

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 242
3163942

BETWEEN CHUN KIT SZE
Applicant

AND KNCC LIMITED
Respondent

Member of Authority: Rachel Larmer

Representatives: Simon Greening and Erin Drew counsel for the
Applicant
Hiruni Wijewardhana and Melissa Johnston counsel for
the Respondent

Investigation Meeting: 22 February 2023 at Auckland

Submissions Received: 3 March 2023 from the Applicant
13 March 2023 from the Respondent

Date of Determination: 15 May 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

Applicant's claims

[1] Mr Chun Kit Sze claimed that he was unjustifiably dismissed by KNCC Limited (KNCC) on 23 July 2021. Mr Sze also claimed that KNCC breached his employment agreement by failing to give him four weeks notice and that he was owed wage arrears because KNCC did not pay him from 24 June 2021 to 9 July 2021. Mr Sze sought interest on his wage arrears.

Penalty claims

[2] In his Statement of Problem Mr Sze asked that penalties be imposed on KNCC for its breach of his employment agreement (failure to give him notice or pay in lieu) and for its breach of its good faith obligations to him.

[3] During the Authority's investigation meeting Mr Sze advised that he did not wish to pursue his claims for penalties under s 134 (breach of an employment agreement) or s 4A (breach of good faith) of the Employment Relations Act 2000 (the Act).

[4] However, in his submissions Mr Sze said that a penalty should be imposed on KNCC under s 134A of the Act, for obstructing and delaying the Authority's investigation, because KNCC failed to attend the case management conference or the investigation meeting.

KNCC's response

[5] KNCC denied that Mr Sze had been dismissed and said he had resigned by agreement. KNCC said it had paid Mr Sze correctly, so he was not owed any wage arrears. KNCC denied that Mr Sze was owed unpaid notice, because it said the parties had agreed to treat 24 June 2021 as his date of resignation. KNCC therefore claimed that Mr Sze worked out his notice period and was paid up until 22 July 2021, which was his last day of work.

[6] KNCC said that because Mr Sze had worked for less than six months, he did not have any paid sick leave or paid annual holiday entitlement accrued to him to use for his absence from 24 June to 9 July 2021, so he was not entitled to be paid for that period. KNCC therefore said Mr Sze cannot have been owed any wage arrears for this period, as his sick leave absence was unpaid leave.

The parties

[7] KNCC provides construction services. Mr Sze was employed by KNCC as "*Assistant Site Manager*". Mr Sze had an individual employment agreement that said he was a permanent, full time employee. His hours of work were 50 hours per week (being 10 hours per day, 7.30 am to 5.30 pm Mondays to Fridays). Mr Sze's employment agreement specified a four week notice period.

[8] Mr Sze was based at KNCC's head office in Newmarket, or he could be required to work on any of KNCC's work sites. During Mr Sze's employment KNCC had three sites in

Auckland (in addition to the Head Office, which was located next to the Newmarket site). Mr Sze worked at both the Newmarket and Cook Street sites, with him attending the Cook Street site about once a week.

Medical leave

[9] Mr Sze was away from work from 24 June 2021 to 9 July 2021 so he could have an operation. He requested annual leave on 15 June 2021 in an email he sent to Eugene McLaren (who was described in his email footer as the “*Office Manager/Administration/Human Resources/Project Administration*”). This email was also copied to Mr Sze’s manager Justin Kim, who was the Site Manager, and to Teyong Kim.

[10] Mr Sze said he had obtained a verbal agreement to use his sick leave and annual leave in advance of his entitlements, in order to cover his medical related absence. Mr Sze told the Authority that he was given verbal permission from Mr McLaren and Mr Kim, and that he was also told that the leave in advance arrangement had been approved by KNCC’s Chairman, Alex Hu Mahit, who Mr Sze understood was also the father of KNCC’s sole Director Jin Woo Heo.

[11] That evidence was supported by Mr Sze’s email sent to Mr McLaren on 12 July 2021, which stated that Mr Kim had approved Mr Sze’s leave, and that he could use sick leave and annual leave in advance.

12 July meeting

[12] When Mr Sze returned to work on 12 July 2021 he was called to a meeting with Mr McLaren and Mr Kim. They told Mr Sze that the construction site he had been working on had been closed by Auckland Council, so “*there was no more work*” for him to do. There was some discussion about Mr Sze being moved to the Cook Street site, but no information about that was provided to him.

