

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2026] NZERA 363
3364623

BETWEEN NATA VENCESLAU DOS
SANTOS
Applicant

AND NRESH GROUP LIMITED
Respondent

Member of Authority: Sarah Blick

Representatives: Susannah Hodson and Sheridan Climo, counsel for the
applicant
Mark Donovan, counsel for the respondent

Investigation Meeting: 28 November 2025 in Auckland

Information and submissions received: Up to and including 20 May 2026

Determination: 9 June 2026

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Nata Venceslau Dos Santos was employed as a painter's assistant by Nresh Group Limited (Nresh). He pursues personal grievance claims for unjustified disadvantage and dismissal, and associated remedies. Mr Dos Santos further seeks arrears of wages and holiday pay, and penalties for breaches of contract and failing to comply with statutory obligations. Nresh largely denies Mr Dos Santos' claims and claims for remedies.

The Authority's process

[2] Mr Dos Santos and another employee of Nresh, Idelvan de Oliveira de Souza gave evidence in support of Mr Dos Santos' claims. For Nresh, its director and shareholder Wanderson Silva and Nresh employees Kleyvin Jhonson Caboculino

Sampaio, Bingxuan Li and Fernando Santos de Sa all gave evidence. All witnesses confirmed their witness statements and answered questions under oath or affirmation at the investigation meeting. Witnesses were assisted with interpretation where required.

[3] This determination states findings of fact and law, expresses conclusions on issues necessary to dispose of the matter and specifies orders. It has not recorded all evidence and submissions received and considered, which was extensive.¹

Issues

[4] There issues for investigation and determination were:

- (a) Does Mr Dos Santos have personal grievances for unjustified disadvantage?
- (b) Does Mr Dos Santos have a personal grievance for unjustified dismissal?
- (c) If he has a personal grievance(s), what remedies should be awarded, if any, and are there issues of contribution?
- (d) Did Nresh breached the terms of the parties' employment agreement?
- (e) Did Nresh breach s 130 of the Act and s 82 of the Holidays Act 2003 in respect of the provision of records?
- (f) Is Mr Dos Santos owed wages and holiday pay?
- (g) Should interest be awarded on any arrears?
- (h) Has Nresh breached duties of good faith under s 4 of the Employment Relations Act 2000 (the Act)?
- (i) Should a penalty or penalties be imposed for any breaches?

Background

Parties and commencement of employment

[5] Nresh provides services as a commercial painting contractor, and is based in Auckland.

[6] Mr Dos Santos is a Brazilian national who came to New Zealand in 2023 on a visitor visa, after living and working in Australia for some time. Mr Dos Santos made contact with Mr Silva through a mutual contact. In his witness statement Mr Silva claimed that Mr Dos Santos then completed a one-week trial starting on 16 August 2023. After that, he says Mr Dos Santos only worked on a few occasions when he

¹ As permitted by s 174E of the Employment Relations Act 2000.

“begged” for work, claiming to be facing financial hardship. Mr Silva says the process of applying for a work visa for Mr Dos Santos began on or around 8 September 2023, and it took some time to be finalised. Mr Dos Santos says he worked for Nresh steadily for about three and a half months for Nresh while holding his visitor visa.

[7] Mr Dos Santos received a formal written job offer and employment agreement from Nresh on 29 October 2023. He says Mr Silva told him “I can’t follow the employment contract 100%, it’s just for you to get the visa”, when he was provided with the employment agreement. He says he was quite concerned to hear this.

[8] On 28 November 2023 Mr Dos Santos was granted an Accredited Employer Work Visa, whose terms allowed him to work for Nresh in Auckland.

Mr Silva and Mr Dos Santos’ claims about each other’s conduct

[9] Mr Dos Santos says during his employment, Mr Silva treated him poorly and often brought his personal issues into the workplace and took his emotions out on him and other employees. Mr Dos Santos also claims Mr Silva always tried to “cut corners” on jobs or rush jobs.

