

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2019] NZERA 696  
3062853

BETWEEN

REGIS CARVER  
Applicant

AND

PAVLOVICH COACHLINES  
LIMITED  
Respondent

Member of Authority: Rachel Larmer

Representatives: Oliver Christeller and Grace Liu, counsel for the  
Applicant  
Bernard Pavlovich, CEO of the Respondent

Investigation Meeting: 6 November 2019 at Auckland

Submissions and further Information Received: 7 November 2019 from the Respondent  
8 November 2019 from the Applicant

Date of Determination: 6 December 2019

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Mr Carver claims he was unjustifiably dismissed by Pavlovich Coachlines Limited (Pavlovich).

[2] Mr Carver says he found out he had been dismissed when he received a letter from Pavlovich dated 1 February 2019 that said his employment had ended because he had abandoned it.

[3] Pavlovich employed Mr Carver as a bus driver between March 2012 and February 2019. During the employment relationship the parties would usually communicate, if not face-to-face, then via Mr Carver's cell phone, the number of which remained unchanged throughout

his employment. Contact between Mr Carver and Pavlovich would occur either by a text message or by phone calls.

[4] Although Mr Carver initially received his payslips by email to his (then) wife's personal email address, after they separated in March 2017 Mr Carver says he asked Pavlovich to stop sending his payslips to her email address because he was unable to access it.

[5] Pavlovich denies knowing that Mr Carver could no longer access the email address it had on file for him as a result of him separating from his wife.

[6] The Authority considers it more likely than not that Mr Carver did advise Pavlovich not to use his ex-wife's email address, but Pavlovich did not record that on his personnel file.

[7] Mr Carver suffered various injuries in 2016 and 2017 which resulted in him being unable to work on medical grounds. Mr Carver's last day of attending and performing work for Pavlovich was 6 February 2018. ACC granted Mr Carver rehabilitation support from Active+ Physio (Active+).

[8] During the period that Mr Carver was away from work, undertaking rehabilitation of his injuries, he remained in ongoing communication with Pavlovich. Mr Carver's (then) manager Gene Julian, told the Authority they would speak at least twice a month, and sometimes more than that.

[9] Mr Julian described these as informal welfare or catch-up calls/chats, to ensure that the parties kept in touch while Mr Carver was away from the workplace. These phone conversations continued with Mr Carver throughout 2018, including during November and December 2018, up until Mr Julian retired.

[10] Mr Carver's physio (from Active+) also communicated with Pavlovich and emailed Mr Julian. The physio's email was also copied to Pavlovich's Human Resources Manager, Ms Adrienne Stormont, and to another Pavlovich manager, Mr Bob Maroney.

[11] One of the emails from Active+ to Pavlovich attached a medical certificate for Mr Carver that covered the period up until 23 October 2018.

[12] On 2 November 2018 Mr Carver arranged for medical certificates to be emailed to Mr Julian from a local print shop. These two medical certificates covered Mr Carver's absence

due to medical incapacity (arising from his injuries) for the period 20 October 2018 to 17 January 2019.

[13] Mr Carver also had at least two phone conversations during the latter part of 2018 with Ms Stormont. Mr Carver and Ms Stormont also exchanged text messages, both before and after his employment had ended.

[14] On 7 December 2018, Ms Stormont sent an email to Mr Carver, at his ex-wife's email address. Mr Carver says he never received it because he was not in contact with his ex-wife, and she did not forward the email to him. She also failed to tell him that his employer had emailed her about his employment.

[15] Mr Carver told the Authority that he was therefore unaware of Ms Stormont's email dated 7 December that had inquired about his likely return to work date. Because Mr Carver did not know about the email asking about his prospects of returning to work in the near future, he did not respond to it.

[16] On 10 January 2019 Ms Stormont sent a letter to Mr Carver's home asking him to contact her to arrange a meeting with the company and his ACC case worker, so they could ascertain the likelihood of him returning to work in the near future.

[17] This letter also claimed that Mr Carver had only provided Pavlovich with one medical certificate. That was incorrect. Mr Carver had provided medical certificates that covered all of the period of absence, but Ms Stormont had not seen them.

[18] Ms Stormont's 10 January 2019 letter asked Mr Carver to send her his updated medical certificates to her HR work email. Ms Stormont also asked Mr Carver to contact her by phone to make arrangements to meet up to discuss his current situation regarding his injury. The letter ended by warning Mr Carver that "*failure to do so could result in disciplinary action*".