[13] Later the same day, Mr Sze emailed Mr McLaren asking for clarification about the status of his employment. Mr Sze also pointed out that regardless of whether the construction site was operating or not, he was still entitled to receive his normal salary. However, KNCC failed to provide Mr Sze with any work after 12 July 2021, although he remained ready, willing and available to work. Mr Sze informed the Authority that he had been told the Chairman, Mr Mahit, wanted him to leave KNCC.

No work provided

[14] Mr Sze's numerous attempts (via text and phone calls) to contact Mr McLaren over the period 12 to 16 July 2021 were unsuccessful. Although Mr Sze and Mr McLaren spoke briefly on the phone on 16 July 2021, during which Mr Sze asked that he be redeployed to KNCC's Cook Street site, Mr McLaren told him that approval for that was required from Mr Mahit.

[15] Mr Sze noted in his email to Mr McLaren on 12 July 2021, which was copied to Justin Kim, that he (Mr Sze) was a permanent full time employee, so he was entitled to be paid regardless of whether the construction site was operating or not. However, Mr Sze indicated a willingness to negotiate with KNCC about a termination package/plan, given that the Chairman apparently wanted Mr Sze to leave KNCC.

Offer to resign

[16] On 19 July 2021, Mr Sze had got to the point where he was confused and stressed about his employment situation. He had not heard back from Mr McLaren, so he texted asking for an update on possible re-deployment. Mr McLaren said he had not got approval for that from the Chairman.

[17] Mr Sze was under considerable financial pressure at this time, and needed clarity about his employment situation. Mr Sze asked Mr McLaren in a text sent at 5.11 pm on 19 July 2021 if he (Mr McLaren) could help Mr Sze get paid his June/July salary. Mr Sze said that if that occurred then he would be happy to hand in his resignation, without taking "*legal actions*".

[18] Three minutes later Mr McLaren emailed Mr Sze a resignation form, without any explanation or other information.

[19] Mr Sze responded to the email two minutes later by saying: "*I will not sign this till (sic) I get confirmation of your proposal in written form.*"

Emailed payslips

[20] Mr Sze did not hear anything further, until he was emailed two pay slips from KNCC on 20 July 2021, one of which included his final pay.

[21] The first payslip was for the period 21 June to 20 July 2021 and the second payslip was for the period 20 July 2021-23 July 2021, which was described as his final pay. This included an 8% pay for holiday pay and his salary paid up until 22 July 2021.

[22] Mr Sze says he was shocked to receive a final payslip. He had not reached an agreement around his resignation, because he had not received a written proposal nor had he provided a written resignation. KNCC processed Mr Sze's final pay without any consultation with him.

[23] Mr Sze texted Mr McLaren the same day saying "*I've just received two payslips from KNCC and will you be able to tell me what it is?*" No response was received, so Mr Sze texted Mr McLaren again on 21 July 2021 querying the payslips and requesting payment for his four week notice period. Again there was no response.

[24] Mr Sze emailed Mr McLaren on 28 July 2021 asking whether his employment had been terminated or if he had been made redundant. No response was received to these messages. The last communication Mr Sze received from KNCC were the two payslips that were emailed to him on 20 July 2021.

The Authority's investigation

[25] Mr Sze's Statement of Problem was served on KNCC on 21 February 2022. The Statement in Reply was therefore due by 7 March 2022. On 4 March 2022, KNCC asked for a one week extension within which to file its Statement in Reply. That request was granted, and its Statement in Reply was lodged on 14 March 2022.

[26] A case management conference (CMC) was held on 21 July 2022. KNCC was expected to attend, but did not do so. The Authority in a letter dated 22 June 2022, advised KNCC that if it was unable to be reached or chose not to take part in the CMC, then it would still proceed anyway, in KNCC's absence.

[27] The CMC was scheduled around KNCC's then counsel's stated availability, but due to technical problems the CMC could not proceed as scheduled on 21 July 2022. It was therefore rescheduled by agreement with the parties to 2.00 pm on 8 August 2022, which was a time and date that Mr McLaren (who would be attending on behalf of KNCC) had said suited KNCC.

[28] Mr McLaren provided the Authority with his mobile number so he could attend the CMC on KNCC's behalf on 8 August 2022. The Authority made a number of repeat calls to

Mr McLaren's mobile number, none of which were answered. The Authority Officer left two voicemails on Mr McLaren's mobile phone number, but no reply was received.

