

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2025] NZERA 790
3246139

BETWEEN OCO
 Applicant

AND ZUA
 Respondent

Member of Authority: Philip Cheyne

Representatives: Philippa Tucker and Emily Gunn, counsel for the Applicant
 Mark Hammond, counsel for the Respondent

Investigation Meeting: 13 & 14 May 2025 and 13 June 2025 in Christchurch

Submissions and
Information Received: 28 July 2025, 29 August 2025, 25 November 2025 and 1
 December 2025 from the applicant
 14 August 2025 and 26 November 2025 from the
 respondent

Date of Determination: 5 December 2025

DETERMINATION OF THE AUTHORITY

Non-publication

[1] There was an earlier non-publication order, initiated by the Authority. OCO now seeks non-publication of his name, his wife's name and all identifying details. ZUA does not oppose the order and asks that it extend to its name, as identifying it is likely to identify OCO.

[2] OCO does not object to non-publication of ZUA's name, for the reason advanced by ZUA's counsel.

[3] In support of the application, counsel refers me to several applicable authorities.¹ It is not necessary to repeat the principles. The evidence establishes that there is a reasonable expectation of adverse consequences for OCO and his family if details canvassed in evidence were published and he was identified.

[4] I prohibit the publication of the names and identifying details of the applicant, his wife and their children. I prohibit the publication of the name and identifying details of the respondent.

[5] I will refer to the applicant and the respondent by random three letter identifiers. I will refer to those involved in events by reference to their position, as naming them is likely to identify the respondent and/or the applicant.

Employment relationship problem

[6] OCO says he was constructively dismissed by and has a personal grievance against his former employer, ZUA. In a preliminary determination, the Authority granted leave to OCO to raise his personal grievance out of time.²

[7] ZUA says that OCO's employment ended when he resigned in November 2022. ZUA says that it did not constructively dismiss OCO and no grievance arises.

The Authority's Investigation

[8] The parties helpfully assembled a common bundle of documents. Other material was requested and provided.

[9] OCO, Mrs OCO (his wife), his community support worker and his social worker gave evidence and answered questions.

[10] Seven witnesses for ZUA gave evidence and answered questions. I will explain their involvement below as I deal with relevant events.

[11] In this determination, I will state relevant factual findings, state and explain relevant legal findings, and express conclusions on issues necessary to conclude the matter and set out any orders.

¹ *Erceg v Erceg* [2016] NZSC 135, *MW v Spiga* [2024] NZEmpC 147.

² *OCO v ZUA* [2024] NZERA 463.

[12] It is helpful to explain more about the context in which OCO resigned before considering whether he was constructively dismissed.

Context for the resignation

[13] ZUA employed OCO as a truck driver from late 2017.

[14] OCO suffered a work injury to his left shoulder in July 2020. OCO sought further medical assistance in November 2020, and was referred to and treated by an orthopaedic surgeon. By May 2021 OCO was referred back to the orthopaedic surgeon and underwent a surgical procedure. In October 2021 OCO suffered another left-shoulder work injury, following which he was seen by the surgeon, with further surgery in April 2022. There were further consultations and investigations.

[15] OCO also had a pain management programme and was seen by a pain management specialist. He was prescribed and took strong pain relief medications.

[16] After the initial injury, at various times OCO was certified as fully unfit for work, fit for light duties or fully fit for work. Medical certificates were provided by different doctors at different times. On several occasions, different doctors set different work restrictions for OCO.

[17] ZUA was part of ACC's accredited employer programme and was responsible for managing employee injuries and claims. ZUA's site manager and later its fleet manager (SM) had suggested that ZUA engage a doctor who would have first-hand knowledge of ZUA's work to better manage graduated return to work and restricted duties programmes. One of the doctors seen by OCO was the company GP.

[18] ZUA also engaged a consultancy firm to manage its injury claims. ZUA later contracted another firm (LMS) to assist with managing some of the long-term injury claims. From July 2022, LMS took over management of all ZUA's injury claims. SK was the LM Safety consultant who managed OCO's claim.

Differing medical certificates

[19] At different times after his initial injury OCO received medical certificates from doctors setting out work restrictions, which were then replaced by certificates from the company GP covering overlapping periods of time. OCO is critical about that.

