

ATTENTION IS DRAWN TO THE
ORDER PROHIBITING PUBLICATION
OF CERTAIN INFORMATION
REFERRED TO IN THIS
DETERMINATION

**IN THE EMPLOYMENT RELATIONS
AUTHORITY CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2025] NZERA 510
3334480

BETWEEN	MTY Applicant
AND	TRANSPORT (WAIMATE) LIMITED Respondent

Member of Authority:	Peter van Keulen
Representatives:	Janet Copeland, counsel for the Applicant Nicola Hornsey, counsel for the Respondent
Investigation Meeting:	22 May 2025 in Timaru
Submissions Received:	22 May 2025 from the Applicant 22 May 2025 from the Respondent
Date of Determination:	22 August 2025

DETERMINATION OF THE AUTHORITY

Non-publication orders

[1] While investigating this employment relationship problem I heard and considered evidence from Transport (Waimate) Limited (TWL) that contained allegations about the applicant using drugs and being a poor driver.

[2] These various allegations were not subject of any disciplinary or performance process with the applicant, so they were untested, and they were denied when raised with the applicant. In terms of my investigation into the employment relationship problem I was not

required to determine if the allegations were correct or not, so the allegations remain just that – allegations, that are untested and unproven.

[3] The allegations are relevant to my investigation because they were subject of discussion in one key meeting and because TWL's view of the allegations informed its actions. So, the allegations need to be referenced in my determination.

[4] I am concerned that by outlining TWL's allegations and its views the applicant's reputation will be tainted by them – those who read my determination may assume the applicant did do the things suggested despite there being no investigation of them, no proof of them occurring and they were denied by the applicant. I believe this prejudicial impact on the applicant displaces the presumption of open justice and his identity should not be published.

[5] So pursuant to Clause 10 of schedule 2 of the Employment Relations Act 2000 (the Act) I make a non-publication order prohibiting the publication of the name and identity of the applicant in connection with this employment relationship problem.

[6] For the purposes of this determination the applicant will be referred to as MTY.

Employment relationship problem

[7] MTY was employed by TWL as a truck driver from June 2022.

[8] In November 2023 MTY received a fine for speeding in a private vehicle, which, due to the applicable demerit points, could have led to a loss of MTY's driver's licence.

[9] After discussion with TWL, in January 2024 MTY accepted the fine and surrendered his driver's licence. MTY then applied to obtain a limited driver's licence for work purposes. During this time MTY was on annual leave from TWL.

[10] MTY obtained his limited driver's licence on 30 January 2024 and returned to work on 31 January 2024 for a prearranged meeting with the Managing Director of TWL.

[11] In the meeting of 31 January 2024 MTY was confronted with various allegations about drug use and poor driving at work. MTY was told he could return to work but would need to return a clear drug test and comply with various restrictions on his work. MTY was

“blindsided” by the allegations and became frustrated and angry at the Managing Director’s aggressive and confrontational approach. In the end MTY told the Managing Director that he would “see him in court” and he could “get stuffed” after which he walked out.

[12] Almost immediately after he left MTY sent a text message to the Managing Director to apologise and explained why he was frustrated and why he reacted as he had. He confirmed he was prepared to return to meet the Managing Director to discuss any conditions for his return to work.

[13] TWL did not respond to MTY and after several weeks MTY believed he had been dismissed. On 18 March 2024 MTY raised a personal grievance for unjustified dismissal.

The Authority’s investigation

[14] The parties have not been able to resolve this employment relationship problem, so I have investigated it, and this determination resolves the problem.

[15] I investigated this problem by receiving written evidence and documents, holding an investigation meeting on 22 May 2025 and assessing the oral and written submissions of the parties’ representatives.

[16] In my investigation meeting, under oath or affirmation, witnesses confirmed their statement and gave oral evidence in answer to questions from myself and the parties’ representatives. The representatives then provided oral and written submissions.

[17] As permitted by s 174E of the Act I have not recorded all the evidence and submissions received, in this determination; I have set out my findings of fact and law, then based on this I have expressed conclusions on issues as necessary to dispose of the matter, and then I have specified the orders made as a result.

Unjustified dismissal

[18] For MTY to have a personal grievance for unjustified dismissal he first needs to establish that was he dismissed by TWL.

