

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2026] NZERA 91  
3374083

BETWEEN            ROBERT TUNNICLIFFE  
                                 Applicant  
  
AND                    SOLLY'S FREIGHT (1978) LIMITED  
                                 Respondent

Member of Authority:    William Fussey  
  
Representatives:        Paul Mathews, advocate for the Applicant  
                                 Nick Mason, counsel for the Respondent  
  
Investigation Meeting:    12 December 2025 in Christchurch  
  
Submissions received:    24 December 2025 from Applicant  
                                 19 January 2026 from Respondent  
  
Determination:         20 February 2026

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**DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY**

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**Employment Relationship Problem**

[1]     On 5 February 2024, Robert Tunnicliffe interviewed for a job as a Truck Driver with Solly's Freight (1978) Limited (Solly's). Solly's offered Mr Tunnicliffe the job, which he accepted and commenced on 12 February 2024.

[2]     On 28 February 2024, following a court hearing, Mr Tunnicliffe was disqualified from driving, by reason of drink driving. Unable to perform the duties of his role, Solly's provided Mr Tunnicliffe with alternative duties.

[3]     On 24 April 2024, Mr Tunnicliffe was dismissed from his employment. Mr Tunnicliffe claims unjustified dismissal.

[4] Mr Tunnicliffe and Solly's accept the facts as described above. The parties, however, do not agree on many of the surrounding facts, including what process (if any) Solly's followed in dismissing Mr Tunnicliffe.

### **The Authority's investigation**

[5] For the Authority's investigation written witness statements were lodged from Mr Tunnicliffe and his wife Amanda Tunnicliffe. On behalf of Solly's, a statement was lodged from Nigel Ward, the Christchurch Branch Manager. Corbin Rushton, a Yard Manager at Solly's (and who Mr Tunnicliffe reported to) was summonsed. All witnesses attended the Investigation Meeting, confirmed their evidence, and answered questions under oath or affirmation.

[6] Following the Investigation Meeting, submissions and provision of further information were timetabled.

[7] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law and expressed conclusions on issues necessary to dispose of the matter. It has not recorded all evidence and submissions received.

### **The contested facts**

#### *5 February 2024 job interview*

[8] Mr Ward says he asked Mr Tunnicliffe if he had any convictions or pending court cases, and Mr Tunnicliffe said no but did mention that he had a couple of old traffic fines. Mr Ward says he made written notes at the meeting but following a request for these to be provided to Mr Tunnicliffe's representative and the Authority, Solly's says it is unable to locate them.

[9] Mr Tunnicliffe initially said that convictions, court cases, and traffic fines were not discussed at the meeting, before later remembering that he had in fact been asked about traffic fines (which he admitted having) but was never asked about convictions or pending court cases.

[10] Mr Tunnicliffe was asked whether at the time of his job interview he knew he had a court hearing scheduled. He replied that due to the stress of being made redundant from his

former employer following the sale of that company, he had forgotten. Mr Tunncliffe accepts he knew the court hearing could result in the loss of his licence but says he only remembered about it when his lawyer rang him up two days prior to the hearing (after he had commenced his role with Solly's).

#### *The employment agreement*

[11] Mr Tunncliffe says that he signed his employment agreement in the work vehicle a couple of weeks after he started with Solly's (and before the court case) and that he had not been provided a copy of the employment agreement before then. He says he signed the agreement as soon as he was given it, without reading it and without seeking advice on it.

[12] Mr Ward says the employment agreement was not ready when he offered Mr Tunncliffe the job, and so he did not provide the employment agreement until a couple of hours before his first shift. He says he left the employment agreement with Mr Tunncliffe for at least half an hour before returning to the truck to pick up the signed copy. Mr Ward adds that the signed employment agreement was then sent to head office in Takaka.

[13] Having only been provided an unsigned copy of the employment agreement, I asked Solly's to produce the signed version. Nevertheless, Solly's informed me that the signed employment agreement could not be located.

[14] The unsigned employment agreement specifies at clause 18.5 that "loss of licence for any reason may result in termination of employment".

#### *The dismissal – Mr Tunncliffe's version*

[15] Mr Tunncliffe's evidence is as follows. He informed Mr Ward about the upcoming court case, and the potential loss of his licence, sometime after he commenced employment, and shortly after being reminded about it by his lawyer.

[16] He attended work directly after the court case on 28 February 2024, immediately informing Mr Ward of the loss of his licence and suggesting he work in the yard instead. Mr Ward agreed and said that the Yard Manager, Corbin Rushton, would talk to him about his hours of work. Mr Ward did not indicate to Mr Tunncliffe that his job was in jeopardy and nor did he accuse Mr Tunncliffe of lying about not having any pending court cases at his interview.

[17] Mr Tunncliffe then approached Mr Rushton to inform him of the loss of his licence and the need for Mr Rushton to find him alternative duties. Mr Rushton initially instructed him to sweep the yard floor before later giving him other alternative duties, such as loading and unloading truck units.

[18] Mr Tunncliffe then began the process of applying for a limited work licence. This would enable him to continue his duties as a Truck Driver despite his driving disqualification. However, he was unable to complete the application process because Mr Ward never gave him the registration of the vehicle he would be driving while on a limited licence. Mr Tunncliffe was also advised it could take up to a couple of months to issue his limited licence.