[10] Mr Silva maintains that he had a strictly professional attitude when giving work instructions, and denies treating Mr Dos Santos poorly. Mr Silva claims Mr Dos Santos often resisted instructions and insisted on doing things his own way, which caused confusion and tension among coworkers. He further says Mr Dos Santos’ limited English fluency often affected his understanding, which led him to question client instructions, assuming they were trying to “cut corners,” when in fact they were not. Mr Dos Santos says he was at fluent in English, having lived in Australia.²

[11] Mr Dos Santos says Mr Silva threatened to dismiss him on two occasions while Nresh was carrying out a job in Whangarei, from late September to December 2023. He says near the start of the job Mr Silva began rushing him and other employees, which led to things getting dirty, and not enough time to clean up. He claims Mr Silva told him, Mr de Souza and Mr Caboculino Sampaio that it was “unacceptable” that they had not cleaned, they did not know how to be grateful for the opportunity to work in New Zealand with a work visa, and he may keep two of them or even just one of them, as he was tired to be repeating the same things. Another time at this same job, Mr Dos

² Mr Dos Santos gave evidence almost exclusively in the English language at the investigation meeting.

Santos says out of nowhere, Mr Silva told him he was going “to fire one or two of you guys”.

[12] Mr Silva denies these claims. He denies rushing his staff on jobs. He says the main problem arose when the friendship among the three employees became too close, negatively affecting performance and deadlines. In response, he warned that the team would be reorganized to restore productivity, but this was not a threat of dismissal.

[13] Mr Dos Santos says in January 2024, Mr Silva tried to require him, Mr de Souza and Mr Caboculino Sampaio to undertake work and travel to Kaitaia on Auckland Anniversary Day. He says he declined to because he did not want to work on the long weekend. Mr Dos Santos states that on 29 January 2024, Mr Silva called Mr de Souza to say he was going to fire everyone because Mr Dos Santos did not want to travel on the public holiday. He says while he did not want to travel for work on a public holiday, especially as they were not paid for travel time, due to the pressure from Mr Silva, he felt he had no other choice but to do so.

[14] On the night of 30 January 2024, Mr de Souza claims Mr Silva called him to say he was going to fire Mr Dos Santos and Mr Caboculino Sampaio, and that Mr de Souza would get a raise, as he would only keep him and Mr Li. Mr Silva says this is untrue.

[15] Mr Dos Santos says Ms de Souza told him about this, and on 31 January 2024, the three discussed what Mr Silva had said. During this conversation, Mr Silva told them “I’m gonna give you guys one more opportunity”. Mr Silva said if they wanted to leave their roles, he would give them three months to find another job and if they did not find another job, then it was not his problem. He also claims Mr Silva separately told him that “You guys want problems, now you guys are going to have problems.”

[16] Mr Silva acknowledges that he held individual meetings with each employee to discuss workplace atmosphere, as he had noticed general dissatisfaction. He claims that in his meeting with Mr Dos Santos, the latter said he was unhappy in New Zealand and wished to return to Australia as soon as he obtained his residence visa. To motivate the team, Mr Silva reports offering all staff \$3/hour pay raise. He says most of the employees were happy with the raise, but he suggested that if anyone wished to pursue other opportunities, he would support them until they found something better and

provide letters of recommendation. He denies that the statements about finding another was a threat.

[17] On 10 March 2024, Mr Dos Santos claims Mr Silva accused him of working elsewhere on weekends without any proof, during a one-on-one meeting. On this occasion, Mr Silva also told Mr Dos Santos that he would give him three months to find a new job and if he did not find one, then it would be Mr Dos Santos' problem and not his. He claims he told Mr Silva "how about we forget about everything and start over".

[18] Mr Silva says during his employment, Mr Dos Santos displayed poor conduct and attitude which impacted the team's ability to meet deadlines and risked damaging Nresh's reputation on site. He claims Mr Dos Santos:

- (a) Refused to obey lawful directions in relation to how work was conducted;
- (b) Engaged in excessive talking in Portuguese, yelling, making jokes, and constant phone use around clients and non-Portuguese speaking colleagues;
and
- (c) Spoke about Mr Silva, and the company, in pejorative terms, using a racial slur in respect of Mr Silva.

[19] Mr Silva denies that discussions Mr Dos Santos refers to were threats of dismissal, and says he issued Mr Dos Santos with multiple verbal warnings, at least five in total. He accepts he did not formally document those warnings, but they were for matters such as insubordination, poor quality of work and excessive phone use and talking.

Health and safety

[20] Mr Dos Santos says he was often put in dangerous situations involving working at heights without proper training or safety certification. He also refers to a job in around March and April 2024, on which he was given a harness, but the harness was not attached to anything. He says he was told by Mr Silva to work that way in order to "finish the job". He says the only time the harness was attached to an anchor point was when a builder, who also worked on site and asked Nresh for help with painting work from time to time, was present.

