

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 40
5416087

BETWEEN

NORMAN LOWE
Applicant

A N D

BAILEY TANKS LIMITED
Respondent

Member of Authority: Christine Hickey

Representatives: Dave Vinnicombe, Advocate for the Applicant
Geoff Bevan, Counsel for the Respondent

Investigation meeting: 12 November 2013 at Christchurch

Submissions Received: At the investigation meeting, and further evidence
received 5,10,14 and 19 February 2014

Date of Determination: 17 March 2014

DETERMINATION OF THE AUTHORITY

- A. Norman Lowe has a personal grievance that he was unjustifiably dismissed.**
- B. Bailey Tanks Limited is to pay Norman Lowe 3 months lost wages less 40%. Mr Lowe has leave to return to the Authority for a calculation of lost wages if the parties are unable to agree on the amount to be paid.**
- C. Bailey Tanks Limited is to pay Norman Lowe \$4,200 compensation under s.123(1)(c)(i) of the Employment Relations Act 2000.**

Employment relationship problem

[1] Norman Lowe was a driver at Bailey Tanks Limited. He claims that he was unjustifiably dismissed.

[2] Bailey Tanks says that Mr Lowe was justifiably dismissed. It says if there were any procedural shortcomings they were only minor. In the alternative Bailey Tanks submits that if Mr Lowe was unjustifiably dismissed his contribution to his dismissal was significant.

Issues

[3] The Authority needs to determine whether:

- (a) The decision to dismiss Mr Lowe was a decision a fair and reasonable employer could have made in all the circumstances at the time; and
- (b) If not, whether Mr Lowe is entitled to remedies; and
- (c) Whether Mr Lowe contributed to the situation giving rise to the dismissal.

Background

[4] Mr Lowe began working as a driver for Bailey Tanks (Baileys) on a permanent basis in June 2011. He delivered water tanks manufactured by Baileys.

[5] In early November 2012 Jeremy Harford, Logistics Coordinator, and Peter Moskaluk, South Island Manager, talked to Mr Lowe about the importance of the company's operator safety rating and about safe driver practice. During that discussion, Mr Lowe was specifically cautioned not to speed and told that speeding infringements could result in disciplinary action.

[6] A little over a week later, Mr Lowe told Mr Harford he had received a speeding infringement notice. Mr Harford and Mr Moskaluk met with Mr Lowe on 26 November 2012. They emphasised the importance to the company of safe and compliant driving. They told Mr Lowe that disciplinary action might follow if he committed further speeding offences.

[7] At that meeting, Mr Lowe said that he had previously been told by Mr Moskaluk to *put your foot down*. Mr Harford and Mr Moskaluk told Mr Lowe

that if Mr Moskaluk had said that, he had not meant that as permission to break the law by driving faster than the speed limit.

[8] After the meeting, Mr Harford wrote a letter to Mr Lowe (which he dated 28 November 2012) but did not give it, or send it, to him. It read:

Re: Discussion with regard to a speeding ticket you received early in November while driving a Bailey Tanks vehicle.

Norm,

Recently you advised us that you received an infringement notice for a speeding offence while driving a Bailey Tanks truck. Peter and I have discussed this with you. The purpose of this letter is to document that discussion.

During this discussion you were reminded that only a matter of days prior to receiving the infringement notice, you had been informed of the importance of safe driving practice, as we have had numerous incidents causing damage this year, and this is affecting our Operator Safety Rating, and our Insurance contracts.

This letter is not a formal warning, however future acts of this nature will result in disciplinary action.

[9] On 28 November 2012 Mr Lowe picked up a loaded truck at the Bailey Tanks yard, checked the load and began to drive the approximately 13kms to a BP truck stop when a 10,000 litre tank fell off the back of his truck. There is a dispute about whether or not Mr Lowe knew that the load was not properly secured at the yard but nonetheless decided to drive to the BP truck stop and tighten the load there.