[19] Mr Tunncliffe initially said that other than his subsequent dismissal meeting on 24 April 2024, he had no further meetings with Mr Ward. However, he later recalled conversations with Mr Ward in his office about his application for a limited licence. He added that at no point was a disciplinary process mentioned, commenced, or progressed. Mr Tunncliffe also says he did not receive any correspondence about a disciplinary process, and nor did Mr Ward talk to him about clause 18.5 of his employment agreement.

[20] In terms of the dismissal on 24 April 2024, Mr Tunncliffe says that shortly after lunch, Mr Rushton informed him about a meeting with Mr Ward at the end of the day. Subsequently, he and Mr Rushton attended that meeting, and Mr Ward informed Mr Tunncliffe that he was dismissed. Mr Tunncliffe's response was to the effect: "that sucks, I have bills".

#### *The dismissal – Mr Ward's version*

[21] Mr Ward's evidence is as follows. At 1.20pm on 28 February 2024, Mr Ward and Mr Rushton met with Mr Tunncliffe in Mr Ward's office, where Mr Tunncliffe informed them of his disqualification.

[22] Mr Ward reminded Mr Tunncliffe that he had asked him during his interview whether he had any convictions or pending court cases, and that Mr Tunncliffe had said no. He then asked Mr Tunncliffe why he had lied during the job interview. Mr Tunncliffe responded: "I don't know, I thought I might get off the charge". Mr Tunncliffe then informed Mr Ward he had applied for a limited licence and Mr Ward said that this wasn't the point, Mr Tunncliffe had deliberately lied and withheld information from him, and he would not have employed Mr Tunncliffe had he known the truth.

[23] Mr Tunnicliffe said that he could work in the yard for a few weeks. Mr Ward agreed and said he would also need to invite him to a formal meeting about the loss of licence. Mr Ward put Mr Tunnicliffe on notice that his job was in jeopardy and Mr Tunnicliffe responded: “OK, I’m sorry”.

[24] On 4 March 2024, Mr Ward wrote to Mr Tunnicliffe inviting him to a disciplinary meeting regarding the allegation that he had failed to disclose a pending court hearing for drink driving and subsequently been disqualified. The letter noted that the allegations could amount to serious misconduct, and his employment could be terminated.

[25] On 8 March 2024, Mr Ward and Mr Rushton met with Mr Tunnicliffe, who chose not to bring a support person or representative. Mr Ward confirmed with Mr Tunnicliffe that he had read the 4 March 2024 letter and asked him to respond. Mr Tunnicliffe replied: “as I said, I thought I might get off the charge, I needed a job”. Mr Tunnicliffe also acknowledged the implications of clause 18.5 of his employment agreement, i.e. that the loss of his licence could mean the loss of his job.

[26] On 28 March 2024, Mr Ward issued Mr Tunnicliffe with a preliminary decision letter upholding Solly’s concerns and providing a preliminary view that Mr Tunnicliffe’s actions amounted to serious misconduct, and his employment would be summarily terminated. Mr Tunnicliffe was provided an opportunity to respond by 11.30am, 11 April 2024. However, Mr Tunnicliffe did not do so and later informed Mr Ward that he had no feedback to give.

[27] On 24 April 2024, Mr Ward and Mr Rushton met with Mr Tunnicliffe where Mr Ward informed Mr Tunnicliffe of his final decision, i.e. summary dismissal, and handed him a letter confirming the outcome in writing.

#### *The dismissal – Mr Rushton’s version*

[28] Complicating matters further is that the summonsed witness, Mr Rushton, has a third version of events which at times materially differs from one or both of Mr Tunnicliffe’s and Mr Ward’s versions. A summary of his evidence follows.

[29] After being informed of Mr Tunnicliffe’s disqualification, Mr Rushton arranged alternative duties for him in the yard.

[30] Mr Rushton subsequently attended up to five meetings with Mr Ward and Mr Tunncliffe in Mr Ward's office. These meetings were about Mr Tunncliffe's efforts to secure a limited licence. It was clear to all present at those meetings that Mr Ward was prepared to retain Mr Tunncliffe in employment providing he successfully secured a limited licence.

[31] At no stage during those meetings does Mr Rushton recall a disciplinary process being mentioned, or of correspondence to Mr Tunncliffe being referred to; however, he does recall Mr Ward being disappointed and making passing remarks such as "why did you lie to me?" and "why did you not disclose this at the start?". Mr Rushton also recalls a clause in Mr Tunncliffe's employment agreement being discussed but does not recall Mr Tunncliffe ever saying he thought he might get off the charge.

[32] In the weeks following the disqualification, Mr Rushton also spoke separately to Mr Tunncliffe, on various occasions, to ask him how he was getting on with his limited licence application.

[33] On 24 April 2024, Mr Tunncliffe met with Mr Ward and Mr Rushton for the final time. Mr Ward again pressed Mr Tunncliffe about his limited licence application, and he and Mr Rushton were both visibly frustrated with Mr Tunncliffe's minimal effort to obtain one. Mr Rushton thought that Mr Ward had been very lenient in not commencing a disciplinary process, and the least Mr Tunncliffe could do was to make a proper effort to obtain his limited licence.

[34] During the meeting, Mr Tunncliffe said that Solly's should pay for his limited licence application. Mr Rushton thought this was a "really cheeky" thing for Mr Tunncliffe to say given the issue was of Mr Tunncliffe's making.