[21] Mr Silva strongly denies Mr Dos Santos was subject to an unsafe workplace, or that he lacked training for working at heights. He says Nresh has appropriate health

and safety policies and procedures, and has provided various documents to the Authority. Mr Silva also refers to Mr Dos Santos having declared three years of roofing experience and presented Australian certificates, that he understood were equivalent to New Zealand training. Mr Silva produced a screenshot of a licence for Mr Dos Santos which stated he had completed training in relation to scissor and boom lifts. Mr Dos Santos notes this training was not for harness systems specifically.

[22] Mr Silva claims that when working on government contracts like Nresh did in this instance, it is impossible to work without proper safety equipment due to constant supervision and security cameras. He says full roof protection and scaffolding were in place. He claims any failure to use safety equipment was due to Mr Dos Santos' own negligence, as all materials were always available in the team van.

[23] Mr Silva's evidence was that toolbox meetings were held before starting any work, in which health and safety, climbing the roof, and using a helmet was discussed. He has produced evidence of such meetings.

Claims around Mr Dos Santos' using a racial slur and alleged recording

[24] Mr Dos Santos believes that on or around 10 March 2024, Mr Silva directed Mr Li to record conversations between him and Mr de Souza while they were travelling to a job, without their knowledge or consent. Mr Dos Santos acknowledges he used a racial term in Portuguese when referring to Mr Silva during the conversation. He acknowledges that the word could be considered offensive if taken out of context, but claims it was simply a funny nickname which he used to refer to Mr Silva when he and Mr de Souza were talking. He says the term was not said in anger and was not directed to Mr Silva in a negative way. He says the conversation was entirely private and casual, and he did not intend any offense or disrespect to Mr Silva. He says even after Mr Silva became aware of Mr Dos Santos referring to him like that, at no time disciplinary action was taken in respect of it.

[25] Nresh's amended statement in reply lodged in the Authority stated a recording had been made, but had since been deleted. Mr Silva says it is false that any device was used to record conversations and denies directing any one to record conversations. He says Mr Dos Santos assumed he was recording him, but that was not true.

[26] In his witness statement Mr Silva says he found out that Mr Dos Santos had made racist remarks about him from Mr Li and also by a client. Although the client did

not understand the language, he asked for clarification, realised the derogatory tone and told Mr Silva about it.

Mr Dos Santos and others advised of dismissal

[27] On 21 May 2024, Mr Silva says he overheard Mr Dos Santos speaking in negative terms about him and Nresh to four other employees. Mr Dos Santos says on the same day, he was called to a short meeting with Mr Silva, along with Mr de Souza and Mr Caboculino Sampaio. During the meeting, Mr Dos Santos says he was told he was being dismissed because of his friendship with his colleagues. Mr de Souza and Mr Caboculino Sampaio were also dismissed in this meeting. Mr Dos Santos says the meeting lasted approximately six minutes. Nresh does not dispute that the meeting was short.

[28] Later that afternoon, Mr Silva emailed Mr Dos Santos stating he regretted to inform that his employment was ending, effective two weeks from that date. The email stated:

This decision was not made lightly. After carefully reviewing your performance and conduct, the decision was made under our company's policies and procedures.

Meeting after dismissal

[29] On about 23 May 2024, before starting work, Mr Dos Santos states Mr Silva approached him, Mr de Souza and Mr Caboculino Sampaio and asked, "What are you guys going to do?". He says they told Mr Silva it was wrong that he dismissed them the way he had. In response, Mr Silva told them "the business is mine and I can do whatever I want". When we raised the issue of being recorded without consent, Mr Silva said, "What's the problem? The van is mine" and "the van is part of the workplace" and that he could fire them for anything said in the van if he wanted to and even if he was not present. Mr Dos Santos recalls Mr Silva saying he would allow the three of them to keep our visas if he did not hear them talking about him outside of work. Unbeknownst to the others present, Mr Caboculino Sampaio recorded this meeting. The transcript (translated into English) states:

I can simply, if I want, ask Mr Dos Santos lawyer to call immigration and say that I simply won't be able to continue with this guy. I can do anything. You know that very well. But immigration isn't going to argue with me. If I don't want this employee, that's it.

[30] During the meeting, Mr Silva also said “I do not want to call immigration to cancel your visa”. Mr Silva said “I didn’t want to fire you guys because I have a lot of work, but I already have made the decision”.