[20] However, OCO has provided no expert medical evidence to back up his criticism and establish that the replacement certificates were anything other than professionally appropriate at the time they were issued. Further, there is nothing in the medical reviews sought by ACC as part of its claim management processes, and which have been produced in evidence, to support OCO's criticisms.

[21] It is not necessary to canvass OCO's criticisms in further detail. They add nothing materially to the issues before the Authority.

Some work issues

[22] OCO was injured at work in July 2020. OCO was required to use a jiffy to move product in a trailer. The trailer he was allocated had ridges in the deck. ZUA's evidence is that trailers develop uneven decks through use over time. OCO injured himself because of the force required to move the jiffy across ridges in the trailer deck.

[23] Following the initial accident, OCO experienced difficulties in performing assigned work. Occasionally, he raised concerns that the assigned work breached the limits set out in applicable medical certificates. While OCO's view is that ZUA did not always respond in a way that was consistent with the restrictions or his preferences, the evidence does not establish that OCO's recovery was negatively impacted by his performance of such tasks. None of those issues were raised as personal grievances at the time, so it is not necessary to canvass them all here.

[24] There is a dispute about whether trucks allocated to OCO had power steering. NM was ZUA's health and safety advisor for the South Island from 2022. She says that most of the fleet would not have had power steering. There is also other evidence that ZUA had an aging fleet. However, the Transport Manager at the time (AS) says that the truck mostly allocated to OCO had power steering, but it was stiffer than usual because it had a new steering box fitted. He also says that two other trucks shown as allocated to OCO also had power steering. I accept his evidence on that point.

[25] In February 2021, OCO complained to ZUA's senior managers about racist comments towards Indians working at ZUA from some other employees. ZUA responded promptly, convening a meeting of affected employees to apologise, denounce the behaviour and assure them that ZUA would respond to any complaints. There is evidence that ZUA also took action against employees involved.

[26] In November 2021, OCO was assigned work which involved him loading and unloading some heavy items. He saw the company GP and was prescribed medication.

[27] In early March 2022 OCO raised an issue with his occupational therapist (OT) that he was again having to wind legs up and down, a task which he said aggravated his discomfort. This had been raised earlier. The OT messaged both AS and the company GP. Assigning work in March 2022 and earlier that included that requirement, was not consistent with OCO's restricted duties. However, there is no evidence that this continued as a problem after March 2022.

[28] At some point in 2022, ZUA created the position of maintenance co-ordinator for OCO. To some extent it was office based, but the role still involved OCO driving work vehicles. OCO wanted to drive, but it was also convenient for ZUA for him to do so as part of his work.

[29] In early August 2022, OCO was driving a pool car around ZUA's yard. That prompted ZUA's Health and Safety Advisor (NM) to check with SK about whether ZUA could stop paying for a taxi to transport OCO to and from work each day. ZUA then stopped providing the taxis.

[30] In September 2022, OCO told the company GP that he was being abused at work and wanted to be away from work on ACC until he was able to drive again. The GP reported that to NM on 20 September and asked her to give him feedback on what was happening at work. OCO's evidence, which I accept, is that there were some discussions with him but no investigation by ZUA.

[31] At some point also, ZUA's managers became concerned about whether OCO should drive work cars while he was taking medication.

[32] The company GP wrote a letter dated 25 October 2022 to advise that OCO's current medication could cause sedation when first started, but once it was stable, sedation would diminish. The letter stated that OCO must not drive commercial or private vehicles if impaired, but could use a private vehicle if not sedated/impaired.

[33] SK told NM and ZUA's People Safety and Compliance Manager (KF) that she had spoken to the company GP. The GP told her that it was ZUA's prerogative to decline the use of its vehicles due to potential impairment and insurance issues, but OCO could drive his own vehicle if not impaired. Another manager (HR) expressed a preference for

OCO to be able to drive a car for work purposes, but said he would accept what was decided by others. KF then confirmed that OCO could not drive company vehicles.

[34] When that was relayed to OCO, he questioned why ZUA had cancelled his transport to/from work and he said he would use his own car if he needed to drive for work. On or about 28 October 2023, OCO was told that he could not drive for work, whether using his car or a ZUA's vehicle.

[35] OCO contacted the company GP who wrote a further letter on 2 November 2022, noting that OCO had told him he had decided to stop some of the medication to reduce the risk of sedation. However, the GP noted it was still up to ZUA to manage the risk regarding use of its vehicles.