[35] Mr Ward became angry at the suggestion Solly's should pay for the limited licence application, and an argument ensued, during which Mr Tunncliffe stormed out of the office (before returning). Ultimately, Mr Ward informed Mr Tunncliffe his employment was terminated. No termination letter was issued to him.

[36] At the Investigation Meeting, Mr Rushton was questioned extensively on the reasons for the dismissal and Mr Rushton was clear throughout that it was due to Mr Tunncliffe's lack of effort in obtaining a limited licence.

## **Factual findings**

[37] Having considered the contested facts, I set out my factual findings and reasoning, including any additional evidence that has assisted me in reaching these conclusions.

### *5 February 2024 job interview*

[38] I find it more likely than not that Mr Ward did ask Mr Tunnicliffe about convictions and pending court cases and that Mr Tunnicliffe indicated he did not have any.

[39] Mr Tunnicliffe was not a persuasive witness, and his evidence was inconsistent. Having initially said he was not asked anything about fines, convictions or pending court cases, he later admitted being asked about traffic fines. I am not convinced Mr Tunnicliffe has a clear recollection of what was said at the meeting or that his evidence about it can be relied upon.

[40] In contrast, Mr Ward's evidence was credible that as an experienced manager in the industry he regularly asks about convictions and pending court cases to prospective employees. It simply would not make sense for him to have only asked about traffic fines given the potential impact of convictions and pending court cases on Mr Tunnicliffe's ability to perform the duties of his role and Solly's regulatory obligations.

### *Employment agreement*

[41] The employment relationship problem does not turn on whether Mr Tunnicliffe signed the employment agreement shortly before commencing work on his first day or within the first week or two of his employment, however, ascertaining whose evidence is more reliable on this point may have assisted credibility assessments of Mr Tunnicliffe and Mr Ward.

[42] It is not clear whether the respondent's failure to locate the signed employment agreement is genuine or if it has not been provided because it does not support Mr Ward's evidence. Nevertheless, although the lack of signed employment agreement makes it difficult to make a factual finding, it does indicate a lack of reliability on Mr Ward's part, especially given the obligation for an employer to retain a copy of the signed employment agreement pursuant to section 64 of the Act.

*The dismissal – witness reliability*

[43] Before addressing the factual context of the dismissal, I first comment on my observations of the reliability of each of the witnesses' evidence.

[44] Mr Tunncliffe provided inconsistent evidence throughout the Investigation Meeting. His clarity of recall was poor, and he would sometimes state one thing before later accepting the contrary was true. Although I do not consider he wilfully misled the Authority, I largely do not consider his evidence to be reliable unless corroborated.

[45] Mr Ward's evidence was clear and consistent throughout. However, it appeared carefully crafted to support a particular narrative and outcome rather than a genuine recollection of events. Mr Rushton's evidence assisted me in coming to this view.

[46] Mr Rushton was a summonsed witness who continues to be a Solly's employee. His employment status arguably incentivises him to assist Solly's in defending the personal grievance, given the potential impact on his employment relationship were he to provide evidence that favours Mr Tunncliffe. Despite this, Mr Rushton contradicted Mr Ward's evidence on some key issues.

[47] Overall, I found Mr Rushton to be a compelling witness. His answers to questions appeared genuine and considered, and he provided honest reflections and details about key events. Where he could not recall specifics, he said that he did not remember rather than make a guess. Mr Rushton's evidence was a crucial factor in determining my factual findings.

*No formal disciplinary process*

[48] I find it more likely than not that no formal termination process to dismiss Mr Tunncliffe was followed and that no letters relating to a disciplinary process or outcome were issued.

[49] Nevertheless, I acknowledge it is an unusual situation where an employer asserts that correspondence was issued and a disciplinary process followed, only for a finding to be made that neither were the case.

[50] I am mindful the standard of proof for serious allegations against an employee, while still on the balance of probabilities, requires that "the evidence in support...must be as

convincing in its nature as the charge is grave”.<sup>1</sup> Although the allegations of a manufactured disciplinary process are made against the employer not the employee, it is arguable I am required to adhere to the same or similar standard given the seriousness of the allegation.

[51] Even when taking this into account, my factual finding stands. As outlined in my assessment below, at no stage has Mr Ward’s evidence of a disciplinary process and letters been corroborated, whether through electronic means or the evidence of others. On the contrary, Mr Rushton (who according to Mr Ward attended all the meetings with Mr Tunnicliffe) was not aware of Mr Ward having followed any disciplinary process or issued letters of a disciplinary nature. In addition, nobody except Mr Ward had seen any of these letters until at least October 2024, approximately six months after the dismissal.

### *The letters*

[52] Solly’s says it provided Mr Tunnicliffe with three letters: a 4 March 2024 letter inviting him to a disciplinary meeting, a 28 March 2024 letter providing a preliminary decision, and a 22 April 2024 letter terminating his employment (that was issued on 24 April 2024). Mr Tunnicliffe says he never received any of those letters and that they are fabricated.

[53] To assist in my investigation, I requested the original electronic correspondence and metadata. However, Solly’s response was that no electronic copy has been retained. Instead, it provided a letter, dated 8 December 2025, from Mr Ward to his lawyer, explaining why:

“I create a letter using Microsoft Word on my PC. Once I am satisfied that the letter is correct, I then print it out on our depot printer. Proofread the letter and then I delete the draft from Microsoft Word.”

