

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 679
3196659

BETWEEN	HENNING HANSEN Applicant
AND	SHIPCO TRANSPORT LIMITED First Respondent
AND	NGS WORLD TRANSPORT LIMITED Second Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Sean McAnally, Counsel for the Applicant Nick Logan, Counsel for the Respondent
Submissions:	13 October 2023 from the Applicant 17 October 2023 from the Respondent
Investigation Meeting:	17 October 2023 at Auckland
Determination:	15 November 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Henning Hansen, claims that he was unjustifiably dismissed by either the First Respondent, Shipco Transport Limited (Shipco), or by the Second Respondent, NGS World Transport Limited (NGS) as a Controlling Third Party.

[2] Shipco denies that it unjustifiably dismissed Mr Hansen on the basis that it did not employ him on 11 August 2022, the date he was dismissed.

[3] NGS denies that it was a Controlling Third Party, but claims it was Mr Hansen's employer at the time his employment was terminated. It further claims that Mr Hansen did not raise his personal grievance with it within the statutory time limit.

The Authority's investigation

[4] The Authority received written and, under oath or affirmation, oral evidence from the Applicant, Henning Hansen.

[5] The Authority received written and, under oath or affirmation, oral evidence from the Respondent witnesses: Stig Krogh Anderson, Chief Operating Officer for Shipco Transport Asia Pacific and Subcontinent, and Arthur Tzaneros, Director of NGS.

[6] Oral and written submissions were received from Mr McAnally for the Applicant and Mr Logan for the Respondent. In particular, whilst I have not referred to all the submissions made by the parties, I have fully considered them.

[7] 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.

Issues

[8] The issues requiring investigation and determination are:

- Who was Mr Hansen's employer on 11 August 2022, the date of his dismissal?
- Was NGS a Controlling Third Party?
- Was Mr Hansen unjustifiably dismissed?
- Did Mr Hansen raise his personal grievance with the employer within the statutory 90 day time limit pursuant to s 114 of the Act?
- What remedies should Mr Hansen be awarded if determined to have been unjustifiably dismissed?
- Should either Shipco or NGS pay a penalty and if so, in what quantum?

Background

[9] Shipco is a freight forwarder and part of the larger Danish company, Shipco Transport Holding A/S.

[10] Mr Hansen had extensive working experience in shipping and freight forwarding. In August 2021 he was engaged by Shipco as a consultant.

[11] Mr Hansen said the consulting arrangement worked well, he received bonus payments, and negotiations were commenced with Mr Krogh in regard to an employment agreement with Shipco, whereby Mr Hansen would become a full-time fixed-term employee.

Mr Hansen's employment with Shipco

[12] The negotiations between Mr Hansen and Mr Krogh resulted in a written employment agreement which Mr Hansen and Mr Krogh both signed (the Employment Agreement). The Employment Agreement set out that Mr Hansen was appointed as Country Manager Shipco Transport Ltd/ International Cargo Terminals Ltd (ICT).

[13] It was of a fixed-term nature, commencing on 10 January 2022 and continuing until 9 January 2026. The duration of the fixed term period was important to Mr Hansen because his consultancy business had started to gain momentum which he believed would be lost if the Shipco employment arrangement were to terminate early; and due to his wish to work until approximately 70 years of age, he wanted to ensure the employment would be in place for approximately the time of that event.

[14] The Employment Agreement provided for a three month notice period at clause 13.1, and at clause 6.1 set out the salary and benefits which applied as being:

- 6.1 The Employee will be paid a gross annual salary of \$207,500 per annum.
 - a. Plus, car allowance \$30,000 per annum (weekly payments less tax)
 - b. Bonus 0.1-3 months' salary based on mutual agreed KPI's
 - c. Fuel card.
 - d. Mobile phone, company laptop and home internet to be paid by company

[15] Mr Hansen said that he and Mr Krogh agreed a bonus subject to the orally agreed KPIs being met, these were agreed as:

- a) Achievement of budget bottom line as a minimum;
- b) Opening two new trade lanes into Christchurch; and
- c) Maximum 10% staff turnover for the year.

