

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA
TAIMAHI ŌTAUTAHI ROHE**

[2024] NZERA 606
3248039

BETWEEN ANDY ADAMS
Applicant

AND ROBINSON FREIGHT
LIMITED
Respondent

Member of Authority: Antoinette Baker

Representatives: Evie Hope, counsel, for the Applicant
Nathan Robinson, for the Respondent

Investigation Meeting: 12 September 2024

Submissions received: On the day

Last information received: 19 September 2024

Determination: 10 October 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Adams worked for a short period of time (approximately 8-9 weeks) driving a long haul truck and trailer carrying freight throughout New Zealand for the respondent (RF). The employment came to an end because Mr Nathan Robinson, the sole director of RF, told Mr Adams there was no more work for him. Mr Adams says this was an unjustifiable dismissal, that the process towards the decision was unfair and that the redundancy was not genuine because Mr Robinson subsequently engaged others to drive the same truck. Mr Adams claims compensation, lost earnings, and an unpaid notice period of four weeks together with costs and an amended application that includes various penalties.

[2] Mr Adams has further applied for leave to join Mr Robinson personally in order that he is also liable to pay the claimed four weeks' notice period. This application is made under s142W and 142Y of the Act.

[3] RF denies the claims. Mr Robinson through representation and then more latterly himself says RF could not afford to keep employing Mr Adams and that Mr Adams knew this situation from about four weeks before Mr Robinson indicated he could not continue to offer him work. He says he engaged another driver for the truck weeks later but by then the truck was for sale, the driver was not permanently employed or was a 'contractor', and it was for driving jobs that by then had come up. Mr Robinson says that the costs to RF for damage that Mr Adams allegedly did to the truck when he collected his gear is offset by what he acknowledges in an unpaid four week notice period. I will return later to discussion of the application to grant leave to join Mr Robinson personally for liability of the notice period.

The Authority's Investigation process

[4] This matter was first lodged in the Authority by a statement of problem on 30 August 2023. A statement in reply was not received although Mr Robinson the director of RF sent messages at various points to the Authority. The Authority continued to ask for a statement in reply and explain the process by emails to Mr Robinson. The Authority set the matter down for a phone conference call but before this occurred Mr Robinson indicated he was seeking a representative. The phone conference was rescheduled for mid-January 2024 but again this date was vacated when a new representative for RF confirmed they had begun to take instructions and asked for more time to have discussions to attempt a resolution and if not would then lodge a statement in reply.

[5] The Authority gave the parties until 25 January 2024 to attempt to resolve matters after which the newly engaged representative for RF was asked to come back and seek leave to lodge a statement in reply out of time. Settlement discussions were not successful, leave was granted and a statement in reply was lodged and served on 26 January 2024 by RF. I then directed the parties to mediation which was held on 19 March 2024. This was unsuccessful. The Authority liaised with the parties about dates for a phone conference call and with some delay in obtaining responses about this a

phone conference eventually occurred on 22 May 2024. Both parties were represented at this phone conference.

[6] I issued Directions after the above phone conference that included aspects of evidence that would assist me. An Investigation Meeting was scheduled for 12 September 2024 with a timetable for evidence provision.

[7] On 15 July 2024 counsel for the applicant then asked to amend the statement of problem to include penalties and made an application for leave to join Mr Robinson in his personal capacity under ss142W and 142Y of the Act. I issued a Minute on 17 July 2024 saying I would consider the leave application at the investigation meeting and noted that penalties are subject to being lodged within 12 months and any amended statement of problem to include these needed to be lodged and served by no later than 23 July 2024. The latter occurred and RF lodged an amended statement in reply which was largely unchanged from the first one lodged.

[8] After the above, Mr Robinson did not continue instructing a representative and he did not lodge evidence as directed. He did not respond in writing to the application to join him in his personal capacity under ss142W and 142Y of the Act and I am satisfied at the investigation meeting that he had limited if no understanding about what this meant. I will return to this below.

[9] Mr Robinson after receiving evidence from the Applicant, including a second brief from a former employee of RF, emailed the Authority to say he too would bring former employees of RF. I then directed that Mr Robinson provide statements of what evidence the two former RF witnesses he named would be saying to allow the applicant some notion of what that evidence would be. I indicated that to do otherwise was not a fair process. I further indicated that Mr Robinson needed to appear in person to provide evidence for RT and by that late stage I would consider the written communications he had already provided together with the statement in reply as his written evidence.