[29] The Authority also attempted to call the other mobile phone number it had on file for KNCC, without success. The Authority also Googled KNCC and phoned the phone number it located as a result of that Google search. There was also no answer to this call.

[30] None of these efforts resulted in contact being made with KNCC, so the CMC proceeded in KNCC's absence, in accordance with the advice provided in the Authority's letter to the parties dated 22 June 2022.

[31] During the CMC the Authority Officer received an email from Elden Baek, General Director of KNCC, that said he had been waiting for the call from the Authority but he did not think the connection had been properly made. Mr Baek asked to be called on his mobile number.

[32] The Authority did not see this message until after the CMC had been completed. It emailed the parties after the CMC had been held to advise that multiple attempts had been made to contact KNCC, without success. The Authority pointed out that it was up to the parties to make themselves available to take the CMC call at the required time.

[33] The Authority confirmed that the matter had been set down for an investigation meeting, that timetable directions for the parties to file their evidence had been made, and that written directions would be sent to the parties. KNCC was also invited to raise any queries it may have, after it had reviewed the Authority's directions.

[34] The timetable directions were issued to the parties on 9 August 2022. The directions recorded the steps the Authority had taken to engage with KNCC for the purposes of the CMC. KNCC was asked to contact the Authority Officer if it had issues with the timetable, if it was unsure about what it had to do in order to participate in the Authority's investigation, or if it had any questions about the Authority's investigation process. KNCC did not do so.

[35] During the CMC the Authority set the investigation meeting down for 11 January 2023, as recorded in the directions that were sent to the parties on 9 August 2022, and in the first notice of investigation meeting that was sent to the parties.

[36] On 17 November 2022, Mr Baek asked the Authority to communicate with Mr McLaren and Alex Jung about this matter, and he provided their contact details to the Authority.

[37] On 9 January 2023, after prompting from the Authority to confirm who would be attending the investigation meeting, KNCC advised that Mr McLaren, who was KNCC's only witness and who had filed a witness statement on 5 September 2022, would be "*leaving soon*". KNCC said that it did not have a legal representative and it would not be able to attend the investigation meeting on 11 January. It asked to have the investigation meeting rescheduled, so it could attend. Mr Sze opposed that request.

[38] However, the investigation meeting was rescheduled, although that occurred for Authority related reasons, to 22 February 2023, which was a date KNCC had said it could attend. It also asked for a Korean interpreter to be provided, and the Authority arranged for that to occur. On 3 February 2023 KNCC emailed the Authority to advise that Jinwoo Heo and Kyoungwan Lee would be attending the investigation meeting on its behalf.

[39] Mr Sze's counsel noted that Mr McLaren had not been included in the list of attendees. He pointed out that the only witness statement KNCC had filed was for Mr McLaren, and that all material communications between the parties took place between Mr Sze and Mr McLaren.

[40] On 20 February 2023 the Authority advised KNCC that Mr McLaren was required to attend the investigation meeting in person. The Authority emailed the parties to that effect and had the Authority Officer phone KNCC to ensure that they were aware of that requirement. The Authority officer spoke to Peter Lee who confirmed that KNCC was aware of the need for Mr McLaren to attend the investigation meeting on 22 February 2023 in person. Mr Lee said he would speak to Mr McLaren about that.

[41] An email was also sent directly to Mr McLaren at his KNCC email address (which he had been using to communicate with the Authority about this matter) to confirm that he was required to attend the investigation meeting in person on 22 February 2023.

[42] Mr Sze attended the in person investigation meeting at 10.00 am on 22 February 2023 in Auckland. A Korean Interpreter was also present. However, KNCC did not appear. The start time of the investigation meeting (IM) was delayed for half an hour while the Authority Officer attempted to contact KNCC to find out why it had not attended the IM.

[43] The Authority Officer spoke to Peter Lee, who said KNCC's lawyer had emailed the Authority on 21 February 2023 to say that KNCC would not be attending the investigation meeting. No email was received by the Authority.

[44] Mr Sze's counsel said they had received an email from KNCC's counsel the previous day. This was sent by Melissa Johnston, who advised that her firm had just been instructed and that Mr McLaren would not be attending the investigation meeting. KNCC asked to be given time to file written submissions. This email was addressed to the Authority and copied to Mr Sze's counsel.