[16] Mr Krogh confirmed these were the agreed KPIs.

[17] Mr Hansen's direct report was Mr Krogh but Mr Hansen also interacted in Singapore with Gary Sayles, a New Zealand based Director. Mr Hansen's role as Country Manager involved the day to day running of Shipco and ICT, and he said his focus was on delivering a healthy and acceptable financial bottom line to both Shipco and ICT as reflected in his KPIs.

[18] Mr Hansen said his role necessitated his spending ample time with all staff to ensure they understood the business direction, and being visible in the market place. This involved

customer visits, although, until later, these were often through electronic means due to the Covid-19 pandemic restrictions.

[19] No performance issues were raised with Mr Hansen by Shipco and he was given no reason to think his performance as Country Manager was not satisfactory. This was confirmed by Mr Krogh who said there had been no concerns with Mr Hansen's performance.

Joint Venture August 2022

[20] In May 2022 it was publicly announced that Shipco was going to enter into a joint venture with an Australian logistics company, AGS World Transport Pty Limited (AGS). The joint venture company would be called NGS World Transport Limited (NGS) and commence on 1 August 2022.

[21] A press release dated 25 May 2022 stated: "The new JV will continue to be managed locally by current Country Manager Henning Hansen, who will report into the Australian operations of AGS."

[22] Mr Hansen said his understanding was the joint venture would commence on 1 August 2022 and Shipco employees would enter into new employment agreements with, and become employees of, the joint venture company, NGS.

[23] Formally his direct reporting line was changed from Mr Krogh to Mr Terry Tzaneros, AGS' Executive Chairman, who was based in Australia. He also interfaced with Mr Arthur Tzaneros.

[24] He said he met Mr Arthur Tzaneros, at a dinner following the public announcement of the joint venture during which they had discussed warehousing which was the area in which Mr Tzaneros was involved.

[25] Subsequently he had been aware that Mr Arthur Tzaneros was in the Auckland office during July and August 2022, but there had not been any significant interaction between them.

Steps taken and completed to transfer Mr Hansen's employment to NGS

[26] In anticipation of the transfer of his employment to NGS, Mr Hansen signed a form on 19 July 2022 giving permission for his annual leave balance to be transferred from Shipco to NGS.

[27] Mr Hansen's salary was paid by Shipco for the period ending on 29 July 2022, but it was paid after that date by NGS. The payslip for the period ending 5 August 2022 also confirms

that the salary benefits including the vehicle allowance and KiwiSaver contribution were paid by NGS, and the annual leave transfer had occurred.

[28] Mr Hansen was presented with an employment agreement with NGS, which contained identical terms to those in his Shipco employment agreement apart from two changes. One was a change of his title from Country Manager to General Manager (to bring it into alignment with the Australian title usage), which was not an issue for him, and the other was an expiry date change from 9 January 2026 to 9 January 2025.

[29] This latter change was a concern for him because the later date had been agreed at the commencement of his employment with Shipco and was important to him given his age.

[30] He had not signed the draft but advised the administrative person responsible for issuing the replacement employment agreement of the change in date, and she confirmed it had been a 'typo', assured him that it had been amended, and a corrected copy placed on Mr Tzaneros' desk for approval when Mr Tzaneros was next in Auckland.

Dismissal: 11 August 2022

[31] Mr Hansen said that on 11 August 2022 when Mr Tzaneros arrived in Auckland, he (Mr Tzaneros) called him into his office. He said Mr Tzaneros told him: "Henning, this isn't really working out" and handed him a document.

[32] The document was headed: "Record of Settlement" (the ROS) and stated that Mr Hansen's employment had been terminated on 11 August 2022. The parties to the ROS were stated to be:

- a) Shipco Transport Limited ... (Employer 1)
- b) NGS World Transport Limited ... (Employer 2)
- c) Henning Hansen ... (Employee)

[33] In a section headed 'Background' the following was set out:

- A. The employee was employed by Employer 1 as Country Manager from 10 January 2022 – 31 July 2022 (**Employment 1**).
- B. Employment 1 was covered by an employment agreement signed 26 November 2021. (**Shipco Agreement**).
- C. The Employee commenced employment with Employer 2 as General Manager, New Zealand on 1 August 2022 (**Employment 2**).
- D. Employment 2 was covered by an employment agreement, which was unsigned (**NGS Agreement**).
- E. Employment 2 was terminated by NGS on 11 August 2022 (**Termination**).
- F. With no admission of liability, it has been agreed between Employer 1, Employer 2 and the Employee that all matters howsoever arising out of Employment 1, the

Shipco Agreement, Employment 2, the NGS Agreement and the Termination are settled in accordance with the terms of this Record of Settlement.