[10] At the investigation meeting I asked questions of all witnesses on their oath or affirmation. This included Mr Adams and Mr Thorpe a former driver for RF; and for RF, Messers Robinson, Harvey and Stewart, the latter two having also driven for RF; Mr Robinson's email of 9 August 2024, some other communications and the amended

statement in reply were treated as his written evidence. Mr Robinson (with my assistance) and Ms Hope asked questions of witnesses.

[11] I heard oral submissions from Ms Hope and Mr Robinson after the evidence was heard.

[12] After the Investigation meeting I asked for IRD¹ earnings information from Mr Adams for the period of four months after his employment ended. After this was received, I reserved my determination.

[13] As permitted by s 174E of the Act, this determination has stated findings and expressed conclusions as necessary to dispose of the matter. It has not recorded all evidence and submissions received.

Was RF justified to terminate Mr Adams' employment?

[14] Section 103A of the Act requires the Authority to assess whether an employer has shown that its decision to dismiss was justified based on what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. This includes asking whether the employer's substantive reasons were sufficient to justify the decision and whether the procedure the employer followed in making the decision was fair. Minor defects in the disciplinary procedure may not support a finding of unfair procedure if they have not had an unfair effect on the employee.

[15] Under s 103A of the Act I need to consider whether RF's decision to make Mr Adams' role as a driver of the truck he drove (the only other truck was one driven by Mr Robinson at the time) surplus to requirements (redundant) and how it went about arriving at that decision were objectively what a fair and reasonable employer could have done in all the circumstances at the time of the decision to make the role redundant.

[16] The Court of Appeal² has confirmed that an employer needs to show that the decision to make an employee redundant is genuine and based on business requirements. If the answer is yes to both and the role made redundant is surplus to the

¹ Inland Revenue *Te Tari Taake*.

² *Grace Team Accounting Ltd v Brake* [2014] NZCA 541 (CA).

employer's needs, it is not then for the Authority to replace the employer's business judgment for that of the Authority. In addition, the Act requires the parties to deal with each other in good faith when restructuring. This includes providing affected employees with access to information (subject to specified confidentiality provisions) relevant to any proposal adverse to continuation of their employment and an opportunity to comment on that information before the decision is made. Section 4(1A) of the Act reflects this obligation on the employer:

(b) ...when proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more [of its employees] to provide to the employees affected -

- (i) access to information, relevant to the continuation of the employees' employment, about the decision; and
- (ii) an opportunity to comment on the information to their employer before the decision is made.

[17] In addition to the above, other factors may be considered³ but procedural unfairness alone will not support an unjustified dismissal if they are only minor and did not result in an employee being treated unfairly.⁴

What happened in the lead up to dismissing Mr Adams?

[18] There is little before me to assess RF's justification for dismissing Mr Adams except what Mr Robinson tells me about it now and what both he and Mr Adams relay about informal conversations had between them, albeit vague as to dates and content. There are a few written messages between them after the dismissal which show at the very least that the relationship deteriorated after Mr Robinson confirmed there was no further work for Mr Adams effectively ending the employment.

[19] Mr Robinson explained to me that things went well for RF from its establishment in 2020 when it contracted for jobs around New Zealand in the first part of 2020. Mr Robinson refers to being new to being an employer although I note his oral evidence included having at one time 5 to 6 trucks and more employees than just Mr

³ Section 103A (4) of the Act.

⁴ Section 103A (5) of the Act.

Adams. A company on the register with the same name as RF but since removed shows that he was, prior to 2020, a co-director of that company.

[20] Mr Robinson explained that the effect of COVID-19 and the country wide lockdowns occurring in the first half of 2020 meant the subsequent low cost of diesel and the need for New Zealand to rely heavily on internal freight around the country meant RF was very busy. RF's corresponding incoming revenue meant RF could borrow later against this income as a forward projected income to obtain five more trucks. However, Mr Robinson says that things then turned for the worse when things started returning to normal and costs rose again including the cost of diesel. Mr Robinson described to me a 'couple' of engine failures and a truck off the road. Mr Robinson describes significant debt to RF and having to sell trucks and let staff go.

