

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2025] NZERA 546
3328120

BETWEEN

TIMOTHY EDWARDS
Applicant

AND

CENTRAL NORTH
AGGREGATES LIMITED
Respondent

Member of Authority: Natasha Szeto

Representatives: William Lynch and Dave Cain, advocates for the
Applicant
Stuart McKinnon, representative for the Respondent

Investigation Meeting: 27 May 2025 in Napier

Submissions and further information received: 6 June and 19 June 2025 from the Applicant
18 June 2025 from the Respondent

Date of determination: 3 September 2025

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

[1] Timothy Edwards was employed by Central North Aggregates Limited (CNA) to be its General Manager Operations in 2023.

[2] Mr Edwards says he was unjustifiably dismissed from his employment because CNA relied on a trial period that was not valid or enforceable. Mr Edwards says even if the trial period was valid, CNA dismissed him outside the 90-day timeframe. Mr Edwards claims his dismissal was both substantively unjustified and procedurally flawed.

[3] Mr Edwards also wants to be paid for 61 hours of work he says he worked before the commencement date of his agreement, as well as 25 hours he claims should have been paid in his notice period, as well as holiday pay for any arrears.

[4] CNA says the trial period provision was valid and enforceable and Mr Edwards was dismissed within the trial period timeframe. It also says Mr Edwards was paid for work he did prior to the commencement of the agreement and it disputes he is owed any further wages or holiday pay.

The Authority's Investigation

[5] The Authority received a written witness statement from Mr Edwards. The witnesses for CNA were James (Jimmy) Scott, General Manager, and Isaac (Zac) Scott, Managing Director and owner. All witnesses attended the Investigation Meeting, and answered questions under oath or affirmation.

[6] 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 the orders made. It has not recorded all the evidence and submissions received, but all information submitted to the Authority has been carefully considered.

Issues

[7] The issues for the Authority to resolve are:

- a. Whether Mr Edwards was subject to a valid trial period and if so, whether Mr Edwards' employment ended within the 90-day trial period.
- b. If not, whether Mr Edwards was unjustifiably dismissed from his employment on the basis that his dismissal was substantively unjustified and procedurally flawed.
- c. If Mr Edwards is found to have a personal grievance, whether he should be awarded compensation under s 123(1)(c)(i) (subject to contribution) and lost wages (subject to mitigation and contribution).
- d. Whether Mr Edwards is owed wage arrears for 61 hours of work he carried out but was not paid for (plus holiday pay) or whether he was fully paid for days worked/claimed.
- e. Whether Mr Edwards is owed wage arrears for 25 hours he was not paid during his notice period (plus holiday pay) or whether he was fully paid for days worked/claimed.
- f. Whether CNA has breached s 4 Wages Protection Act, s 27 Holidays Act, and s 130 of the Act, and if so, whether penalties should be imposed.

Relevant background

[8] Central North Aggregates Limited (CNA) was incorporated in 2022. The company was formed to be a specialist aggregate sector area of a civil and haulage group of companies. In 2023 CNA started building up its operations with Jimmy Scott as General Manager (Mr J Scott) and Zac Scott as owner and managing director (Mr Z Scott).

[9] In mid-June 2023, Mr J Scott decided the business needed a General Manager Operations. He heard through industry contacts that Mr Edwards was looking for a new role and called him about coming to work for CNA.

[10] Mr J Scott says things moved pretty quickly from there. By 22 June, Mr J Scott had sent Mr Edwards an individual employment agreement for his consideration. On 28 and 29 June, Mr J Scott and Mr Edwards negotiated terms including salary and the length of a restraint of trade provision. Mr Edwards proposed a start date of 19 July because he had some personal affairs to get in order and his first task after starting with CNA would be to assist Mr J Scott to submit a tender due on 21 July. It was agreed that Mr Edwards would work a minimum of 45 hours per week and be paid an annual salary. The terms were settled and Mr Edwards signed and returned the agreement to Mr J Scott on 30 June 2023. Mr J Scott counter-signed the agreement on 3 July, although he back-dated his signature to 30 June to match Mr Edwards'.

[11] The trial period is a key provision of the agreement, so it is set out in full as follows:

Trial Period

4.1 The Employee will initially be employed on a trial basis for the first 3 months during which time, notwithstanding any other provision in this Agreement, either party may terminate this agreement on 1 weeks' notice. The Employer reserves the right to make a payment of wages in lieu of notice.

4.2 Serious misconduct may result in dismissal without notice.

4.3 The purpose of the trial period is to allow the Employee assess the Employee's suitability [sic]. During the trial period an Agent authorised by the Employer will discuss with the Employee any concerns about the Employee's performance or conduct. The Employee will be offered a chance to respond to any such concerns. The Employer shall review the Employee's performance after the first month of employment, and at that review the Employee's performance will be discussed. The Employer will also discuss any steps it can take to assist the Employee to meet its expectations. The Employer is expected to bring any problems or concerns to the Employee's attention during the trial period so further guidance and training may be made available.