[31] In the afternoon, after this meeting, Mr Silva also told Mr Dos Santos further in the car park, saying “I can fire you guys in the right way if I send a message to immigration saying that Mr Dos Santos business is going to have some cuts, and that I can’t keep you. How does that sound to you guys?”. He then told Mr Dos Santos “what about we forget about that email that has been sent and then if you guys stop talking about me outside of the working hours then I’ll give you three months to find a new job, but if things go well in the three months that I’m giving to you then I might let you work until the end of your visas”. Mr Silva also said something along the lines of “All I want is to stop hearing my name outside of the working hours”. Mr Caboculino Sampaio and Mr de Souza agreed to continue working. Mr Dos Santos did not as he did not feel it to be genuine, that he would have any job security after what he had already done and after his previous threats to dismiss him.

Mr Dos Santos raises personal grievance

[32] On 30 August 2024 Mr Dos Santos raised a personal grievance for unjustified dismissal and made other claims. It is common ground that Mr Silva shared the letter with Mr de Souza over and made comments around sharing the letter with Mr Dos Santos’ current employer. In audio messages provided to the Authority by Mr de Souza, Mr Silva also told him:

So there's no reason to have meetings, to have to write down on paper that you, Jhonson, and Natã were at the meeting where we talked about these problems and to sign a warning. I will never give a warning. I've never done it and I never will, it could be today, it could be tomorrow. Because my intention is not to send anyone away for reasons that don't exist.

[33] Mr Dos Santos says on or around 1 October 2024 he was told that Mr Silva had also forwarded Mr Dos Santos’ personal grievance letter over to a mutual contact.

Mr Dos Santos says he is owed wages and holiday pay

[34] Mr Dos Santos says his employment agreement was for 40 hours of work per week. Nresh claims the agreement did not guarantee payment for 40 hours if those hours were not reached. It also says Mr Dos Santos verbally agreed to be paid 30 hours per week during times of low workload.

[35] Mr Dos Santos says he was required to work overtime without payment, which Mr Silva denies. Mr Silva acknowledges giving an instruction that “we don’t have a leaving time, just a starting time”, but this was related to the flexible nature of the commercial work Nresh does. He says any overtime was due to client demand or was necessary to complete the contracted weekly hours, and it was always duly paid.

[36] Mr Dos Santos also reports never being paid for travel time, citing regular work outside of Auckland. Nresh says employees were “occasionally asked” to help at sites outside Auckland, with all transportation expenses covered.

[37] Additionally, Mr Dos Santos says on a number of occasions he was not paid correctly for public holidays. In particular, he worked on ANZAC day on 25 April 2024 but did not receive an alternative holiday. He says he was also paid incorrectly while working over Easter 2024.

Request for employment records

[38] On 30 August 2024, Mr Dos Santos’ counsel requested copies of his wage, time and leave records. Nresh provided these in January 2025, nearly five months later.

Personal grievances

The test for justification

[39] In assessing whether an employer’s actions are justified, the test is set out in s 103A of the Act and it involves determining 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 action occurred. Under s 103A(5) of the Act, the Authority must not determine a dismissal or an action to be unjustifiable solely because of minor defects in the process that did not result in an employee being treated unfairly.

[40] A fair and reasonable employer is also expected to comply with its statutory obligations which include the good faith obligations which include at s 4(1A)(b) of the

Act. These require the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative. Failure by an employer to comply with these obligations may fundamentally undermine its ability to justify a dismissal or other action.³

Does Mr Dos Santos have personal grievances for unjustified disadvantage?

[41] Mr Dos Santos says he unjustifiably disadvantaged by Nresh's actions during his employment. An unjustified disadvantage personal grievance is set out in s 103(1)(b) of the Act. Based on s 103(1)(b), the questions to be addressed are:

- (a) What does Mr Dos Santos complain of in terms of Nresh's actions and did it act as alleged?
- (b) If so, did Nresh's actions cause any disadvantage to Mr dos Santos' employment or a condition of his employment?
- (c) If so, were Nresh's actions unjustified?

Claims about hostile work environment

[42] Mr Dos Santos' complaint relates to allegations that Mr Silva made threatening, harsh and unreasonable comments to him, including threatening to "fire" him on several occasions and making threats in relation to his visa conditions and unreasonably accusing him of working for other employers, without evidence or reasonable cause. Mr Dos Santos says this conduct created a hostile and insecure work environment for him, resulting in an unjustified disadvantage.