OCO's complaint – being threatened by a driver – November 2022

[36] In the evening on Saturday 5 November 2022 in an email to ZUA's managers, OCO said he had had exchanges on two days during the past week with a driver about trailers the driver had damaged but blamed on others. OCO also said that a second driver had told him that the driver had threatened to set fire to the trailer allocated to the driver's run. OCO said he had reported that to ZUA's transport dispatcher at the time. OCO said he rang the second driver while a manager was present and asked the second driver to write down what he had told OCO. The second driver then apparently told the driver that OCO had reported the matter to a manager.

[37] In his email, OCO claimed that the driver was really upset and yelled at and threatened him later at the yard. Another employee intervened to stop the driver assaulting OCO. The same thing happened a short while later in the smoko-room. A little later, according to OCO, others helped him and the driver to shake hands and resolve the disagreement. Despite that, the next day the driver threatened to assault OCO. In his email to ZUA, OCO also said he had complained to the Police.

[38] ZUA took steps promptly to investigate OCO's complaint. The driver was suspended on Monday 7 November. NM was appointed to investigate the complaint. Over the following week or more, NM spoke to employees who had been identified in the complaint. Interviewees were reluctant for NM to share their responses with OCO.

[39] Meantime, on Sunday 6 November, OCO had a message exchange with a dispatcher in which OCO suggested assigning someone else to the driver's run. The dispatcher said that the instruction to replace the driver had to come from management.

[40] On Monday 7 November OCO had a chance encounter with NM. He expressed an intention to self-harm. It is not necessary to set out the details, but NM's responses were appropriate and supportive. OCO obtained medical assistance, in part with NM's assistance. In exchanges later that evening with NM, OCO updated her about that. They shared a view that his state of mind was probably caused by the pain medication.

OCO is suspended

[41] JS was ZUA's Stores and Compliance manager at the time. On the morning of Tuesday 8 November, he told OCO that he was suspended on the grounds that he was attempting to manipulate the investigation into his complaint. OCO became very agitated, referred to his work injury and threatened to sue ZUA. He also referred to prospective self-harm. JS's responses too were appropriate and supportive. JS also then escorted OCO off the site and took his access card off him.

[42] JS reported his interaction to KF and HR (ZUA's South Island Transport Manager) in an email.

[43] After being suspended, OCO contacted HR to ask if he could work from home. HR, who knew about the suspension, declined that request. Later on 8 November, OCO received a letter from HR confirming that he was suspended on pay as his continued presence at work would impede ZUA's instigation into his complaint.

[44] OCO also called SK that morning after being suspended. SK's evidence is that OCO threatened to contact the media and to set fire to himself and ZUA's office. SK reported that to ZUA (KF). SK also contacted the company's GP to report what OCO had said and later reported that conversation to KF. The GP contacted OCO. According to the GP's notes, OCO explained that he had said it in the heat of the moment.

[45] Interactions between OCO, his social worker and the GP resulted in a referral to and him being seen by a psychiatric service.

[46] By mid afternoon on 8 November 2022, ZUA knew from SK that the company GP's opinion was that OCO was not likely to go ahead with his threats of harm.

[47] On 10 November OCO provided ZUA with a written statement setting out details of his complaint about the driver. OCO was also interviewed by NM.

[48] On 11 November, SK reported to KF on her contact the day before with OCO. That contact had included SK talking to him about vocational independence.³ SK also mentioned that OCO seemed to be better, given the assistance and support that he was accessing.

[49] As noted above, NM continued with the investigation into OCO's complaint during his suspension.

Complaint investigation ends and disciplinary process starts

[50] On 18 November, NM messaged KF to say that she had found no evidence to support OCO's complaint, that she thought ZUA should reinstate the driver but might have to go through a different pathway with OCO. NM also thought that OCO's threat to set himself on fire outside the office putting ZUA into lockdown was enough to warrant dismissal.

[51] At some point, NM provided a draft investigation report to KF, who on 21 November returned her edited version of the report into OCO's complaint.

[52] OCO was not advised of the developments with ZUA's investigation into his complaint. However, on 20 November he found out that the driver was no longer on suspension.

[53] OCO sought an update from KF, HR and SK on 21 November. KF did not respond, HR said that KF would be in touch in the next few days and SK said that she had not heard from KF.