[12] On Monday 26 June Mr J Scott sent Mr Edwards a link to the tender CNA was working on, which at that point CNA believed was due on 21 July. On 27 June, Mr J Scott sent Mr Edwards tender documentation with the covering email: “Give me a bell when you have a moment to discuss”.

[13] From 5 to 7 July 2023, Mr Edwards attended a quarry managers’ conference in Christchurch. Mr Z Scott had arranged to go to the conference, but when he was unable to attend Mr Edwards went in his place. CNA paid for the conference as well as flights and accommodation. Mr Edwards says he wanted to attend the conference as continuing professional development to maintain his Quarry Manager’s license.

[14] CNA then realised the tender was due on 17 July and not 21 July as it had thought. On 13 July Mr J Scott copied Mr Edwards into an email to the tender owner, asking for an extension to 19 July. The extension was granted. Mr Edwards agreed with CNA that he would start work earlier to ensure the tender could be submitted by the new due date of 19 July. Mr Edwards attended a meeting on 17 July at CNA's office and on 18 July he sent CNA a one-page cover letter for the tender. The tender was completed by Mr J Scott on 19 July and submitted to the tender owner. CNA paid Mr Edwards for nine hours of work each day for 17 and 18 July.

[15] On 11 August Mr J Scott sent Mr Edwards an email entitled “Weekly timesheet and planning” requesting a detailed timesheet of what Mr Edwards was working on and hours he had been working and a detailed plan of upcoming work in the next week. Mr Edwards provided this to CNA on 12 August.

[16] The parties exchanged further communications about reporting on 13 August, 14 August, 15 August and 3 September. On 16 September Mr Edwards sent a four-page email to Mr Z Scott raising issues about work, a number of which concerned Mr J Scott’s alleged treatment of him.

[17] On 18 September, Mr Edwards rolled a vehicle at a quarry site. He was unharmed but it took more than two months for the vehicle to be fixed. Mr J Scott requested an incident report on 20 September and Mr Edwards sent this on 22 September.

[18] On 2 October 2023, CNA terminated Mr Edwards’ employment with one week’s notice under the 90-day trial period. It listed eight reasons for termination

including areas raised with Mr Edwards in a performance review meeting on 14 August that CNA said had not been addressed or improved, quality issues to do with product and top-soil stripping, safety concerns, on-site leadership and management of health and safety, unsafe work practices, machinery damage, lack of focus and execution and inability to work effectively with senior management.

[19] On 16 October 2023 Mr Edwards' representatives wrote to CNA raising a personal grievance for unjustified dismissal and recovery of wages.

Was Mr Edwards subject to a valid trial period?

What is the law?

[20] An employment agreement may contain a trial provision for 90 days or less.¹ A trial provision is only available where the employee has not previously been employed by that employer. The trial provision must be for a specified period not exceeding 90 days starting at the beginning of the employee's employment. During that period, the employer may dismiss the employee and the employee is not able to bring a personal grievance or other legal proceeding in respect of the dismissal.²

[21] There are strict requirements for a trial provision to be compliant with s 67A of the Act in order to be considered effective and enforceable. The trial provision is required to state or be to the effect that the employer is able to dismiss the employee during the trial period and if they do so, the employee is not entitled to bring a personal grievance or other legal proceeding in respect of their dismissal.³

[22] Principles arising from case law include that the trial period provisions of the Act should be strictly interpreted as they remove longstanding employee protections and access to courts and tribunals.⁴ A trial period provision is invalid if the employment agreement has been executed after the employee starts their employment, because they were an existing and not a new employee.⁵ A trial period can be agreed on in an individual employment agreement and signed before the commencement of work but be expressed to begin on the day of commencement of work some time later.⁶

¹ Section 67A of the Act.

² Section 67B of the Act.

³ Section 67A(2) of the Act.

⁴ *Smith v Stokes Valley Pharmacy (2009) Ltd* [2010] NZEmpC 111.

⁵ Section 67A of the Act. See also *Smith v Stokes Valley Pharmacy (2009) Ltd* [2010] NZEmpC 111 and *Senate Investment Trust Through Crown Lease Trustees Ltd v Cooper* [2021] NZEmpC 45.

⁶ *Blackmore v Honick Properties Ltd* [2011] NZEmpC 152.