[43] Mr Dos Santos' claims about Mr Silva's comments to him are detailed, provided with sufficient context and internally consistent with each other. The nature of the comments were also consistent with the manner in which Mr Silva terminated Mr Dos Santos' employment, and his comments in recorded transcripts provided after notice of dismissal was given. The Authority is satisfied it is more than likely than not that Mr Silva made comments of the nature described by Mr Dos Santos, which objectively were not those of a fair and reasonable employer, and contributed to a hostile and insecure work environment. He has established an unjustified disadvantage grievance on this basis.

³ *Simpsons Farms Ltd v Aberhart* [2006] ERNZ 825 (EmpC) at 842 [65].

Health and safety concerns around working from heights

[44] Mr Dos Santos says Nresh required him to undertake work without a Site Safe or Height Safety Course, and forced him to work on roofs without proper training, and in some cases without a harness connected to an anchor point and/or in the rain.

[45] Nresh denies any health and safety breaches and relies on Mr Dos Santos' Australian training, signed toolbox meeting records, and other health and safety records as showing compliance with its obligations. Mr Dos Santos says Nresh's reliance on generic documentation does not address the specific failures alleged. The Authority has considered the conflicting evidence of the witnesses presented by both parties in relation to these claims, but is not satisfied on the balance of probabilities that the claims Mr Dos Santos makes are made out.

[46] He has not established a personal grievance for unjustified disadvantage on the ground Nresh failed to comply with health and safety obligations. His claim for unjustified disadvantage on this ground is not established.

Does Mr Dos Santos have a personal grievance for unjustified dismissal?

[47] In applying the test of justification in the context of a dismissal, the Authority needs to assess:

- (a) Whether, having regard to the resources available to it, Nresh sufficiently investigated allegations before dismissing Mr Dos Santos;
- (b) Whether it raised the concerns with Mr Dos Santos before dismissing him;
- (c) Whether it gave him a reasonable opportunity to respond to its concerns; and
- (d) Whether it genuinely considered Mr Dos Santos explanation (if any) before dismissing him; and
- (e) Whether there are any other relevant factors to consider.

Dismissal process

[48] Nresh is a small business with no dedicated human resources function. In that context, it says the actions taken by Nresh to put Mr Dos Santos on notice that his conduct and performance was unacceptable was reasonable, even if not formally documented. The Authority accepts that formally documented warnings were not

required to be recorded pursuant to the parties' employment agreement or other policies.

[49] However, even if one or more verbal warnings were issued as claimed, the Authority cannot be satisfied on the evidence that they were justified. Given the Authority's findings on Mr Dos Santos' unjustified disadvantage claim, the Authority considers it unsafe to place reliance on the alleged warnings. There were no contemporaneous notes or a record of warnings against which the Authority can objectively assess Nresh's claims.

[50] Mr Dos Santos in any event submits that Nresh's evidence, specifically the transcribed recordings that have been provided, confirms that at no point did Nresh consider that it had ever given Mr Dos Santos a warning. Recorded statements of Mr Silva demonstrate a failure to undertake a procedurally fair process in dismissing Mr Dos Santos – he considered Nresh could do anything it wished in relation to Mr Dos Santos's employment.

[51] Nresh does not dispute Mr Dos Santos was given no warning of the meeting on 21 May 2024, and no opportunity to have a support person or representative. The dismissal meeting clearly did not provide a sufficient opportunity for Nresh to raise its concerns and provide all relevant information to Mr Dos Santos, or an opportunity to comment before the decision was made. The content of the letter also made it clear a decision had already been made.

[52] Nresh submits it is also notable that Mr Dos Santos was dismissed on notice, rather than without, and that he was encouraged to consider correcting his behaviour and remain employed. It says the two other staff members also dismissed at the same time agreed to remain and continue to be employed by Nresh. While they may have chosen to stay on for their own reasons, this does not result in the dismissal being justified either in terms of substance or process. Nresh did not formally retract the notice of dismissal at any stage, and it was reasonable for Mr Dos Santos to understand that Nresh intended to dismiss him and continued to do so. The terms of the conditional "offer" to remain employed for three months while looking for alternative employment elsewhere were insufficient and given Mr Dos Santos' visa status, it was reasonable for Mr Dos Santos to proceed to alternative employment. The Authority agrees with Mr

Dos Santos' submission that Nresh's action in dismissing and the way it went about it broke the trust and confidence required in the employment relationship.

[53] It is clear the defects in Nresh's process were not minor and resulted in Mr Dos Santos being treated unfairly.