[54] In the messages with SK in the afternoon on 21 November, OCO finished by saying that he had been removed from official emails, that he thought the company had an excuse to get rid of him and that he knew he had lost his job.

³ Provided for by the Accident Compensation Act 2001.

[55] OCO received a letter from HR dated 21 November by email later that afternoon to his personal address. It advised that there was not sufficient evidence to sustain OCO's complaint and ZUA's investigation was now considered closed.

[56] In the letter, HR also raised disciplinary allegations against OCO. During the investigation, other employees claimed that OCO's behaviour had been erratic and that he had threatened them and their families with harm. ZUA said it was not prepared to disclose the identities of those employees but was required to act given the potential seriousness of the matter. Secondly, OCO had told SK that he would set himself and ZUA on fire. That caused the site to be placed in a lockdown for a day. The third matter was that the present alternative work arrangement was not sustainable permanently, that the company GP had confirmed that OCO would not be able to return to driving within a reasonable time and it was impossible for ZUA to create separation between OCO and other team members. HR said he was concerned that OCO may have breached ZUA's standards constituting serious misconduct. A possible outcome might be dismissal. A meeting was set for 23 November.

[57] OCO met with his social worker, and they spoke by phone with SK on 22 November. The social worker and OCO explained to SK that OCO had earlier told her that he would set himself on fire in front of the ZUA's building and everyone could see and the media would come, not that he would set himself and the ZUA's building on fire. SK maintained that OCO had told her that he would set himself and the ZUA's building on fire.

[58] In their evidence, OCO and the social worker say that SK then recommended that it would be better for OCO to resign from ZUA rather than be fired. The social worker's case note includes that account, but the note appears to have been written sometime later. In his personal grievance correspondence in June 2023, OCO said that he was encouraged to resign by SK who told him that if he resigned he would be less anxious and would be able to obtain another role shortly. OCO and the social worker also say that SK encouraged OCO to write a friendly resignation letter.

[59] SK agrees that they discussed OCO's options about returning to work but disputes that she said he would be fired, that she gave him employment advice or that she encouraged him to resign.

OCO resigns

[60] In the evening on Tuesday 22 November, OCO sent ZUA an email with his resignation. OCO expressed his appreciation for the help and support, saying that he was resigning due to his injury and not being able to get back to his driving role.

[61] There followed a phone discussion between HR and OCO. In the morning on 23 November 2022, OCO sent an email to HR (copied to SK) in which he confirmed the agreement between him and HR that his resignation would be effective immediately because he was unable to drive due to his injury.

[62] In his message to AS on the evening on 23 November 2022, OCO expressed his thanks to him for his help and support during his injury and described him as the best boss OCO had worked for in New Zealand.

[63] There was some later contact between OCO and ZUA as he continued to be paid by ZUA under the ACC accredited employer scheme until April 2023. The exchanges add nothing of relevance at present.

Was OCO dismissed by ZUA?*The Law*

[64] Dismissal includes situations where an employer gives an employee the option of resigning or being dismissed; an employer follows a course of conduct with the deliberate and dominant purpose of coercing the employee to resign; or a breach of duty by an employer leads an employee to resign.⁴

[65] In breach of duty cases, it is necessary to consider whether the resignation has been caused by a breach of duty on the part of the employer. The next question is whether the employer's breach of duty was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the prevailing conditions.⁵

⁴ *Auckland Shop Employees' IUOW v Woolworths (NZ) Ltd* [1985] 2 NZLR 372.

⁵ *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW* [1994] 2 NZLR 415.

[66] A constructive dismissal often involves a series of events over a period of time, the last of which is considered as the “final straw”. In *Spotless Facility Services NZ Ltd v Mackay*, the Employment Court set out relevant principles.⁶

[67] I must first consider whether ZUA breached duties owed to OCO immediately beforehand causing him to resign, and will consider earlier claimed breaches only if any proximate breaches are not sufficiently serious to make a resignation reasonably foreseeable.

The investigation into Mr OCO’s complaint

[68] ZUA was obliged to fairly investigate OCO’s complaint.

[69] There is a submission that the investigation was rushed and that NM should not have interviewed OCO on 10 November 2022, given his state at the time. However, through SK, NM sounded out OCO as to his ability to be interviewed. He willingly participated. ZUA’s investigation was timely, not rushed.