Parties' submissions

[23] Mr Edwards says he performed work for CNA prior to the employment agreement being signed on 30 June as well as on multiple occasions following the agreement being signed but before the commencement date of 19 July. Because of this work, Mr Edwards says there was no valid trial period provision, as he was not a “new employee” when the agreement came into force. Mr Edwards points to other issues he says makes the trial period provision defective: the start date of the trial was unclear because it was “for the first three months” and the commencement date of the agreement was not the date he actually started work. The trial period was for three calendar months, which is longer than 90 days and no time period was specified in days. In the alternative, Mr Edwards says if there was a valid trial period, CNA was out of time to invoke it because the 90 days should start from 26 June (being the first day he worked for CNA on the tender) or 30 June when he signed his employment agreement.

[24] CNA says the commencement date was 19 July by Mr Edwards’ request. During the eight days of agreement negotiations, CNA says Mr Edwards never made any reference to starting work before signing the agreement and he did not ask to bring the commencement date forward. CNA says 17 July was Mr Edwards’ actual first day of work and the first day for which he was paid. CNA says Mr Edwards’ employment was terminated 77 days after he started his employment and was therefore within 90 days.

When did Mr Edwards start working for CNA?

[25] There is ambiguity around the dates of significant events in the present matter. I set out the timeline based on my assessment of the evidence before the Authority.

[26] I find Mr Edwards did not start working for CNA on 27 or 28 June 2023. Mr Edwards’ evidence was that he carried out work on the tender on or around these dates and he says the email exchange between himself and Mr J Scott confirms this. However, the email exchange only confirms that on 27 June Mr J Scott provided Mr Edwards with the tender documents and asked Mr Edwards to “give me a bell when you have a moment to discuss”. On 28 June Mr Edwards told Mr J Scott that the tender folder was empty and provided a link to his login so that Mr J Scott could arrange access to the tender documentation portal for him. The evidence does not substantiate that CNA directed or expected Mr Edwards to carry out work on the tender at this point. Mr Edwards did not produce any records of hours completed on the tender for which

he says he expected remuneration. I am more persuaded by CNA's submission that at this stage Mr Edwards was showing an active interest in the business prior to his formal start date. This is consistent with the role he was to undertake given he was to be one of only two employees in the business and employed in the senior position of General Manager. Mr Edwards did not discuss being remunerated for this work when he was negotiating his agreement with Mr J Scott. He did not seek remuneration for this work when he received his first pay from CNA, or in the multiple pay cycles that occurred during his employment up until the time he raised a personal grievance. At no stage did Mr Edwards ask for his start date to be changed to 27 June to reflect the first date he says he started working for CNA.

[27] I also find Mr Edwards was not working for CNA on 5 July 2023 when he attended the quarry managers' conference. Mr Edwards attended the conference in place of Mr Z Scott who could not attend. At this date, the parties had an executed employment agreement which Mr Edwards had signed on 30 June and which Mr J Scott had signed on 3 July, backdating it to 30 June. However again, Mr Edwards never raised with CNA that he expected to be remunerated for his attendance at the conference. He did not ask for his employment agreement to commence from 5 July. He did not seek remuneration for being at the conference when he received his first pay from CNA, or in the multiple pay cycles that occurred during his employment up until the time he raised a personal grievance.

[28] In Mr Edwards' personal grievance letter on 16 October 2023, which is the closest document to a contemporaneous record of hours, Mr Edwards claims to have carried out "61 hours of work before signing an employment agreement". This was tested and found to be incorrect at the investigation meeting, given that Mr Edwards claims 21 hours of time for being at the quarry managers' conference which occurred after Mr Edwards had signed his employment agreement.

[29] Based on all the evidence before the Authority, I am not persuaded that Mr Edwards had an expectation of being paid for any work he did on the tender prior to 17 July, or for attending the quarry managers' conference. He did not tell CNA that he expected to be paid. CNA never directed Mr Edwards to carry out work prior to 17 July and it did not expect Mr Edwards to claim payment. Instead, I find Mr Edwards put some groundwork into preparing for the tender of his own volition because the tender was due shortly after he was to start with CNA in late July and he wanted to

make a good impression on his soon-to-be employer. Likewise, in good faith CNA offered Mr Edwards the conference ticket, flights and accommodation for the quarry manager's conference for his professional development when Mr Z Scott could not attend. Neither party had an expectation that this work would be paid, or that it would signal the beginning of the employment. I conclude that, at the time, Mr Edwards was content to carry out any preparatory work on a "swings and roundabouts" basis.

[30] Having made these findings, I conclude that Mr Edwards started working for CNA on 17 July. Both parties agreed that work on the tender began on this date in anticipation of the tender being submitted on 19 July which was Mr Edwards' original commencement date. CNA produced time records confirming that Mr Edwards was paid for working from 17 July until he was dismissed.