Substantive justification

[54] Nresh alleges that Mr Dos Santos' conduct, including the use of a racial term and negative comments, justified dismissal. Mr Dos Santos submitted that Nresh's process in dismissing Mr Dos Santos was so flawed, that the Authority is not required to decide whether the dismissal was appropriate. Notwithstanding this, it submitted that Nresh had no substantive justification to dismiss Mr Dos Santos. He does not accept that the alleged conduct occurred as described, or that it was ever raised as a disciplinary issue prior to dismissal. Nresh has not demonstrated that dismissal was a reasonable and proportionate response, particularly in the absence of a fair process and opportunity for Mr Dos Santos to comment.

[55] It is also noted that Mr Dos Santos was not the only individual initially dismissed by Nresh. None of the three employees were provided the opportunity to participate in a disciplinary investigation or provide responses on the decision to dismiss. This indicates Mr Dos Santos's dismissal was not related to conduct or performance issues related to Mr Dos Santos as now argued by Nresh, and that instead it related the personal friendships between Mr Dos Santos, Mr de Souza and Mr Caboculino Sampaio.

Finding

[56] Nresh has failed to show it undertook a procedurally fair process in dismissing Mr Dos Santos, or substantive justification for dismissing him. The Authority finds Mr Dos Santos was unjustifiably dismissed.

Personal grievance remedies

[57] Mr Dos Santos is entitled to an assessment of remedies.

Reimbursement of lost wages

[58] Pursuant to sections 123 and 128 of the Act if an employee has a personal grievance and they have lost remuneration because of that grievance then they are entitled to their actual lost remuneration or three months ordinary time remuneration.

[59] Mr Dos Santos seeks the shortfall in his wages between his remuneration with Nresh and his new employer for three months following dismissal. Nresh points out that Mr Dos Santos confirmed he had already arranged to vary his work visa to work for an different employer, and that this variation to his visa was issued on 4 June 2024 – the same day that his employment with Nresh ended. It says if Mr Dos Santos had already arranged alternative employment to commence from 4 June 2024 at a lower rate than his rate of pay with Nresh, then that was his choice.

[60] The Authority has found Nresh's unjustified actions created a hostile work environment and contributed to Mr Dos Santos' feelings of job insecurity, causing him to look for other work and obtain other work while still employed. The Authority is satisfied Mr Dos Santos should in those circumstances be reimbursed money lost as a result of his grievances. He has calculated this to be \$1,440 gross, which the Authority accepts.

Compensation under s 123(1)(c)(i) of the Act

[61] Mr Dos Santos seeks hurt and humiliation compensation of \$50,000 in relation to his unjustified dismissal and \$30,000 in relation to his disadvantage claim. Nresh opposes any award of compensation and says an award at these levels would be manifestly excessive.

[62] Mr Dos Santos relies on evidence of psychological harm, which he says is directly attributable to Nresh's conduct during his employment and the manner of dismissal. He has presented a letter from a registered psychologist, which notes he had initially sought psychological assistance in Australia in April 2022 in relation to personal issues, which were resolved. The letter also records its stated purpose is to outline the significant emotional distress Mr Dos Santos experienced in relation to his employment with Nresh.

[63] The report refers to differences between Mr Dos Santos and Mr Silva that appear to relate to events after the dismissal, including references to misunderstandings

about his grievance letter and distress arising from the legal proceedings, rather than the dismissal itself. Nresh submits the letter does not distinguish between Mr Dos Santos' pre-existing issues and any distress specifically attributable to the dismissal. Nresh says it should not be liable for Mr Dos Santos' baseline psychological state, and the distress was not related to the job loss itself. Nresh submits that the harm suffered by Mr Dos Santos is not causally linked to dismissal and challenges the amount of compensation sought.

[64] In response, Mr Dos Santos submits the Authority should not discount the impact simply because Mr Dos Santos had prior psychological support. It was further submitted that admissions made by Mr Silva in Nresh's submissions should in fact increase any awards being made, because it means Nresh was aware Mr Dos Santos was seeking psychological support prior to his dismissal.

[65] Mr Dos Santos' counsel submit his mental state significantly worsened after the unjustified actions from Nresh, and the impact of the unjustified actions were significant.