[21] Mr Adams commenced his employment in around early June 2023 and by this time I accept there were only two trucks in RF's fleet, the one driven by Mr Robinson and the one driven by Mr Adams. Mr Adams first weeks were busy. It is not disputed that a major client was then 'lost'. I find a likelihood this was something that Mr Robinson explained to Mr Adams. He recalls telling Mr Adams about it when he came off the phone to the client. The client had sold their business, and the purchaser would contract for driving only if trucks had its livery and other conditions that Mr Robinson says RF could not afford. It appears not in dispute that this had a dramatic effect on the loss of driving work for RF and the truck that Mr Adams drove.

[22] Mr Adams confirmed that his work drastically reduced. As I understand it, he continued to be paid although IRD records now produced appear to have been less than the \$1000.00 per week salary the parties agreed was a term of the employment. I cannot be sure about this. RF has not provided any pay records or time sheets.

[23] It appears not to be in dispute that on or about 27 June 2023 Mr Robinson called Mr Adams and explained that if they could not find more work for Mr Adams to drive, the truck would have to be sold. At its very basic level and based on the apparently informal way that Mr Adams and Mr Robinson communicated, this appeared to be the start of RF explaining a type of restructuring albeit without any clear details provided. However, Mr Adams says he did not understand or expect that this conversation meant he would lose his job approximately a month later. I accept this was likely.

[24] After the above conversation, Mr Adams and Mr Robinson both confirm that they were doing their best to find more jobs for Mr Adams in the truck he drove. Mr Robinson emailed an Individual Employment Agreement (IEA) to Mr Adams on 22 July 2023. Mr Robinson's explanation for doing this was because he said the Land Transport Authority (LTA) required him to insert certain clauses into the IEA. This is consistent with the cover email sent to Mr Adams where Mr Robinson asks for the IEA to be signed as soon as possible for the file record and because it was a requirement of the LTA. As I understand it Mr Adams had previously not signed an earlier version of an IEA offered because he considered it did not comply with provisions that had to be in it relating to safety. I have not been provided with any documentation about this.

[25] Inconsistent with RF sending an IEA to be signed on 22 July 2023 was then the phone call that I accept Mr Robinson made to Mr Adams the next day on 23 July 2023 telling him there was no more work for him. I have nothing to show me that before this RF took any steps other than the above. It did not provide Mr Adams with information relevant to the continuation of his employment nor did it and to provide Mr Adams an opportunity to comment on this information. Even if I consider the casualness of the earlier conversation about the truck needing to be sold if no work came through, the evidence is that the truck was not then sold until the following year and by then two further drivers drove the truck.

[26] Mr Thorpe's evidence is that he was approached by Mr Robinson to drive the truck that Mr Robinson drove. He says he had earlier been asking Mr Robinson for work. He says that Mr Robinson told him he would pay him cash because he had let Mr Adams go 'unfairly.' Mr Robinson says his words were misinterpreted by Mr Thorpe. Bank records provided by Mr Thorpe show he was likely paid based on \$1,000.00 gross per week from the second half of August 2023. This means he likely started driving the truck a couple of weeks after Mr Adam's role was made redundant. Mr Thorpe continued to be paid from either a RF account or what Mr Robinson says was other places he could pay from. Mr Robinson says that Mr Thorpe was not an employee and the narration on the bank accounts shows 'Contractor Day Rate'. He says that this shows that the work was only while the truck was on the market and that the work was never long term but rather only until the truck was sold. Mr Thorpe genuinely did not appear to understand the concept of being self employed when I asked him about

it. He says he simply thought he was employed. He was an unsophisticated witness and I accept his understanding was likely. Either way, a short time after dismissing Mr Adams, RF required a driver to drive the same truck that Mr Adams had been driving irrespective of whether that driver was an employee or self-employed.

[27] Had the 'redundancy' been genuine I would not expect to see RF needing a driver for this truck soon after deciding Mr Adams' driving role was surplus to requirements. At the very least Mr Adams was not given the opportunity to respond to other options in relation to the amount of ongoing work he may be able to do for RF.

[28] When Mr Robinson asked questions of Mr Adams at the Investigation meeting he put two questions to Mr Adams about him understanding the financial losses that were occurring for RF at the time. Mr Adams quite plausibly answered he had no idea whether this was the situation. This supports the problem here for RF in that none of this financial information was communicated to Mr Adams at the time for his feedback in the proposed likelihood of the role being surplus to requirements.