Mr Edwards' employment was terminated within 90 days

[31] CNA gave Mr Edwards notice of the termination of his employment on 2 October which was within 90 days of 17 July. It therefore needs to be established whether the trial period provision in Mr Edwards' employment agreement was valid and effective.

The trial period provision was not valid

[32] Based on the evidence before the Authority, I find the trial period provision was not valid for the following reasons:

- a. The specified period is for three months, which exceeds 90 days.
- b. The trial period does not say that the employer may dismiss the employee, and that the employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal.

[33] Irrespective of whether Mr Edwards started his employment on 17 July or 19 July, in the factual circumstances of this matter the three-month period is equivalent to 92 days. The legislation set an upwards limit of 90 days in which an employee may be dismissed without being able to bring a personal grievance for unjustified dismissal. CNA's trial period provision does not comply with this timeframe.

[34] More significantly however, CNA's trial period provision does not state or use words to the effect that during the trial period the employer may dismiss the employee. It also does not state or use words to the effect that if the employer does so, the employee

is not entitled to bring a personal grievance or legal proceedings in respect of the dismissal. The trial period provision in Mr Edwards' employment agreement instead purported to operate on a mutual basis to give both parties the ability to terminate the agreement on one week's notice. The trial period provision also sets out a detailed purpose and process statement requiring the employer to raise concerns, give the employee a chance to respond, review the employee's performance at one month and to discuss steps to assist the employee to meet expectations.

[35] The requirements to establish a valid and effective trial period must be read strictly given that they constitute an abrogation of employee rights. Those strict requirements have not been met in this case. I conclude the trial period provision is not legally valid as a 90-day trial period in accordance with s 67A of the Act and Mr Edwards is not prevented under s 67B from bringing a personal grievance in respect of his dismissal.

Was Mr Edwards unjustifiably dismissed?

What is the law?

[36] In determining whether a dismissal was unjustifiable, the Authority must apply the test of justification in s 103A of the Act and is required to consider on an objective basis whether CNA's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred.

[37] The Authority must consider the four procedural fairness factors as set out in s 103A(3) of the Act and determine whether CNA:

- a. sufficiently investigated the allegations against Mr Edwards before dismissing or taking action against him (having regard to resources available to it);
- b. raised the concerns it had with Mr Edwards before dismissing or taking action against him;
- c. gave Mr Edwards a reasonable opportunity to respond to its concerns before dismissing or taking action against him;
- d. genuinely considered Mr Edwards' explanations before dismissing or taking action against him.

[38] The Authority may take into account other factors as appropriate and must not find a dismissal to be unjustifiable solely because of minor defects that did not result in

the employee being treated unfairly.⁷ While adequate consideration of alternatives to dismissal are not one of the specific statutory factors to consider, evidence that an employer has fully considered alternatives to dismissal will support that the substantive decision to terminate was fair and reasonable.

Analysis

[39] CNA dismissed Mr Edwards on 2 October 2023 for the eight reasons listed in its letter which have been summarised above. Based on the evidence before the Authority, I find three main events preceded Mr Edwards' dismissal.

[40] Firstly, on 14 August, Mr Edwards met with Mr J Scott and was told he was not working the required hours and that his reporting needed to reflect more hours by task.

[41] Secondly, on 15 September Mr J Scott and Mr Z Scott conducted a visit to Mr Edwards' worksite. They later said they were concerned about a number of issues at the site including health and safety. Mr J Scott and Mr Z Scott discussed Mr Edwards on the way home and discussed terminating his employment under the trial provision of his agreement.

[42] Thirdly, on 20 September, Mr Edwards sent CNA an email (to Mr Z Scott) which was dated 16 September, outlining concerns he had about the operation of the company. The email concluded:

At the end of the day, this can go one of two ways. I'm willing to try and fix my working relationship with Jimmy, that will take time. If not, hopefully with your help Zac you can help me manage my way out of this situation on good terms... There are myriad issues, which are not solved by personal attacks.

[43] On 2 October, Mr J Scott called Mr Edwards and requested a meeting at the office. On arriving, Mr J Scott gave Mr Edwards a letter outlining that CNA and Mr Edwards were going in different directions. The letter said Mr Edwards was being given one week's notice of termination of his employment under the 90-day trial period.

⁷ Employment Relations Act, section 103A(5).

Was the dismissal substantively justified?

[44] Mr Edwards accepts CNA told him on 14 August that his recorded hours should increase. He denies that CNA had previously raised any of the other reasons it gave for his termination listed at points 2 to 8 of the letter. These issues included quality issues to do with product and top-soil stripping, safety concerns, on-site leadership and management of health and safety, unsafe work practices, machinery damage, lack of focus and execution and inability to work effectively with senior management.