[19] Dismissal is the termination of employment at the initiative of the employer, being an unequivocal act that amounts to a sending away.¹

[20] In some cases, an employer may say it did not intend to dismiss an employee, and the language used in an exchange and/or the employer's actions are equivocal as to whether there is a sending away, but this can still amount to a dismissal.²

[21] Whether an employer's statement and/or actions amount to a sending away, when it was not intended to be by the employer and the language and/or actions are equivocal, is a question of fact based on an analysis of the statement/actions and the circumstances giving rise to the statement/actions. Judge Holden in *Cornish Truck & Van Limited v Gildenhuis* said:³

[45] The test is an objective one: was it reasonable for somebody in Mr Gildenhuis' position to have considered that his or her employment had been terminated?

[22] So, to determine if there was a dismissal I must decide if the actions of TWL in the meeting of 31 January 2024 and subsequently were an unequivocal sending away or alternatively the actions were such that it would be reasonable for a person in MTY's position to interpret that as a sending away.

[23] If MTY establishes that he was dismissed by TWL, then TWL will need to show that the dismissal was justified.

[24] The test for justification is set out in s 103A of the Act; the test being whether the actions of the employer were what a fair and reasonable employer could have done in all of the circumstances.

[25] Justification is assessed in two parts. First, whether the employer carried out a fair process in coming to the decision to dismiss and second, whether the decision to dismiss was substantively justified.

[26] So, if MTY was dismissed TWL will need to show that in dismissing MTY it followed a fair process – one that a fair and reasonable employer could have done in the

¹ *Wellington Clerical Union v Greenwich* [1983] ACJ 965 (AC).

² See for example, *No 1 Autohaus Ltd v Wrigley* EmpC Auckland AEC75/97, 18 July 1997 where the words "Good God, look at you, you can just go" were held to be a dismissal.

³ *Cornish Truck & Van Limited v Gildenhuis* [2019] NZEmpC 6 at [45].

circumstances.⁴ And then TWL will need to show that the decision to dismiss MTY was one that a fair and reasonable employer could have come to in all of the circumstances.

Analysis

What happened before the meeting on 31 January 2024?

[27] In November 2023, MTY received a fine for speeding in a private vehicle i.e. not whilst driving for work. MTY had already incurred demerit points from previous speeding fines and this additional fine would mean his demerit points total would be such that his driver's licence would be suspended for excess demerit points.⁵

[28] MTY spoke to TWL's Managing Director, Barry Sadler, about this in November 2023. Mr Sadler advised MTY that he should accept the fine, surrender his driver's licence and apply for a limited driver's licence for work purposes, which TWL would support. MTY says Mr Sadler confirmed his job would remain open for him during the time that he surrendered his licence and applied for the limited licence.

[29] During the Christmas and New Year period (2023/2024) MTY was on leave and was paid annual leave.

[30] MTY did not surrender his driver's licence until the middle of January 2024 because of the Christmas/New Year break and the impact that had on the timing of any application made. And during this time MTY did not turn up to work for TWL because of the shutdown period and then because he believed, on instruction from Mr Sadler, that he was not to return to work at TWL until he had obtained his limited driver's licence.

[31] On 22 January 2024 MTY and Mr Sadler spoke – in this telephone call Mr Sadler and MTY discussed the status of his driver's licence and the application for the limited driver's licence. In this call Mr Sadler accused MTY of abandoning his employment as he had not attended work when he still had his licence.

⁴ Justification of any process is informed by Employment Relations Act 2000, ss 4(1A) and 103A.

⁵ MTY would have over 100 demerit points in a two year period – on this basis his driver's licence would be suspended for three months.

[32] In the end MTY advised he was applying for the limited driver's licence and there was an affidavit for Mr Sadler to complete in support of that application. Mr Sadler completed the affidavit on 26 January 2024. In his sworn affidavit Mr Sadler stated that MTY was employed by TWL (as of 26 January 2024).

[33] MTY then obtained an order for his limited driver's licence on 30 January 2024 and advised TWL. Later on 30 January 2024 MTY received a text message from Mr Sadler that asked MTY to come to the TWL yard to meet him the following morning. Mr Sadler did not tell MTY what the meeting was for.

The meeting on 31 January 2024

[34] MTY says that when he met Mr Sadler at the TWL yard Mr Sadler told him to come through to a meeting room and when he was in the room Mr Sadler told him that the meeting was a disciplinary meeting. Mr Sadler denies this and says from his perspective the meeting was a health and safety one to address issues with MTY and his return to work.