[29] In addition to the above, Mr Robinson's own evidence is that after he told Mr Adams on the phone he had no further work for him he formed the view he did not want him driving for him again. In other words, despite an email after this where Mr Adams says he would drive if a load was found, Mr Robinson formed a view that he somehow could not trust Mr Adams not to then drive the truck without doing damage to it or abandoning it somewhere.

[30] It was difficult to get to the bottom of Mr Robinson's claims about this other than hearing Mr Robinson's suppositions. Again, RF has provided no evidence to back up this risk analysis but having heard from Mr Robinson I find it likely ending Mr Adam's employment was about more than or potentially different to Mr Adam's role being surplus to requirements, at least at that time.

[31] Mr Robinson's evidence included that he was unhappy about the way Mr Adams behaved during his employment. He has made allegations about Mr Adam's personal affiliations and his reactive nature, all allegations without any evidence provided by RF about specifics and to which I make no findings. I find a likelihood that the 'redundancy' was more motivated by Mr Robinson wanting to exit Mr Adams from

RF's employment rather than it being a genuine situation of a role surplus to requirements at the time. Effectively I find Mr Adams missed out because of this on opportunities for more driving work, albeit something that may have eventually finished when the truck was eventually sold which was not until the following year.

[32] I accept the submission for Mr Adams that the process towards the dismissal was unfair to him and the decision itself was not justified. RF did not carry out a redundancy process and make a decision to end Mr Adams' employment in the way that a fair and reasonable employer could have done in the circumstances at the time. I find RF also breached its duty of good faith under s 4(1A)(c) of the Act. I find the dismissal was unjustified.

If RF was not justified in dismissing Mr Adams what if any compensation and lost earnings are to be ordered?

Wages

[33] Under s 123(1)(b) of the Act an employee can be awarded earnings lost as a result of a grievance. Under s 128(2) of the Act this can include an order the lesser of a sum equal to lost remuneration or to 3 months' ordinary time remuneration. Mr Adams explained in his oral evidence to me that he picked up work here and there on fertiliser boats soon after he left RF but that this did not become more regular until later in 2023. Mr Adams' IRD records show he earned wages from September 2023 with a contracting company and from October 2023 with the company I take it he says the work became more regular with. Mr Adams obtained welfare assistance from August 2023 but I do not take this into consideration.

[34] Three months earnings for Mr Adams from the end of his notice period (23 August 2023) would take him to 23 November 2023. He would have contractually earned a nominal \$12,000.00 gross over 3 months earning with RF based on as his base gross weekly payment of \$1,000.00. However, by 23 November 2023 according to the IRD records Mr Adams is recorded as earning from two subsequent employers totalling an amount likely up to or exceeding \$12,000.00. Accordingly, I find I do not have evidence to support making an award for lost earnings as a result of the grievance.

Compensation

[35] I accept Mr Adams was emotionally adversely affected by the dismissal after only a short time in the job. He lived in a remote town where I accept job opportunities for him would be limited and this job had enabled him to secure an earning by travelling in the job but remaining based with his family. He refers to the sudden dismissal causing him 'quite a bit of stress' for him and his family and caused relationship problems for a time because of the lack of finance. As noted below, IRD records show he did not start earning again until September 2023 so approximately 4-6 weeks in my estimation this stressful situation would have continued. His evidence also includes his partner also lost their position so this cannot be something caused by RF.

[36] Mr Adams says he took out a loan about a week before he was dismissed on a motorbike and was then left with repayments. I accept he would have been stressed by this ongoing debt. Mr Adams refers to being angry after he was 'fired' and this appears evident from his post employment behaviour. I find below that this was far from acceptable no matter how angry he felt about the unfairness of the situation. I accept Mr Adams felt stressed in that he could not provide for his family immediately after his dismissal and humiliated having to get wider family assistance for a time.

[37] Standing back from the above I find \$7,000.00 to be appropriate compensation.

Is Mr Adams owed a four week notice period?

[38] It is not in dispute that the agreed pay was \$1,000.00 gross per week with an additional payment of \$140.00 per night for every night away from home. This is likely to have been the basic agreement at commencement and is consistent with the (IEA) that Mr Adams was sent to sign the day before Mr Robinson called him on 23 July 2023 to say the employment was at an end.⁵ The same IEA draft sent to Mr Adams on the day before he was terminated from his employment includes reference to 'Four weeks' notice of termination of employment to be given by either party and if that required notice is not given an amount equivalent shall be paid.

