

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 447
3142422

BETWEEN PAUL HINES
 Applicant

AND KNCC LIMITED
 Respondent

Member of Authority: Sarah Blick

Representatives: Kate Henry, counsel for the applicant
 Eugene McLaren, for the respondent

Investigation Meeting: 1 June 2022 at Auckland

Submissions received: 3 June 2022 from the Applicant
 8 June 2022 from the Respondent

Determination: 8 September 2022

DETERMINATION OF THE AUTHORITY

What is the employment relationship problem?

[1] The applicant, Paul Hines, worked for the respondent, KNCC Limited (KNCC) as a construction site manager. Mr Hines says KNCC unjustifiably dismissed him and claims compensation for loss of dignity and injury to feelings and lost wages and other entitlements. He says a probationary or trial provision in his employment agreement relied on by KNCC did not satisfy statutory requirements and was invalid. In the alternative, Mr Hines says KNCC engaged in adverse conduct in dismissing him for a prohibited health and safety reason.

[2] Mr Hines also says KNCC breached his employment agreement by terminating his employment on two weeks' notice rather than his contractual entitlement of four weeks, and he seeks a penalty for that breach. He says this was also an unlawful

deduction and seeks arrears of wages and a penalty in relation to that breach. Mr Hines further says KNCC breached s 4(1A)(c) of the Employment Relations Act 2000 (the Act) and seeks a penalty in relation to that breach.

[3] KNCC says Mr Hines' employment was terminated by mutual agreement. If the employment was not terminated by mutual agreement, KNCC says Mr Hines was not unjustifiably dismissed and that it did not engage in adverse conduct for a prohibited health and safety reason. KNCC also says any actions in terminating Mr Hines' employment were within the scope of what a fair and reasonable employer could have done in all the circumstances and did not amount to breach of good faith. KNCC says it and Mr Hines had also agreed to a probationary period but Mr Hines failed to achieve the standard it required within that period. Further, even if KNCC had not followed correct processes, which is denied, it had substantive reasons to end Mr Hines' employment. KNCC also says it did not breach Mr Hines' employment agreement and did not make an unlawful deduction from his wages in relation to his notice period.

What has the Authority's process been?

[4] Mr Hines provided two witness statements. Mr Eugene McLaren, KNCC's office manager at the relevant times, and Mr Justin Kim, a construction site manager for KNCC, provided witness statements.

[5] Each witness answered questions under affirmation from the Authority and counsel. Following the investigation meeting, both counsel filed helpful written closing submissions. Counsel for KNCC has since withdrawn as counsel. Mr McLaren is now recorded as its representative.

[6] The evidence has been carefully evaluated and consideration has been given to how reasonable, plausible and probable the evidence is. Where the evidence between witnesses is not consistent I have made findings based on the balance of probabilities as to which version is more likely than not. I have been assisted in my evaluation and consideration of the evidence by taking into account the documents provided by the parties.

[7] As permitted by s 174E of the Act, this determination does not record all the evidence and submissions received, and fully considered, during the Authority's

investigation but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

What are the issues?

[8] The following are the issues for investigation and determination:

- a. Was Mr Hines dismissed?
- b. If Mr Hines was dismissed from his employment was the dismissal unjustified?
- c. In the alternative, did KNCC engage in adverse conduct in dismissing Mr Hines for a prohibited health and safety reason?
- d. If the dismissal is found to be unjustified should remedies be awarded and are there issues of contribution?
- e. Did KNCC breach s 4(1A)(c) of the Act?
- f. Did KNCC breach its employment agreement with Mr Hines?
- g. Did KNCC make an unlawful deduction in relation to Mr Hines' notice period?
- h. Should any penalties be imposed?
- i. Should interest be awarded on wages relating to the notice period?
- j. Should either party contribute to the costs of representation of the other party?

What happened?

[9] KNCC is a construction company which specialises in building multiple storey residential buildings in Auckland. As office manager, Mr McLaren was in charge of administration and human resources at the relevant times.

Job interviews

[10] In early February 2021 Mr Hines attended two interviews with KNCC for a construction site manager role. At the interviews Mr Hines met Mr McLaren and another person who was introduced to him (and became known to him) as "the Chairman". As this person did not participate in the investigation meeting, I will continue to refer to him as "the Chairman". In his evidence Mr McLaren referred to the Chairman as an "Advisor" and a fulltime independent contractor to KNCC. He says the Chairman's main focus is on finance, accounting, procurement and HR, and he

provides professional advice including on pricing, reviews and budget. Mr McLaren says he lets the Chairman know what is going on at KNCC but does not report to him, although sometimes the Chairman tries to advise on operations.

[11] Mr McLaren further says during the relevant period, In Cheol Kim was the sole director and the decision maker of KNCC. However, Mr McLaren says the Chairman was part of “senior management” at KNCC. There is no record of the Chairman ever holding director status of KNCC. Mr Justin Kim gave evidence that the Chairman is an owner of KNCC, although under cross-examination said he does not know who owns KNCC. The Chairman is not recorded as a shareholder.

[12] Mr McLaren says that due to the Chairman’s level of English he interpreted for the Chairman at the job interviews. Mr Hines recalls that during the job interview process Mr McLaren asked how he would run the site if he was hired. Mr Hines says he emphasised that health and safety onsite was very important to him and he ran a tight ship in this regard. Mr McLaren says it was clearly explained to Mr Hines that his main role would be focusing on the management programme and budget of the project, and that Mr Hines accepted this. Mr Hines denies that focus was discussed or that he agreed to it.