[35] Mr Sadler started the meeting by checking that MTY was aware of the rules attaching to a limited driver's licence and the restrictions imposed on him when driving.

[36] He then told MTY that TWL was going to drug test him when he was ready to start driving. MTY immediately asked why and was told by Mr Sadler it was because he had shown irresponsible behaviour by losing his licence.

[37] Mr Sadler then went on to tell MTY that TWL had other issues. These issues included:

- (a) Unsafe driving practices and unsafe use of equipment – Mr Sadler referred to an alleged incident of MTY loading wheat and grain without the necessary cover bars. And another incident when MTY was alleged to have failed to put in the required bolts in the sides of his truck.
- (b) Poor work attendance - Mr Sadler described MTY as having the worst work attendance of any employee he had ever seen.
- (c) Not listening to instructions – Mr Sadler cited an example when MTY's truck broke down and he was instructed to wait for assistance.

[38] MTY tried to answer the allegations but became agitated and annoyed by Mr Sadler's approach – he felt targeted and became angry and expressed his frustrations in the way he spoke to Mr Sadler.

[39] The meeting deteriorated with both Mr Sadler and MTY raising their voices and talking over each other. At one point Mr Sadler told MTY he was “showing disrespect” for the workplace and if MTY could not be trusted to “show some respect for the workplace” Mr Sadler did not want him there.

[40] The meeting then ended with the following exchange:

Mr Sadler	I really don't like your attitude and I don't have to put up with it . I'm your employer I pay your wages.
MTY	So don't put up with it. I'll see you in court [Mr Sadler].
Mr Sadler	Okay.
MTY	I'll see you in court.

[41] MTY then left the meeting.

What happened after the 31 January 2024 meeting?

[42] Ten minutes after the meeting MTY realised he had behaved poorly and reacted badly to Mr Sadler, so he sent a text message to him that said:

Sorry bout all that. I'm just stressed out it's been a stressful few weeks trying to get this work licence and my mate died and it's his funeral today. I can come back in when you are free to talk to you about the conditions but I didn't want to hear about how much of a bad employee I am. Let me know ow (sic) when you are available next

[43] Mr Sadler did not respond to MTY's text. Later in the day on 31 January 2024 Mr Sadler drafted an email for MTY which he sent to himself. The email stated:

Your attitude in the meeting of 31 jan. (sic) was unacceptable. You were rude and dismissive when we explained the reasons for the decision to require drug testing. Your failure to recognise the unsafe work practices that we have pointed out does not give me any confidence that you will not be a danger to yourself and others. Our work must be carried out in a safety sensitive manner. I am on leave until the end of Feb. and do not feel it would be appropriate to allow you to rejoin our workforce while I am away. We can revisit the matter then but I will insist on a clear drug test to meet our obligations under the health and safety act.

[44] Mr Sadler did not send this email to MTY. Mr Sadler printed the email and left that copy with TWL's office manager with instructions for the manager to give it to MTY if he turned up at work.

[45] Having not heard anything from Mr Sadler or anyone at TWL regarding a return to work MTY went to TWL's office on 19 February 2024 and asked for a copy of his employment agreement. The office manager gave MTY a copy of his employment agreement and the copy of the printed email. MTY then asked if he could speak to Mr Sadler and was told that Mr Sadler was away on holiday. MTY says the office manager then told him Mr Sadler would contact him when he returned from holiday. The office manager says she told MTY that he needed to contact Mr Sadler when Mr Sadler returned from holiday.

[46] Mr Sadler did not contact MTY when he returned from holiday at the end of February 2024. MTY did not contact TWL again regarding his two requests to meet with Mr Sadler to discuss his return to work.

[47] During January 2024 MTY saw job adverts placed by TWL for a truck driver, and in February 2024 MTY saw a new employee driving the TWL truck that he would normally drive when he was working.

[48] Based on all these events MTY believed he had been dismissed by TWL, so he sought legal advice. On 18 March 2024 MTY raised a personal grievance for unjustified dismissal.

[49] On 19 March 2024 TWL responded to MTY's personal grievance stating amongst other things that MTY had resigned in the meeting of 31 January 2024.

Did TWL's actions amount to an unequivocal sending away?

