a decision to terminate his employment that had already been made.

[82] It did not put forward a proposal, it conveyed a firm decision.

[83] It did not ask for feedback, or suggest any avenue for providing feedback. On the contrary, it contained instructions for Mr Tulafono to return all company property and to ensure that the company truck was washed and left in a clean and tidy condition.

[84] The letter ends by stating that Combined wishes "you every success in finding alternative employment". This language strongly suggests to the reader that there are no further avenues for employment within Combined.

[85] In terms of the requirements of section 103A, there is no indication that Combined had investigated whether work could be found for Mr Tulafono prior to issuing this letter. Given that Mr Tulafono had performed a variety of duties in the past without incident, and had been prepared to promptly sign the variation document that was put to him, this omission is surprising. Likewise, there is no indication that Combined investigated the true status of Mr Tulafono's employment in light of the unbroken duration of his employment.

[86] Combined did not raise its concerns, being that it needed to terminate Mr Tulafono's employment because the contract season was coming to an end, and Mr Tulafono's employment "must also be terminated", prior to making the decision to dismiss Mr Tulafono.

[87] This is significant, because this statement explaining why Mr Tulafono's employment was being terminated was not in fact correct. It is not clear that the contract season was coming to an end as of 31 July 2019. Instead, it appears that it had already ended, as indicated in the previous letter dated 23 May, and again in the variation agreement dated 4 June. It is also not clear that the inevitable result of the contract season ending was that Mr Tulafono's employment "must" be terminated. This had not occurred the previous year, and the relevant clause in the employment agreement provided that termination would only occur if the employer elected to issue a notice to that effect.

[88] Mr Tulafono did not have any opportunity to discuss such matters with Combined, because he was not provided with any opportunity to respond to a proposal to terminate his employment, prior to being given the letter of 31 July 2019 advising that the decision had already been made.

[89] Likewise, Combined did not genuinely consider any comments or feedback from Mr Tulafono, because it never gave him the opportunity to provide such comments.

[90] Finally, it is relevant that Combined is a larger employer, which employs several staff in its human resources department. These staff members were known to Mr Tulafono, who communicated with them as needed. Combined clearly has the resources and internal knowledge to implement a consultation process, as Ms Te Kani-McQueen confirmed to me when describing in some detail the standard processes that Combined had in place for hiring and on-boarding staff, and ending employment in other circumstances.

[91] It is clear that in deciding to terminate Mr Tulafono's employment, Combined did not meet the test of justification as set out in section 103A of the Act. In my view, Combined's actions were not what a fair and reasonable employer would have done in all the circumstances, particularly given that there might have been a real possibly that Mr Tulafono could have been given part-time work, alternative duties, or even a "casual contract", given that his employment had continued in the previous year, if only these matters had been able to be discussed between the parties.

[92] Combined also raised as a defence (or at least, a mitigating factor) that in its view, there was no work available for Mr Tulafono to perform at that time, and this was the real reason he was issued with a notice of termination. There was no particular evidence produced in support of this statement. I also note that the letter of termination refers to the employment agreement as the key justification for why Mr Tulafono's employment "must" come to an end.

[93] This submission does not assist Combined. Even if Mr Tulafono's employment came to an end as a result of a lack of work available for him to perform (which is not entirely clear on the facts available to the Authority), Combined would still be required to follow a fair process when terminating his employment on this basis. The test of justification set out in section 103A of the Act would still apply, and for the reasons set out above, the process that was followed by Combined fails to meet this test.

[94] For completeness, I also need to address the submission made for Combined, most strongly in written submissions following the investigation meeting, that Mr

Tulafono resigned. I do not accept that this is what occurred when the facts are properly considered. Mr Tulafono did send a text message saying he "will be leaving". This message was sent in the context that he had been seeking to return to work, and had been told no work (or pay) was available. When Ms Te Kani-McQueen had asked him to confirm his position by filling out the appropriate forms, he stated that he had not resigned, and declined to fill out those forms, even when told that he would not receive his previously agreed annual leave payments as a consequence. Combined cannot rely on this as a genuine resignation in those circumstances.

[95] Mr Tulafono's termination is unjustified, and he is entitled to remedies accordingly.

Was Mr Tulafono Unjustifiably Suspended?

[96] In addition to his personal grievance claim for unjustified dismissal, Mr Tulafono raises a personal grievance claim for unjustified disadvantage, on the grounds that he was unfairly suspended without pay, from the date of his accident down to his final day.

[97] Combined says that he was never suspended, and that the reason he was not working and being paid was either because there was no work available for him to perform, or because he was not proactive in coming into the office and seeking out work.