[10] Mr Harford went to where the tank had fallen off to assist with loading it again. He and Mr Lowe were directed to go back to the yard where a Police officer would meet them. The Police officer had a discussion with Mr Lowe who was given an infringement notice carrying a \$600 fine. The Police officer told Mr Harford and Mr Moskaluk that the driver would be given the infringement notice but often the employer paid the fine. However, Mr Lowe told Mr Harford and Mr Moskaluk that he knew as the driver he was responsible for the loss of the load and that he would pay the fine. After that discussion Mr Moskaluk and Mr Harford decided to have a formal disciplinary meeting with Mr Lowe about the incident.

[11] The following day, 29 November 2012, Mr Lowe telephoned Mr Harford and told him that he had been pulled over for going too fast but not given a ticket, only warned to drive more slowly.

[12] Immediately after that call Mr Harford drafted two separate letters asking Mr Lowe to attend two disciplinary meetings on 30 November, one at 9am - about *driver responsibility* - and one at 9.30am – about *speeding*. He left those at the office in an envelope for Mr Lowe along with the letter he wrote on 28 November 2012 about the speeding infringement notice they discussed on 26 November 2012.

[13] Later that afternoon Mr Harford rang Mr Lowe and told him to pick up an envelope from the office when he got back. He did not tell him:

- what was in the envelope, or
- that he was asked to attend a disciplinary meeting the next day, or
- which incident of *speeding* the meeting was concerned with, or
- what Baileys' concern about his *driver responsibility* was.

[14] The 29 November 2012 letters were almost identical:

DISCIPLINARY MEETING

We would like to meet with you at 9.00am on Friday 30th November 2012. The purpose of the meeting is to discuss the following concerns with you:

- Driver responsibility

At the meeting we will discuss these issues in more detail, give you a full opportunity to respond and provide any comments you wish to make.

I will not make any decision as to what steps I will take to deal with these issues until I have fully considered your views.

However, I am required to advise you that the issues listed above, are very serious and disciplinary action, up to and including dismissal, is a possible consequence of this meeting.

Peter & I will be present at the meeting on behalf of the company. You are entitled to bring a representative or adviser with you to the meeting.

[15] The second letter varied only in that it asked Mr Lowe to meet at 9.30am with the *concerns* identified as *Speeding*.

[16] On 30 November 2012, Mr Lowe attended the meeting with Mr Harford and Mr Moskaluk without a representative or support person. There are no minutes of the

meeting. Although Mr Moskaluk attended with the intention of taking minutes he soon became actively involved in the meeting and did not take minutes. He says that is because Mr Lowe soon became angry and agitated.

[17] The parties do not entirely agree on what was said at the meeting. Nevertheless, I am satisfied that neither Mr Moskaluk nor Mr Harford verbally told Mr Lowe that it was a disciplinary meeting that could potentially result in his dismissal and did not ask him if he was comfortable proceeding without a representative.

[18] I am also satisfied that Mr Lowe was told that the *driver responsibility* concern was that his load had not been secure on 28 November resulting in the loss of the tank from the back of the truck. He was also told that the concern about *speeding* related to the fact that he had been pulled over for speeding on 29 November so soon after having had an infringement notice for speeding and having been spoken to about that on 26 November.

[19] Mr Moskaluk and Mr Harford say that Mr Lowe told them that he had checked the tank at the yard before driving off and noticed that it was *less than perfect* but decided to drive to the BP truck stop before securing it. Mr Lowe denies that he said that and instead says that he told Mr Moskaluk and Mr Harford that he had checked the load at the yard and considered it *okay*. He decided he did not need to tighten the straps to secure the load at the yard but that he would check it again once he reached the truck stop.

[20] In relation to speeding, Mr Harford's and Mr Moskaluk's evidence is that they sought an assurance from Mr Lowe that he would not exceed the speed limit again. They say that while Mr Lowe agreed that he was bound to follow the law in relation to speed limits, he would not promise that he would never exceed the speed limit again, saying *I'm only human*. However, Mr Lowe says that he agreed that he was bound to keep to the speed limit and agreed that he would not exceed the speed limit again.