[50] Based on the facts I have established I make the following findings:

- (a) Mr Sadler did not want MTY to return to work despite having told MTY that he could continue to work if he obtained a limited driver's licence. This was because Mr Sadler believed MTY was a drug user and as a result MTY was a poorly performing employee, evidenced by poor attendance, unsafe driving and misuse

of company property.⁶

- (b) Consequently, Mr Sadler made MTY's return to work difficult. Firstly, by placing doubt in MTY's mind about any return when he referred to abandonment of employment before MTY had obtained a limited driver's licence. Then, most significantly, by raising various work issues with MTY without following any process - no proper investigation of the issues, no warning to MTY about the reason for the 31 January 2024 meeting, not providing any information to MTY about TWL's concerns, not giving MTY an adequate opportunity to respond and making unilateral decisions about the issues and the consequences for MTY.
- (c) In the 31 January 2024 meeting Mr Sadler told MTY that if he did not show respect for the TWL workplace TWL did not want him there. And Mr Sadler told MTY that he did not have to put up with MTY's attitude.
- (d) Mr Sadler's actions were designed so that MTY would either resign – it was clear to me that Mr Sadler knew MTY would react badly to the various allegations being put to him in the 31 January 2024 meeting - or not meet the requirements imposed so that TWL could dismiss MTY – it was also clear to me that Mr Sadler believed MTY would fail the drug test.
- (e) Mr Sadler readily accepted that when MTY walked out of the 31 January 2024 meeting MTY had resigned as this was the result he was hoping for. For TWL to obtain the benefit of MTY's action in the 31 January 2024 meeting Mr Sadler ignored the apology text from MTY thereby not responding to MTY's request to meet to discuss any conditions for MTY's return to work.
- (f) Mr Sadler made a unilateral decision that if MTY did show up for work he would be suspended, without pay until Mr Sadler had returned from his holiday in Fiji. For this to work as a backstop Mr Sadler sent the email to MTY to himself and printed it so that MTY would only get it if he did turn up to work – there was no reason for Mr Sadler to deal with the email in this way unless he simply wanted to “run dead” on MTY's return to work and let what Mr Sadler believed to be the status quo play out i.e. leave MTY thinking he had no job because of his actions in the 31 January 2024 meeting.

⁶ This was clearly referenced in Toolbox Talk Minutes that Mr Sadler drafted for the 31 January 2024 meeting.

- (g) The effect of MTY then turning up to work on 19 February 2024 and being given Mr Sadler's email was that TWL unilaterally suspended MTY without pay because Mr Sadler was on holiday – so MTY was simply left not knowing if he had a job and unable to pay many of the daily outgoings for his family because Mr Sadler was relaxing in his private holiday home on a remote Fijian island.
- (h) Mr Sadler then ignored MTY's request that Mr Sadler contact him on his return from holiday – in this regard I find that MTY's account of what occurred on 19 February 2024 to be accurate as it is unlikely he would agree to contact Mr Sadler on his return from holiday when MTY did not know when Mr Sadler would be returning.

[51] I am satisfied that the totality of the actions above are a sending away of MTY by TWL – it is clear that TWL did not want MTY to return to work despite him having obtained his limited driver's licence and it denied him the ability to return by imposing conditions on his return, not facilitating any further discussion about this when MTY requested a further meeting, purporting to suspend MTY and then not following up on the suspension and MTY's return to work when Mr Sadler returned from his holiday.

Was it reasonable for a person in MTY's position to interpret TWL's actions as a sending away?

[52] Alternatively, if the actions described above cannot be said to amount to a sending away by TWL then I find that it was entirely reasonable for an employee in MTY's position to consider that they had been sent away.

Conclusion on dismissal

[53] MTY was dismissed by TWL.

Was TWL's dismissal of MTY justified?

[54] I can deal with the issue of justification in relatively short terms:

- (a) TWL did not carry out a fair process in respect of the events that gave rise to MTY's dismissal.

- (b) TWL did not have any substantive justification for the way it acted, which amounted to a dismissal – MTY’s dismissal was not substantively justified.

Conclusion on MTY’s personal grievance for unjustified dismissal

[55] MTY was unjustifiably dismissed by TWL.

Remedies

[56] As MTY has been successful with his unjustified dismissal personal grievance I must consider what remedies he may be entitled to. In this regard, I may award any of the remedies provided for under s 123 of the Act.