[98] Mr Tulafono says he believes there was work available, because he knew other members of his team were going out working while he was waiting for the investigation and disciplinary process to conclude.

[99] Mr Tulafono's accident occurred on Saturday 6 July 2019. He was not available for work on Monday 8 July, or Tuesday 9 July, because he was visiting his mother in hospital, albeit this trip was a day or two later than originally envisaged.

[100] Mr Tulafono was effectively suspended from Wednesday 10 July onwards. I find that he was told by Ms Te Kani-McQueen not to come in to work while the disciplinary process was on-going. This amounts to a suspension, however it is described. Mr Tulafono recalled clearly that he had been told by Ms Te Kani-McQueen and other members of the human resources team when Ms Te Kani-McQueen was not available, that there would be no work available for him while the "investigation was

pending". Ms Te Kani-McQueen's response that Mr Tulafono was not suspended or stood down, on the grounds that she had never used those actual words, is unconvincing. This is especially so in light of the text message exchange between herself and Mr Tulafono, where he asks her to provide him with work, and she replies saying the investigation is "still pending", being the specific words that Mr Tulfono recalled being said to him.

[101] In addition, Mr Tulafono's view that he had been suspended was shown in the meeting on 16 July, when he asked if he had been "stood down".

[102] Mr Tulafono was clearly suspended, from 10 July to 16 July, when he was told in response to his questioning that he had not been stood down. Wages are owed for this period.

[103] The more difficult question is whether he was suspended after 16 July, or if the lack of work provided to Mr Tulafono from this time onwards was due to a genuine lack of work coupled with Mr Tulafono's unavailability, as Combined contends.

[104] I do not accept that there was a genuine lack of work for Mr Tulafono. Mr Tulafono says that he was aware that other members of his team continued working in his absence, as they called him to tell him this and inquire where he was, and Combined has not provided any evidence to refute this. Equally importantly, if there was a genuine lack of work available during this time, Combined could have been expected to engage with Mr Tulafono about this and/or his absence from the workplace, separate from the disciplinary process. Instead, Combined have criticised Mr Tulafono for not being more active in seeking out work and not coming into the office to make himself more available for work, which suggests work was available.

[105] In addition, despite Ms Te Kani-McQueen's statement on 16 July that Mr Tulafono was not stood down, the investigation and disciplinary process continued after 16 July, and Mr Tulafono was told well after this date that there was no work for him while this process was "pending".

[106] I find that it must be the case that Mr Tulafono was suspended during the investigatory and disciplinary process. His employment agreement provides for suspension while Combined investigates any alleged misconduct, and states that this

will be on pay[5]. Accordingly, Mr Tulafono is owed wages from 10 July 2019 through to 8 August 2019, which was the date the disciplinary process concluded with the issuing of a written warning.

[107] Mr Tulafono's employment then came to an end some 9 days later on 17 August 2019. I have already found that Mr Tulafono's dismissal was unjustified, however, I note that even if I had accepted that the notice given to Mr Tulafono was genuine, Combined would still have been obliged to pay him for the duration of his notice period.

[108] Accordingly, Mr Tulafono needs to be paid for the time up to the ending of his employment on 17 August 2019. This amounts to 5 weeks and 3 days.

Remedies

[109] Mr Tulafono submits that his usual weekly wage was $1,000 per week. The schedule of earnings provided by Combined shows that Mr Tulafono's average earnings over the past 52 weeks was $920.83 per week. Using Mr Tulafono's average weekly earnings of $920.83, the amount he is owed for 5 weeks and 3 days equals $4,880.40.

[110] Holiday pay calculated at the rate of 8% is payable in addition to this, being $390.43.

[111] Mr Tulafono has also claimed for interest on unpaid monies.

[112] The Interest on Money Claims Act 2016 provides for a mandatory award of interest, as compensation for a delay in the payment of money, at section 10 of that Act.

[113] The amount of interest owing is to be calculated in accordance with that Act[6], and an interest site calculator is provided for the purposes of calculation[7], known as the Civil Debt Interest Calculator.

[114] Mr Tulafono should have been paid his wages and holiday pay on or immediately after his last day of employment on 17 August 2019. These outstanding amounts attract interest until paid, and total $5,270.83.

[115] Mr Tulafono's last day of employment was a Sunday, but Combined put through a special payment for Mr Tulafono's final pay on Monday 18 August 2019.

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[5] At clause 29 of that agreement.
[6] See section 12 of the Interest on Money Claims Act 2016.
[7] See section 13 of the Interest on Money Claims Act 2016.

[116] At the very latest, these monies should have been paid to Mr Tulafono then. Accordingly, it is appropriate to calculate interest owing starting from Monday 18 August 2019.

