

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-Ā-TARA ROHE**

[2024] NZERA 309  
3262799

BETWEEN                      KAYD PARATA  
   Applicant  
  
AND                                TNT CONCRETE  
   RESURFACING LIMITED  
   Respondent

Member of Authority:        Rowan Anderson

Representatives:              Applicant in person  
   Thomas McElhaney, in person for the Respondent

Investigation Meeting:        23 May 2024 in Wellington

Submissions and further    At the investigation meeting from both parties  
information received:

Determination:                24 May 2024

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Kayd Parata commenced employment with TNT Concrete Resurfacing Limited (TNT) as a labourer on 11 November 2021. Mr Parata had an individual employment agreement (IEA) that included a 90-day trial provision. His uncle, Thomas McElhaney, is a director of TNT.

[2] Mr Parata claims that he was unjustifiably dismissed from his employment with TNT on 28 April 2022 when he received an email advising that his employment was being terminated, effective from the following day, because he has failed to return a signed copy of a second IEA. Mr Parata had been issued a final written warning on 21 April 2022 that relied on a number of reasons for the warning relating to Mr Parata's conduct and performance.

[3] Mr Parata seeks compensation for humiliation, loss of dignity, and injury to feelings. He also seeks compensation for lost wages.

[4] TNT denies that claims made by Mr Parata and asserts that the dismissal was justified having regard to Mr Parata's conduct.

### **Issues**

[5] The issues identified for investigation and determination are:

- (a) Was Mr Parata unjustifiably dismissed from his employment?
- (b) If TNT's actions were not justified, what remedies should be awarded, considering:
  - (i) Lost wages (subject to evidence of reasonable endeavours to mitigate loss); and
  - (ii) Compensation under section 123(1)(c)(i) of the Employment Relations Act 2000 (the Act).
- (c) Should either party contribute to the costs of representation of the other party?

### **The Authority's Investigation**

[6] A case management conference (CMC) was held on 7 February 2024 at which timetable directions were issued for the lodgement of written witness statements. TNT confirmed at the CMC that a counterclaim seeking penalties be imposed on Mr Parata for breach of good faith, made by way of its statement in reply, was withdrawn.

[7] Written witness statements were lodged prior to the investigation meeting from Mr Parata in support of his claims. Mr McElhaney lodged a written statement in support of TNT's position. All witnesses attended the investigation meeting and answered questions under oath at the investigation meeting.

[8] Both parties are, or have, been represented by counsel or an advocate. Those representatives both advised, prior to the investigation meeting, that they would not be in attendance at the investigation meeting, but that their respective clients would be in attendance.

[9] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues

necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

### **Was Mr Parata unjustifiably dismissed from his employment?**

[10] Section 103A of the Act sets out the test for justification. The Authority must consider, on an objective basis, whether TNT's actions, and how it acted, were what a fair and reasonable employer could have done in all of the circumstances at the time the action occurred.<sup>1</sup> Also relevant to the Authority's consideration are the good faith obligations in s 4 of the Act.

[11] Mr Parata's IEA contained a 90-trial provision and in the relevant clause stated:

...  
After the trial period has been completed and employment is to continue a new employment agreement will be offered.

[12] Mr Parata continued to work past the relevant 90-day period without having signed a new IEA. Mr McElhaney's evidence was that the above provision, as to a new employment agreement, was put in place because there was an agreement with Ngāti Toa that they would provide support Mr Parata, in the form of a wage subsidy and the provision of tools valued at approximately \$5,000, conditional upon a signed IEA being provided to them. Mr McElhaney said that Mr Parata received the tools and the wage subsidy was paid for one period, but that the subsidy was stopped because TNT could not provide the signed IEA on account of Mr Parata failing to sign and return a copy of it.

[13] Mr Parata continued to work for TNT. On 14 April 2022, there was an incident whereby TNT claim Mr Parata failed to report for work on time, with significant potential consequences for its business.

[14] Mr McElhaney's evidence is that Mr Parata was given very clear instructions that he was to be at the work site at 8.00am on 14 April 2022. He said that he drove Mr Parata to the work location the day before and that he clearly explained he was to be there on time, and that Mr Parata assured him that he understood that. Mr Parata's evidence was that he was not given a start time and so he and the other workers decided themselves what time they would start work.

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<sup>1</sup> Employment Relations Act 2000, s 103A.

[15] I prefer Mr McElhaney's evidence as to the events relevant to the incident on 14 April 2022. Mr McElhaney provided the Authority with screenshots of various text messages relating to Mr Parata's employment, including from 13 April 2022. Those records show that Mr McElhaney, on the evening of 13 April 2022, sent Mr Parata a text message asking Mr Parata to be at work at 8.00am or earlier. Mr Parata responded approximately one hour later saying "sweet". I also accept Mr McElhaney's evidence as to the instruction given to Mr Parata in person that same day.