[13] Mr McLaren says KNCC’s policy of employing employees on a “probationary or trial period” of three months with a salary review at the end is explained to applicants at every interview. In his witness statement Mr McLaren says he “understood” this would have been explained to Mr Hines at his interview. At the investigation meeting he said he clearly remembered the Chairman explained this and that he translated for him. Mr McLaren says Mr Hines accepted the three month period. Mr Hines says there was no discussion about the offer of employment being subject to either a probationary or trial period. Mr Hines says he verbally accepted an offer of employment with KNCC. It is likely he verbally accepted the role on 8 February 2021, at the second interview.

[14] KNCC filed one page of brief handwritten notes, partly in Korean script, which Mr McLaren says he wrote on 8 February 2021. He says they record what was discussed at the interview. They appear to relate to the second job interview. The notes are difficult to decipher, but list words like “programme”, “subcontractor”, “staff”, “budget”, “HS” and phrases such as “direct or manage operation” and “site – general

admin work”. There was no evidence suggesting they reference a trial or probationary period having been discussed.

The written agreement

[15] On 9 February 2021 Mr Hines signed a written employment agreement with KNCC and commenced working that day at its Newmarket construction site. A block of apartments was being built, and the project was at the excavation and foundation stage. He says he did not appreciate his employment was subject to any probationary or trial period until he received the written agreement. Clause 3.1(d) of Mr Hines' agreement stated as follows:

During the trial period specified in the First Schedule to this agreement, the Employee's employment will be on a trial or probationary basis and that until such time as the Employee's permanent appointment is confirmed in writing at the expiry of the trial period, the employee has no expectation on [sic] ongoing employment beyond the expiry of the Trial Period.

[16] The First Schedule of the agreement did not identify a trial or probationary period or specify the length of such a period. There are no other references to a trial or probationary period elsewhere in the agreement. The effect of this clause will be addressed later in this determination.

[17] In relation to the termination of employment, the First Schedule of the agreement provided for a notice period of four weeks. Clause 15.3 of the agreement provided that either party may terminate the agreement and KNCC “shall pay remaining wages and allowances such as annual leave”. Clause 15.3 also applied to redundancy situations.

[18] The employment agreement set out Mr Hines' duties, several of which relate to health and safety promotion and compliance. Other relevant duties were recorded as follows:

- Produce accurate and comprehensive site diary, purchase orders and dayworks records
- Production of weekly short-term programmes to monitor against overall construction programme to achieve practical completion ahead or on schedule.

Health and safety

[19] Mr Hines says prior to joining KNCC, he was aware that it had a “bad name” when it came to health and safety. As evidence of this, Mr Hines provided a 2020 media release from WorkSafe’s website stating KNCC was convicted and fined under the Health and Safety at Work Act 2015 (HSWA) for failing to notify of an incident in 2018. It noted numerous other enforcement actions had been taken by WorkSafe against KNCC since 2018. Mr Hines says he was confident in his knowledge of health and safety practices for construction sites and believed he could lift KNCC’s standards in that area.

[20] Mr Hines says shortly after starting work for KNCC, he noticed that its health and safety protocols were not being adhered to in a manner they should have been. He was particularly concerned not everyone on site was wearing personal protective equipment (PPE), including the Chairman. He says workers and visitors to the site failed to wear safety boots and hard hats, despite him telling them it was a safety requirement and that if anyone was to find out there could be serious repercussions. Mr McLaren says during the period of Mr Hines' employment, KNCC complied with all regulations required to maintain and manage a safe workplace for all workers and visitors. He says everyone working or visiting the site wore proper PPE.

[21] Mr Hines says after he was employed, it became clear to him that the Chairman was the most senior person at KNCC. Mr Hines says he thought the Chairman was an owner of KNCC as he was very involved in decision-making including regarding pricing. Mr Hines says the Chairman was onsite all day every day including Saturdays, and that he would change activities being performed on site and overrule decisions of others. Mr Justin Kim acknowledged the Chairman gave instructions to others on site.

[22] Mr Hines says shortly after joining KNCC, he started holding weekly toolbox meetings. He says at these meetings he would discuss various matters including health and safety matters such as wearing PPE onsite. Mr Hines says the Chairman attended all of the toolbox meetings. Mr Hines says while he understood the Chairman spoke little English, he believed his “driver”, who also attended the meetings, was translating for him. Mr Hines says despite this the Chairman continued to not wear PPE onsite, including a hard hat and safety boots. Mr Hines notes the Chairman would stand behind

the team as Mr Hines spoke, sometimes waving his arms saying “go, go”, meaning get back to work.

[23] Mr Hines says in or around mid-February 2021 he raised his concerns about the Chairman’s PPE with KNCC’s project manager (KK), to whom Mr Hines reported. Mr Hines says KK told him he would speak to the Chairman about PPE. However, Mr Hines continued to note the Chairman was onsite without a hard hat or safety boots. He says he did start to wear a high visibility jacket if one was handed to him. Mr Hines says he asked KK on more than one occasion whether he had spoken to the Chairman about his use of PPE and was told KK would talk to him.

[24] Mr Hines says it was in late February 2021 that Mr Justin Kim, the Chairman’s brother-in-law, started working for KNCC and came to visit the site. Mr Justin Kim confirms he started working for KNCC in February 2021. Mr Hines says he approached Mr Justin Kim to ask whether he would be willing to translate for Mr Hines while he talked to the Chairman about the requirement to wear PPE onsite. Mr Justin Kim says he did not regard this as an issue because although the Chairman sometimes arrived at the site without wearing full PPE, his personal assistant gave him a safety vest and hard hat to wear. Mr McLaren does not agree there was any concern regarding the Chairman's PPE onsite - he says PPE was provided to him by his personal assistant whenever the Chairman entered the site.