[117] The amount of interest owing up to the date of this determination is $266.42 This sum is to be paid to Mr Tulafono, in recognition of his loss of the use of the monies that should have been paid to him.

[118] Mr Tulafono claims for the reimbursement of 13 weeks ordinary time remuneration, in accordance with section 128 of the Act. He gives evidence that he sought jobs by signing up with Tradestaff, and applied for jobs using Facebook, Trademe, and Seek.

[119] He says he even applied for another role with Combined that was advertised, but nothing came of this.

[120] He had one day's work doing a temporary traffic management role, earning $275, until he was given casual work at the end of October.

[121] On this evidence, Mr Tulafono was unemployed for some 10 weeks counting from the date of his last day at Combined. Accordingly, he is awarded 10 weeks lost remuneration, calculated at the rate of his average weekly earnings of $920.83. This is a sum of $9,208.30, less the $275 he earned during this time, being $8,933.30.

[122] Mr Tulafono also claims compensatory payments for hurt and humiliation, relating both to the unjustified disadvantage claim regarding his unpaid suspension, and the unjustified dismissal claim.

[123] Mr Tulafono's evidence was that throughout the time of his suspension, and up until his employment ended on 17 August, he experienced feelings of frustration, helplessness, and confusion. He and his family experienced financial hardship as a result of the sudden loss of income, and although he reached out to Combined, he was not always able to contact Ms Te Kani-McQueen, and he received no contact from Combined to either provide him with work, or to clarify his standing or the status of his employment. Mr Tulafono says he became very frustrated when, after the disciplinary process had concluded, he had still not been asked to return to work. In particular, he

points to the request by Ms Te Kani-McQueen that he fill out a resignation form before Combined would pay out his last 6 days of annual leave, despite this having been already agreed to by another member of the human resources team, as an example of his poor treatment by Combined.

[124] Throughout the investigation meeting, as well as in the written submissions subsequently filed for Combined, it became apparent that the Director of Combined, Mr Lewis, held and continued to hold an adverse view of Mr Tulafono. He stated that he remained "livid" about Mr Tulafono's accident even after a gap of some two years. He repeatedly accused Mr Tulafono of theft, on the unfounded basis that Mr Tulafono drove a work vehicle on a Saturday morning on one occasion. He stated that he would not re-employ Mr Tulafono (and indeed, when Mr Tulafono applied for further employment with Combined, his application was not progressed despite Ms Te Kani-McQueen explaining that Combined's usual policy was to prefer previously reliable workers such as Mr Tulafono for reemployment). He stated that Mr Tulafono didn't "take responsibility", although exactly what this meant is unclear. Combined's written submissions following the investigation meeting go so far as to state that Combined has suffered distress because of Mr Tulafono's accident, although this submission is mis-conceived as a company cannot suffer personal distress[8].

[125] None of this appears to have been properly put to Mr Tulafono at the time of the investigation and disciplinary process, even though this took place over some weeks. In addition, this adverse view is consistent with Combine's decision not to provide Mr Tulafono with further work after his accident occurred.

[126] The hurt and humiliation that Mr Tulafono felt during the flawed process that resulted in his dismissal was caused by Combined's decision not to communicate with him openly and honestly about what work was available, why he was not being given work, when he could realistically expect this to end, and why he was not provided with work as normal after the conclusion of the disciplinary process. Ms Te Kani-McQueen's requirement that Mr Tulafono fill out a resignation form in order to be paid out his annual leave is unexplained, as at that time, Mr Tulafono was an employee, and could have expected to be able to take annual leave during his employment (as in fact had already been agreed with another member of the human resources team, in

[8] See for example, *Freeman Holdings Ltd v Livingston*, [2015] NZEmpC 120.

recognition that Mr Tulafono had not been provided with work and needed some form of income).

[127] In all the circumstances, Mr Tulafono is awarded the sum of $15,000 in compensation for hurt and humiliation.

[128] Mr Tulafono has also asked that penalties be awarded, for what he says are the following three breaches of statute:

a. A breach of the duty of good faith in section 4 of the Act, in that the employer failed to be active, constructive, responsive and communicative in its dealings with Mr Tulafono;

b. A breach of section 4 of the Wages Protection Act 1983, for failing to pay Mr Tulafono his wages when due;

c. A breach of the employment agreement as set out at section 134 of the Act, by failing to allow the applicant to return to work and/or work the hours set out in the employment agreement.

[129] For any of these three breaches that are made out, the employer is liable for a penalty of up to $20,000.