[54] Solly’s also provided an accompanying letter, similarly dated 8 December 2025, from Solly’s IT Support Vendor, CNX Limited, stating:

“The process Nigel described for creating these letters involved creating the letter in Microsoft Word on his PC, then printing it out on the local printer, and finally deleting the MS Word draft.”

[55] However, CNX’s letter does not assist my investigation because it relies on “the process Nigel described” rather than its own knowledge of those processes.

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<sup>1</sup> In *Honda NZ Ltd v NZ Boilermakers etc Union* [1991] 3 NZILR 23, the Court of Appeal quotes with approval the then Labour Court’s formulation of the standard of proof of serious allegations against an employee. This formulation is also repeated in *Glengarry Hancocks Ltd v Madden* [1998] 3 ERNZ 361.

[56] At the Investigation Meeting, when questioned as to how he still retained a copy of the letters having issued them after printing, Mr Ward said he would have printed two or three copies.

[57] Mr Ward says he deleted electronic copies of the letters to protect Mr Tunnicliffe's private information as his office computer is accessible to other employees. Although I accept that other employees may have access to his computer, this does not explain why, given the importance of the documentation, he did not use alternative means of electronic storage.

[58] Mr Ward said further that he stored physical copies of the letters in a filing cabinet in his office, however, he similarly acknowledged the filing cabinet is accessible to other employees. Although Mr Ward said it would be obvious if someone attempted to access his filing cabinet, I am not convinced that competing privacy concerns are a feasible explanation for Mr Ward allegedly retaining physical copies of the letter but deleting electronic versions.

[59] It is notable that Mr Rushton did not see Mr Ward hand Mr Tunnicliffe a dismissal letter during the dismissal meeting on 24 April 2024, was not aware of any ongoing disciplinary process, and heard neither Mr Ward nor Mr Tunnicliffe refer to any written correspondence.

[60] It is also notable that from Mr Rushton's perspective the 24 April 2024 meeting had not been arranged to issue Mr Tunnicliffe's dismissal; rather, it arose from what happened at the meeting. This is not consistent with the preparation of a prearranged termination letter.

[61] Curiously, the termination letter is dated 22 April 2024, two days prior to the termination. Mr Ward says that was due to Mr Ward's absence from work on 23 April 2024 (something which the wage and time records confirm), although it is not clear why the letter could not have been issued on 22 April 2024. I consider the discrepancy between the date of the letter and the date of the termination to be a neutral factor.

[62] Finally, per the chronology below, although Mr Tunnicliffe raised a personal grievance for unjustified dismissal on 30 April 2024, it was not until 22 October 2024 (almost six months later) that Mr Ward provided copies of the letters to Solly's HR.

[63] In a 1 May 2024 email to Nicole Hockly (Solly's HR), Mr Tunnicliffe's representative stated: "if there was a process, please provide the letters and minutes of meetings". Ms Hockly

emailed Mr Ward the same day stating: “we will need the history and dates of your discussions with Tunncliffe. We have five working days so due by COB Tuesday next week”.

[64] However, Mr Ward did not provide Ms Hockly the letters as she had requested, and I am not satisfied by Mr Ward’s explanation that Mr Tunncliffe had subsequently called him asking for a reference and saying he was not going to proceed with his personal grievance.

[65] On 18 October 2024, Ms Hockly emailed Mr Ward stating: “This is becoming urgent as our lawyer needs time to prepare a response. Ed told me you have evidence that you did follow process, we need this please. If you don’t have anything, please let us know ASAP so we can move to Plan B”.

[66] Ms Hockly followed up on the morning of 21 October 2024: “please send everything to HR first”; to which Mr Ward quickly responded: “as per my phone call will get this to you later today”. Eventually, on the evening of 22 October 2024, Mr Ward provided Ms Hockly copies of the letters.

[67] In conclusion, I find that no disciplinary letters were issued to Mr Tunncliffe.

#### *Handwritten notes and meetings*

[68] Mr Ward says the disciplinary process included a meeting on 28 February 2024 (at which Mr Tunncliffe was informed a disciplinary process would follow), a meeting on 8 March 2024 (at which Mr Tunncliffe had an opportunity to respond to allegations), and a meeting on 24 April 2024 (at which Mr Tunncliffe was dismissed). He has provided what he claims to be handwritten notes of each of those meetings. At the top of the notes for each of these meetings it is specified that Mr Tunncliffe, Mr Ward, and Mr Rushton were all present.

[69] I do not consider it feasible that Mr Ward made contemporaneous handwritten notes of the 28 February 2024 meeting, or at least that if he did these were the notes the Authority has been provided. The notes in question transcribe in full sentences and block capitals the conversation between Mr Tunncliffe and Mr Ward. They are written neatly with only one small crossing out, and Mr Ward’s opening 90-word statement is written in full, with no errors. Mr Ward then transcribes the 25-word response, also containing no errors.

[70] It is unlikely that Mr Ward was able to have written down everything he said, and everything Mr Tunncliffe said in response, while maintaining such a neat and error free set

of notes. It would be challenging (but possible) for a well-practiced note-taker not actively participating in the conversation to have made such notes, but it is difficult to see how a person taking such a leading role in the meeting (even a self-described former “traffic cop”) could do so.