[21] It is common ground that Mr Lowe had previously asked if he was able to load and secure the tanks onto his truck himself rather than them being loaded and secured ready for him when he arrived at work. He was unhappy that other people loaded his truck. He had previously been told that it was not acceptable to Baileys to have the

drivers loading the truck and was not company policy. Baileys considered it saved time to have the trucks ready to go when drivers started their shifts, although they expected drivers to check their load and to tighten existing straps as necessary or add extra straps if they thought that necessary. The company position on that was reiterated to Mr Lowe at the 30 November 2012 meeting.

[22] Mr Lowe also asked that he be allowed to tighten the straps slightly tighter than usual, which he acknowledged would dent the tanks. It was his belief that the dents would disappear over time when the tank was heated by sunlight or when it was filled with water. However, Mr Harford and Mr Moskaluk told him that this was not acceptable practice.

[23] Mr Lowe says it was in relation to the security of loads he told Mr Harford and Mr Moskaluk that he could not guarantee that he would be able to secure a load so as not to lose another tank because he was *only human*.

[24] At the end of the meeting, Mr Harford and Mr Moskaluk told Mr Lowe that they needed to have a discussion to consider what he had said at the meeting. Mr Moskaluk told Mr Lowe that he should think about what had been said and that they would need to meet again.

[25] Mr Moskaluk considered Mr Lowe should be dismissed. He drafted a letter recording what had been discussed and communicating Baileys' decision to dismiss Mr Lowe. However, Mr Moskaluk and Mr Harford discussed the matter further and decided to give Mr Lowe some more time to think about the matters they had raised and to cool down because he had been quite agitated and a little angry in the meeting.

[26] On Monday, 3 December 2012, Mr Harford drafted a letter, headed *Disciplinary meeting*, inviting Mr Lowe to a meeting at 9 o'clock on Tuesday, 4 December:

The purpose of the meeting is to conclude our discussions on Friday November 30th.

Peter & I will be present at the meeting on behalf of the company. You are entitled to bring a representative or adviser with you to the meeting.

[27] Mr Moskaluk and Mr Harford say that the purpose of the meeting was to ask Mr Lowe to reconsider his responses to Baileys' requirements that he commit to

properly securing loads, to not speeding again and generally to acting as a responsible driver. However, they both say that Mr Lowe would not agree that he would not speed again. After hearing that, Mr Moskaluk left the room and put that day's date, 4 December 2012, on the letter that he had drafted the previous Friday:

On Friday 30 November 2012 at 9:00am you met with Jeremy and myself to discuss recent incidents which have occurred in the course of your work.

Specifically we discussed the loss of a tank from your truck on Wednesday 28 November 2012 and two recent speeding offences. These have occurred since your meeting in September 2012¹ discussing Bailey Tanks Operator Safety Ratings with Jeremy and myself. In that meeting we discussed what sort of things affected our rating in a negative way and the consequences of our rating worsening from its current point. You told us that you fully understood the topic of discussion and what was required from you in the course of performing your work functions. We have discussed Operator Safety Ratings and what your responsibilities and obligations are on numerous occasions since September 2012.

On Wednesday 28 November 2012 you checked the BT10000 tank on your truck and decided that it was secure enough to make it to the BP Truck Stop. Your intention was to check it again when you got there. The tank fell from the truck before you had made it to the BP Truck Stop. It had been incorrectly assessed as being secured properly. You have accepted responsibility for this incident and have advised us that you are going to pay the Infringement Notice received for the load being insecure.

Since our recent meeting about Operator Safety Ratings you have advised us that you have been pulled over twice for speeding. The second of these offences occurred on Thursday 29 November 2012, the day after the tank had fallen off your truck. You were fully aware that these actions would be detrimental to Bailey Tanks Operator Safety Rating. You have also been made aware of the impact a worsened Operator Safety Rating would have on the ability of the company to continue to function in delivering its product, the fact that other peoples jobs are put at risk if the company cannot function properly and the result of significantly increased costs and ultimately our ability to insure our fleet of vehicles, relying on us having a good Operator Safety Rating.