Fall incident

[25] In late February 2021 Mr Hines says when he was walking on a path onsite his boot became stuck in a muddy puddle and he lost his balance, falling to one knee. Mr Hines says while it was not raining that day, it had been continuously for two days prior and the path was muddy and well worn. Mr Hines says this was a small fall and he did not give it much thought. He says he did not injure himself, and that he got back to his feet and returned to work. He was not aware that anyone had witnessed the fall and no one from KNCC asked if he was okay or mentioned it to him at the time.

[26] Mr McLaren gave evidence that Mr Hines instead twice fell to the ground on that day. He says Mr Hines struggled to stand up and understands the Chairman witnessed this through a window. He says due to the risk of hazards at construction

sites, KNCC's senior management was concerned about Mr Hines' physical condition to fulfil his role.

Mr Hines' performance as site manager

[27] Mr McLaren says during Mr Hines' employment he failed to satisfactorily conduct his duties as a site manager in relation to "five key aspects" - programme/schedule, budget, quality control, personnel and health and safety. Mr McLaren says Mr Hines' main role was to lead and supervise all site team members and to prioritise the five aspects. He says there were several site meetings with the whole site team in Mr Hines' presence regarding a lack of proper and regular reporting and communication in written form in relation to the five aspects. Mr McLaren says he attended a site team meeting once.

[28] Mr McLaren says Mr Hines' first requirement as site manager was to produce and present daily, weekly, monthly, quarterly and yearly "schedules" according to the project plan. He says it was agreed and Mr Hines promised to do it once he started working and expressed his confidence to meet proposed deadlines. However, he says none of the schedules were produced or presented. Mr McLaren says he "understands" that when Mr Hines was asked at one of the job interviews "if he could produce and provide a full programme and how long it would take to complete, he responded by saying that he could produce a full programme and it would take him half a day".

[29] Mr McLaren says Mr Hines also failed to provide daily reports in writing concerning the project. He says despite the need for written reporting being mentioned several times at meetings with the site team, Mr Hines did not produce or file any written reports. Mr Justin Kim also says the issue of the lack of proper and regular written reporting and communication was discussed at site team meetings.

[30] Mr Hines says he recalls KK mentioning reporting to him towards the end of February 2021. Mr Hines says he explained to KK that normally on a construction site, the site managers report progress and any issues to the project manager who then provide the reports. He says KK appeared to accept this and did not raise it with him again.

[31] Mr Hines disagrees that the main focus of his role was focusing on management of programme and budget of the project. Mr Hines says he was at no time provided budget figures as these were managed between KK and the Chairman. He also disagrees that personnel duties were part of his role, as Mr McLaren dealt with human resources for KNCC. I note budget and personnel duties are not in Mr Hines' job description. Mr Hines says in terms of quality control this was always up to standard as his and his team's work was reviewed by engineers and building inspectors. He further reiterates the evidence showing he was very conscious of health and safety. Mr Hines also says he did not receive any formal complaints regarding the work he was involved in or supervised.

[32] Mr Hines further says he did agree to produce a project plan regarding the timeline for the project. However, this was contingent on KNCC engaging subcontractors. He states KK and the Chairman were in charge of agreeing on wages and reviewing quotes provided by subcontractors as well as hiring them. Mr Hines says this never occurred and prevented him from putting together a project plan.

Café discussion on 11 March 2021

[33] On Thursday 11 March 2021, Mr McLaren invited Mr Hines to a café to have a coffee with him. Mr Hines says after they arrived at the café, Mr McLaren told him he had some bad news for him – that the Chairman had said he would have to be “let go” and KNCC would be giving Mr Hines two weeks' notice. Mr Hines says he asked why he was being let go and Mr McLaren said the Chairman did not think he was doing the job he wanted him to do. Mr Hines reports being shocked and upset by this news but felt there was no point having a go at Mr McLaren because he was just the messenger of the news. Mr Hines denies that he agreed to the four-week notice period in his employment agreement being reduced to two weeks.

[34] Mr Hines says at the time he had owned a small construction company for approximately three years, and while he was working for KNCC, he did not promote his company nor did it earn any income. Mr Hines says it occurred to him while he was with Mr McLaren that as he had just been fired, he would need some income. Mr Hines says he was aware KNCC had a shortage of carpenters and builders and had been unable to hire staff through labour hire companies/organisations. He says he provided his

business card to Mr McLaren for use in the future and for any upcoming work. KNCC says this was not the act of a person taking umbrage with an unjustified dismissal.

[35] Mr McLaren described the 11 March 2021 café discussion with Mr Hines in his witness statement as follows:

...During the meeting, I explained senior management's concerns about Mr Hines' performance and his physical condition. When I raised termination of Mr Hines' employment, he accepted and agreed without any hesitation, reluctance, comment, or question by saying "Okay". There was no expression of any shock or surprise on the comment. In his witness statement, Mr Hines stated I told him that I had some "bad news" for him. He also stated I told him that The Chairman had said that Mr Hines would have to be "let go". I have not used those words, "bad news" or "let go". I also deny saying The Chairman did not think Mr Hines was doing the job The Chairman wanted him to.

During the same meeting, I offered two weeks' paid leave in lieu of notice which would allow him to seek for another job without being responsible for his roles at KNCC. Mr Hines agreed with me that his notice period would be reduced to two weeks and his last day of work would be 26 March 2021. On our way back to office, Mr Hines gave me his business card. On it, Mr Hines was named as managing director of Hines Construction & Interiors. When Mr Hines handed the card to me, he said to contact him if KNCC needed his help with its projects in the future. Although KNCC offered him payment in lieu of notice, he told me that he will continue to come to work every day until the last date. In his witness statement, Mr Hines stated that he gave me his business card because he was aware that KNCC was in desperate need for carpenters and builders. However, at the time, the site was at the stage of groundwork (excavation etc) and there was no urgent need for carpenters.