[19] Mr Carver told the Authority that he was suffering severe financial hardship at this time. He had made Pavlovich aware of that because he had called and spoken to Ms Stormont expressing concern about his serious financial difficulties and to explore possible options to alleviate that.

[20] While those enquiries did not result in an improvement in Mr Carver's financial situation, they did put Pavlovich on notice that he was in dire financial circumstances.

[21] Mr Carver told the Authority that he had difficulty in responding to Ms Stormont's requests. He did not have enough credit on his phone to be able to call or even text Ms Stormont. Due to his injury he could not walk to the bus station because it was too far away for him, given his mobility problems. Mr Carver also told the Authority that he did not have enough money to be able to afford a taxi, Uber or even a bus fare to his workplace.

[22] Mr Carver said that he therefore decided to respond to Ms Stormont by asking a local Print Shop to scan and email copies of his medical certificates that covered his absence from work for the periods 20 October 2019 to 17 January 2019 and from 18 January 2019 until 17 April 2019.

[23] An email was then sent by the Print Shop to Mr Carver's manager, Mr Julian (who Mr Carver did not know had resigned) and to Ms Stormont that attached, as pdfs, his two medical certificates. The Print Shop did not put anything in the header of its email and there was no text in the body of the email explaining what the accompanying pdfs were. There was nothing visible that linked this email from the Print Shop to Mr Carver's employment.

[24] Although Pavlovich received this email from the Print Shop Mr Julian did not recall opening it. He said he would likely have automatically deleted it if he had received it because it looked like unsolicited spam. Ms Stormont also deleted it without opening it because she thought it was unsolicited spam because the email was sales@[name of Print Shop].

[25] Ms Stormont explained to the Authority that she was not expecting an email from the Print Shop's email address, the sender was unknown to her, the email she received from it was unsolicited, and she didn't know what the attachments related to.

[26] Ms Stormont also said it would have been against company policy to have opened an unsolicited, unknown attachment, received from an unknown person, in an unsolicited email. She didn't open it because she thought it too risky to do so, as it was likely spam.

[27] Mr Carver said he did not think that an unsolicited email, with attachments, from the email address of the unknown Print Shop, without any further information explaining what it was about would risk Pavlovich ignoring it as unwanted spam.

[28] Mr Carver told the Authority he simply did not think to ask the Print Shop to include in its email that the email related to him (Mr Carver) and/or that the attachments were the medical certificates that Ms Stormont had requested.

[29] Mr Carver said he was not experienced with such matters so he just handed the documents over to the Print Shop and asked them to send them on to his employer. Mr Carver says the next communication he received from his employer was this dismissal letter dated 1 February 2019.

### **Issues**

[30] The following issues are to be determined:

- (a) Was Mr Carver dismissed?
- (b) If so, was his dismissal justified?
- (c) If not, what, if any, remedies should be awarded?
- (d) What, if any, costs should be awarded?

### **Was Mr Carver dismissed?**

[31] Pavlovich's letter of 1 February 2019 attempts to invoke the abandonment clause in an individual employment agreement when Mr Carver was in fact covered by the Pavlovich Coachlines Limited and First Union (Inc) Collective Employment Agreement dated November 2018 – September 2019 (*“the collective agreement”*).

[32] The applicable clause in the collective agreement is clause 5, relating to notice. Clause 5.2 deals with abandonment and it says:

Where an employee without good cause absences his/herself from work for a continuous period of three days without the consent of the employer, or without notification to the employer, he/she shall be deemed to have terminated his/her employment. The employer shall make all reasonable endeavours to contact the employee prior to termination.

[33] The significance of an abandonment clause is that it operates by way of a contractual term to end an employment relationship. In order for an abandonment clause to be effective, the terms of the specific clause must be met, and if those terms are met then it is the contract (and not a party's actions) that ends the employment relationship.

[34] If an abandonment clause applies, then the employer will not have dismissed the employee, because it is the operation of that contractual term that has ended the employment relationship.

[35] The Authority therefore needs to ascertain whether the specific requirements of the abandonment clause in clause 5.2.1 of the applicable collective agreement operated in these particular circumstances to end Mr Carver's agreement. If it did, then there would not have been a dismissal and there is no need to consider the other issues to be determined.

[36] It is clear that the abandonment clause could not apply in this situation.