[130] I have already found that Combined did not adequately communicate with Mr Tulafono during the investigatory and disciplinary process, as discussed above. This is particularly acute in respect of the lack of communication with Mr Tulafono as to what work was available to him, why, and when work might be expected to resume, including why the letter issued to Mr Tulafono dated 31 June 2019 terminating Mr Tulafono's employment was a letter Combined intended to rely on in contrast to its past behaviour. In my view, Combined has not acted towards Mr Tulafono consistent with its duties of good faith, therefore this breach is made out.

[131] In relation to the alleged breach of the Wages Protection Act by failing to pay Mr Tulafono his wages in full when they became due, my view is that this breach has not been made out. Mr Tulafono was employed on an hourly rate, and the wages that were due to him each week depended on the number of hours he had worked. Combined

have made it clear that the reason Mr Tulafono was not paid was because he did not perform work. I have already made awards of back wages and interest in this regard, and there appears to be the potential for "double counting" if a penalty is also awarded.

[132] The same comment applies equally to the claim for a breach of Mr Tulafono's employment agreement by failing to allow a return to work. Back wages and interest have already been awarded as a result of these actions.

[133] The law in respect to quantification is well established given the content of s 133A of the Act and cases such *as Borsboom (Labour Inspector) v Preet PVT Limited* and *Warrington Discount Tobacco Limited*[9], *A Labour Inspector v Prabh*[10], and *A Labour Inspector v Daleson Investment*[11]. Section 133A requires I have regard to the object of the Act, the nature and extent of the breach(s), whether they were intentional or not, the nature and extent of any loss or damage, steps to mitigate effects of the breach, circumstances of the breach and any vulnerability and finally previous conduct.

[134] The Court has found a failure to provide minimum standards directly disadvantages employees, and often arise in circumstances involving a distinct power imbalance[12]. That would appear the case here, as the impact of Combined's failure to be active, responsive, and communicative in its dealing with Mr Tulafono, not only caused hurt and humiliation to him, but took away any opportunity he might have had to be heard on the decision to cease providing him with work, or to address the adverse view held of him by Combined's director.

[135] The requirement of intention is not necessarily about whether the party was aware they were breaching the law. Instead, it is about whether they acted intentionally, in the sense of intending to do the act in question[13], or failed to take reasonable steps to fulfil their legal obligations[14]. In this case, my view is that Combined failed to take reasonable steps, even though they were in a position to have the internal knowledge and expertise to be aware of an employer's obligations and what was required to fulfil them.

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[9] *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited* [2016] NZEmpC 143.
[10] *A Labour Inspector v Prabh Limited* [2018] NZEmpC 110.
[11] *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12.
[12] *A Labour Inspector v Daleson Investment Limited,* above n 3, at para [27].
[13] *Parton v Fifita,* TT 1815/00 DC Auckland, quoted in *MBIE v Sumich,* Auckland TT 4088383.
[14] *El-Agez v Comprede Limited,* TT 4121553, at para 18.

[136] With respect to severity I note the judgement of the Court in *Preet* suggests failures to pay proper entitlements should be assessed at 80%[15]. Other breaches were assessed at a lower starting point. In this case, this suggests a reduction should be applied.

[137] There is no evidence of similar previous conduct by the respondent and finally I have to consider issues of consistency and proportionality.

[138] Having weighed these factors I conclude the respondent should be required to pay a penalty of $5,000. The final issue is then to whom the penalty should be paid. I note that the actions of Combined that led to this breach have had an appreciable impact on Mr Tulafono. He should therefore share in the penalty and I consider half appropriate.

[139] Accordingly, Combined is ordered to pay the sum of $5,000 to the Crown account, half of which ($2,500) is to be paid to Mr Tulafono.

Orders

[140] Combined is to pay to Mr Tulafono the following amounts:

a. Unpaid wages, being $4,880.40 gross.
b. Holiday pay calculated at the rate of 8% on this amount, being $390.43.
c. 10 weeks lost remuneration, less earnings, being $8,933.30 gross.
d. Interest in accordance with the Civil Debt Interest Calculator, being $266.42.
e. Compensation for hurt and humiliation, being $15,000 without deduction.
f. A penalty of $5,000 without deduction is to be paid to the Crown account, with half of this amount ($2,500) going to Mr Tulafono.

[15] See *Preet*, at paragraph [167] which suggests at starting point of 80% for minimum wage breaches, and paragraph [171] which suggests a starting point of 70% for failures to pay for Holidays Act entitlements.

Costs

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

[142] If they are not able to do so and an Authority determination on costs is needed either party 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 other party 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.

[143] 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.[16]

Claire English
Member of the Employment Relations Authority

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