[34] The Record of Settlement was to be signed by an authorised representative of Shipco, an authorised representative of NGS, and by Mr Hansen.

[35] Under a section headed “Acknowledgment” it stated: “We confirm that we fully understand that once the Mediator signs the Record of Settlement” it would be final and binding on and enforceable ...” . After the Acknowledgement statements there was again provision for all three parties to sign it.

[36] Mr Hansen said he recalled asking Mr Tzaneros what it meant, and Mr Tzaneros saying that “he didn’t want to go into all that”. All he remembered Mr Tzaneros providing by way of explanation for the decision was that he “spent too much time in his office”.

[37] Mr Tzaneros told him he had to leave for the airport at 2 p.m. and that the proposed terms in the Record of Settlement would be available for acceptance until then. Mr Hansen responded he was shocked by what had occurred and the speed by which it had occurred and that he wanted to seek legal advice.

[38] A short while later, Mr Tzaneros told Mr Hansen he could extend the offered terms to include a payment representing 6 months’ notice rather than 5 months’ notice, and extend the deadline for signing it until the end of the following day, Friday 12 August 2022, but the offer would not be valid any longer than that.

[39] Mr Hansen said Mr Tzaneros asked him to leave. He had tried to complete as much of his work load as he could before returning keys and company access codes as instructed, and being escorted off the premises by Mr Sayles.

[40] Mr Krogh confirmed when questioned that he was still in the position of Mr Hansen’s direct report manager at the date of Mr Hansen’s dismissal, and that he had been aware of the intention to end Mr Hansen’s employment two to three weeks prior to 11 August 2022.

[41] The following day, 12 August 2022, Mr Hansen said he consulted a lawyer and a letter raising a personal grievance was sent addressed to Shipco Transport Limited and to NGS World Transport Limited. It stated:

2. From 10 January 2022 to 11 August 2022 our client was employed by Shipco Transport Limited (“Shipco”) pursuant to an individual employment agreement made on, or about, 28 November 2021.

9. On 1 August 2022 operation of that joint venture commenced. Our client was (seemingly) not made redundant and continued in his role as New Zealand country manager. While a draft employment agreement between he and NGS has been drafted ... that agreement was not concluded or signed.
10. Mr Hansen's direct report did, of course, change from Singapore to Mr Terry Tzaneros.
11. Our client continued to be employed by Shipco until 11 August 2022. NGS, however, had control of the business and was the "controlling third party" for the purposes of a 103A of the Employment Relations Act ("the Act") and is hereby notified that Mr Hansen considers that it caused or contributed to his unjustified dismissal ...

[42] The letter continued to set out the specifics of the grounds for the personal grievance this being unjustifiable dismissal, and the remedies sought.

Bonus Payment 11 August 2022

[43] Mr Hansen received a letter on Shipco letterheaded paper on 12 August 2022. It was dated 11 August 2022 and signed by Mr Sayles. It stated:

Bonus payment.

I refer to our recent discussions. This letter confirms our discussions that the Board has determined to pay a bonus to you, in accordance with clause 6.1(b) of the contract dated 26 November 2021 of \$19,791.67 (inclusive of car allowance) equivalent to one month's pay (less appropriate taxation). This payment is in complete satisfaction of your entitlement to a bonus in accordance with clause 6.1 (b).

[44] Mr Hansen said he did not receive payment of the bonus until 24 August 2023, a year after it was due for payment.

Who was Mr Hansen's employer on 11 August 2022, the date of the dismissal?