[36] Mr McLaren's witness statement elsewhere stated about the discussion that:

... the senior management's concern regarding Mr Hines' performance and ability to physically perform his role were fully conveyed to Mr Hines during our meeting at the café on 11 March 2021. Mr Hines also said in his evidence that I had told him on 11 March 2021 that the reason was due to The Chairman's dissatisfaction with Mr Hines. However, I never said during our conversation at the café that The Chairman was dissatisfied with Mr Hines.

[37] When asked about whether he advised Mr Hines that termination of employment would be discussed in advance of the café discussion, Mr McLaren said he was not going to raise termination, so it was not raised earlier. Mr McLaren stated the discussion was not a formal meeting. He said if it was going to be a meeting about termination he would not have asked Mr Hines for coffee – he would have asked him to attend a meeting at a certain time, suggest he bring a support person, have a meeting agenda and seek Mr Hines' response. Mr McLaren said he wanted to have coffee to see how Mr Hines was doing as the senior management had a concern about his physical condition. He also said senior management wanted him to stress the lack of written

reports as an issue and talk about what KNCC could do to support Mr Hines in that area. He also gave oral evidence that senior management were quite negative about the situation – they thought Mr Hines had breached their trust and his contract, as with 40 years’ experience they expected excellent performance from him. He says however they did not want to fire him and intended to offer Mr Hines two weeks paid leave.

[38] When asked about why his witness statement said Mr McLaren “raised termination of employment” at the meeting, Mr McLaren stated he did not remember raising any issue about termination or notice. Mr McLaren reiterated that he offered Mr Hines two weeks’ paid leave to find another job, but said Mr Hines understood this offer to be two weeks’ notice of ending employment. Mr McLaren gave oral evidence that he never intended to convey anything about the future (or otherwise) of Mr Hines’ employment.

[39] Despite this evidence, when asked about the reasons given for terminating employment, Mr McLaren said Mr Justin Kim, KK and Mr Hines had previously discussed Mr Hines’ employment ending and a reduction of his notice period. Mr McLaren said the three of them had agreed it would end. Mr Justin Kim did not give any evidence on this point. Mr Hines denied ever discussing the end of his employment with Mr Justin Kim, and only recalled KK suggesting Mr Hines may want to stand in as project manager at one point. He was also clear he did not have a discussion with Mr Justin Kim or KK about reducing his notice period.

[40] I note Mr McLaren did not take any notes of the café discussion.

Events of 12 March 2021

[41] Mr Hines says he did not go into work the next morning, Friday 12 March 2021. Mr Hines says he felt shocked from being dismissed and wanted to get some advice on what he should do next. Mr Hines noticed Mr McLaren tried to call him in the morning but he did not answer because he was on another call. Mr Hines says he went into work that afternoon however. He recalls a conversation with Mr McLaren where Mr Hines said he had taken advice and that he had no other choice than to challenge it, but there were no hard feelings.

[42] Mr McLaren says contrary to Mr Hines' insistence to work out his two weeks' notice, Mr Hines' arrival time at work was irregular for that period. He says on 12 March 2021, Mr Hines did not attend work and failed to give any prior notice or seek approval. Mr McLaren says as it is part of his responsibility to contact staff who are absent from work without prior notice, he telephoned Mr Hines to ask his whereabouts, but Mr Hines did not answer his phone calls. He says later that day, Mr Hines returned his phone call and told McLaren he was in a meeting with a lawyer and would come to work after the meeting. Mr McLaren says when Mr Hines arrived at the office, he told him he was going to reveal critical information about KNCC and was willing to take legal action against it. Mr McLaren states later that day, Mr Hines approached him and said he does not want to cause any trouble with KNCC by raising a legal dispute. He said he wished to avoid any unnecessary conflict with KNCC and maintain a good relationship with it. He says Mr Hines said he wanted to resolve the issues quietly and smoothly.

[43] Mr Hines denies his arrival time during his notice period was irregular – that the only date he did not arrive at work on time was on 12 March 2021 when he was seeking legal advice regarding his employment situation. He says he was very worried that once he left KNCC that health and safety regulations would continue to be ignored and the safety of its workers would be jeopardised. He acknowledges telling Mr McLaren that he was willing to take legal action regarding KNCC's treatment of him and its health and safety practices. He denies saying to Mr McLaren that he wanted to “resolve the issues quietly and smoothly.”

Events of 15 March 2021 – the termination letter

[44] It is common ground that on Monday morning 15 March 2021, Mr McLaren placed a letter on Mr Hines' desk. Despite his oral evidence regarding not raising termination during the café discussion, Mr McLaren's statement says the “letter confirmed the agreement reached on 11 March 2021 to terminate Mr Hines' employment”. Mr Hines found the termination letter on his desk which read as follows:

Paul Hines, The Site Manager

Re Notice of Termination of the Employment Agreement

This is to notify that the employment agreement for the above person is terminated with effective (sic) on 26th March 2021 due to the following reasons.

1. The role and position became redundant followed by restructuring the site team. The responsibility is reallocated to the Project Manager and the Construction Site Manager.
2. The cooperation with the senior management team has not been successful by lack of regular written reports, forms and documents required, eg. work schedule/programme.
3. The probation of 3 month period is applicable as mutually agreed.
4. The concerns on the above person's physical capacity have been raised since by observation of an occasion where a minor accident occurred at the site.

The notified person is required to return all the property belongs to the employer and not to access the site and the office during and after the notice period, with immediate effect. If the person does not comply with this notice, it shall be regarded as trespassing on the employer's property and the police may be called in for enforcement, if necessary.