[45] CNA says it was concerned that the GM Operations role was more of a hands-on operator role and there was no time to drive the business in operations, processes and sales. CNA also gave evidence of health and safety concerns it had about Mr Edwards including his decision-making ability. CNA says the decision was made to terminate Mr Edwards' employment following safety incidents, lack of expected outcomes from the job description and lack of demonstrable change by Mr Edwards. CNA says there was no bad faith shown in its decision to dismiss Mr Edwards under the trial period provision. It says it addressed concerns with Mr Edwards and gave him an opportunity to improve.

[46] Based on the evidence before the Authority, I find the decision to dismiss Mr Edwards was substantively justified. Mr Edwards had a number of concerns about CNA's operations and CNA had number of concerns about Mr Edwards' performance, but these crystallised into the key issue CNA raised with Mr Edwards in the dismissal letter about his "apparent inability to work in a cooperative and strategic manner with the senior management team to achieve [CNA's] objectives". CNA was a small operation with only two general managers who needed to work closely and collaboratively. Based on the communications it is clear that the newly-established role was not working as either party had envisaged and there had been a breakdown in the relationship.

Was the dismissal procedurally fair?

[47] I turn to consider whether the dismissal was enacted in a procedurally fair manner including whether Mr Edwards was given reasonable notice and the consultation requirements have been met.

[48] Mr Edwards says CNA failed to consult with him and it therefore failed to meet its statutory obligations to act as a fair and reasonable employer could. Mr Edwards

says issues or concerns that CNA had about his work were not raised with him other than the number of hours he was working, prior to being handed a dismissal letter.

[49] CNA relies on the trial provision period and says Mr Edwards was dismissed on the 77th day of the start of his employment on 17 July.

[50] Based on the evidence before the Authority, I find the dismissal was not procedurally fair because CNA failed to act as a fair and reasonable employer could in terms of its notice and consultation obligations. I acknowledge CNA believed it was operating under a valid trial period provision, but as I have concluded the trial period provision was not valid and enforceable, CNA is not able to rely on it as justification for its actions.

[51] Based on the records before the Authority, CNA provided very little information to Mr Edwards prior to the 2 October meeting. On 14 August Mr J Scott raised an issue with Mr Edwards about the travel and commitment he believed was necessary to do the job of GM Operations. Mr J Scott requested Mr Edwards complete timesheets because planning and execution were important for the business and CNA wanted to understand what Mr Edwards was spending his time on. I conclude CNA made its concerns around time-keeping very clear to Mr Edwards and he was aware of them.

[52] However, CNA had numerous other concerns about Mr Edwards' actions and conduct. While it may have sufficiently investigated its concerns given the small size of its operation, including by conducting a site-visit, CNA failed to transparently raise these concerns with Mr Edwards before deciding to dismiss him.

[53] CNA also failed to give Mr Edwards a reasonable opportunity to respond to its concerns and genuinely consider any explanations he gave before dismissing him. This is because CNA had decided it would dismiss Mr Edwards under the trial period provision before meeting with him on 2 October. CNA invited Mr Edwards to this meeting without telling him the purpose of the meeting and without giving him the opportunity to prepare or have a support person. CNA did not come to the meeting with an open mind ready to listen to Mr Edwards' feedback, consider his responses, and genuinely reflect before deciding what to do. The purpose of the meeting was to tell Mr Edwards he was dismissed, give him one week's notice and hand him the prepared dismissal letter setting out the reasons.

[54] Based on the evidence before the Authority, CNA did not meet the notice and consultation requirements under the Act. It may also have failed to meet its contractual obligations under the trial period provision, had that provision been held to be valid. This is because the evidence did not substantiate that CNA raised all the concerns it had about Mr Edwards' performance or conduct, offered him a chance to respond, or conducted a formal one month performance review.

[55] Finally, there was no evidence before the Authority that CNA considered alternatives to dismissal. Mr Edwards had stated in his email to Mr Z Scott that he was willing to work on his relationship with Mr J Scott, but there is no evidence CNA genuinely considered whether the relationship could be repaired. The way in which CNA dismissed Mr Edwards by handing him a letter at the 2 October meant there was no real opportunity to engage on alternatives to dismissal.

Conclusion

[56] Looking objectively at the process CNA followed, I conclude Mr Edwards' dismissal was not procedurally fair. CNA relied on the trial period provision and it did not take steps to ensure that its dismissal process was fair and reasonable. CNA decided to dismiss Mr Edwards before the 2 October meeting and its decision was made without consultation. CNA failed to meet notice and consultation requirements under the Act and has not acted as a fair and reasonable employer could.

[57] The procedural defects I have identified were significant and ended the employment relationship in a manner that did not fall within the parameters of what a notional fair and reasonable employer could have done in all the circumstances at the time. I find that Mr Edwards was unjustifiably dismissed.