⁵ Email Mr Robinson to Mr Adams, 22 July 2023, 1.03pm including a cover email from Mr Robinson saying, 'Please get this signed and returned as soon as possible please, as we need this on file as soon as possible so that we can also send a copy to LTA as per their request.'

[39] In its statement in reply, RF does not dispute that four weeks' notice was due to be paid to Mr Adams at termination.⁶ While Mr Robinson has emailed the Authority to say four weeks' notice was given,⁷ I understand this relates to his position that he had the discussion with Mr Adams four weeks prior explaining if there was no work he would have to sell the truck. That is not the same as providing an employee with a paid contractual notice period upon informing them they were terminated from their employment.

[40] Based on the above I find that RF is liable to have paid Mr Robinson 4 weeks' notice period at \$1,000.00 gross per week, a total of \$4,000.00 gross at the end of the employment. This was a breach of the employment agreement terms and a statutory breach of s 4 of the Wages Protection Act 1983 which requires an employer to pay wages due without deduction unless there is written consent (s5 of the WPA).

Is RT entitled to set off the \$4,000.00 notice period owing based on alleged financial loss from damage done to its property by Mr Adams after his employment ended?

[41] In its statement in reply, RF says that while the '4 weeks' pay is therefore due but RF 'wishes to deduct the cost of damage to the truck, which meant its sales price dropped by some \$12,500, [sic] plus the cost of the mattress and phone, from this payment and accordingly is not willing to pay anything ...'.

Dashboard rings removed

[42] Mr Adams confirms he removed speedo rings from around the dashboard dials when he collected his gear from the truck after his employment ended. He says he did this because he thought he would get some money for them second hand after Mr Robinson had refused to pay his four week notice period. He gave oral evidence that he thought the cost of repair would be \$300.00 to \$400.00 but provided nothing to support this in relation to his 'google' searching of the same.

⁶ Statement in Reply received by the Authority 24 July 2024.

⁷ Email dated 7 December 2023 from Mr Robinson to the Authority and copied to the then advocate for Mr Adams.

RF's cell phone

[43] Likely on the same thinking as with the removal of the dashboard speedo rings, Mr Adams says he kept the company cell phone because his own was damaged and his intention was to keep it until his phone was fixed. Mr Robinson had earlier messaged Mr Adams that the phone was part of RF's items that had to be returned upon termination. Mr Adams says he returned the phone sometime later. By then I accept that Mr Robinson had Mr Harvey (the person present when Mr Adams collected his gear and removed the dashboard rings) lay a complaint of theft with the Cheviot police for RF in relation to the rings, the cell phone and the mattress. Mr Robinson says the phone was damaged when eventually it was returned by Mr Adams.

Mattress

[44] Mr Adams says he did not know where RF's original mattress from the truck cab was because it was in a very poor state when he started his job. He says he communicated this to Mr Robinson at the time and replaced it with one of his own. The mattress Mr Adams says he took from the truck was his own property.

Consideration of the set off claimed by RF

[45] I do not find that RF can set off the four weeks' notice period in relation to its purported financial loss for the above. Firstly, RF has provided no evidence to support any financial loss for the phone or rings removed. Secondly, I found some plausibility about the mattress in the way Mr Adams explained what happened with that. In any event a second hand mattress value is likely to have been minimal. While it is far from acceptable behaviour on Mr Adams' part that he took matters into his own hands to try to retrieve the unpaid notice period by damaging property, he was still entitled to a paid four week notice period at termination. RF did not have written consent from Mr Adams for this amount to be deducted from his pay. It cannot seek to set-off against its statutory duty under s 4 of the WPA to pay wages due.

[46] While the above set off defence was presented to the Authority in the statement in reply, I also note that messaging at the time of the termination includes simply that Mr Robinson refused to pay the four weeks' notice period when Mr Adams asked for

this entitlement. His evidence includes he considered Mr Adams did not deserve any money based on Mr Adams bringing a claim against RF and that Mr Adams just entered employment to make a claim like he has here. Mr Robinson has further made allegations about Mr Adam's alleged propensity to be angry throughout some of the employment. These and other allegations about Mr Adams have been made by Mr Robinson without any evidence. I also have no evidence from RF that it dealt with any purported performance issues during the employment. None of this substantiated, I find it a concern when an employer fails to understand the basic entitlements of an employee and their right to challenge any breach of these entitlements.