[45] Section s.6 of the Act provides:

6 Meaning of employee:

- (1) In this Act, unless the context otherwise requires, **employee** –
 - (a) Means a person of any age employed by an employee to do any work for hire or reward under a contract of service ...
- (2) In deciding ... whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them.
- (3) For the purposes of subsection (2)... or the Authority-
 - (a) must consider any relevant matters, including any matters that indicate the intention of the parties
 - (b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship

[46] It is therefore necessary in determining the question of who was Mr Hansen's employer on 11 August 2022 that I examine all relevant matters to determine the real nature of the relationship between Mr Hansen, Shipco and NGS.

[47] In this case Mr Hansen was initially employed by Shipco but the new joint venture entity, NGS, came into existence on 1 August 2022. The intention indicated by the press release dated 25 May 2022 was that NGS would be managed in New Zealand by Mr Hansen as the Country Manager. In fact Mr Hansen commenced acting as the Country Manager for NGS from 1 August 2022.

[48] Steps were taken to transfer over Mr Hansen's employment from Shipco to NGS, involving the transfer of Mr Hansen's accrued holiday entitlement to NGS, change of his salary payee, and the drafting of an intended employment agreement.

[49] The first two steps had been completed by 11 August 2022. The draft employment agreement had not been signed by either party because a term of it, the finish date of the fixed term period, was incorrect, but there was no indication that this was other than a genuine mistake. Indeed the administration person accepted it as a 'typo' error, it was corrected by her and placed on Mr Tzaneros' desk for signing.

[50] The signed copy of the employment agreement was not provided to Mr Hansen for counter-signing, however there is no evidence that he would not have signed it if it had been.

[51] Mr Tzaneros said during cross-examination that the fixed term end date change amendment was not an issue for him. However when questioned about whether or not he had intended to sign the amended employment agreement, said that he would not have done so based on his observation of Mr Hansen's performance.

[52] The fact that Mr Tzaneros stated at the Investigation Meeting that he would not have signed the amended employment agreement was neither known to, nor envisaged by, Mr Hansen as likely to occur prior to the discussion on 11 August 2022 and I find this does not negate the fact that Shipco and NGS intended, and in fact had acted, to transfer Mr Hansen's employment from Shipco to NGS.

[53] I find that as at 1 August 2022 all essential steps either had been, or were in the process of being, completed to transfer Mr Hansen's employment to NGS. It was also Mr Hansen's intention to transfer his employment to NGS as indicated by his signing the annual leave transfer form to transfer his annual leave accrual from Shipco to NGS on 19 July 2022 and acting from 1 August 2022 as the Country Manager for NGS.

[54] Mr Hansen was also assisting Shipco employees to complete all necessary administration steps to finalise the transfer of their employment from Shipco to NGS.

[55] I find on that basis the unsigned employment agreement with NGS was not determinative of the issue of the identity of the employer when balanced against the other factors which indicate that Mr Hansen's employment had been transferred to NGS from 1 August 2022.

[56] I determine that Mr Hansen's employer at 11 August 2022 was NGS.

Was NGS a Controlling Third Party?

[57] I have determined that NGS was Mr Hansen's employer at the date of dismissal.

[58] On that basis, I determine NGS was not a Controlling Third Party.

Was Mr Hansen unjustifiably dismissed?

[59] There is no dispute that Mr Hansen was unjustifiably dismissed. There were no performance issues raised with Mr Hansen prior to 11 August 2022, in fact he was awarded a bonus by Shipco based upon his having achieved the KPIs set for him whilst employed by it. There were no serious disciplinary issues identified which might justify a summary dismissal outcome.

[60] A fair and reasonable employer will have substantive justification for a dismissal decision and will follow a fair and reasonable process.¹

[61] Mr Hansen had been acting in the role of Country Manager of NGS since 1 August 2022, a period of 10 days. In that period he had no significant discussions with Mr Arthur Tzaneros, and there is no evidence that Mr Terry Tzaneros raised any disciplinary or performance matter with him. I find no reason indicating there were substantive grounds for the summary dismissal.

[62] When questioned during the Investigation Meeting, Mr Tzaneros acknowledged that NGS did not follow a fair and reasonable process as required by New Zealand employment law, but said that there was "no time to waste".