Remedies for personal grievance

[58] I have found Mr Edwards was unjustifiably dismissed from his employment with CNA and he is therefore entitled to an assessment of remedies.

[59] Mr Edwards seeks:

- (a) Compensation under s 123(1)(c) of the Act for humiliation, loss of confidence, loss of dignity and injury to his feelings.
- (b) Reimbursement of lost wages under s 123 (1)(b) of the Act.

[60] Mr Edwards says his sudden termination caused him significant hurt and upset. He felt completely blindsided by CNA's decision. He had immediate financial stresses because he was only given one week's notice. Mr Edwards says his dismissal had a significant impact on his mental health and wellbeing and his self-esteem. He was deeply afraid of the impact on his family arrangements and very worried about the professional ramifications for his career.

[61] Based on the evidence of Mr Edwards as expressed in his statement, I accept the dismissal impacted him in that he suffered humiliation, loss of dignity and injury to his feelings. I have considered the general range of compensation awards in other cases and standing back to objectively assess the impact as best I can, I consider an appropriate award of compensation under s 123(1)(c)(i) of the Act is \$12,000.00, subject to contribution.

Lost wages

[62] Under s 123(1)(b) of the Act, the Authority is able to order that the employee be reimbursed a sum equal to the whole or part of any wages or other money lost by the employee as a result of the grievance. Section 128 of the Act provides that the Authority must order the employer to pay lost remuneration or three months' ordinary time remuneration where the Authority determines an employee has a personal grievance and has lost remuneration as a result of the grievance, although there is a discretionary power in s 128(3) of the Act to award a greater sum.

[63] When assessing the appropriate award for lost remuneration, the applicable principles are that full financial losses set the upper limit on an award of compensation, and there is no automatic entitlement to full compensation. Moderation is required. Precision is difficult and awards of compensation "will inevitably involve a broad brush approach".⁸

[64] Mr Edwards says he was without employment from 6 October 2023 until around 6 December 2023, a period of two months. He decided to go back to his original plan and start his own business. Mr Edwards has provided an Inland Revenue summary of earnings demonstrating that his only source of income (other than minor bank interest) between 1 September and 31 December 2023 was from CNA. He claims \$11,666.00 per month or a total of \$23,332.00 (gross) for two months' lost wages.

⁸ *Sam's Fukuyama Food Services Ltd v Zhang* [2011] NZCA 608 at [36].

[65] CNA says it is clear that had it not relied on the trial period provision, a dismissal was likely on the basis of Mr Edwards' poor performance and no lost wages are appropriate.

[66] Mr Edwards lost remuneration as a result of his grievance. His actual loss is two months' ordinary time remuneration. I am satisfied on the evidence that the employment relationship had broken down and would not have continued indefinitely.⁹ However, even allowing for this contingency, I consider Mr Edwards' lost remuneration claim of two months' wages (\$23,332.00 gross) is a modest and appropriate award, subject to contribution.

Contribution

[67] In deciding the nature and extent of remedies for any personal grievance, I must consider the extent to which Mr Edwards may have acted in a way that contributed to the situation that gave rise to his grievance.¹⁰

[68] The Employment Court has recently succinctly summarised the key principles relating to contribution as follows:¹¹

- a. First, the Court must be satisfied that the actions of the employee contributed to the situation that gave rise to the personal grievance; if so
- b. Second, an assessment of whether the employee's actions "require" a reduction in the remedies that would otherwise have been awarded.

[69] The Court also stated:¹²

The primary considerations when determining whether a particular action should result in a reduction for contribution are causation and proportionality.

[70] The Court has endorsed an approach where a reduction of 50 percent sits at the higher end with 25 percent representing a still significant reduction.

⁹ *Sam's Fukuyama Food Services Ltd v Zhang* [2011] NZCA 608 at [39].

¹⁰ Section 124 of the Act.

¹¹ *Keighran v Kensington Tavern Limited* [2024] NZEmpC 28 at [39]; see also *Maddigan v Director General of Conservation* [2019] NZEmpC 190 at [71] – [76].

¹² *Keighran v Kensington Tavern Limited* [2024] NZEmpC 28 at [41].

[71] Mr Edwards says he did not contribute to the circumstances giving rise to the personal grievance. He was told on 14 August that more hours were expected to be recorded, but beyond this no performance or disciplinary issues were raised with him.

[72] CNA says Mr Edwards' contribution to the dismissal was "substantial".

[73] I have found Mr Edwards' dismissal was not justified because it was not procedurally fair. However, Mr Edwards' actions contributed to this situation because the email he sent to Mr Z Scott was not constructive or conducive to maintaining the employment relationship. The tone of the email was generally disparaging of the working conditions at CNA and the actions of Mr J Scott. Mr Edwards chose to send the email to Mr Z Scott, bypassing Mr J Scott to whom he reported, which indicates a lack of openness and willingness to resolve the issues directly with Mr J Scott. For these reasons, I find Mr Edwards contributed to CNA's decision that the relationship was unable to continue and to dismiss Mr Edwards without delay under the trial period provision. I consider a 20 percent reduction in remedies is required to recognise Mr Edwards' contribution.