[47] I find it likely that the reason RF did not pay the notice period initially was more to do with Mr Robinson being upset about the manner in which Mr Adams spoke to him and hung up on him when he called to say the employment came to an end. That this happened is likely, Mr Adams says the call did not go well. Mr Adams' later behaviour when he collected his gear from the truck appears to have been consistent with an aggressive manner. I found Mr Harvey's evidence about this persuasive including how upset he found Mr Adams' comments were to his wife who was also present.

[48] Based on the above, while Mr Adams' behaviour around the time he collected his gear from the truck after his employment ended was far from unacceptable, I find that RF breached its contractual obligation to pay a four week notice period of \$4,000.00 gross and that this also constituted a breach of s 4 of the WPA.

[49] Accordingly, RF is to pay Mr Adam \$4,000.00 gross for four weeks' notice.

Penalties

[50] The Authority may award penalties where an employer is liable for them. For a company this is a maximum penalty per breach of \$20,000.00.⁸ The factors to consider in relation to penalty claims are provided under s133A of the Act and can be summarised as :

⁸ Employment Relations Act 2000, s135(2)(b).

- (a) The objects of the Act⁹ which include employment relationships built on mutual trust and confidence and good faith. This also includes an acknowledgement of the ‘inherent inequality of power in employment relationships’;
- (b) The nature and extent of breaches
- (c) Whether the breaches were intentional, inadvertent, or negligent;
- (d) Whether steps had been taken to mitigate the effect of the breaches;
- (e) The circumstances of the breaches including the vulnerability of the employee; and
- (f) Whether the person in breach has previously been found by the Authority or Court to have ‘engaged in similar conduct.’

[51] Mr Adams claims the following penalties against RF for:

- a. A failure to provide and retain a signed copy of the individual employment agreement (IEA) under s 64 of the Act;
- b. A failure to provide Mr Adams with his contractual entitlement to a notice period under the IEA under s 134 of the Act;
- c. For failing to comply with the duty of good faith under s4(1A) of the Act by not providing Mr Adams access to information and an opportunity to comment when proposing to restructure and adversely affect the continuity of his employment.

A failure to provide and retain a signed copy of the individual employment agreement (IEA) under s 64 of the Act

[52] I have limited documentary evidence to support this penalty. What I have is the message from Mr Robinson to Mr Adams on the day before Mr Robinson ended the employment. That accompanies a draft employment agreement that he requested Mr Adams sign. It is submitted that the breach was “sustained and ongoing” and that Mr Adams asked about getting an employment agreement. I have not had any evidence to support this except, as mentioned above, Mr Adams saying he would not sign an earlier IEA because he wasn’t happy about some clauses.

⁹ Employment Relations Act, s 3.

[53] In the context of this very short term of employment; that the parties conducted themselves informally in relation to communication and knew the basic tenet of the term of pay agreed; that RF had likely made some effort to provide at least one IEA albeit potentially to meet LTA requests, and that I have nothing to show RF had breached this obligation before, I decline to award a penalty.

A failure to provide Mr Adams with his contractual entitlement to a notice period under the IEA under s 134 of the Act

[54] I find a likely personalised aspect to Mr Robinson's apparent refusal for RF to pay the notice period. This is apparent to me from the messaging and his emails into these proceedings where he expresses strongly that he views Mr Adams' challenge to the dismissal and unpaid notice period as somehow disloyal and goes as far to say he thinks that Mr Adams 'does this [bringing challenges] for a job'. However, I am not without acceptance that Mr Robinson was under financial pressures in relation to making this payment. His messaging at the time also supports this. There is also the aspect of him being affronted by Mr Adams' post-employment behaviour which may well have exacerbated any effort to mitigate the breach. In short there has been a human personalised aspect to this employment relationship problem that likely fed into this breach. It is not admirable on either man's behaviour.

[55] While I comment elsewhere that I have not had documentation about RF's financial capacity to pay, there is some evidence that would lean away from ordering a penalty on this aspect. There is RF's bank account overdraft as May 2024, the pending removal from the Companies Office Register and Mr Robinson's own consistent evidence about this.