As discussed previously you have a responsibility to look after the company's products and tools of trade to the best of your ability. Damage caused to the BT10000 tank and recent damage to GGU 942² were completely avoidable occurrences.

Further to the damage that has been caused recently, your disregard for the need for safe practices to be followed is not acceptable. The

¹ This is the same meeting that I refer to in paragraph [4] above and I am satisfied that it happened in early November 2012 based on Mr Harford and Mr Moskaluk's evidence prepared for the investigation meeting.

² A Baileys' truck that was damaged when Mr Lowe was driving it.

importance for taking responsibility for your personal safety, as well as, the safety of the general public on the road, has been discussed with you and although you have agreed with this, your behaviour has not evidenced acceptance of this agreement.

What concerns us at this time is that you have told us that you will not be able to avoid further reoccurrences of such incidents in the future, having cited reasons such as being “only human”. Bailey Tanks trucks need to be operated safely and within the speed limit at all times without exception and we cannot accept you clearly communicating your not being able to make a commitment to these requirements. We have made every endeavour to try and communicate the importance of safe practices and other important issues with you. You have refused to give these any serious consideration on any occasion.

As a result of you not being able to agree and commit to performing basic requirements of your position as a truck driver for Bailey Tanks we are unable to continue to maintain our employment agreement with you and have no option except to advise you that your employment with the company has been terminated effective as from today.

[28] After receiving the dismissal letter Mr Lowe left the meeting but returned a few minutes later holding what Mr Harford assumes were the three letters he left in the envelope for Mr Lowe on 30 November. Mr Lowe indicated one of those letters and said to Mr Harford and Mr Moskaluk that the letter told him the meeting was not a disciplinary one. The implication was that he did not understand that it was possible that he could be dismissed as a result of the 30 November and 4 December meetings.

Is Mr Lowe’s dismissal justifiable?

[29] The test for whether Mr Lowe’s dismissal was justified is in s.103A of the Employment Relations Act 2000. The Authority must objectively consider whether what Baileys decided, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the actions occurred.

[30] In applying that test the Authority must consider the factors in s.103A(3)(a) to (d) and any other factors it thinks appropriate as set out in s.103A(4) of the Act as to the fairness of the procedure. The Authority must not determine a dismissal unjustifiable if any procedural defects were minor and did not result in Mr Lowe being treated unfairly.

[31] The first issue to consider is whether Baileys was entitled to dismiss Mr Lowe for the substantive incidents of loss of the load on 28 November and being pulled over

for speeding on 29 November 2012 when considered in conjunction with the other issues raised in the letter of dismissal.

[32] In objectively considering what a fair and reasonable employer could have done at the time it decided to dismiss Mr Lowe I can only take into account what the employer knew at the time it made its decision, not what was said by the employee subsequently. I consider it more likely that while Mr Lowe agreed that he needed to keep to the speed limit and obey the law he said that he could not guarantee he would not speed again because he was *only human*. That is not what he said at the investigation meeting but I prefer Mr Harford and Mr Moskaluk's evidence of what he said in their meetings with him on 30 November and 4 December 2012.

[33] It is clear that Baileys wanted an absolute commitment from Mr Lowe not to speed. That is what a fair and reasonable employer could expect from a professional driver, especially when recently he had had a speeding infringement notice and been spoken to about the importance of avoiding any further infringement offences.

[34] At the investigation meeting both parties agreed that the speedometer on Mr Lowe's truck was inaccurate and that Mr Lowe had been aware of that prior to receiving the speeding infringement offence notice. However, I am satisfied that this issue was not raised by Mr Lowe in mitigation at the disciplinary meetings on 26 or 30 November or 4 December 2012. Therefore, Baileys did not take that into account when coming to the decision to dismiss Mr Lowe. I am satisfied that Mr Lowe knew by how many kilometres per hour the speedometer was "out" and a fair and reasonable employer could have expected him to take that into account when driving the truck.

[35] However, I do not consider that a fair and reasonable employer could have concluded that Mr Lowe being stopped and warned about speeding on 29 November 2012 was a second infringement notice speeding offence as Baileys concluded in its letter of dismissal³. Mr Lowe was not issued with an infringement offence notice on 29 November 2012 but given a verbal warning by the Police officer instead.