[37] Mr Carver was away from work with good cause. He had injured himself and was medically unfit to work. Pavlovich knew that because it had received information to that effect from Mr Carver, from ACC and from his physio. Although Pavlovich did not open the email with the recent medical certificates that was sent in January 2019, they had been provided with that information.

[38] All of Pavlovich witnesses, Mr Bernard Pavlovich, the CEO, Ms Adrienne Stormont, the HR Adviser, and Mr Gene Julian, who until he retired was Mr Carver's manager, all knew that Mr Carver was absent from work because he had been assessed as medically unfit to work. This is not a situation where he was absent from work without the knowledge or consent of the employer and/or without notification of his absence to his employer.

[39] Pavlovich also failed to meet the requirement in the abandonment clause to "*make all reasonable endeavours to contact the employee prior to termination*" because its attempts to contact Mr Carver were deficient.

[40] The attempts Pavlovich made to communicate with Mr Carver over the December 2018 and January 2019 period were related to its attempts to address the situation of if/when he would be returning to work.

[41] There was no suggestion in those communications that Pavlovich did not know why Mr Carver was not at work. For example, the email that was sent to him on 7 December 2018 specifically refers to the fact that Mr Carver was off work due to "*medical incapacity*".

[42] Similarly, the letter of 10 January 2019 states that the purpose of the letter from Pavlovich was to arrange a meeting with Mr Carver and his ACC case worker to discuss the likelihood of his ability to return to work in the near future.

[43] Neither of these communications raised the prospect that Mr Carver was seen as having abandoned, or potentially abandoned, his employment, or that his absence from work was inappropriate, unacceptable or unauthorised.

[44] The issue of abandonment was raised for the first time in the letter of 1 February 2019. However a supposed “*abandonment*” was inconsistent with the express terms of that letter. Pavlovich recognised in its letter that it was actively dismissing Mr Carver by its use of the words “*We have no alternative but to terminate your employment [...]*”.

[45] If the abandonment clause had applied, then Pavlovich would not have had to have terminated Mr Carver’s employment because the abandonment clause would have operated to have ended it – without a dismissal (or termination) occurring.

[46] Pavlovich’s express reference to it terminating Mr Carver’s employment shows that the initiative for ending the employment relationship came from Pavlovich, and not from an abandonment clause.

[47] Pavlovich also failed to make reasonable attempts to contact Mr Carver. It knew where he lived and it had his mobile number. Pavlovich could have couriered a letter to him advising that if he did not contact it in person then he was at risk of having his employment ended.

[48] Pavlovich could also have sent someone to Mr Carver’s house to find out why it (from its perspective) had not heard from him in 2019 when he had been in regular contact with it throughout 2018.

[49] Pavlovich could also have reached out to Mr Carver’s physio, who had contacted it on his behalf, or his ACC case worker to find out why (in its view) it had not heard from Mr Carver. These people could have been asked to pass a message from Pavlovich on to him.

[50] It was insufficient for Pavlovich to seek to rely on the email it had sent to Mr Carver at his ex-wife’s private email in December 2018 and its letter of 10 January 2020 as amounting to reasonable attempts to contact him.

[51] The possibility of technology failures should have been considered. The email may not have been delivered or it could have gone into a junk folder, or Mr Carver's technology could have broken down.

[52] The easiest and most obvious way for Pavlovich to contact Mr Carver was by calling or texting him on the mobile phone number it has always used to communicate with him. Pavlovich had never had any problems communicating with Mr Carver via his mobile phone.

[53] Despite this, Pavlovich made no attempt to contact Mr Carver via his cell phone over the period of 7 December 2018 until after it had ended his employment.

### **Was his dismissal justified?**

[54] Justification is to be assessed in accordance with the justification test in s 103A(2) of the Employment Relations Act 2000 (the Act).

[55] This test requires the Authority to objectively assess whether Pavlovich's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time Mr Carver was dismissed.<sup>1</sup>

[56] A fair and reasonable employer is expected to comply with its statutory obligations. These include the good faith requirements in s 4(1A) of the Act to provide access to relevant information and an opportunity to comment on it before an employee is dismissed.

[57] It also includes each of the four procedural fairness tests set out at s 103A(3)(a) of the Act. These represent basic minimum procedural fairness requirements that employers are expected to meet.

[58] Failure to do so is likely to fundamentally undermine an employer's ability to establish justification. That is the case here.

[59] Pavlovich did not comply with its good faith requirements or with any of the basic minimum procedural fairness requirements specified in the Act.