[45] When asked about the first point in the letter, that Mr Hines' role and position had become redundant followed by restructuring, Mr McLaren said he was told Mr Justin Kim had joined KNCC and that Mr Justin Kim and KK would take over what Mr Hines was supposed to do. Mr McLaren and Mr Justin Kim confirmed that after Mr Hines left employment, Mr Hines' responsibilities in particular became Mr Justin Kim's responsibilities.

[46] The letter contains a signature but the author is not named. At the investigation meeting, Mr McLaren gave evidence that KNCC's director had dictated the letter to him and the Chairman had signed it on behalf of KNCC. Mr McLaren could not recall why the Chairman signed the letter - he said it may have been because the director insisted the Chairman sign it, or because the director was not available to.

[47] While Mr Hines initially said he called Mr McLaren about the termination letter on 15 March 2021, he later acknowledged they had a conversation in person. He says this was not a formal meeting but a casual conversation in the office. Mr Hines says during that conversation, Mr McLaren confirmed it was the Chairman's decision to fire Mr Hines and told him he should stay at home and the Chairman would see if or how he needed Mr Hines onsite. Mr Hines says Mr McLaren assured him that Mr Justin Kim and KK would have "a word" with the Chairman for him. Mr McLaren says Mr Hines wanted to have a chat with him separately in the boardroom and that Mr Hines said he did not want to cause any issue regarding his termination of employment by taking any legal action. Mr McLaren says Mr Hines asked if KNCC would reconsider

its termination decision, which Mr Hines denies. Mr Hines says he worked as normal on 15 March 2021.

[48] Mr McLaren says he does not understand why Mr Hines thinks he was fired because the Chairman was frustrated with him for asking him to wear PPE and for having toolbox meetings – he says the reasons for termination were clearly stated in the letter of 15 March 2021. Mr McLaren and Mr Justin Kim say the Chairman never mentioned to them that wearing PPE or having the toolbox meetings frustrated him.

Events after 15 March 2021

[49] Mr McLaren says on 16 March 2021 Mr Hines invited him to a conversation onsite. Mr McLaren says they had a conversation in a meeting room, and that Mr Hines told him he was going to collect all his belonging on the next day. Mr McLaren further states Mr Hines told him he did not want to be disputatious and wanted to finish his employment as mutually agreed.

[50] Mr Justin Kim says he recalls Mr Hines asking him sometime in March 2021 why he was not needed at the site. Mr Justin Kim says he never saw or heard Mr Hines complaining about having a two week notice period.

[51] On 18 March 2021 Mr Hines received his final pay. He says when he received his final payslip he realised he had only been paid two weeks' pay, constituting pay for a two week notice period.

[52] It is common ground that on 22 March 2021 Mr McLaren telephoned Mr Hines. Mr Hines says Mr McLaren told him he needed to come into the office and collect his things, which Mr McLaren denies. Mr McLaren says Mr Hines told him he would return to the office to collect his belongings. Mr Hines says he did so a few days later.

Was Mr Hines dismissed?

[53] KNCC says Mr Hines' employment ended by mutual agreement, despite the wording of its 15 March 2021 letter. The issue of mutual ending of employment was recently considered afresh by the Employment Court:

[16] There are a number of ways in which employment relationships can come to an end, ranging from a decision that is fully the employee's, to one that is fully the

employer's. There are also cases where termination is foisted on the parties by external events or circumstance. The justification or otherwise for a termination is a separate issue. At one end of the spectrum are cases which may be categorised as (employer) dismissal; at the other end of the spectrum (employee) resignation. There is a shady area around the middle of the spectrum. The point of equilibrium (what has been referred to as mutual consent to terminate) sits at the epicentre. It goes without saying that terminations which occur in the shady area carry a degree of risk for both parties.¹

[54] To determine where on the spectrum this termination of employment lies, I have carefully considered Mr Hines' and Mr McLaren's evidence about their café discussion on 11 March 2021. The Authority finds Mr McLaren's evidence about the discussion was not reliable because of inconsistencies between his witness statement and oral evidence about whether he intended to raise termination and did in fact raise termination at the meeting. I therefore prefer and accept Mr Hines' account of the discussion that he did not agree to end employment or agree to a shorter notice period.

[55] I also take into account that Mr Hines' employment agreement provided for four weeks' notice in writing to end employment. KNCC does not suggest Mr Hines was given notice in writing in accordance with the agreement at any point. Rather, the only written evidence of the termination is KNCC's letter of 15 March 2021, which enumerated the reasons it was terminating employment.

[56] It is also noted clause 18 of Mr Hines' employment agreement provides that aside from KNCC's house rules and health and safety policy, the provisions of the agreement may be varied in writing and signed by Mr Hines and KNCC. Mr Hines says he did not agree to a variation of his notice period, nor does KNCC claim a written variation was signed. The 15 March 2021 letter makes no reference to an agreement to vary the notice period.

[57] I also accept Mr Hines' evidence that he did not have another job to go to and needed his wages, such that he would not have agreed to a notice variation.

[58] I find the initiative for ending employment clearly came from Mr McLaren, who was acting on KNCC's behalf. In my view, Mr McLaren's actions at the café discussion constituted an unequivocal sending away from employment. I do not accept there was mutual agreement to end Mr Hines' employment reached at the café. It is clear this

¹ *Ellish v Network Service Providers Ltd* [2021] NZEmpC 175.

termination is at the “employer dismissal” end of the spectrum, and not a “shady area” termination around the middle of the spectrum.