Is Mr Edwards owed wage arrears for 61 hours of work prior to starting his employment (plus holiday pay)?

[74] Mr Edwards says he worked approximately 40 hours preparing the tender documentation prior to 17 July as well as 21 hours at the quarry managers' conference from 5 to 7 July. This totals 61 hours that Mr Edwards says he worked and was not paid by CNA.

[75] As I found above, I am not persuaded that Mr Edwards had an expectation of being paid for any work he may have done prior to 17 July. The evidence does not substantiate that Mr Edwards worked these hours. In the circumstances, I find Mr Edwards has not made out his claim for wage arrears for hours worked prior to starting employment and I decline to award them.

Is Mr Edwards owed wage arrears for 25 hours he was not paid during his notice period (plus holiday pay)?

[76] Mr Edwards' last payslip from CNA for the pay period 2 to 8 October 2023 records that he was paid for 20 hours at \$59.82900 per hour. Mr Edwards says he

worked an additional 25 hours during his notice period that were not paid and should have been.

[77] CNA says Mr Edwards did not keep track of the hours he worked in his notice period. CNA paid Mr Edwards for the 20 hours recorded by its vehicle monitoring system (e-roads) in the absence of evidence that Mr Edwards worked the full 45 hours he was expected to work.

[78] Based on the evidence before the Authority, I find CNA should have paid Mr Edwards for the full week of his notice. Under his employment agreement, Mr Edwards was paid a salary, not an hourly wage, which means he was contractually entitled to be paid for 45 hours of work irrespective of how many hours were recorded on e-roads. I therefore conclude Mr Edwards was underpaid by 25 hours in his final week of work for CNA, amounting to \$1,495.73 (gross).¹³ CNA is ordered to pay Mr Edwards this amount plus 8 percent holiday pay of \$119.66 (gross).

Interest

[79] The Authority has discretion to order interest in any matter involving the recovery of any money, such interest to be calculated in accordance with Schedule 2 of the Interest on Money Claims Act 2016.¹⁴ It is appropriate to order interest be paid on the notice period arrears, given that Mr Edwards has been deprived of the benefit of money he is owed.

[80] Interest is to be calculated using the civil debt interest calculator¹⁵ on the amount of \$1,615.39 (wages and holiday pay) from 8 October 2023 when these amounts became due, until the date the payment is made in full.

Has CNA breached the legislation, and if so, should penalties be imposed?

[81] The Authority has full and exclusive jurisdiction to deal with actions for the recovery of penalties.¹⁶ Mr Edwards asks the Authority to order a penalty for CNA's breach of s 4 of the Wages Protection Act 1983 (WPA) and s 27 of the Holidays Act 2003 (HA) for failing to pay him outstanding wages and holiday pay entitlements. Mr Edwards also seeks a penalty under s 130 of the Act for CNA's continuous failure to

¹³ 25 hours at \$59.83 per hour.

¹⁴ Clause 11, Schedule 2 of the Act.

¹⁵ <https://www.justice.govt.nz/fines/civil-debt-interest-calculator/>

¹⁶ Section 133 of the Act.

provide him with wage and time records from the date of his first request on 16 October 2023.¹⁷

[82] CNA does not dispute it has technically breached these provisions. The Authority finds that CNA breached the WPA by making a deduction from Mr Edwards' final notice period pay without written consent. It accordingly also breached the HA by failing to correctly pay Mr Edwards' holiday pay. CNA breached the Act by failing to provide wage and time records when requested.

[83] These penalty claims are within time, having been brought when Mr Edwards' statement of problem was lodged with the Authority on 30 September 2024 within 12 months of the causes of action arising in October 2023.¹⁸

[84] Each breach attracts a maximum penalty of \$20,000.00 against a company. However, even if a penalty is technically available, I have to be satisfied that the imposition of any penalty would meet the purposes and principles of penalties. In deciding whether to impose a penalty, and if I decide to, how much that penalty should be, I need to consider the factors in s133A of the Act and the approach set out by the Full Court in *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited*.¹⁹ These principles have been elaborated on and followed since.

[85] The purpose of penalties is punitive. They are not imposed to remedy a loss, but to punish the person who has breached a duty under the Act and to condemn that behaviour. The law in respect of quantification is well established given s 133A of the Act and requires that regard is given to the objects of the Act; the nature and extent of any breach; whether it was intentional, inadvertent or negligent; the nature and extent of any loss or damage, steps taken to mitigate the effects of the breach, circumstances of the breach, including vulnerability of the employee; and previous conduct. This is a non-exhaustive list of considerations.