[45] The investigation meeting proceeded in KNCC's absence in accordance with s 173(2) of the Act. KNCC had received a copy of Mr Sze's evidence in advance of the IM. The Authority used the information filed by KNCC to question Mr Sze about his claims and the evidence he had provided in support of that.

[46] The parties were given an opportunity to provide written submissions after the investigation meeting. Both parties did so.

Issues

[47] The following issues are to be determined:

- (a) Credibility findings and findings on the material conflicts in the evidence;
- (b) Is Mr Sze owed wage arrears?
- (c) If so, what is he owed?
- (d) Should interest be awarded on any wage arrears?
- (e) Was Mr Sze dismissed?
- (f) If so, was his dismissal justified?
- (g) If not, what remedies should he be awarded?
- (h) Did KNCC breach the notice of provisions in Mr Sze's employment agreement?
- (i) If so, what if any damages should Mr Sze be awarded?
- (j) Did KNCC obstruct and delay the Authority's investigation?

- (k) If so, should a penalty be imposed under s 134A of the Employment Relations Act 2000 (“the Act”)?
- (l) What costs should be awarded?

Credibility findings and findings on the material conflicts in the evidence

[48] Mr Sze attended the Authority’s investigation and was questioned by the Authority about his evidence. KNCC did not attend the investigation meeting, nor did its witness Mr McLaren. The witness statement provided by Mr McLaren was therefore unsworn/unaffirmed evidence, which contrasted with Mr Sze’s affirmed evidence. KNCC later attempted to give evidence via its submissions.

[49] The Authority finds that Mr Sze was the more credible witness, because he presented himself for questioning under affirmation. Where there are conflicts in the evidence, then his version of events has been preferred.

Is Mr Sze owed wage arrears?

Remuneration

[50] Mr Sze was contractually entitled to be paid 50 hours per week, at the rate of \$25 per hour, direct credit into his bank account. Mr Sze was paid correctly from the beginning of his employment until 21 June 2021.

Medical leave

[51] Mr Sze took leave for an operation from 24 June 2021 to 9 July 2021, returning to work on 12 July 2021 and said he had not been paid for that period. However, KNCC said it paid him two extra days’ wages, that he was not entitled to. Mr Sze acknowledged that because he had worked for less than six months, his statutory entitlement to sick leave and paid annual holiday had not yet crystallised. The Authority did not award Mr Sze wage arrears for the other ten days he said he should have been paid because he would have had to prepay this advance annual leave when his employment ended.

Advance sick and annual leave

[52] The Authority accepted Mr Sze’s evidence, as this was uncontradicted by any other witness who attended the investigation meeting, that he had been given permission to take two days (20 hours) sick leave in advance and ten days (100 hours) of his annual leave entitlement,

in advance. His evidence about that was corroborated by the email Mr Sze sent Mr McLaren on 12 July 2021.

[53] At that time, Mr Sze had previously used three days in advance of his paid sick leave entitlement, which is why the verbal agreement was for him to use two days only (and not five days) advance sick leave. However, because Mr Sze was dismissed on 23 July 2021, his paid sick leave and annual holiday entitlements did not crystallise. He was paid 8 percent of his total gross earnings as his holiday pay in his final pay when his employment ended.

[54] The Authority considered it likely that although Mr Sze was permitted to use his sick and annual holiday entitlements in advance, he would have been required to repay them when his employment ended. That view was supported by Mr Sze's attempt to negotiate an agreed exit under which he would be paid for the days he been away from work, due to his operation.

[55] Mr Sze's medical leave amounted to 12 days (120 hours, consisting of 20 hours sick leave and 100 hours of annual leave). He was paid two extra days in his final pay. That meant that Mr Sze's wage arrears claim for that period related to 10 days (100 hours) of paid annual holiday that he wanted to take in advance.

[56] However, because Mr Sze did not have 10 days paid annual holiday accrued to him by the time his employment ended, this claim did not succeed.

Work done from 21 to 23 June 2021

[57] Before taking his medical leave Mr Sze worked as normal on 21, 22 and 23 June 2021. He was therefore entitled to be paid 30 hours for that period. On 12 July 2021, Mr Sze worked for approximately four hours before being told to leave work because there was no work for him to perform.

[58] At the time that he was sent home Mr Sze was ready, willing and available to work his usual 10 hour day, so he should have been paid as normal on 12 July 2021.