[16] When Mr McElhaney became aware that Mr Parata was not on time, he tried calling him. There was an exchange of messages with Mr Parata saying that they would be starting at 9.30am because another worker had to drop his cousins off at school. Mr McElhaney's evidence was that the issue presented a real problem for his business that could have had serious consequences because of the impact to a significant client. Mr Parata sent Mr McElhaney a text message on 17 April 2022 in which he apologised, albeit that he suggested a need for better communication.

[17] In addition to the incident on 14 April 2022, Mr McElhaney said there were numerous issues with Mr Parata's conduct during his employment. He said that he had verbally warned and raised several issues with Mr Parata during his employment but that he was reluctant to take further steps given the family relationship. In questioning, Mr McElhaney said that he should have dismissed Mr Parata during the 90-day trial period.

[18] On 18 April 2022, Mr Parata was issued a final written warning. That warning was issued by email on the instructions of Mr Parata. The warning was issued in relation to the incident of 14 April 2022 and set out what Mr McElhaney said were the previous verbal warnings issued to Mr Parata. Mr McElhaney also provided text messages supporting that some of the issues were raised in what might be described as a matter of fact way. The verbal warnings were said to have been issued in relation to various matters, including, but not limited to, the following:

- (a) Mr Parata using his mobile phone during work hours;
- (b) Mr Parata's treatment of equipment causing damage;
- (c) Mr Parata insisting that two people were required for a one person job;
- (d) the submission of incorrect hours of work by Mr Parata;
- (e) Mr Parata not responding to communications; and

(f) Mr Parata sitting down and not working without good reason when others were working.

[19] The final written warning issued contained reference to the issue relating to the second IEA, including saying that TNT was reluctant to offer Mr Parata a permanent employment contract because he had not returned an IEA given to him at the conclusion of this 90-trial period. Mr Parata denied ever having been given a copy of that document. Mr McElhaney's evidence was that Mr Parata was given the document to sign, that he followed up with Mr Parata on a number of occasions, and that Mr Parata never returned the signed IEA.

[20] It was stated in the written warning that if Mr Parata felt that it was not warranted, that he should speak to TNT and outline his concerns. The warning concluded by stating that Mr Parata should take time to consider whether "this is an avenue of employment [he wished] to pursue".

[21] In the days that followed, Mr Parata did not attend work. There was some conflicting evidence about the timing of his absence and his return to work. However, I do not consider that of significance in terms of the issues I am required to determine. Mr McElhaney also gave evidence that he communicated with Mr Parata's Stepfather during that time and that Mr Parata's Stepfather said, in effect, that he would find Mr Parata alternative work.

[22] Mr Parata sent a message to Mr McElhaney on 25 April 2022 saying that he had taken on board the warning and that he would be back at work the following day. Mr Parata did not work the following day, 26 April 2022, on account of bad weather. Mr Parata did return to work, including on 28 and 29 April 2022.

[23] On 28 April 2022, Mr Parata was advised by email that his employment was being terminated. The email provided as follows:

Hi there Kayd,

After having not received your offer of permanent employment as per email sent 21 August 22 we are terminating your employment as of Friday 29 April 22.

You have had ample time to return this.

....

[24] As noted above, Mr Parata worked on 29 April 2022. That was his final day of work at TNT.

[25] The onus is on TNT to justify its actions and justification requires the consideration of both substantive and procedural fairness. I find that the dismissal was both substantively and procedurally unjustified.

[26] There was some evidence that the dismissal was motivated by both the IEA issue and Mr Parata's previous conduct, including the conduct outlined in the final written warning issued on 21 April 2022. Mr Parata also accepted that the dismissal was likely for other reasons in addition to the content of the email on 28 April 2022. However, the reason given at the time clearly related to the IEA issue only, that being the only issue raised in the dismissal email. In any event, I find that even if the dismissal were for reasons related to Mr Parata's other conduct, that the dismissal was still unjustified.

[27] I accept Mr McElhaney's evidence as to the second IEA, his having provided it to Mr Parata, and his having followed that up with Mr Parata. However, I find that Mr Parata not providing a signed copy of that document did not amount to misconduct and did not otherwise provide a sound substantive basis on which TNT could have dismissed Mr Parata.

[28] In addition to the above, any consideration of Mr Parata's previous conduct had already been dealt with either by the issuing of the final written warning on 21 April 2022 or by what Mr McElhaney described as the issuing of various verbal warnings. It was not open to TNT, acting as a fair and reasonable employer, to dismiss Mr Parata for conduct that had already been the subject of a previous warning, particularly in circumstances where that there were no fresh allegations of the same or similar conduct having been repeated.

[29] Regardless of TNT's views as to Mr Parata's conduct and work ethic, the manner in which TNT went about dealing with the issues was ultimately problematic. Even if the various concerns were taken on a holistic basis, there was no procedural justification for the dismissal. Mr Parata was not put on notice of the allegations prior to disciplinary action being taken, nor was he afforded an opportunity to respond to the concerns prior to the dismissal.

[30] Having regard to the nature of the business, it is perhaps unsurprising that no formal investigation process was conducted and that any procedural steps taken lacked formality. I do not consider that critical in this matter. However, a significant issue is apparent in terms of the absence of any basic procedural fairness.