[70] There was CCTV footage without audio showing part of the exchanges that led to the complaint. NM viewed it, as did JS. ZUA did not provide an opportunity for OCO to see it and give his account of events alongside the footage. However, the footage was produced in evidence. Given the lack of audio, it provides little support for OCO’s account, except to confirm those present and the timing and sequence of exchanges on 3 November 2022. But those matters were never in dispute. Although ZUA should have shown it to OCO, there was no substantive unfairness caused by that omission.

[71] NM spoke to three staff members who witnessed aspects of the exchanges, none of whom were prepared to provide statements to be shared with OCO. Their accounts and the reasons why they refused to be named nonetheless informed NM’s view that the complaint should not be upheld. That is apparent from her 18 November 2022 message to KF, especially her comment that they may have to use a different pathway for OCO *to move him on*.

[72] The reason given in the 21 November 2022 advice to OCO - that there was not sufficient evidence to sustain his allegations - did not directly explain why ZUA had

⁶ *Spotless Facility Services NZ Ltd v Mackay* [2016] NZEmpC 153 at [72].

closed its investigation into his complaint. In reality, it was because NM accepted what she had been told by the other staff members.

[73] The explanation given was misleading and unfair to OCO.

Decision to suspend OCO – 8 November 2022

[74] JS's evidence was that he communicated the decision to suspend OCO, but the decision came from Human Resources and HR. He also said in evidence that he had not been involved before he was told to suspend OCO. KF's evidence was that she was not 100% sure it was her decision to suspend OCO and HR did not give any evidence.

[75] I accept JS's evidence, supported by his email to KF and HR shortly afterwards, about what he told OCO at the time. I also accept his evidence that it was not his decision. Although JS says that he first "proposed" suspension, that mischaracterises the situation. The decision to suspend had already been made by either KF or HR, so OCO had no opportunity to influence it.

[76] The second problem relates to the grounds given for the suspension. JS told OCO that the manipulation was him directing dispatch to reassign the run as the complained about driver would be gone by Monday. The messages relied on are now in evidence. They show that OCO accepted what he was told by dispatch about the run assignment. The messages could not reasonably have been read as OCO attempting to manipulate the investigation into his complaint. The purported manipulation was not even referred to in ZUA's 21 November 2022 letter ending its complaint investigation and starting the disciplinary investigation. I find that the messages provided no substantive ground for ZUA to suspend OCO while it investigated his complaint.

[77] ZUA's decision to suspend OCO and how it made that decision were not actions that a fair and reasonable employer could have taken at the circumstances at the time.

Decisions to close the complaint investigation and to initiate a disciplinary investigation – 21 November 2022

[78] As above, it was unfair to OCO to close the investigation into his complaint without properly explaining why.

[79] Turning to the decision to commence a disciplinary process, ZUA was entitled to raise its concern that OCO had told SK after he had been suspended that he would set himself and ZUA on fire. I accept ZUA's evidence that it locked down the site in response to the SK's report about OCO's statement. The details of what that involved are not relevant. ZUA was entitled to raise its concern, even though it knew the same day that OCO probably would not have acted on what he had said.

[80] OCO is adamant that he did not threaten to burn ZUA's property. He first challenged SK's account after he received the 21 November 2022 letter. However, on 8 November he had an exchange with the company GP about what SK had told the GP. Notes report him explaining the circumstances of his comment to the GP, not denying it. As at 21 November 2022, there were grounds on which a fair and reasonable employer could raise its concern based on SK's account.

[81] There were also grounds on which a fair and reasonable employer could raise its concern that OCO's inability to return to work as a driver in the foreseeable future prevented it from separating OCO from other employees.

[82] However, the allegation that OCO's behaviour had been erratic and that he had threatened direct harm to other employees and their family members was problematic.

[83] It has long been understood that a fair inquiry into serious allegations against an employee requires timely full and fair disclosure of material evidence, including generally the identity of the complainants.⁷ The statutory good faith obligation reinforces the importance of full disclosure.⁸

[84] ZUA said its disciplinary concerns arose during its investigation into OCO's complaint, but also declared that it would not disclose the identities of the complainant employees or details that may identify them. Nor did ZUA specify the alleged comments and behaviour of concern, despite saying it was required to act given their potential seriousness.