No work, or wages, from 13 to 23 July 2021

[59] From 13 July 2021 to 23 July 2021, Mr Sze remained ready, willing and able to work. He made a number of attempts to engage with KNCC regarding work that he could do, but it did not respond. This period from 13 to 23 July involved nine workdays, so Mr Sze is entitled to be paid 90 working hours for that period.

Payslips

[60] There were no explanation provided by KNCC before it simply emailed Mr Sze two payslips on 23 July 2022, one of which was stated to be a final payslip.

[61] In terms of the two pay slips that KNCC emailed to Mr Sze on 23 July 2021:

- (a) For the period 21 June to 20 July 2021 (which covered 13 days of work, or 116.67 hours) he was paid \$2,956.67 gross, which included \$40 for “*mobile support*”. That meant his wages for that period was \$2,916.67 gross.
- (b) For the period 21 July to 23 July 2021, Mr Sze was paid for 18 hours, so received \$450 gross for hours worked over that period. He was also paid 8% holiday pay amounting to \$2,285.07. That meant that his total gross earnings recorded in his final payslip was \$2,735.07, inclusive of his annual holiday entitlements.
- (c) His annual holiday pay entitlement of \$2,285.07 was based on 8% of his year to date accumulated pay of \$28,563.35.

Finding – wage arrears claim

[62] Mr Sze is owed wage arrears for work he did, but was not paid for, and for days he was available to work but KNCC failed to provide him with work to do.

What is Mr Sze owed?

[63] Mr Sze is owed wage arrears of \$2,583.25 gross, being the 103.33 hours he was not paid for, at the gross hourly rate of \$25 per hour, for the pay period 21 June 2021 to 20 July 2021.

[64] Mr Sze is also owed \$300 gross, being 12 hours pay at the rate of \$25 per hour for the period 20 July 2021 to 23 July 2021.

[65] Mr Sze is owed annual holiday pay on his wage arrears of \$230.66, being 8% of the \$2,883.25 wage arrears he was owed.

[66] Mr Sze is therefore owed total wage arrears of \$3,113.91. KNCC is ordered to pay Mr Sze that amount within 28 days of the date of this determination.

Should Mr Sze be awarded interest on his wage arrears?

[67] The Authority has the discretion to award interest in accordance with clause 11 of Schedule 2 of the Act. KNCC has deprived Mr Sze of the use of his own wages, putting him in a precarious financial situation, which has caused him considerable stress and financial pressure.

[68] Accordingly, Mr Sze is awarded interest on his total wage arrears of \$3113.91 gross to be calculated in accordance with the Interest on Money Claims Act 2016, using the civil debt calculator on the Ministry of Justice website. Interest is to run from 23 July 2022 until the amount of wage arrears has been paid to Mr Sze in full.

Was Mr Sze dismissed?

[69] KNCC claimed Mr Sze's employment ended by agreement, with an agreed resignation date of 24 June 2022, while Mr Sze said he was summarily dismissed.

[70] A free and voluntary resignation is not a dismissal. However, a resignation that occurs at the initiative of the employer may amount to a dismissal if it effectively involved a 'sending away' of the employee by the employer.

[71] Mr Sze demonstrated that he wanted to work. He emailed KNCC on 12 July 2021 stating that the closure of the Newmarket site "*does not justify the reason for me to leave as requested by the Chairman*". Mr Sze followed up with Mr McLaren via text on 12 July, 14 July and 15 July seeking a response to his email above, but got no reply.

[72] Mr Sze also emailed Mr McLaren on 28 July 2021 asking for confirmation of his "*current employment status with KNCC Limited*" and of whether "*KNCC had terminated [his] employment agreement or had made [him] redundant*". KNCC failed to respond to any of Mr Sze's communications.

[73] The initiative for the ending of the employment relationship came from KNCC. It failed to pay Mr Sze while he was on medical leave, despite a verbal agreement to do so. It told him the worksite he worked at had been closed.

[74] KNCC sent Mr Sze home at 11am on 12 July 2021, after he had worked less than half a day. It failed to give him any more work after that. KNCC did not pay Mr Sze, even though he was ready and willing to attend work. It did not respond to his queries about his employment

situation. Instead it simply processed Mr Sze's final pay and sent him a final payslip on 23 July 2021, without any consultation with him.