[31] Mr McElhaney referred, for example, to the statement contained in the written warning that invited Mr Parata to respond if he disagreed with the warning. While Mr Parata's claim related to the dismissal rather than the written warning, the approach taken highlights the procedural issues. Raising concerns and providing a reasonable opportunity to respond are steps required prior to the relevant action being taken. What occurred here is that a conclusion was reached absent investigation, without notice of the concerns being given, and without an opportunity to respond being given. That is not an approach that would have been open to a fair and reasonable employer.

[32] In relation to the dismissal and the immediate reason provided for it, some notice of the IEA issue was given in the final written warning issued on 21 April 2022. The IEA issue does not provide a substantive justification for the dismissal as I have already outlined. However, even if it had, I do not consider the reference in the written warning in any way justified the dismissal from a procedural standpoint. The reference in the warning letter noted that TNT were reconsidering its position in relation to permanent employment. A significant problem with that is that Mr Parata was already working on a permanent basis.

[33] In addition to the above, written warning did not in any way suggest that Mr Parata's employment might be terminated if he did not sign the second IEA. Mr Parata was not called to meeting, was not asked to respond to any allegations, and no genuine consideration of any response could have occurred. The dismissal was absent procedural justification having regard to the factors at s103(3) of the Act.

[34] I find that the dismissal was both procedurally and substantively unjustified.

### **Is Mr Parata entitled to remedies?**

*Is Mr Parata entitled to compensation for lost wages?*

[35] Mr Parata seeks compensation for lost wages. His evidence was that he remained unemployed following his dismissal, that he applied for other jobs, and that he first secured alternative employment in July 2022. He said he believed he had a claim

for lost wages in the amount of \$12,210.25 and that his hourly rate at TNT was \$22.10 per hour.

[36] Mr Parata's evidence in relation to lost wages was unsatisfactory. Initially, Mr Parata claimed that he worked an average of 40 hours per week for TNT. In questioning he then agreed that his average hours would have been more like 30 hours per week. That evidence changed again when presented with Mr McElhaney's evidence as to the hours Mr Parata worked. I accept Mr McElhaney's evidence as to the hours of work and find, based on the information provided as to the hours worked by Mr Parata excluding one week where he was paid but did not work due to COVID-19, that Mr Parata worked an average of 15 hours per week.

[37] I find that Mr Parata is entitled to payment of lost wages on the basis of 15 hours per week, at \$22.10 per hour, for a total of nine weeks between the dismissal and his finding alternative work in July 2022.

[38] I order TNT to make payment to Mr Parata, within 28 days, of \$2,983.50 as compensation for lost wages.

*Is Mr Parata entitled to compensation for humiliation, loss of dignity and injury to feelings?*

[39] Mr Parata seeks compensation for humiliation, loss of dignity and injury to feelings. His statement of problem asserted that \$25,000 would be an appropriate award.

[40] I accept that the dismissal and TNT's actions had some impact on Mr Parata. However, as with his evidence as to his hours of work, I find his evidence in relation to hurt and humiliation unsatisfactory. Mr Parata's claims of depression were not supported by medical evidence and his evidence as the financial impacts was limited. When questioned as to the financial impacts and stated inability to pay his bills, it was apparent that those bills were limited in nature.

[41] To his credit, Mr Parata was able to secure alternative work relatively quickly. I am not satisfied that the impact was such that would warrant an award of any more than compensation at the very low end.

[42] I order that TNT make payment to Mr Parata, within 28 days of this determination, of \$7,000 as compensation for humiliation, loss of dignity and injury to feelings.

#### *Contribution*

[43] Section 124 of the Act requires that I consider the extent to which Mr Parata's actions contributed towards the situation that gave rise to the personal grievance, and if those actions so require, that I reduce the remedies that would otherwise have been awarded accordingly.<sup>2</sup>

[44] While I accept that there were various frustrations that Mr McElhaney had in relation to Mr Parata's performance and conduct, and noting my findings as to the reasons for dismissal and wholesale procedural defects, I am unable to find that there is a basis on which Mr Parata's actions could be said to have contributed to the situation giving rise to his personal grievance.

#### **Summary of orders**

[45] TNT Concrete Resurfacing Limited is ordered, within 28 days of the date of this determination, to make payment to Mr Parata of:

- (a) \$2,983.50 as to compensation for lost wages.as compensation for lost wages; and
- (b) \$7,000 as compensation for humiliation, loss of dignity and injury to feelings.

#### **Costs**

[46] Costs are reserved. Having regard to the personal attendance of both parties at the investigation meeting, any costs claimed are likely to be negligible. The parties are encouraged to resolve any issue of costs between themselves.

[47] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Mr Parata 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 TNT 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.

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<sup>2</sup> Employment Relations Act 2000, s 124.

[48] 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.<sup>3</sup>

Rowan Anderson  
Member of the Employment Relations Authority

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<sup>3</sup> For further information about the factors considered in assessing costs see: [www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1)