[71] There are no written errors in the handwritten notes for the 8 March 2024 and 24 April 2024 meetings either, and similar questions about the feasibility of taking the role of interviewer and notetaker also persist for those meetings. However, given these notes are shorter (particularly the 24 April 2024 meeting), I cannot discount the possibility that Mr Ward was able to make contemporaneous notes.

[72] Solly’s was unable to say when the handwritten notes from the meetings were provided to its HR team, instead informing the Authority there was no email correspondence about the notes, and that Mr Ward had sent them via the internal company mail bag.

[73] Nevertheless, given Mr Ward’s cover email to Ms Hockly attaching the letters noted: “only other notes are on A4 paper which I have not located yet but will find”, it is clear they were not sent (if they were sent at all) until sometime after 22 October 2024. Certainly, Mr Tunnicliffe does not appear to have been provided them until they were attached to the Statement in Reply in May 2025.

[74] If I am wrong and these are the handwritten notes from the meetings, I nevertheless have concerns about their being a true and accurate account of those meetings.

[75] For example, the 28 February 2024 meeting notes refer twice to Mr Ward saying there would need to be a formal meeting, and the 8 March 2024 meeting notes refer to Mr Ward describing it as a formal meeting, asking Mr Tunnicliffe whether he had read the 4 March 2024 letter, and making references to both next steps and potential termination.

[76] Such notes are at odds with Mr Rushton’s evidence that Mr Ward gave no indication of any formal or disciplinary process, or of disciplinary letters having been issued to Mr Tunnicliffe. Had the three meetings proceeded consistent with the handwritten notes, Mr Rushton would have been clear that these were disciplinary meetings with a prospect of termination. In fact, Mr Ward would presumably also have discussed the disciplinary process with him. That Mr Rushton was present at all the meetings and had no inkling of a disciplinary process is telling.

[77] Furthermore, Mr Rushton clearly and consistently explained that the purpose of the meetings was to facilitate Mr Tunncliffe obtaining a limited licence in a timely fashion. This is not reflected in the handwritten notes and severely undermines Mr Ward's credibility given his comments at the Investigation Meeting that he had no interest in Mr Tunncliffe obtaining a limited licence as this obscured the point that Mr Tunncliffe had lied to him.

[78] Mr Rushton's compelling account of an impromptu dismissal also conflicts with both the handwritten notes of the termination meeting and any disciplinary process having been followed.

[79] Mr Rushton describes the meeting as including: a further discussion about the limited licence application, a disagreement about who would pay, Mr Tunncliffe storming out, Mr Tunncliffe being dismissed without being handed a termination letter, and Mr Tunncliffe being upset about his dismissal because of the impact it would have on his ability to pay his bills. In contrast, the handwritten notes simply state:

“Told Rob it was my view that you deliberately withheld/failed to disclose a pending court case prior to being employed by Solly's.

Your employment is terminated.

Rob handed letter dated 22/04/2024”.

[80] For completeness, I note that there are some aspects of the handwritten meeting notes which are partially consistent with Mr Rushton's evidence, such as Mr Ward's initial reference to Mr Tunncliffe having lied, and mention being made of a clause in Mr Tunncliffe's employment agreement.

[81] I take it from this that Mr Ward did express disappointment with Mr Tunncliffe's actions, including asking him why he lied at the job interview and reminding him of clause 18.5 of his employment agreement. Indeed, it would have been unusual if he had not. Nevertheless, there is no evidence to suggest that any of this was said in anything other than a fleeting way. Certainly, it does not appear to have been said in a disciplinary context.

#### *Disciplinary process timeline*

[82] The timeframe between Mr Tunncliffe informing Solly's of his driving disqualification and Mr Tunncliffe's employment being terminated is revealing. Had Solly's followed a disciplinary process to termination as it claims, it is unclear why the process would

take eight weeks. In particular, a three-week gap between the disciplinary meeting and a preliminary decision letter being issued, and a four-week gap between the preliminary decision and final decision, are unusually long.

[83] In the ordinary course of events the entire process would usually take no more than two to three weeks. An eight-week timeframe is therefore more indicative of a process retrospectively being made to fit a termination.

*Unlawfully driving to and from work*

[84] During the Investigation Meeting, Mr Tunncliffe explained that he unlawfully drove to and from work while his licence was suspended, as there were no buses from Rolleston. Mr Ward accepted that he knew about this.

[85] When asked why he did not raise this as a disciplinary issue with Mr Tunncliffe, Mr Ward said he did not need to as he already had enough to dismiss Mr Tunncliffe.

[86] If this was genuinely the case, Mr Ward appears to have predetermined the termination. The more likely explanation, however, is Mr Ward was more interested in Mr Tunncliffe obtaining a limited licence than in disciplining him for his misdemeanours. This is consistent with my factual finding that Mr Tunncliffe's dismissal related more to his failure to obtain a limited licence than for misleading Solly's at the job interview.

*Did Mr Tunncliffe inform Solly's of his upcoming court case?*

[87] Mr Tunncliffe says he informed Solly's of the upcoming court case two days prior to it happening, whereas Mr Ward says he did not know anything about it until Mr Tunncliffe told him about the disqualification shortly after it happened.

[88] It is not directly relevant to the outcome of this matter as to who is correct about this. However, without corroboration of Mr Tunncliffe's comments, I consider it more likely than not that Solly's were not informed until after Mr Tunncliffe had been disqualified.