[75] These actions were inconsistent with an intention to maintain an employment relationship and effectively amounted to a 'sending away' of Mr Sze.

[76] KNCC said it had not embarked on a redundancy process, so there was insufficient evidence to establish that Mr Sze had been made redundant. Mr Sze told the Authority that there was work available for him on other KNCC sites, and there was no witness from KNCC who contradicted that.

[77] KNCC's claim that Mr Sze had resigned in the 19 July 2021 text he sent Mr McLaren did not succeed. The text said:

Is there a way where you can try and help me negotiate getting the June-July salary paid to me? If you can get that for me I am happy to hand my resignation in without taking any legal actions.

[78] This text was not a resignation. Nor did the text say he wanted to backdate a resignation to 24 June 2021, as KNCC alleged.

[79] The parties did not reach agreement regarding an agreed termination of Mr Sze's employment. Although Mr Sze had attempted to engage with KNCC, in order to negotiate a termination package, he had only indicated a willingness to have that conversation. The parties did not reach an agreed outcome, because there was no offer and acceptance or accord and satisfaction.

[80] Mr McLaren sent Mr Sze a resignation form that he did not sign or return. Mr Sze emailed Mr McLaren saying that he (Mr Sze) would not be signing the resignation form until KNCC had put an exit proposal in writing for him to consider. That did not occur. Also, the terms that Mr Sze had indicated he would be prepared to resign on (namely payment of his wage arrears for June and July) had not been met.

[81] It was therefore clear that, although the parties had communicated about the possibility of an agreed exit, there had not been a meeting of the minds by the time that KNCC unilaterally emailed Mr Sze his final payslip. Mr Sze did not resign.

[82] KNCC dismissed Mr Sze when it processed his final pay and emailed him his final payslip on 23 July 2022.

Was Mr Sze's dismissal justified?

[83] Justification is to be objectively assessed in accordance with the justification test in s 103A of the Act. This required the Authority to objectively assess whether KNCC's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time Mr Sze was dismissed.¹

[84] A fair and reasonable employer is expected to comply with its contractual and statutory obligations. These include the good faith requirements in s 4(1A)(c) of the Act and the minimum procedural fairness requirements in s 103A(3) of the Act.

[85] Section 4(1A)(c) of the Act required KNCC to give Mr Sze access to relevant information and an opportunity to comment on it before he was dismissed. That did not occur. KNCC also failed to meet any of the minimum requirements of the four procedural fairness tests in s 103A(3) of the Act. These deficiencies meant that KNCC's dismissal of Mr Sze was procedurally unjustified.

[86] In terms of substantive justification, although the construction site that Mr Sze normally worked on had been temporarily closed, he had not received a restructuring proposal and there had been no consultation with him regarding a possible redundancy or about possible redeployment opportunities.

[87] KNCC said in its submissions that it was investigating options instead of redundancy. Mr Sze also believed that there was other work available for him at the Cook Street site.

[88] There was inadequate information available to the Authority to conclude that this was a situation in which it was inevitable that Mr Sze would have been made redundant, had he not been unjustifiably dismissed on 22 July 2022. Therefore the closing of the Newmarket construction site did not break the chain of causation, in terms of Mr Sze's lost remuneration claim.

[89] When KNCC sent the payslips (including the final payslip) to Mr Sze on 23 July 2022, it had no good reason for doing so. It had not conducted a full and fair redundancy consultation

¹ Section 103A(2) of the Act.

process, it had not investigated possible redeployment options for Mr Sze in light of the closure of the Newmarket construction site, and there had been no meeting of the minds regarding an agreed exit.

[90] KNCC was unable to meet any of the elements of the justification test in s 103A(2) of the Act. Accordingly, KNCC's dismissal of Mr Sze was procedurally and substantively unjustified.

What remedies should Mr Sze be awarded?

Mitigation of loss

[91] Mr Sze provided the Authority with considerable evidence about the steps he had taken to attempt to mitigate his loss. However, he did not secure new employment until 28 September 2021. The Authority was satisfied that Mr Sze had appropriately mitigated his loss.

Lost remuneration

[92] Mr Sze was out of work for two months and five days. His actual lost remuneration over that period was \$12,083.34 gross.

[93] KNCC is ordered to pay Mr Sze \$12,083.34 gross under s 128(2) of the Act to compensate him for his actual lost remuneration. This is to be paid to Mr Sze within 28 days of the date of this determination.