[36] Also at the time he was warned by the Police officer Mr Lowe believed that there had been no consequence from his speeding infringement notice because although Mr Harford wrote a letter about it giving him a warning (though not a *formal*

³ "...the second of these offences occurred on Thursday 29 November 2012"

one) that any further infringement notices for speeding would result in disciplinary action Mr Lowe was not yet aware of that. Mr Harford did not make that letter, dated 28 November 2012, available for Mr Lowe until later on 29 November 2012.

[37] Given that letter did not contain a formal warning I do not consider a fair and reasonable employer could have based its decision to dismiss an employee for a further speeding infringement notice on that letter. In any event, to reiterate, Mr Lowe did not get any further speeding infringement notice.

[38] Serious misconduct:

... will generally involve deliberate action inimitable to the employer's interests ... [it] will not generally consist of mere inadvertence, oversight, or negligence however much that inadvertence, negligence, or oversight may seem an incomprehensible dereliction of duty.⁴

[39] It is conduct which:

deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship.⁵

[40] The loss of the tank was Mr Lowe's responsibility and he accepted that as evidenced by his offer to pay the \$600 fine. The tank loss was not as a result of a deliberate act but as a result of Mr Lowe's negligence at most. At the investigation meeting Mr Harford said he and Mr Moskaluk made the decision that Mr Lowe's tank loss was serious misconduct because *it came across that [Mr Lowe] hadn't checked and tightened the load at the yard before leaving* but decided to drive to the truck stop anyway. Mr Lowe disputes that and says he checked the load and thought the tank was OK but decided he'd check it again and tighten the straps if necessary once he got to the truck stop.

[41] Based on the wording of the dismissal letter which Mr Moskaluk wrote immediately after the 30 November meeting I find it more likely than not that Mr Lowe told them he assessed the security of the load at the yard and decided it *was* secure enough to get to the BP truck stop:

...you checked the BT10000 tank on your truck and decided that it was secure enough to make it to the BP Truck Stop. Your intention

⁴ *Makatoa v Restaurant Brands (NZ) Ltd* [1999] 2 ERNZ 311 (EmpC) at 319

⁵ *Northern Distribution Union v BP Oil NZ Ltd* [1992] 3 ERNZ 483

was to check it again when you got there. ...It had been incorrectly assessed as being secured properly.

[42] That is not congruent with Mr Harford's written witness statement prepared for the investigation meeting:

He told us that he had checked the load at the yard and seen that it was not properly secured. He told us he thought that he would get to a BP struck stop 13km away ... and tighten the load there.

[43] I consider the dismissal letter, which was written very close in time to the incident, is more likely to reflect what Mr Moskaluk and Mr Harford believed at the time; that is, that Mr Lowe checked the load and considered it was adequately secured although he intended to check it again at the truck stop.

[44] Even if Mr Lowe's behaviour was as Mr Harford and Mr Moskaluk concluded; that he checked the load and saw that it was not properly secured then it was negligent behaviour at the most. There is a question about whether such behaviour could have been reasonably viewed as serious misconduct. One instance of an employee's negligence does not generally justify summary dismissal, but may do if the negligence can be said to sufficiently impair or be destructive of the necessary trust and confidence between the parties.

[45] In cases of serious negligence or negligence creating a danger a single act may be sufficient to justify summary dismissal. Under s.9 of the Land Transport Act 1998 Mr Lowe, as the driver, has a responsibility to ensure his load is and remains secure. The person or persons loading the vehicle have the same responsibility:

Loads transported by vehicles to be secured

A person operating a motor vehicle on a road, and any person loading that vehicle, must ensure that any load carried in or on the vehicle, or in or on a vehicle being towed by the vehicle driven by the operator, is secured and contained in such a manner that it cannot fall or escape from the vehicle.