[85] ZUA's decision to proceed in this way was a significant breach of obligation owed by ZUA to OCO.

⁷ *Porter v Board of Trustees of Westlake Girls' High School* [1998] 1 ERNZ 377.

⁸ Employment Relations Act 2000 s 4(1A)(c).

Disputed exchange with SK – 22 November

[86] With no substantive update from KF and HR about his complaint by 21 November, OCO also messaged SK to ask if she had heard anything. She said she had not. Later that afternoon, he told SK that the other driver was already back at work, that he had been removed from group emails, that he knew the company had an excuse to get rid of him because of his shoulder and that he knew he had lost his job.

[87] On the group emails point, there is information from ZUA's lead technician saying that they would not have disabled OCO's user account before the request came through. What has not been explained is why the ticket was created with "Last Day: Mon 21 Nov, 2022 17:00", when OCO did not resign until late the following evening.

[88] The technician's information is not sufficient reason to reject OCO's evidence, so I accept that he found his email access was restricted. But that alone would not amount to a breach of duty owed to him by ZUA.

[89] OCO received the 21 November letter at 5.46 pm that day, having earlier had a phone discussion with HR. The letter, if not the earlier call from HR, alerted him to ZUA's disciplinary concerns, including about what he had said to SK on 8 November.

[90] As previously scheduled, OCO met his social worker on 22 November and there was a phone discussion between them and SK then. As noted above, there is a dispute in evidence between OCO and the social worker on the one hand and SK on the other hand about the content of their discussion.

[91] On 11 November, SK told KF that everyone had been talking to OCO about the possibility of him looking for work elsewhere, that she would continue to explore that and that she would get an occupational assessment. However, all that was properly within the role of an ACC claims manager under that Act. That aside, there is no evidence that SK shared NM's view that ZUA might need to go through a different pathway to move OCO on.

[92] Returning to the disputed evidence, it is likely that SK would have been cautious not to give advice on matters outside of her ACC claims management role.

[93] In summary, OCO and the social worker disputed SK's recollection of his 8 November comments, while SK maintained her recollection was correct. SK would not

have told OCO that he would be fired. It is unlikely that she recommended that OCO should resign, telling him it would be better for ACC compensation purposes. Resignation or dismissal would not have affected OCO's right to ACC entitlements and SK knew that. However, SK would have been supportive of OCO's intention to resign and is likely to have encouraged him to communicate it in a positive way.

What caused OCO's resignation?

[94] The circumstances of OCO's resignation included the unfair way in which ZUA decided to suspend him, the lack of proper grounds to do so, the unfair way in which ZUA concluded its investigation into his complaint and ZUA's decision to conduct a disciplinary investigation into alleged serious misconduct but not identify the complainants or detail the allegations.

[95] It is clear from JS's description of OCO's reaction when he was suspended that he was aggrieved about the suspension. OCO's unanswered messages to others on 21 November and then to SK when he knew that the other driver had returned to work, showed that he was still aggrieved. I accept the social worker's evidence that OCO presented as very distressed on 22 November.

[96] Although OCO's resignation email in the evening on 22 November only referred to his injury, him not being able to get back to his driving role and his uncertain prognosis for full recovery, I find that the circumstances referred to above were material factors in his decision to resign.

[97] I further find that the breaches were of sufficient seriousness to make it reasonably foreseeable by the employer that a resignation might result. It is not necessary therefore to further canvass the historical matters also relied on by OCO.

[98] I find that OCO was constructively dismissed.

[99] ZUA has not shown that its actions and the way it acted resulting in the constructive dismissal were the actions of a fair and reasonable employer at the time. OCO has a personal grievance as a result.

Personal grievance remedies

[100] There are claims for reimbursement of wages and other money lost as a result of the dismissal to together with compensation.

Reimbursement

[101] Under s 128(1) of the Employment Relations Act 2000, I must order ZUA to pay OCO the lesser of a sum equal to the lost remuneration or to 3 months' ordinary time remuneration. Under s 128(2) I have a discretion to order ZUA to pay a greater sum in reimbursement for lost remuneration that required under s 128(1).