[59] However, if the café discussion somehow did not constitute a dismissal, any shady area doubt was quickly removed by KNCC issuing the letter of 15 March 2021 outlining all the reasons for Mr Hines’ termination – being on the grounds of redundancy, performance issues, claimed concerns about Mr Hines’ physical capacity, and invoking the probationary period.

[60] Accordingly, I find Mr Hines was dismissed from his employment.

Was the dismissal unjustified?

[61] Justification is to be assessed in accordance with the test in s 103A of the Act. In determining justification of actions, the Authority does not consider what it may have done in the circumstances. It is required to consider on an objective basis whether the actions of KNCC and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time of the alleged unjustified actions.

[62] A fair and reasonable employer is expected to comply with its statutory obligations. These include the good faith requirements in s 4 of the Act and each of the four procedural fairness tests in s 103A(3) of the Act. Failure to do so is likely to fundamentally undermine an employer’s ability to justify a dismissal.

Trial or probationary period

[63] I firstly address the validity and effect of clause 3.1(d) of Mr Hines’ employment agreement as it relates to his dismissal. I note KNCC’s letter of 15 March 2021 stated one of the reasons for terminating Mr Hines’ employment was the “probation of 3 month period is applicable as mutually agreed”. KNCC does not claim clause 3.1(d) was intended to be a trial period pursuant to ss 67A and 67B the Act, but says it was a probationary period. The agreement was clearly not compliant with s 67A(2) in any event, and KNCC could not have relied on it to protect itself from Mr Hines’ dismissal grievance. This is because the agreement did not identify that the trial was for “a specified period” not exceeding 90 days as required by s 67A(2)(a), nor did it state Mr Hines was not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal.

[64] For a probationary period to be valid, it must comply with s 67 of the Act. Section 67(1)(a) states where parties agree an employee will serve a period of probation:

- (a) the fact of the probation period must be specified in writing in the employment agreement; and
- (b) neither the fact that the probation period is specified, nor what is specified in respect of it, affects the application of the law relating to unjustifiable dismissal to a situation where the employee is dismissed in reliance on that agreement during or at the end of the probation period.

[65] I am not satisfied clause 3.1(d) created a valid probationary period because it did not identify the length of the “probation period”, nor was its length specified anywhere else in the agreement. While s 67B(1)(a) only says “the fact” of the probation period must be in writing - using different language from s 67A - I consider the length of the period is likely required to be clear in the employment agreement.

[66] I am in any event not satisfied on the balance of probabilities that a probationary period (including its length) was orally discussed and agreed to. I hold concern about the accuracy of Mr McLaren’s recollection of this aspect of the job interview process and note there is no reference to the period in his handwritten notes of 8 February 2021.

[67] Even if clause 3.1(d) was valid, it does not assist KNCC here due to the deficient procedure followed in dismissing Mr Hines.

KNCC’s actions and how it acted

[68] I now explore how KNCC’ actions and how it acted in relation to the dismissal.

[69] In its letter of 15 March 2021, KNCC stated “cooperation with the senior management team has not been successful by lack of regular written reports, forms and documents required, eg. work schedule/programme.” If KNCC had expectations beyond what was outlined in Mr Hines’ job description, it needed to make this clear to him. If Mr Hines held responsibility for providing regular written reports, forms or other documents, KNCC did not undertake any formal steps to address this as a performance issue. The only steps KNCC appears to have taken was talking about a lack of written reporting in wider team site meetings and holding a discussion with KK. KNCC did not follow up the site meetings or KK’s discussion with Mr Hines in any way that would have set clear expectations or consequences for failure to improve. If

KNCC had concerns about Mr Hines' performance, it was obliged to point out the perceived shortcomings, advise him of necessary improvement required, warn him of the likely consequences if expectations were not met (termination) and provide a reasonable period time to remedy his performance.² Overall, I am also not satisfied KNCC has provided any clear or documented examples of Mr Hines failing in his duties as a site manager. I also observe Mr Hines' dismissal came just one month into his employment, in which time there would have been very little opportunity to identify shortcomings and follow a fair process that would allow for improvement.

[70] KNCC's letter of 15 March 2021 also stated concerns that "physical capacity have been raised since by observation of an occasion where a minor accident occurred at the site." KNCC does not claim to have raised Mr Hines' physical capacity prior to dismissing him. There was also no evidence of how this concern was affecting or could affect Mr Hines' performance. If KNCC had a genuine concern regarding Mr Hines' physical capacity, it should have made inquiries with him to find out if there was an issue, provide him an opportunity to comment and seek or provide medical advice if needed, before reaching a conclusion. None of that occurred here.

[71] I find KNCC failed to comply with any of the four minimum procedural fairness requirements set out in s 103A(3) of the Act to address the situation. Mr McLaren invited Mr Hines to coffee without any explanation as to what would be discussed or whether he could have a support person or representative. KNCC did not sufficiently investigate its concerns before it dismissed Mr Hines, in breach of s 103A(3)(a) of the Act, nor did it sufficiently raise its concerns with Mr Hines before he was dismissed, in breach of s 103A(3)(b) of the Act. Mr Hines was not given a reasonable opportunity to respond to KNCC's concerns before he was dismissed, in breach of s 103A(c) of the Act. Finally, KNCC did not provide Mr Hines with a genuine opportunity to provide an explanation to its concerns, in breach of s 103A(3)(d) of the Act. I find the process defects that occurred in this case were serious, fundamental and resulted in substantial unfairness to Mr Hines.