[66] The Authority accepts the impact of Nresh's actions during and after his employment has been significant on Mr Dos Santos' mental and emotional wellbeing. He reported experiencing ongoing stress, anxiety, and a loss of confidence as a result of the dismissal. He says his sleep was disrupted, and he found it difficult to engage in normal daily activities. The Authority accepts Mr Silva's behaviour following dismissal compounded the humiliation Mr Dos Santos had already suffered, given the personal nature of the content of the personal grievance letter shared with others.

[67] Mr Dos Santos says he has incurred financial costs for medical consultations and therapy sessions, which he would not have needed but for Nresh's actions. He said the ongoing effects of this experience continue to impact his life, and he was still in the process of recovering from the harm caused.

[68] The Authority has considered the general range of compensation awards in other cases. Standing back to objectively assess the impact as best I can, and subject to any reduction for contribution, I consider it appropriate to award a figure of compensation under s 123(1)(c)(i) of the Act, of \$5,000 in relation to the disadvantage grievance, and \$20,000 in relation to the dismissal grievance.

Contribution

[69] Nresh seeks a reduction in personal grievances remedies, if awarded, on the basis Mr Dos Santos contributed to the situation giving rise to his grievance(s). Given the Authority's findings that Nresh's actions were unjustified procedurally and substantively, no reduction in remedies is warranted.

Recommendations

[70] In his amended statement of problem, Mr Dos Santos sought a recommendation that Nresh review its disciplinary process and procedures to prevent similar employment relationship problems occurring.⁴ Nresh's failures will be apparent to it from this determination. It is not necessary in the circumstances to issue recommendations in addition to any of these findings.

Has Nresh breached the terms of the parties' employment agreement?

[71] In closing submissions for Mr Dos Santos, submissions sought to expand the penalty claims to cover the failure to pay his minimum contractual hours. This claim was not included in his amended statement of problem nor was it later agreed as an issue for determination. It was brought out of time and is not included in the Authority's assessment.

[72] Mr Dos Santos has sought a penalty for breach of the parties' employment agreement relating to his dismissal. That claim is based on non-specific references in the agreement to Nresh's entitlement to end Mr Dos Santos' employment if there is a good reason and a fair process is followed in deciding to end employment. I am not satisfied that an additional finding of breach of contract is necessary given the Authority's findings above.

[73] The Authority has not made findings that Nresh breached the relevant clause relating to health and safety in the employment agreement. No remedies are available in relation to it.

[74] No breaches of contract are established.

⁴ Pursuant to section 123(1)(ca) of the Act.

Has Nresh breached s 130 of the Act and s 82 of the Holidays Act 2003 in respect of the provision of records?

[75] Nresh accepts there may be a technical breach of its obligations under s 130 of the Act and s 82 of the Holidays Act 2003, to provide the requested wage and time records promptly.

Is Ms Santos owed wages and holiday pay?

Shortfall in payment for 40-hour week

[76] Mr Dos Santos' employment agreement stated he was entitled to be paid \$29.66 (gross) per hour. His hourly wage increased to \$33 (gross) on 11 March 2024. The agreement stated "he will work for a minimum of 40 hours each week on Monday to Friday" between 7am to 4pm. It recorded he was entitled to paid rest break of 30 minutes at 10am each day.

[77] Mr Dos Santos submits that pursuant to the agreement he was entitled to a guaranteed 40 hours per week, and should have been paid up to that amount when there was a shortfall in hours available. Nresh disputes this and says Mr Dos Santos agreed to reduced hours when work was not available.

[78] Nresh has acknowledged that no written acceptance of a variation exists, despite the requirement to obtain written consent for changes set out in the agreement. Section 63A of the Act sets minimum expectations of employers when bargaining for variations to terms and conditions of employment. There is no evidence Nresh met those expectations. Further, the Authority is not satisfied the lack of objection to reduce Mr Dos Santos' hours at the time amounts to acceptance of a variation in the circumstances.

[79] Mr Dos Santos' payslips and timesheets demonstrate that he was not paid for his minimum contracted 40 hours on several weeks. The Authority accepts Mr Dos Santos' calculation that the total number of hours owing as wage arrears is 87.51 hours, with \$56.08 hours owing at \$29.66 per hour, and \$31.43 hours are owing at \$33 per hour. The gross amount owing to Mr Dos Santos for wage arrears is accepted as \$2,698.15.

Travel time, overtime and rest breaks

[80] Mr Dos Santos also submits that travel time to and from out-of-town sites, results in an entitlement to wages. Nresh says there was no agreement that Mr Dos Santos would be paid for travel time. There was also no clause in the employment agreement or verbal agreement that Mr Dos Santos would be entitled to be paid for travel time.