Distress compensation

[94] Mr Sze demonstrated considerable distress during the Authority's investigation meeting. These events have obviously been extremely stressful for him. He was placed under real financial pressure and has struggled as a result of that.

[95] Although Mr Sze indicated that he would have been willing to have embarked on an agreed exit, KNCC's failure to engage with him about that left him in a situation where he was without income, without work and without certainty about the status of his work situation.

[96] All of that caused him considerable distress, along with receiving unexpectedly the emailed final payslip. KNCC's failure to engage with him at all over the final payslip was also upsetting for him.

[97] KNCC is ordered to pay Mr Sze \$15,000 under s 123(1)(c)(i) to compensate him for the humiliation, loss of dignity and injury to feelings he has suffered as a result of his unjustified dismissal.

Contribution

[98] Having determined that Mr Sze's had an unjustified dismissal personal grievance claim, s 124 of the Act required the Authority to consider the extent to which his actions had contributed towards the situation that had given rise to it, and if so to reduce remedies accordingly.

[99] Contribution denotes blameworthy conduct, which had not been proved in this case. Accordingly, Mr Sze's remedies are not to be reduced under s 124 of the Act because there was no evidence he had contributed to the situation that gave rise to his dismissal grievance.

Did KNCC breach the notice provisions in Mr Sze's employment agreement?

[100] Each party was required to give the other four weeks' notice of termination. That did not occur, because KNCC dismissed Mr Sze without notice.

[101] Mr Sze's dismissal without notice breached notice provisions in clause 15 of his employment agreement and the four week notice period that was recorded in the First Schedule, that was appended to his employment agreement. Mr Sze's breach of employment agreement claim succeeded.

What if any contractual damages is Mr Sze owed?

[102] Because KNCC failed to provide Mr Sze with any notice of his dismissal, he is entitled to be paid four weeks' notice for that breach. Accordingly, KNCC is ordered to pay Mr Sze \$5,000 gross pay in lieu of notice as that is the amount he lost (i.e. the damage he suffered) as a result of KNCC's breach of his employment agreement.

Did KNCC obstruct or delay the Authority's investigation?

[103] KNCC's non-appearance at the investigation meeting delayed the start time by 30 minutes, while inquiries were made into its whereabouts.

[104] KNCC's failure to attend the IM benefited Mr Sze, as his evidence was preferred because he presented himself for questioning and KNCC did not.

Should a penalty be imposed on KNCC under s 134A of the Act?

[105] This penalty claim was not put to KNCC and it was not addressed during the IM. The Authority did not consider KNCC obstructed its investigation and the delay of 30 minutes to the start time of the IM was not significant enough to give rise to a penalty under s 134A of the Act.

What costs should be awarded?

[106] Mr Sze as the successful party is entitled to a contribution towards his actual legal costs. This matter involved a two hour investigation meeting, with half an hour of that time being used to wait for KNCC to turn up.

[107] For the purposes of assessing costs, the notional starting point is \$1,500. That amount is pro rata the current notional daily tariff of \$4,500 for a one day investigation meeting. That notional starting tariff will need be adjusted to reflect the particular circumstances of this case.

[108] The Authority is aware that there have been without prejudice communications between the parties, so costs will be dealt with by an exchange of costs memoranda. Mr Sze has 14 days from the date of this determination to file a costs memorandum and KNCC has 14 days from receipt of that to file its own costs memorandum.

[109] No costs application will be considered outside this timetable, except with the prior leave of the Authority.

Outcome

[110] The Authority made the following findings:

- (a) Mr Sze is owed wage arrears of \$3,113.91;
- (b) KNCC is ordered to pay interest on Mr Sze's wage arrears from 23 July 2022;
- (c) Mr Sze was unjustifiably dismissed;
- (d) KNCC is ordered to pay Mr Sze \$27,083.34:
 - (i) \$12,083.34 lost remuneration;
 - (ii) \$15,000 distress compensation;
- (e) KNCC breached Mr Sze's employment agreement;

- (f) KNCC is ordered to pay Mr Sze \$5,000 contractual damages for the loss he incurred as a result of KNCC's breach of his employment agreement.

[111] KNCC is ordered to pay Mr Sze the money he has been awarded within 28 days of the date of this determination.

Rachel Larmer

Member of the Employment Relations Authority