[72] KNCC's letter of 15 March 2021 states another reason for termination was that Mr Hines' "role or position became redundant followed by restructuring the site team". Where questions are raised about the commercial rationale for an employer's decision

² *Nelson Air v NZAPLA* [1994] ERNZ 665 at [669].

in a redundancy situation, or ulterior motives are alleged for the selection of a position and a worker for redundancy, the Authority's evaluation may consider whether the employer's decisions were made for genuine business reasons and "not used as a pretext for dismissing a disliked employee".³ The Authority must also consider whether the employer's process for making and carrying out that decision was fairly conducted. Fairness, in this context, includes meeting the statutory good faith obligations placed on an employer proposing to make a decision likely to have an adverse effect on the continuation of a person's employment. Workers likely to be affected should have access to information relevant to the continuation of their employment and an opportunity to comment on it before a decision is made. How much must be done to meet those obligations of fairness and good faith will vary to some degree with regard to the resources available to the particular employer.

[73] Where the evidence discloses the employer's motive for its decisions had mixed its business needs with underlying performance or personality concerns about the worker, the employer bears the burden of persuading the Authority that the predominant reason were the needs of the business. Any 'paper trail' generated at the time of making those changes may assist with identifying the motives for removing or changing job positions in the employer's workforce.⁴ If the predominant motive is found to be removal of "a disliked employee", the dismissal will be unjustified.

[74] I consider KNCC's dissatisfaction with Mr Hines was clearly the motivating factor for his dismissal. The only real paper trail is KNCC's letter of 15 March 2021 which outlines its other reasons for termination, which demonstrates KNCC's mixed motives for the dismissal. I am not satisfied Mr Hines' dismissal came about as a result of a genuine redundancy situation due to restructuring just a few weeks into his employment. KNCC employed Mr Kim a short time after Mr Hines commenced employment, and Mr Hines' responsibilities were distributed between Mr Justin Kim and KK. I reiterate here that no process was followed to raise the issue of redundancy with Mr Hines – indeed, the first he heard about it was in KNCC's letter confirming the termination of employment.

³ *Grace Team Accounting Ltd v Brake* [2014] NZCA 541 at [85].

⁴ See *Rillstone v Product Sourcing International 2000 Ltd* (ERA, Auckland AA167/07, 7 June 2007) at [34] and the cases cited.

[75] I further find the Chairman is a highly influential figure in KNCC's business. I am satisfied the Chairman had the power to direct workers onsite and the authority to employ and terminate their employment, which he did here. I also accept Mr Hines' keen focus on health and safety onsite, particularly as it pertained to the Chairman wearing PPE, was likely a motivating factor in the dismissal.

[76] Overall, I am not satisfied KNCC's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances. He has therefore established a personal grievance for unjustified dismissal.

In the alternative, did KNCC engage in adverse conduct in dismissing Mr Hines for a prohibited health and safety reason?

[77] Mr Hines submitted in the alternative that he has a personal grievance within the meaning of s 103(1)(j)(i) of the Act – on the basis KNCC terminated his employment for a prohibited health and safety reason. Mr Hines relies on the meaning of prohibited health and safety reason set out in s 89 of HSWA - that he raised an issue or concern about health and safety (the failure to wear PPE) with a person in control of the business or undertaking or another worker at KNCC. Given my finding Mr Hines' dismissal was unjustified, and this health and safety matter forms part of the factual matrix for that grievance, I do not make any findings under s 103(1)(j)(i).

Should remedies be awarded and are there issues of contribution?

[78] Mr Hines has a personal grievance for unjustified dismissal and is entitled to consideration of remedies.

Lost wages pursuant to section 123(1)(b) of the Act

[79] Mr Hines seeks reimbursement of lost wages as a result of his dismissal, pursuant to s 123(1)(b) of the Act. Mr Hines says he secured a position approximately six weeks after his employment ended with KNCC. He is claiming lost wages for the period following the expiry of what would have been his four week notice period, namely from 12 April 2021 to 20 April 2021 inclusive. I am satisfied Mr Hines mitigated his losses by finding employment at the time he did and is entitled to an award of lost wages for a period equivalent to 1.4 weeks.

[80] Mr Hines says he is entitled to KiwiSaver employer contribution payments KNCC should have paid on his earnings at 3 percent for the period 27 March 2021 to 20 April 2021. I accept he is entitled to those contributions. He is also entitled to be paid annual holiday pay at the rate of 8 percent on his gross earnings for that period. These are types of “other money lost” by Mr Hines as a direct result of his personal grievance, which he would otherwise have received. KNCC is ordered to pay these amounts as set out below.

[81] In making this finding, I am satisfied Mr Hines did not personally receive any income as the director and shareholder of his limited company during these times, which could have been set off against his financial losses.

[82] I note Mr Hines’ IRD earnings show that he received Ministry of Social Development (MSD) benefits between 31 March and 30 April 2021. He says this was relocation and job seeker help. He says his accountant noticed the payments had been received, and the payments were all paid back. I accept Mr Hines’ evidence on this point, but note in any event that the payment and/or return of such benefits was, or is, a matter between MSD and Mr Hines to reconcile.

Compensation pursuant to section 123(1)(c)(i) of the Act

[83] Mr Hines seeks \$25,000 compensation under s 123(1)(c)(i) of the Act as a fair and just award for injury to his feelings. Mr Hines says after being fired from his job he felt very down. He says he felt rejected and worried about what he was going to do next. It was difficult for him to sleep because he kept thinking about what had happened and why. He says he still does not understand why he was fired and does not believe it was for the reasons given to him. Mr Hines says he did not eat properly after the dismissal. He lives alone and before this happened he was sociable, but for at least two months he withdrew from friends and family because he felt ashamed and did not know what to say.

[84] Mr Hines is a mature man with 40 years’ experience in the building industry. He says he has never been dismissed from employment before. Mr Hines says he felt like he could not talk to the people close to him about what happened. When his daughter found out he had been fired, she queried why he had not told her. Mr Hines explained when you are his age you do not want to tell people you have just been sacked.