[81] Mr Dos Santos also claims he was not paid for time spent preparing for and waiting at a particular job and for rest breaks. These arrears calculated are framed as “approximate” only. As Nresh also points out, Nresh relied on the time records Mr Dos Santos submitted for this work and paid him accordingly. The Authority is not satisfied the hours claimed are accurate or recoverable. The Authority is also concerned awarding travel time and overtime may result in “double-dipping”, with Mr Dos Santos being awarded the top-up to 40 hours for the relevant weeks. The Authority declines to award the claims for travel time and overtime in all the circumstances.

Public holiday pay

[82] Mr Dos Santos says Nresh failed to pay him time and a half and alternative holidays in relation to hours worked on Good Friday and ANZAC Day 2024. The Authority accepts he is owed payment for those days.

Should interest be awarded on any arrears?

[83] It is appropriate where a person has been deprived of the use of money to make an award for interest, and as such Mr Dos Santos is also entitled to an award of interest on the arrears of wages and holiday pay found to be owing. Interest is to be calculated using civil debt interest calculator from the date Mr Dos Santos lodged his application in the Authority, which put Nresh on notice of his claims.

Has Nresh breached the duty of good faith under s 4 of the Act for which a penalty should be imposed?

[84] Mr Dos Santos claimed Nresh breached good faith obligations under ss 4(1) and 4(1A) of the Act, on the basis it failed to provide him with access to relevant information and an opportunity to comment before a decision in respect of his employment was made. I have found that Mr Dos Santos was unjustifiably disadvantaged, and his dismissal was unjustified.

[85] There is a high threshold to be met when it comes to awarding a penalty for a breach of good faith. Mr Dos Santos needs to show that either Nresh's failure was "deliberate, serious, and sustained", or that the failure was intended to undermine the employment relationship. On balance, I find that the failures were sufficiently serious in how they negatively impacted the employment relationship and were sustained over time. A penalty is warranted, and quantum will now be assessed.

Should a penalty or penalties be imposed for any breaches?

[86] The approach to determining penalties under s133A of the Act is well established.⁵ The starting point for a penalty in the case of a company is a maximum amount of \$20,000. The purpose of penalties is punitive, and to act as a specific deterrent to an employer and other employers not to act in a similar fashion.

[87] Having acknowledged it breached s 130 of the Act and s 82 of the Holidays Act, Nresh says in mitigation:

- (a) the failure was inadvertent, rather than deliberate, and the records were ultimately supplied;
- (b) though two separate statutory sections are invoked, it is essentially a single request for information that was made and it should be treated as a singular breach;
- (c) it cannot be said that Mr Dos Santos suffered significantly as a result, or that Nresh gained anything by the delay; and
- (d) there is no evidence that Nresh has acted similarly in the past.

[88] Having acknowledged the failure to provide public holiday pay, Nresh says those breaches were inadvertent and minor.

[89] Taking account relevant factors, including proportionality, small penalties are appropriate for the record-keeping breaches at \$500, and \$500 for the public holiday pay breaches, and \$2,000 for the breach of good faith penalty. Half of the total penalty amount is to be made payable to Mr Dos Santos.

⁵ *Borsboom v Preet PVT Ltd* [2016] NZEmpC 143; *Nicholson v Ford* [2018] NZEmpC 132; and *A Labour Inspector v Daleson Investment Ltd* [2019] NZEmpC 12.

Outcome

[90] Nresh Group Limited is to pay Nata Venceslau Dos Santos within 21 days of the date of this determination:

- (a) \$25,000 as compensation under s 123(1)(c)(1) of the Act;
- (b) \$1,440 gross as lost wages of under s 123(1)(b) of the Act;
- (c) \$2,698.15 gross as arrears of contractual wages;
- (d) Time and a half and alternative holidays in relation to work on Good Friday and ANZAC Day 2024;
- (e) Interest on the amounts at (c) and (d); and
- (f) \$1,500 as penalty.

[91] Within the same timeframe, Nresh must pay the balance of the penalty of \$1,500 to the Crown Bank Account.

Costs

[92] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed Mr Dos Santos may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination.

[93] From the date of service of the costs memorandum Nresh 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. If the Authority is asked to determine costs, the parties can expect the Authority to apply its usual daily rate unless particular circumstances or factors require an upward or downward adjustment of that tariff.

Sarah Blick
Member of the Employment Relations Authority