[56] I have no evidence of prior noncompliance.

[57] If I ordered a penalty I would not find any reason to have some or all of it paid to Mr Adams¹⁰. He already a remedy for this breach and I do not find he is likely to have asked for penalties otherwise. Penalties are not awarded as a form of further

¹⁰ Employment Relations Act 2000, s136(2).

compensatory payment to the employee. I decline to order a penalty in relation to this breach.

For failing to comply with the duty of good faith under s4(1A) of the Act by not providing Mr Adams access to information and an opportunity to comment when proposing to restructure and adversely affect the continuity of his employment.

[58] I decline to order a penalty under this head for some of the same reasons as immediately above. I also note that I have already found above a breach of good faith under this head which led to my finding of unjustified dismissal. I consider that I have considered the relevance of this failure under the compensatory payment made to Mr Adams.

Is leave granted to Mr Adams to bring an application to the Authority under s 142Y of the Act to find Mr Robinson personally liable for the payment of the notice period?

[59] The effect of ss 142W and 142Y of the Act is that an employee is able to claim recovery of money from a director of a company that is held liable for non-performance of the company's employer obligations in relation to employment standard entitlements. Mr Robinson appeared to have little or no understanding of this aspect of Mr Adams' claim at the investigation meeting.

[60] I have found RF has failed to pay the notice period and that this is a breach of RF's statutory obligation under s 4 of the WPA. I have found that Mr Robinson likely made a decision to not pay the notice period based on messaging around the time of the dismissal. The breach falls within the definition of 'employment standards'¹¹ to which s142Y of the Act can apply.

[61] Mr Adams could be regarded as 'a person involved'¹² in the breach as director of RF. However, Mr Adams can only make this application if the Authority grants leave for this to happen and then any recovery can only be ordered if RF 'is unable to pay the

¹¹ Employment Relations Act 2000, s5

¹² Employment Relations Act 2000, s142W (2).

arrears in wages or other money.¹³ There is also a statutory defence that can be brought in relation to such an application.¹⁴

[62] At the investigation meeting, I gave a preliminary view that I was not convinced I should grant leave. However, on further reflection, having now taken the opportunity to better consider this application based on what evidence is before me, I am satisfied it is right to grant leave for Mr Adams to come back to the Authority in these proceedings if RF 'is unable to pay' the \$4,000.00 gross notice period ordered. At this point in time, I do not accept that there is sufficient information before me that RF 'is unable to pay'.

[63] RF continues to appear on the Companies Office register but is pending removal for not filing of returns.¹⁵ While Mr Robinson spoke at length of his and RF's financial strife none of this was particularised or supported by any documentation except for what appears to be RF's bank account showing a \$20,000.00 overdraft as at 29 May 2024.

[64] Accordingly, I grant leave to Mr Adams to return to the Authority in these proceedings in the event that RF is unable to pay the order of \$4,000.00 gross for the notice period arrears. If he does this I will then consider the application that Nathan Robinson is to be held fully liable for the payment of \$4,000.00 gross to Mr Adams under s142Y of the Act. The parties should expect this to entail a further investigation process giving both sides the opportunity to be heard.

Outcome summary

[65] Within 28 days from the date of this determination Robinson Freight Limited is to pay to Andy Adams the following:

- a. \$4,000.00 gross for unpaid notice at the end of employment; and
- b. \$7,000.00 in compensation under s 123(1)(c)(i) of the Act.

¹³ Employment Relations Act 2000, s142Y (2)(a) and (b).

¹⁴ Employment Relations Act 2000, s142ZD.

¹⁵ <https://app.companiesoffice.govt.nz/companies/app/ui/pages/companies/8056378>.

[66] Under s 142Y of the Act Andy Adams is granted leave to bring an application to be heard as to whether Nathan Robinson, current director of Robinson Freight Limited is to be liable to pay the order expressed above at [65] in the event that Robinson Freight Limited is unable to pay the same.

Costs

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

[68] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Mr Adams 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 RF will then have 14 days to lodge any reply. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[69] While on Mr Adams' behalf there is included in the application that he seeks 'costs as they accrue', 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.¹⁶

Antoinette Baker
Member of the Employment Relations Authority

¹⁶ www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1