*Mr Tunncliffe's attempts to obtain a limited licence*

[89] I find that Mr Tunncliffe made minimal effort to obtain a limited licence, despite Solly's instructions for him to do so.

[90] Mr Ward arranged numerous meetings to facilitate the progression of Mr Tunnicliffe's application and consistently reminded him of the importance of obtaining a limited licence. Mr Rushton frequently checked in on Mr Tunnicliffe's efforts outside of those meetings, and he described his and Mr Ward's frustrations in the 24 April 2024 meeting when it became clear that Mr Tunnicliffe had done little to progress the application. Mr Tunnicliffe's unreasonable request for Solly's to pay also highlighted his unwillingness to take the necessary steps without financial assistance.

[91] Furthermore, Mr Tunnicliffe would reasonably have been aware that a failure to adequately progress his limited licence application could jeopardise his ongoing employment with Solly's.

### **Unjustified dismissal claim**

[92] Section 103A(2) of the Act sets out the legal test as to whether a dismissal or action was unjustifiable, i.e. "whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred", taking into account the factors set out in section 103A(3).

[93] Having found it more likely than not that no formal termination process to dismiss Mr Tunnicliffe was followed and no letters relating to a disciplinary process or outcome issued, I have no option but to determine that Mr Tunnicliffe was unjustifiably dismissed. If Solly's did terminate Mr Tunnicliffe for his loss of licence and job interview dishonesty, it did so without undertaking any of the required steps: commencing a formal employment process, investigating the allegations, providing a reasonable opportunity for Mr Tunnicliffe to respond to the allegations, and putting Mr Tunnicliffe on notice of potential termination. These are not the actions of a fair and reasonable employer.

[94] I have found that Solly's terminated Mr Tunnicliffe for failing to progress his limited licence application, after matters became heated when Mr Tunnicliffe asked for Solly's to pay. It was therefore an impromptu dismissal without any process. Solly's then erroneously claimed Mr Tunnicliffe was dismissed for the non-disclosure of a pending court case and subsequent licence disqualification and retrofitted a process to justify that dismissal. These are considerable flaws rendering the dismissal procedurally unjustified.

[95] The procedural failings were so serious they also undermine any substantive justification Solly's may have had for the dismissal.

### **What remedies should be awarded?**

[96] The starting point is that where the Authority determines an employee has a personal grievance it may in settling the grievance provide for one or more of the specified remedies.<sup>2</sup>

*Is this a case where no remedies would be justified?*

[97] In *Xtreme Dining Ltd t/a Think Steel v Dewar*,<sup>3</sup> a Full Court concluded that the absence of a remedy, in rare cases, may be appropriate even if there is an established personal grievance. It is not open to reduce remedies to zero by application of s 124 of the Act, however, the Court confirmed:<sup>4</sup>

Rather, when there is misconduct which is so egregious that no remedy should be given, notwithstanding the establishing of a personal grievance, the Authority or Court may take that factor into account in its s 123 assessment in a manner that conforms with "equity and good conscience". The absence of a remedy in rare cases, notwithstanding the establishing of a personal grievance may be appropriate. The Court of Appeal reached this conclusion where there is disgraceful misconduct discovered after a dismissal. We consider that the statutory scheme allows for the same outcome in other instances where, for example, there has been outrageous or particularly egregious employee misconduct.

[98] If there is misconduct by the applicant that is outrageous or particularly disgraceful, I am to consider whether it is appropriate to award any remedies. In accordance with *Xtreme Dining*, this assessment is not limited to misconduct discovered after termination of employment as was the case in *Salt v Fell*.<sup>5</sup>

[99] The dishonesty displayed by Mr Tunnicliffe in his job interview was grave. Had he been truthful, he would not have been offered the role. Consequently, if Solly's had made procedural errors in dismissing him for this, I may have considered his actions sufficiently egregious as to warrant no remedy.<sup>6</sup>

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<sup>2</sup> Employment Relations Act 2000, s 123.

<sup>3</sup> [2016] NZEmpC 136.

<sup>4</sup> At [216].

<sup>5</sup> [2008] NZCA 128.

<sup>6</sup> Had I reached this conclusion, I would also have had to consider whether job interview dishonesty sits outside the parameters of employee misconduct given the employment relationship was not on foot at the time. However, I do not consider the Employment Court intended to deliberately limit the conduct assessment in this way. Mr Tunnicliffe's actions pertained to a fundamental aspect of his employment and there is no reason why egregious actions of this nature cannot be used to justify the absence of a remedy.

[100] However, Solly's clearly did not consider Mr Tunnicliffe's dishonesty, loss of licence, and continued breaches of his licence disqualification warranted dismissal. Otherwise, it would have terminated his employment for one or more of those reasons. Instead, it condoned the behaviour by continuing his employment, assigning him alternative duties, and indicating he could return to his Truck Driving duties as soon as he obtained a limited licence.

[101] Although a no remedy assessment focuses on the employee's actions, it would be artificial to not also consider how the employer viewed those actions at the time. Solly's having not considered Mr Tunnicliffe's actions to justify termination, I cannot find that they were so egregious as to eliminate all remedies.

[102] Mr Tunnicliffe's actions may instead warrant a reduction of remedies for contribution, which I will come to later.