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<sup>1</sup> Section 103A(2) of the Act.

[60] The procedural defects that occurred were not minor and did result in significant unfairness to Mr Carver. Section 103A(5) of the Act therefore does not preclude the Authority from determining that Mr Carver's dismissal was unjustified.

[61] Pavlovich also did not have a good reason for dismissing Mr Carver. He was on certified medical leave which was covered by medical certificates. Pavlovich had not discussed Mr Carver's situation with him and his evidence to the Authority was that he was undergoing rehabilitation with the expectation he would be returning to work.

[62] Pavlovich's dismissal of Mr Carver was substantively and procedurally unjustified.

**What, if any, remedies should be awarded?**

[63] Mr Carver's remedies are confined to an award of distress compensation under s 123(1)(c)(i) of the Act due to his inability to work as a result of his injuries.

[64] Mr Carver sought an award of \$20,000 distress compensation based on the Employment Court's decision in *Wikaria v Chief Executive of Department of Corrections* in which the then Chief Judge of the Employment Court stated that an award of \$20,000 was "*a moderate amount of compensation*".<sup>2</sup>

[65] Mr Carver set out in his witness statement details of the humiliation, stress and distress that his unjustified dismissal caused him. He also spoke to the Authority about the significant adverse effects his unexpected dismissal had on him.

[66] Pavlovich suggested that Mr Carver's distress was likely due to his injury and not to his dismissal. The Authority does not accept that submission. Mr Carver clearly linked the claim for distress compensation to the effects that the unjustified dismissal had had on him.

[67] Mr Carver described feelings of uncertainty and stigma, a sense of abandonment, stress and depression, withdrawal from socialisation with long term impact, loss of motivation, withdrawal from his rehabilitation because he had been focused on undertaking his rehabilitation activities with a view to returning to work.

[68] Mr Carver explained to the Authority that when the opportunity to return to work was removed from him, it left him feeling helpless and demotivated regarding his rehabilitation

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<sup>2</sup> [2016] NZEmpC 175.

activities. He described feelings of worthlessness and failure, loss of sleep, and a feeling that his reputation had been damaged.

[69] Mr Carver also described feeling embarrassed and withdrawing from his musical activities and having a loss of a desire to play music. His personal grooming suffered and he felt that he had lost face before his friends because of his dismissal.

[70] Pavlovich is ordered to pay Mr Carver \$18,000 distress compensation under s 123(1)(c)(i) of the Act to compensate him for the humiliation, loss of dignity and injury to feelings he suffered as a result of his unjustified dismissal.

*Should remedies be reduced on the grounds of contribution?*

[71] Section 124 of the Act requires the Authority to assess the extent to which (if any) Mr Carver contributed to the situation which gave rise to his personal grievance and (if so) to reduce remedies accordingly.

[72] Mr Carver did contribute to the situation that gave rise to his grievance by not asking the print shop that forwarded the emails with his medical certificates to Ms Stormont in January 2019 to note in the header of the email that it was a communication from Mr Carver and that the PDFs attached were the medical certificates that had been requested.

[73] Mr Carver's omission to contact Ms Stormont to set up a meeting, as she had requested, is also blameworthy conduct that contributed to the situation that gave rise to his dismissal grievance.

[74] Mr Carver's distress compensation should be reduced by 15% (\$2,700) to reflect his contribution to the situation that gave rise to his unjustified dismissal grievance. His award is therefore reduced from \$18,000 to \$15,300 under s 124 of the Act.

**What, if any, costs should be awarded?**

[75] Mr Carver as the successful party is entitled to recover a contribution towards his actual costs and to be reimbursed for his filing fee.

[76] This matter involved a four hour investigation meeting. Adopting the Authority's usual notional daily tariff based approach to costs, on a pro rata basis, means that the starting point for assessing costs is \$2,500.

[77] Mr Carver seeks that the tariff be applied without adjustments and Pavlovich did not identify any adjustments that should be made.

[78] Pavlovich is therefore ordered to pay Mr Carver \$2,500 towards his actual costs and to reimburse him \$71.56 for his filing fee.

**Summary**

[79] Within 28 days of the date of this determination, Pavlovich is ordered to pay Mr Carver:

- (a) \$15,300 distress compensation;
- (b) \$2,500 towards his actual legal costs; and
- (c) \$71.56 to reimburse his filing fee.

**Rachel Larmer**  
**Member of the Employment Relations Authority**