Compensation

[57] Compensation is an award for the humiliation, loss of dignity and injury to feelings that an applicant suffers because of the respondent’s unjustified actions.⁷

[58] When considering compensation, I must consider the effects of TWL’s unjustified dismissal on MTY, identifying the harm caused to him and the loss he suffered as a result. Then I must quantify that harm and loss by assessing where that sits on the spectrum of harm and loss suffered by those that have been unjustifiably dismissed. Then I must consider where that corresponds to the spectrum of quantum awarded as compensation.⁸

[59] From the evidence I conclude that the effects on MTY of being unjustifiably dismissed by TWL include:

- (a) Anger and bitterness for how he was treated.
- (b) Loss of confidence and self-esteem.
- (c) Sadness and feeling depressed.
- (d) Anxiety and stress of being without work and the consequent loss of income.
- (e) A sense of failing his family.

⁷ Employment Relations Act 2000, s 123(1)(c)(i).

⁸ *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71, *Waikato District Health Board v Kathleen Ann Archibald* [2017] NZEmpC 132, *Richora Group Ltd v Cheng* [2018] NZEmpC 113.

[60] Based on this I assess there is a reasonable amount of harm caused to MTY and loss suffered by him. I do not rate this as severe, but it is more than moderate.

[61] I assess the quantum of compensation to be paid to MTY to be \$24,000.

Reimbursement

[62] MTY has a personal grievance, and he has lost remuneration as a result of that grievance, so I find he is entitled to an award for lost remuneration.⁹

[63] The starting point for any award of lost remuneration is the lesser of three months ordinary time remuneration or the employee's actual lost remuneration.

[64] MTY calculates his lost remuneration as being \$57,105.67. Three months ordinary time remuneration is \$14,040.

[65] So, from a starting amount of \$14,040 I can award more, if I consider it appropriate to exercise my discretion, up to MTY's actual loss. In this case I consider it appropriate to exercise my discretion to award MTY more than three months ordinary time remuneration.

[66] The question is how much of MTY's actual loss should I award. In answering this question, I must keep in mind that there is no automatic entitlement to full loss, moderation is appropriate, my assessment should be individualised to the circumstances of the case and I must allow for any contingencies that might have resulted in termination of the MTY's employment such that he would not have earned the total amount of his loss.¹⁰

[67] I consider it appropriate to award MTY six months of his average weekly wage as his lost remuneration. This is \$30,558.84.

Reimbursement of other money lost

[68] MTY also seeks payment of the KiwiSaver contributions he would have received from TWL and the cost of the limited driver's licence that he obtained so he could work for TWL.¹¹

[69] I accept that both sums should be awarded to MTY. I calculate the KiwiSaver

⁹ Employment Relations Act 2000, ss 123(b) and 128.

¹⁰ *Sam's Fukuyama Food Services Ltd v Zhang* [2011] NZCA 608.

¹¹ Employment Relations Act 2000, s 123(b).

contributions on \$30,558.84 to be \$916.76 and the cost of the limited driver's licence application is \$1,822.50.

Contribution

[70] As I have awarded remedies to MTY, I must now consider whether he contributed to the situation that gave rise to his grievance.¹² This assessment requires me to determine if MTY behaved in a manner that was culpable or blameworthy, and this behaviour contributed to his grievance.¹³

[71] In this case there are two considerations – MTY had his driver's licence suspended and MTY behaved poorly in the 31 January 2024 meeting.

[72] I am not satisfied that either consideration gives rise to contribution. Yes, MTY was culpable for his driver's licence being suspended but this was not the reason he was dismissed by TWL as he had obtained a limited driver's licence and could drive. Similarly, MTY behaved badly in the 31 January 2024 meeting, but this did not contribute to his dismissal – it enabled TWL to act as it did, but it is not the reason he was dismissed.

[73] I am satisfied that there is no conduct by MTY that requires a reduction in the remedies awarded.

Summary

[74] TWL unjustifiably dismissed MTY. In settlement of this grievance TWL must pay MTY:

- (a) \$24,000.00 for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000.
- (b) \$30,558.84 for lost remuneration pursuant to ss 123(b) and 128 of the Employment Relations Act 2000.
- (c) \$916.76 and \$1,822.50 as money lost by MTY as a result of his dismissal pursuant to s 123(b) of the Employment Relations Act 2000.

¹² Employment Relations Act 2000, s 124.

¹³ *Xtreme Dining Ltd v Dewar* [2016] NZEmpC 136

Costs

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

[76] If the parties are unable to resolve costs, and an Authority determination on costs is needed, MTY may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum TWL will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[77] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.¹⁴

Peter van Keulen
Member of the Employment Relations Authority

¹⁴ For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1