#### *Remedies for unjustified dismissal*

[103] Having found that Solly's unjustifiably dismissed Mr Tunnicliffe and this is not a case where an absence of remedies is appropriate, I turn to consider the appropriate lost wages and compensation remedies pursuant to section 123(1)(b) and 123(1)(c)(i) of the Act.

#### *Lost wages*

[104] Mr Tunnicliffe seeks reimbursement of loss of earnings for a period of up to three months following the date of dismissal. Pursuant to sections 123 and 128 of the Act if an employee has a personal grievance and they have lost remuneration because of that grievance then they are entitled to the lesser of their actual lost remuneration or three months' ordinary time remuneration.

[105] However, this is subject to the employee's duty to take reasonable steps as are appropriate in the circumstances to mitigate loss,<sup>7</sup> and Solly's asserts Mr Tunnicliffe has provided scant evidence of having done so. An unreasonable failure to mitigate loss, means that an employee's lost remuneration stops being caused by the unjustified dismissal but rather becomes a product of that failure.

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<sup>7</sup> *Maddigan v Director-General of Conservation* [2019] NZEmpC 190. A failure to mitigate loss does not automatically disentitle an employee to lost wages but will depend on a case-by-case assessment as to whether that failure was reasonable.

[106] Mr Tunnicliffe asserts that he visited and made phone calls to a small number of businesses but did not apply for any jobs online or send any emails. He has no corroborating evidence and was an unreliable witness. On his own evidence, from 24 April 2024 until June 2024, he can only be sure of having visited one company (on 14 May 2024) and cannot be sure of having made any phone calls (these allegedly having been made on unspecified dates in May or June 2024). He further claims to have visited a second business on 18 June 2024 and a third on 10 July 2024.

[107] Mr Tunnicliffe did not provide any evidence of mitigating against his licence disqualification. As a qualified Truck Driver, he would have been limited in his employment options until the expiry of the licence disqualification, and obtaining a limited licence (for example) may have assisted any job search.

[108] In the circumstances, Mr Tunnicliffe could have been expected to seek to mitigate his loss. He was not so affected by the dismissal as to prevent him from doing so in a timely fashion. However, I do not have sufficient evidence of any reasonable attempts at mitigation. Mr Tunnicliffe appears to have made no record of job search attempts at the time; instead, retrospectively creating a short and uncorroborated list, containing minimal detail.

[109] I conclude that Mr Tunnicliffe failed to take reasonable steps as were appropriate in the circumstances to mitigate his loss. I decline to award lost wages.

### *Compensation*

[110] An award of compensation is to mitigate the impact on the employee of the personal grievance and is not intended as a punitive action to signal disapproval of the employer's conduct.<sup>8</sup> In considering an award of compensation, the assessment required is the nature and extent of harm caused to the employee by the employer's breach.<sup>9</sup>

[111] Mr Tunnicliffe described feelings of worthlessness, shame and anger. Mrs Tunnicliffe confirmed those feelings and described impacts on their relationship. It is not clear whether the impacts were solely attributable to the dismissal or also related to the drink driving

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<sup>8</sup> Paykel Ltd v Ahlfield [1993] 1 ERNZ 344 at [342]

<sup>9</sup> Pyne v Invacare New Zealand Limited [2023] NZEmpC 179 at [41].

conviction and loss of licence generally; nevertheless, I accept that the dismissal did injure Mr Tunnicliffe's feelings.

[112] Overall, the impact on Mr Tunnicliffe was modest.

[113] Subject to any consideration of contribution under s 124 of the Act, I consider an award of \$10,000 as compensation to be appropriate. The evidence supports the award of this amount, and it is consistent with recent awards of compensation for unjustifiable dismissals that have had a modest impact on employees.<sup>10</sup>

### **Contribution**

[114] The Authority must consider whether there ought to be a reduction in the remedies that would otherwise have been awarded to the employee.<sup>11</sup> It must first be satisfied the actions of the employee contributed to the situation that gave rise to the dismissal. This requires a causal connection between the employee's conduct and the situation which gave rise to the dismissal.<sup>12</sup>

[115] In assessing whether Mr Tunnicliffe's actions require a reduction in the remedies that would otherwise have been awarded, I am to determine if Mr Tunnicliffe behaved in a manner that was culpable or blameworthy.<sup>13</sup>

[116] The Employment Court has endorsed an approach where a reduction of 50 percent sits at the higher end with 25 percent also representing a significant reduction.<sup>14</sup>

[117] Mr Tunnicliffe submits the Authority is to only consider the conduct that directly contributed to the grievance. In other words, as I have accepted the dismissal was in relation to frustrations around Mr Tunnicliffe's lack of progression with the limited licence and his protestations about who should pay, this is the only behaviour which should be considered in assessing contribution. He submits that the 5 February 2024 job interview, the subsequent disqualification for drink driving, and driving to work while disqualified are not relevant.

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<sup>10</sup> See for example: *Beveridge v PVB Investments Limited and Percy Vernon Burlace* [2026] NZERA 51 at [65].

<sup>11</sup> Employment Relations Act 2000, s 124.

<sup>12</sup> Above n 5 at [78].

<sup>13</sup> Above n 7 at [73].

<sup>14</sup> Above n 3 at [217] – [222].