¹ Employment Relations Act 2022 s 103A

[63] In particular with regard to procedural fairness as required under the test of justification set out in s 103A of the Act:

- Mr Hansen was not provided with specific details of any issues with his performance as Country Manager;
- Mr Hansen was not provided with a reasonable opportunity to respond to the concerns about him; and
- There is no evidence that Mr Tzaneros gave any consideration to any explanation Mr Hansen might provide since he was denied such an opportunity prior to being notified of the termination decision and being presented with the ROS.

[64] Whilst minor flaws which did not result in an employee being treated unfairly would not render a dismissal unjustifiable, in this case I find the flaws in the procedure adopted by NGS were more than minor.

[65] In all the circumstances at the relevant time I find that dismissing Mr Hansen was not a decision a fair and reasonable employer could have taken.

[66] I determine that Mr Hansen was unjustifiably dismissed by NGS.

Did Mr Hansen raise his personal grievance with NGS within the statutory time frame?

[67] The letter raising the personal grievance dated 12 August 2022 was addressed to both Shipco and NGS. It stated that Mr Hansen was employed by Shipco at the time of the dismissal and notified NGS that he considered it caused or contributed to his unjustified dismissal as a controlling third party.

[68] I have determined that NGS was the actual employer at the time of Mr Hansen's dismissal despite Mr Hansen's belief that it was Shipco.

[69] Mr Hansen's evidence was that he believed he remained employed by Shipco until the amended employment agreement with NGS was signed.

[70] I consider that there were reasons that contributed to this belief. It was early in the joint venture which had commenced operations on 1 August 2022. The transfer arrangements in regard to other Shipco employees had not all been completed by that date, a process with which Mr Hansen was assisting.

[71] Mr Hansen's direct reporting line had been changed from Mr Krogh to Mr Terry Tzaneros in Australia, but Mr Krogh's evidence at the investigation meeting was that he was still Mr Hansen's direct line manager at the time of dismissal and Mr Hansen's evidence was that he still interfaced as previously with Mr Sayles.

[72] I find that in these early stages of transition, there was some overlap and slight confusion about the operation of NGS, and that Mr Hansen held a genuine belief that Shipco remained as his employer until such time as NGS signed the intended amended employment agreement.

[73] The slight confusion that appeared to exist regarding the transition from Shipco to NGS I find is not assisted by the drafting of the ROS. This did not clearly identify NGS as the sole employer, but included Shipco, identified as 'Employer 1' in the parties section of the Agreement, with NGS being identified as "Employer 2", and for the ROS to be signed by all three parties: Shipco, NGS and Mr Hansen. It was dated 11 August 2022, the same date as the bonus payment letter from Shipco.

[74] Despite Mr Hansen's belief to the contrary, I have determined that NGS was the employer at the time the letter raising a personal grievance was sent on 12 August 2022. The letter raised the personal grievance with Shipco, not with NGS, other than as a controlling third party which I have determined it was not, being the actual employer. However NGS was included as a recipient.

[75] In the case of *Wilkinson v ISL Computer Systems Ltd* the Court found that the applicant had been genuinely mistaken about the identity of her employer and raised a personal grievance with her previous employer. That employer forwarded the letter to the actual employer within the 90 day statutory period, and the Court held that the grievance had been clearly communicated to the employer, and that the personal grievance had been raised with the employer.²

[76] In *Forever Living Ltd* the judgment of the Court in *Wilkinson* was upheld. In that case the Court held that communication could be via a third party, provided the personal grievance was raised within the statutory 90 days and enabled a response to it from the employer.³

[77] The reasoning in these two judgments, made under the Employment Contracts Act 1991, was upheld in the later case, *Premier Events Group Ltd v Beattie* in which Chief Judge Colgan commented:

² *Wilkinson v ISL Computer Systems Ltd* [1993] 1 ERNZ 512

³ *Forever Living Ltd v Kruesi* [1993] ERNZ 636

Further, I consider that this approach is mandated by the terms of s 114(2) itself which define the raising of a grievance with an employer as occurring “as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware”. What is required is that the employee has made the employer aware of the grievance ... In addition, the inclusion of the words “has taken reasonable steps to make”, a phrase which was absent from the Employment Contracts Act, also clearly allows a grievance to be raised where reasonable steps have been taken even if the employee has not succeeded in directly raising the grievance with the employer. I consider that Parliament's use of this phrase confirms this Court's interpretation that a “circuitous route” for raising a personal grievance may be permissible depending on the facts of the case.⁴

[78] I consider that Mr Hansen mistakenly regarded Shipco as his actual employer at 11 August 2022. I accept that in the circumstances there were understandable grounds for some confusion, including Mr Hansen's genuine but mistaken belief that because a term of the intended employment agreement with NGS, important to him, had not been confirmed by Mr Tzaneros having signed it, his employment had not been transferred at that point.

[79] However Mr Hansen's intention to raise a personal grievance in connection with his unjustifiable dismissal on 11 August 2022 was clear in the letter dated 12 August 2022. It was not necessary that NGS was made aware of this intention by being notified of it by Shipco, it was in fact directly notified by Mr Hansen since the letter was also addressed to it.

[80] I find that NGS was aware from the letter dated 12 August 2022 that Mr Hansen was raising a personal grievance and that as his employer, (confirmed in an email it sent to Mr Hansen's lawyers on 6 September 2022), it was required to respond as the statute envisaged.

[81] I determine that Mr Hansen raised his personal grievance with NGS within the statutory time frame.

Remedies

[82] I have found that Mr Hansen was unjustifiably dismissed by NGS. He is entitled to remedies.

Lost Wages

[83] Mr Hansen's evidence was he started to apply for alternative jobs by calling network contacts in the shipping industry. In so doing he tried to avoid stating why he had left his employment at Shipco and that he had been dismissed.

⁴ *Premier Events Group Ltd v Beattie (No 3)* [2012] ERNZ 257 at [11]

[84] Mr Hansen also enlisted with two recruitment companies, one of whom specialised in shipping, the other in freight forwarding and logistics. In addition he looked for suitable jobs on Seek and LinkedIn.

[85] I accept that it was reasonable for Mr Hansen to seek employment in the industries in which he had experience, and that the process would not have been made easier by his age.

[86] Mr Hansen gained employment on 12 June 2023, 10 months after his employment was terminated by NGS.

[87] In considering the appropriate period of time for lost remuneration I take into consideration what has been described as the ‘vicissitudes of life’.⁵ In this case based on Mr Tzaneros’ evidence, Mr Hansen’s employment with NGS may not have subsisted until the end of the fixed term period.

[88] In all the circumstances I consider six months (12 August 2022 to 12 January 2023) is an appropriate period for which to award Mr Hansen lost remuneration.

[89] I order NGS to pay Mr Hansen the sum of \$104,614.58 gross (calculated as \$207,500.00/12 x 5 months plus \$217,875.00 (\$207,500.00/12 x 5% increase per annum/12) x 1 month) pursuant to s 128(3) of the Act.

Lost Benefits under s 123(1)(c)(ii) of the Act

(i) *Car allowance*

[90] Mr Hansen was entitled to a car allowance of \$30,000 per year.

[91] I order NGS to pay Mr Hansen the sum of \$15,000.00 (calculated as 6 months entitlement) pursuant to s 123(1)(c)(i) of the Act.

(ii) *Mobile phone, company laptop and home internet*

[92] Mr Hansen was entitled payment in respect of mobile phone, company laptop and home internet.

[93] I order NGS to pay Mr Hansen the sum of \$630.00 (calculated as three months loss) pursuant to s 123(1)(c)(i) of the Act.

(iii) *Kiwisaver*

[94] Mr Hansen was entitled to receive a contribution to his KiwiSaver account.

⁵ *Telecom New Zealand Ltd v Nutter* [2004] 1 ERNZ 315 (CA) at [73]

[95] I order that NGS to pay Mr Hansen the sum of \$3,178.20 (calculated as 6 months lost KiwiSaver contributions) pursuant to s 123(1)(c)(i) of the Act.