[102] Reviewing the payslips in evidence, over the approximately three months before the termination of the employment, OCO ordinarily received \$3,296.94 each fortnight. That included payments for hours worked, allowances paid for those hours and an ACC top-up. His ordinary hours of work were less than previously because his injury prevented him driving. But that had been the case for a considerable time and there is no evidence that OCO could have resumed driving, including the associated heavy physical tasks. \$3,296.94 fortnightly must be regarded as his ordinary time remuneration for assessing remedies.

[103] Following the termination, OCO usually received \$2,637.56 in ACC earnings related compensation paid by ZUA under the accredited employer scheme. OCO therefore lost wages of \$659.38 per fortnight as a result of the termination of his employment. The evidence covers through to 31 March 2023, or 18 fortnightly pay periods. The loss over that time was \$11,868.84.

[104] There is no direct evidence to show lost remuneration from 1 April 2023, although presumably OCO received earnings related compensation paid directly from ACC when ZUA no longer managed his claim.

[105] Another factor should be mentioned. There is evidence of significant mental health events in late December 2022, May 2023 and June 2023. Collectively, the events could have affected OCO's continuing ability to earn remuneration from employment. On balance, it is appropriate to limit the period of loss attributable to the personal grievance to 31 March 2023 on the evidence available, given this other factor.

Compensation

[106] OCO submits that a fair and just award would be \$60,000.00. I am referred to *Richora Group Limited v Cheng* in support.⁹

[107] The personal grievance properly before the Authority is OCO's constructive dismissal. Compensation can only be ordered for harm shown to have resulted from that grievance.

[108] OCO's situation is complex. Significant stressors pre-dated the employment and continued to operate afterwards. Compensation for the personal grievance cannot be based on those matters.

[109] During the employment there were some significant mental health events, but they cannot be advanced in support of the claim for compensation for harm caused by the termination of the employment. Compensation can only be based on harm that resulted from the established personal grievance.

[110] To a material degree, the emotional harm relied on by OCO in support of his claim for compensation resulted from the work injuries he suffered and the treatment including pain relief to treat those injuries. The Authority cannot award compensation in personal grievance proceedings for damages arising directly or indirectly out of personal injury covered by the Accident Compensation Act 2001.¹⁰ Compensation under s 123(1)(c) of the Employment Relations Act 2000 is available for the harm caused by the dismissal, but only to the extent that it is not for damages arising directly or indirectly from personal injury covered by the Accident Compensation Act 2001.

[111] There is evidence about harm experienced by OCO following the termination, and I note my earlier finding that the termination contributed materially to that harm, but was not its sole cause.¹¹

[112] I accept OCO's evidence that he was absolutely traumatised, losing his job. It caused or at least contributed to a separation for a time. OCO is very upset that he cannot support his family, there is considerable financial stress and he is upset that he cannot afford to travel to see his parents. The evidence of OCO's support worker and his social

⁹ *Richora Group Limited v Cheng* [2018] NZEmpC 113.

¹⁰ Accident Compensation Act 2001 s 317.

¹¹ *OCO v ZUA* [2024] NZERA 463 at [57].

worker corroborate OCO's evidence as to the harm caused by the termination of his employment. I accept the evidence of OCO's wife that it was devastating after he resigned, that it caused a lot of financial pressure and that OCO cannot cope with feeling ashamed, depressed and upset.

[113] In summary, the emotional harm suffered properly attributable to the personal grievance is significant. I place it into the upper range of the middle band of cases.¹² An award of \$30,000.00 is required to remedy the proven harm.

[114] It was not suggested that OCO contributed in a blameworthy manner to the circumstances giving rise to his personal grievance.

Summary

[115] OCO was constructively dismissed and ZUA did not justify the dismissal. OCO has a personal grievance against ZUA.

[116] To settle the personal grievance, within 28 days of this determination, ZUA must pay OCO the following amounts:

- (a) \$11,868.84 (gross) reimbursement pursuant to s 123(1)(b) of the Employment Relations Act 2000.
- (b) \$30,000.00 compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000.

[117] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If the parties are not able to resolve costs, and an Authority determination on costs is needed, the party who believes they are entitled to costs may lodge, and then should serve, a memorandum within 28 days of the date of this determination. The other party will then have 14 days to lodge a reply.

Philip Cheyne

Member of the Employment Relations Authority

¹² *GF v Comptroller of the New Zealand Customs Service* [2023] NZEmpC 101