[86] Penalties should be set at a level which both punishes for breaches and deters from future non-compliance. Specific and general deterrence are relevant considerations. A message should be sent to CNA and to any like-minded employers who might be tempted to treat legislative requirements as optional. The Authority must

¹⁷ Section 13 of the WPA, s 75 of the HA and s 130(4) of the Act.

¹⁸ Section 135(5) of the Act.

¹⁹ *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited* [2016] NZEmpC 143.

take into account whether any penalty would be significantly out of proportion to the gravity of the breaches and whether there is a real risk that a penalty could be of such magnitude as to create a significant risk of non-payment.²⁰

Analysis

[87] In determining the penalty claim I follow the four-step approach as set out by the Employment Court in *Borsboom v Preet*.²¹

[88] There are three breaches alleged and the cumulative maximum penalty is \$60,000.00. CNA's actions were inconsistent with the Act's objects, including acknowledging and addressing the inherent inequality of power in employment relationships and promoting the effective enforcement of employment standards. They were also inconsistent with the HA purpose of providing employees with minimum entitlements to annual holidays.

[89] I assess the nature and extent of the breaches as being at the less serious end of the scale. In relation to the failure to pay Mr Edwards outstanding wages and holiday pay entitlements, there was a legitimate dispute between the parties as to whether wages (and therefore holiday pay) were owed. In those circumstances, CNA was entitled to test Mr Edwards' claims with the Authority. Although I found against CNA in relation to Mr Edwards' notice period arrears claim, that was the lesser of his two wage arrears and holiday pay claims.

[90] In relation to CNA's failure to provide him with wage and time records, Mr Edwards says he was prejudiced in his ability to prepare for litigation given that receipt of the time, wage and leave records would have been relevant in proving that work had been performed prior to the agreement commencing. Other than this, Mr Edwards does not point to any particular impact. I do not accept that the records would have proven Mr Edwards carried out work prior to 17 July because both parties acknowledged Mr Edwards' hours for this period were not recorded. The records were not required to establish Mr Edwards' claim to being underpaid during his notice period because CNA acknowledged it had only paid him for 20 hours instead of 45 and his payslip verified this. As a consequence, I find Mr Edwards was not prejudiced in being able to advance his claim for unpaid hours.

²⁰ *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited* [2016] NZEmpC 143 at [147].

²¹ Above n20 at [137] to [151].

[91] There is no evidence before the Authority of previous conduct by CNA. Its current financial position is unknown. Consequently there are no circumstances that would justify either increasing or reducing an otherwise appropriate penalty.

[92] Stepping back to look at the matter objectively and considering parity with other cases, I consider an appropriate global penalty for all breaches to be \$1,300.00. This consists of a penalty of \$800.00 for CNA not paying Mr Edwards his full wages for one week's notice (plus holiday pay) and a penalty of \$500.00 for CNA failing to provide wage and time records. Where a breach has resulted in a non-compensable loss to the employee (where the breach is in the nature of 'performing a public duty') it may be appropriate to order some of the penalty be paid to the employee, especially to the extent that costs may not adequately compensate the employee.²² On that basis, I order 50 percent of the penalty to be paid to Mr Edwards.

Orders

[93] I have found Mr Edwards was unjustifiably dismissed by CNA and is entitled to remedies. Mr Edwards is also owed wage arrears and holiday pay.

[94] Central North Aggregates Limited is to pay Timothy Edwards within 28 days of the date of this determination:

- a. Compensation for humiliation, loss of dignity and injury to feelings under s 123(1)(c)(i) of the Act in the amount of \$9,600.00 (\$12,000.00 less 20 percent contribution).
- b. Reimbursement of lost wages under s 123(1)(b) and s 128 of the Act in the amount of \$18,665.60 (\$23,332.00 less 20 percent contribution).
- c. Wage arrears of \$1,495.73 (gross) plus holiday pay of \$119.66 (gross) plus interest on these amounts from 8 October 2023 until paid in full.

[95] Central North Aggregates Limited is also ordered to pay a penalty of \$1,300.00 within 28 days of this determination, with \$650.00 to be paid to Timothy Edwards and \$650.00 being paid to the Employment Relations Authority. On recovery of this amount, the Authority must transfer this to the Crown Bank Account.

²² *Borsboom v Preet PVT Limited and Warrington Discount Tobacco Limited* [2016] NZEmpC 143 at [150].

Costs

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

[97] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Mr Edwards may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum CNA will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[98] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.²³

Natasha Szeto
Member of the Employment Relations Authority

²³ For further information about the factors considered in assessing costs see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1