[46] Therefore, it is a fundamental duty of a driver to check the security of his load and ensure it cannot fall off the truck. The loss of the tank on 28 November 2012 was potentially very dangerous to other road users and pedestrians/cyclists etc. in the vicinity, as well as having the potential to damage the tank and cause financial loss to Baileys.

[47] In light of the potential serious danger the loss of the tank from the truck was capable of being serious misconduct. However, under s.9 of the Land Transport Act whoever loaded the truck should also have been held to account for the loss of the load. There is no evidence that they were and that in itself is unfair to Mr Lowe.

Was the process used compliant with s.103A(3) and one a fair and reasonable employer would have used?

Was there sufficient investigation?

[48] Mr Harford attended the site of the lost tank after Mr Lowe rang him to tell him what happened. By the time he got there the tank had been reloaded. In evidence received on 7 February 2014 Mr Harford says that he looked at the straps and confirmed that none of them were broken and that there were no other problems with them.

[49] When the tank was back at the yard and unloaded Mr Harford checked to see if there was some problem with the tank that had caused it to fall. However, there was no such problem.

[50] Although there was not a formal investigation of the loss of the tank I consider that bearing in mind Baileys is a small business the investigation into what caused it to fall was sufficient.

[51] However, there was no investigation into whether Mr Lowe had actually received a speeding infringement notice on 29 November 2012. That was more than a minor matter and caused Mr Lowe to be treated unfairly.

Did the employer raise the concerns it had with Mr Lowe before dismissing him?

[52] Baileys did raise the concerns it had about Mr Lowe's speeding and about his loss of the tank with him before dismissing him. However, Mr Harford and Mr Moskaluk never directly told Mr Lowe that unless he could commit to not speeding again and to making sure he secured his loads he would be dismissed. At the investigation meeting they both said that the lack of those two undertakings was fundamental to his dismissal.

Was Mr Lowe given a reasonable opportunity to respond to the employer's concerns?

[53] Although Mr Lowe was able to respond as far as he understood the employer's concerns it was not clear to him that unless he gave an unconditional agreement never to speed again and to ensure he would in every other way also be a responsible driver he would be dismissed. Therefore, I consider that Mr Lowe was not given a reasonable opportunity to respond to his employer's concerns. This is more than a minor procedural breach and contributed to unfairness towards Mr Lowe.

Did the employer genuinely consider Mr Lowe's explanation of his conduct before dismissing him?

[54] Insofar as Mr Lowe was able to give an explanation it was taken into consideration before he was dismissed.

What other procedural factors should be considered?

[55] I have concerns about other aspects of the process used to reach the decision to dismiss Mr Lowe. Mr Harford's use of three separate letters in one envelope was unfortunately complex. The two letters inviting Mr Lowe to the 30 November disciplinary meetings were not clear enough about Baileys' concerns to allow Mr Lowe to be properly prepared to give his explanations at the 30 November meeting. Mr Harford spoke to Mr Lowe by telephone on 29 November and could easily have given Mr Lowe more detail about Baileys' concerns over the phone but did not.

[56] Mr Lowe was somewhat confused about the purpose of the meetings and I consider that was partly due to getting three different letters at the same time one of which gave him an informal warning only about his speeding infringement notice.

[57] Because of the 29 November 2012 letter Mr Lowe proceeded to attend the two disciplinary meetings on the understanding that his warning about speeding was not going to lead to disciplinary action as he had not committed a further speeding infringement offence.

[58] All three letters about the disciplinary meetings informed Mr Lowe that he was entitled to bring a representative or advisor to the meetings with him. However, in a case where dismissal is a possible outcome I consider that a fair and reasonable

employer is more likely to advise an employee that it is *advisable* to bring a representative or advisor with him, rather than merely being entitled to do so.

[59] The letter dated 3 December 2012 was insufficient to warn Mr Lowe that dismissal was a very real possible result of the 4 December meeting and that bringing a representative or advisor was advisable. After all, Mr Moskaluk had already drafted a dismissal letter and told Mr Harford he thought dismissal was the appropriate outcome. The 4 December meeting was Mr Lowe's very last opportunity to avoid dismissal. A fair and reasonable employer could not have failed to advise Mr Lowe that dismissal was a possible, perhaps even a likely outcome, of the 3 December meeting. Again Mr Lowe should have been advised to seek advice and representation.