Compensation

[96] Mr Hansen's evidence was that he felt emotionally drained by his dismissal. He also described the difficulty involved in seeking new employment in circumstances in which he might have to explain the circumstances of his job loss.

[97] Mr Hansen's dismissal was carried out in a contemptuous manner. Mr Hansen said he was shocked, which I accept given there had been no indication at that point that his performance was anything but satisfactory. Indeed I note that he was awarded a bonus payment from Shipco on the day he was dismissed, an indication that he had met his KPIs.

[98] Mr Hansen's dismissal took effect immediately, with him having to return his keys and company access codes and being escorted off the premises by Mr Sayles which would have been demeaning.

[99] I also take into account when making an award the fact that Mr Hansen was not a long-serving employee. In addition he was offered a compensatory payment by NGS in the ROS⁶ in respect of the job loss which if accepted, would have mitigated the immediate financial impact whilst he looked for alternative employment.

[100] NGS is ordered to pay Mr Hansen the sum of \$25,000.00 as compensation pursuant to s 123(1)(c)(1) of the Act.

Contribution

[101] I am required under s 124 of the Act to consider the issue of any contribution that may influence the remedies awarded.

[102] Mr Hansen did not contribute to the situation which resulted in his dismissal and there is to be no reduction in the remedies awarded.

Penalty

[103] Mr Hansen is seeking a penalty in respect of a breach of good faith arising from the termination of his employment.

⁶ Equivalent to 5 months' payment plus accrued entitlements, verbally increased to 6 months' salary.

[104] Pursuant to s 4A(b)(iii) a penalty for a breach of good faith is available if the failure was deliberate, serious, and sustained, or the failure was intended to “undermine an employment relationship”.

[105] I find NGS breached the duty of good faith by dismissing Mr Hansen without procedural justification pursuant to s 103A (3) of the Act. It did not act as a fair and reasonable employer could have acted in the circumstance and its actions fundamentally undermined the employment relationship.

[106] In considering whether a penalty is warranted and, if so, at what level, regard is had to the factors set out in s 133A of the Act, as well as the Employment Court decisions in *Boorsbom v Preet*, *Nicholson v Ford* and *A Labour Inspector v Daleson Investment Ltd.*⁷

[107] NGS’s actions must be seen as intentional and its culpability high.

[108] The starting point for a penalty in the case of a company is a maximum amount of \$20,000.00.

[109] The purpose of penalties is punitive, and to act as a deterrent to other companies not to act in a similar fashion. NGS had no regard to employment law in New Zealand when it chose to act as it did towards Mr Hansen. There was no attempt to seek to maintain a productive employment relationship with Mr Hansen, or to explore options short of dismissal if it considered his performance fell short of its expectations.

[110] **In all the circumstances and considering proportionality, I consider that a penalty of \$5,000.00 to be appropriate.**

[111] Mr Hansen has been recompensed for his losses and therefore I make no part of the penalty payable to him.

Orders

[112] **I have made the following orders that NGS pay to Mr Hansen:**

- a) **The sum of \$104,614.58 gross in respect of lost remuneration.**
- b) **The sum of \$15,000.00 in respect of loss of a car allowance.**
- c) **The sum of \$630.00 in respect of the loss of payment for mobile phone, company laptop and home internet company usage**

⁷ *Boorsbom v Preet PVT Limited* [2016] NZEmpC 143 at [138] – [151]; *Nicholson v Ford* {2018} NZEmpC 132 at [18]; and *A Labour Inspector v Daleson Investment Limited* [2019] NZEmpC 12 at [19]

- d) **The sum of \$3,178.20 (calculated as 6 months lost KiwiSaver contributions) pursuant to s 123(1)(c)(i) of the Act.**
- e) **The sum of \$25,000.00 as compensation pursuant to s 123(1)(c)(1) of the Act.**
- f) **I order NGS to pay the full penalty amount of \$5,000.00 to the Authority for transfer to a Crown Bank Account.**

Costs

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

[114] 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.

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

[116] 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.⁸

Eleanor Robinson
Member of the Employment Relations Authority

⁸ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].