[118] I do not accept this submission. Section 124 refers to the employee's contribution "towards the situation that gave rise to the personal grievance". This is a broad enquiry. Mr Tunnicliffe's job interview dishonesty led to employment he would not otherwise have obtained. His subsequent loss of licence led to the need for a limited licence, which in turn led to the disagreement that caused his dismissal.

[119] I do accept, however, that Mr Tunnicliffe driving in breach of his licence disqualification did not contribute towards the situation that gave rise to the grievance. Although this behaviour demonstrates Mr Tunnicliffe's disregard for complying with New Zealand law and the rules of the road, Solly's demonstrated no concern about it, and it is not connected to the personal grievance. I am therefore to disregard this factor.

[120] I instead consider the following factors.

*Drink driving conviction and loss of licence*

[121] Mr Tunnicliffe's drink driving conviction and loss of licence rendered him unable to perform the fundamental duties of his role. It would have been open to Solly's to consider termination on this basis alone, particularly given clause 18.5 of his employment agreement states that the loss of licence may lead to termination. Mr Tunnicliffe was aware (or should reasonably have been aware) of the possibility of dismissal for a licence disqualification.

*Job interview dishonesty*

[122] I found that at the job interview on 5 February 2024, Mr Tunnicliffe answered falsely about convictions and pending court cases. I also found that this was not a matter Mr Tunnicliffe could feasibly have forgotten about, regardless of any other issues he was experiencing in his life at that time. He was therefore untruthful to his prospective employer about something that was fundamental to his employment.

[123] Mr Tunnicliffe's actions at the job interview were deliberately dishonest. He said he did not have any criminal convictions or pending court cases even though he knew the loss of his licence would mean he could not do the duties of the role. Crucially, if Solly's had known about the pending court case and licence disqualification it would not have employed Mr Tunnicliffe as a Truck Driver.

[124] Had Solly's terminated Mr Tunnicliffe for his dishonesty following a fair process, as it purported to have done, it would likely have had sufficient grounds to justify dismissal.<sup>15</sup>

*Attempts to obtain a limited licence*

[125] At the time of his dismissal, Mr Tunnicliffe had made minimal progress in obtaining a limited licence. He knew that his alternative duties were only temporary and that his continued employment was effectively conditional on him obtaining a limited licence.

[126] Having not been dismissed for his dishonesty, Mr Tunnicliffe could have been expected to respond to such leniency with a concerted effort to obtain his limited licence. He did not do so, however, and eight weeks later indicated this was because he wanted Solly's to pay for his limited licence.

[127] Solly's were under no obligation to keep his position open indefinitely pending Mr Tunnicliffe's progression of his limited licence application. After eight weeks and little progress, Solly's may have been entitled to commence a disciplinary process for that sustained failure. Without a limited licence Mr Tunnicliffe remained unable to perform the fundamental duties of his role.

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<sup>15</sup> In assessing this, I would have been guided by *Murray v Attorney-General* [2002] 1 ERNZ 184. I would have first determined serious misconduct was not open to Solly's given at the time of the interview Mr Tunnicliffe was not an employee pursuant to section 6 of the Act, including not being "a person intending to work" (this requiring an offer of employment to have been made and accepted).

I would then have determined that Mr Tunnicliffe could not have had his employment lawfully terminated for pre-contractual misrepresentation as the commencement of the employment relationship was not conditional on the truth of Mr Tunnicliffe's representations, nor did any clause of the employment agreement specify that such misrepresentations could warrant dismissal. This is consistent with *Richardson v Fonterra Cooperative Group Limited* [2013] NZERA Wellington 132 in which a prospective employee's inaccurate responses about prior convictions under the mistaken belief the Criminal Records (Clean Slate) Act 2004 applied were unable to justify termination due to the unconditional nature of the employment offer and there being no reference as to misrepresentation in the employment agreement.

Notwithstanding, I would likely have relied on *Murray v Attorney General* to find the dismissal justified due to equity and good conscience, recognising the special nature of the relationship between employees and employers and the importance of an employer being able to rely on a prospective employee's representations when asked about fundamental questions relating to their employment (see paragraphs [50] – [54]). The law recognises that "there is no duty on negotiating parties to reveal material facts voluntarily. However, if the other party asks and the first party chooses to answer, that answer must be honest and full" (see paragraph [44]). The ability to dismiss under equity and good conscience then arises where the untruthful answer induces the employer to offer employment.

## *Conclusion*

[128] When considering Mr Tunncliffe's actions in their totality, it is clear he significantly contributed to the dismissal. Mr Tunncliffe's deliberate dishonesty at the job interview seriously affected the trust and confidence in the employment relationship from the outset. His licence was subsequently disqualified preventing him from performing the duties of the role he had been employed in, and he was dilatory in rectifying that situation by seeking to obtain a limited licence.

[129] I find that compensation is to be reduced 50% for contribution. Mr Tunncliffe is therefore to be awarded \$5,000.

## **Outcome and costs**

[130] Solly's Freight (1978) Limited unjustifiably dismissed Robert Tunncliffe. Solly's are ordered to pay Mr Tunncliffe a sum of \$5,000 in compensation.

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

[132] If the parties are unable to resolve costs, and an Authority determination on costs is needed, the party who believes they are entitled to costs may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum the other party 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.

[133] 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.<sup>16</sup>

William Fussey  
Member of the Employment Relations Authority

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<sup>16</sup> [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)