[60] In all of the circumstances at the time of the dismissal a fair and reasonable employer could not have dismissed Mr Lowe. He has a personal grievance of unjustified dismissal and is entitled to remedies.

Remedies

Lost remuneration

[61] Mr Lowe claims three months lost remuneration. Section 123(1)(b) of the Act allows me to provide for the reimbursement by Baileys of the whole or any part of wages Mr Lowe lost as a result of his grievance. Section 128(2) of the Act provides that I must order Baileys to pay Mr Lowe the lesser of a sum equal to his lost remuneration or to 3 months' ordinary time remuneration.

[62] Mr Lowe's evidence is that he was so badly affected by his dismissal that his pre-existing depression that had been under control was significantly worsened and he had a severe recurrence of it. He says he spent the first four weeks after his dismissal confined to his bedroom. After that he visited Work and Income NZ and was put on a sickness benefit which he was still receiving at the date of the investigation meeting.

[63] Since Mr Lowe's only income from the date of his dismissal until the date of the investigation meeting was a sickness benefit I need to consider whether his need for the sickness benefit was caused by his unjustified dismissal. I also need to take into account whether Mr Lowe adequately mitigated his loss.

[64] On 10 February 2013 Mr Lowe's GP provided a letter stating that he wrote to:

confirm that since his dismissal from work in December 2012 - he has had [sic] suffered from depression, requiring medications - and as a result has had time away from his new employer.

[65] I accept Mr Bevan's submission that the cause of the diagnosis of depression is based on Mr Lowe's self-reporting to his GP. However, that is the usual situation with depression which is frequently diagnosed and treated by general practitioners.

[66] Mr Bevan submits that there is no evidence that Mr Lowe made reasonable efforts to mitigate his loss by, for example, applying for other jobs and in the absence of such mitigation and the absence of financial records of his actual income and loss over the three months after his dismissal Mr Lowe should not be entitled to any lost remuneration.

[67] However, I accept Mr Lowe's evidence that for at least the first four weeks after his dismissal he was incapable of seeking work and that he was only in receipt of a sickness benefit for at least the first 3 months after his dismissal. In all the circumstances I consider that, subject to a consideration of contribution, Mr Lowe is entitled to 3 months (or 13 weeks) of lost wages.

Compensation

[68] Mr Lowe also claims compensation for humiliation, loss of dignity and injury to his feelings under s.123(1)(c)(i) of the Act.

[69] The evidence about the effect of the unjustified dismissal on Mr Lowe means that a fair amount of compensation is \$7,000, before contribution is considered.

Contribution

[70] Section 124 of the Act requires me to consider to what extent Mr Lowe's behaviour contributed to the situation that led to his personal grievance, and to reduce any remedies that have been awarded. The only aspect of Mr Lowe's behaviour that contributed to the situation leading to the personal grievance is the loss of the load. I consider that Mr Lowe's responsibility for the loss of the load is shared with the employee or employees who loaded the tank onto the truck. However, his contribution was blameworthy and therefore I consider his remedies should be reduced by 40%.

Orders

[71] Bailey Tanks Limited must pay Norman Lowe 3 months lost remuneration reduced by 40%. If the parties are unable to agree on the amount Mr Lowe may return to the Authority to calculate the amount of lost remuneration payable.

[72] Bailey Tanks Limited must pay Norman Lowe \$4,200 in compensation under s.123(1)(c)(i) of the Employment Relations Act 2000.

Costs

[73] Costs are reserved. The investigation meeting took less than half a day; a little over two hours. The parties are encouraged to agree on costs. The Authority's usual approach is to award a nominal tariff amounting to \$1,750 for a half day. If the parties are unable to agree on costs the party seeking costs will have 28 days from the date of this determination to submit a memorandum on costs and the other party will have 14 days from that date to submit a memorandum in reply.

Christine Hickey
Member of the Employment Relations Authority