[85] I am satisfied Mr Hines has experienced the loss of dignity and injury to feelings claimed. Having regard to the particular circumstances of this case and other awards of compensation, I consider that an award of \$15,000 under s 123(1)(c)(i) of the Act is appropriate.

[86] Section 124 of the Act states that I must consider the extent to which, if any, Mr Hines' actions contributed to the situation giving rise to the personal grievance and then assess whether any remedy should be reduced. Having carefully considered the evidence, no aspect of what Mr Hines did or did not do was sufficiently blameworthy to require a reduction in remedies. Accordingly, no reduction in remedies is made.

Did KNCC breach s 4(1A)(c) of the Act?

[87] It is not clear to me how the claim for breach of s 4(1A)(c) of the Act is distinct from parts of the personal grievance claim for unjustified dismissal which is addressed above. This claim is dismissed.

Did KNCC breach its employment agreement with Mr Hines?

[88] I am satisfied KNCC breached clause 15.3 of its employment agreement with Mr Hines by unilaterally terminating his employment on two weeks' notice rather than the four week notice period agreed in his agreement.

Did KNCC make an unlawful deduction in relation to Mr Hines' notice period?

[89] Section 4 of the Wages Protection Act 1983 (the WPA) provides that an employer shall, when any wages become payable to a worker, pay the entire amount of those wages to that worker without deduction. Mr Hines did not give written consent or make a written request for the deduction to occur, and accordingly KNCC breached s 4 of the WPA by not paying Mr Hines his full four week notice period. While this claim was made pursuant to the WPA, I consider it is more accurately framed as an arrears claim under s 131 of the Act. I find there has been a default in payment of wages or other money payable, and accordingly award two weeks' wages relating to Mr Hines' notice period pursuant to s 131(1) of the Act.

Should any penalties be imposed?

[90] The primary purpose of a penalty is to punish wrongdoing and to act as a deterrent to further breaches by the relevant party and the deterrence of others with respect to obligations owed. Not all breaches will result in the imposition of a penalty and it is relevant to ascertain how much harm the breach has occasioned and how important it is to bring home to the party in default that such behaviour is unacceptable or to deter others from it.⁵

[91] In assessing this penalty I have had regard to the factors set down in s133A of the Act. Guidance over the application and balancing of relevant factors can be found in *Borsboom (Labour Inspector) v Preet PVT Limited*⁶ and further refinements have been subsequently made by the Court, including in *Nicholson v Ford*.⁷

[92] KNCC's breaches of the agreement and the WPA involve the same conduct. In light of this, I globalise the breaches to constitute one breach. Accordingly, the maximum penalty available against KNCC is \$20,000. Taking into account s 133A factors and guidance of the Court, I find it is appropriate to impose a \$3,000 penalty on KNCC. As Mr Hines was deprived of an entitlement as a result of the breach, I consider 50 per cent of the penalty should be paid to him pursuant to s 136 of the Act.

Should interest be awarded on wages relating to the notice period?

[93] Mr Hines is entitled to an award of interest on the two weeks' wages relating to his notice period as sought. The Authority has the power to award interest under clause 11 of the Second Schedule of the Act. Interest is to reimburse someone for the loss of use of monies to which there is an established entitlement. It is appropriate where a person has been deprived of the use of money to make an award for interest. KNCC is ordered to pay interest on the wages relating to the notice period, calculated from 27 March 2021 until the date payment is made in full.⁸ The civil debt interest calculator is to be used to calculate this interest.

⁵ *Xu v McIntosh* [2004] 2 ERNZ 448 at 464.

⁶ *Borsboom (Labour Inspector) v Preet PVT Limited* [2016] NZEmpC Christchurch 143.

⁷ *Nicholson v Ford* [2018] NZEmpC 132.

⁸ Mr Hines received his final pay on 18 March 2021, which paid him up until 26 March 2021. Interest is to be calculated from 27 March 2021.

What are my orders?

[94] Mr Hines has provided me with a schedule of loss identifying only net amounts relating to his financial losses. I identify below the calculations required to identify the gross amounts owing, with tax amounts to be taken into account thereafter by the parties. KNCC Limited is ordered to pay to Paul Hines the following within 21 days of the date of this determination:

- a. Lost wages at Mr Hines' gross annual salary (\$120,000 per annum) from 12 April 2021 to 20 April 2021 inclusive;
- b. Contributions to KiwiSaver at the rate of 3 percent of Mr Hines' gross annual salary from 27 March 2021 to 20 April 2021 inclusive;
- c. Annual holiday pay at the rate of 8 percent of Mr Hines' gross annual salary from 27 March 2021 to 20 April 2021 inclusive;
- d. Compensation of \$15,000 pursuant to s 123(1)(c)(i) of the Act;
- e. Two weeks' wages at his gross annual salary from 27 March 2021 to 11 April 2021 inclusive;
- f. Interest on the amount calculated at e. above, calculated from 27 March 2021 until the date payment is made in full.

[95] KNCC Limited is also ordered to pay a penalty of \$3,000 within 21 days of the date of this determination. Fifty percent of that penalty is to be paid into the Authority's bank account, to be forwarded to the Crown Bank Account, and the other 50 percent of which is to be paid to Mr Paul Hines.

Should either party contribute to the costs of representation of the other party?

[96] 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 a party may lodge, and then should serve, a memorandum on costs within 14 days of the date of this determination. From the date of service of that memorandum the other party would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[97] 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.⁹

Sarah Blick
Member of the Employment Relations Authority

⁹ For further information about the factors considered in assessing costs, see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.