

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 144
5362730

BETWEEN GRAHAM MILLIGAN
Applicant

A N D BROADWAY GENERAL
CARRIERS LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: Richard Peters, Counsel for Applicant
Marisa Brugeyroux, Counsel for Respondent

Investigation Meeting: 22 July 2014 at Christchurch

Submissions Received: On the day

Further Information
and Evidence: 20 August and 5 September 2014

Date of Determination: 15 September 2014

DETERMINATION OF THE AUTHORITY

- A. I have found that the relationship between the parties ended by the dismissal of Graham Milligan.**
- B. I have found that the dismissal was unjustified.**
- C. There is no award for lost wages as a loss in that respect was unable to be established.**
- D. Broadway General Carriers Limited is ordered to pay Graham Milligan, taking contribution into account, the sum of \$4,000 without deduction being compensation under s 123 (1)(c)(i) of the Employment Relations Act 2000.**

- E. There is no proof as to the loss suffered by virtue of the damage or non-return of two items belonging to Graham Milligan. There is accordingly no award made in relation to that matter.**
- F. Broadways General Carriers Limited is to pay to Graham Milligan the sum of \$5,821.30 net being holiday pay.**
- G. I have reserved the issue of costs and failing agreement have set a time table for an exchange.**

Employment relationship problem

[1] Graham Milligan was employed by Broadway General Carriers Limited (Broadway) from 28 October 2006 as a long haul truck driver on a run between Christchurch and Picton. He says that on 29 June 2011 he was actually or constructively dismissed.

[2] Mr Milligan is seeking the following:

- Reimbursement of lost wages;
- Compensation;
- Holiday pay of about 17 weeks;
- Reimbursement for damaged and/or missing personal property;
- Costs.

[3] Broadway does not accept that Mr Milligan was actually or constructively dismissed. It says that the ability for the parties to perform their obligations under the employment agreement was frustrated as a result of Mr Milligan assaulting a staff member of its only customer and being barred by the customer from their premises.

[4] Broadway's managing director, Keith Church, passed away in September 2013, so the Authority did not have the benefit of his evidence. Mr Church's daughter, Jodie Cole, gave evidence at the Authority's investigation meeting. Ms Cole undertook the account administration and assisted her father with the business although she did not have dealings directly with employees. No written employment agreement could be found between Mr Milligan and Broadway.

[5] There is no holiday and leave record as required under s 81 of the Holidays Act 2003. Broadway does not accept that Mr Milligan is entitled to 17 weeks holiday pay. It says he took several weeks of leave including around the Christmas period each year and that he was paid a number of payments over and above his salary. Some of these have the narration *H pay* beside them.

[6] Broadway says that Mr Milligan's personal belongings were returned to him after the Authority telephone conversation and it does not accept that there were any items missing or damaged. In any event, it says that Mr Milligan has not been able to establish loss.

Progress in the matter to the Authority

[7] There was a delay in the lodging of the Statement of Problem until December 2013. Ms Cole raised a concern that proceedings were deliberately lodged after Mr Milligan understood Mr Church had died. Mr Milligan did not accept that.

[8] Mr Milligan was not I find responsible for the delay in lodging the Statement of Problem. He signed the Statement of Problem in February 2013 but due to changes with his representative the Statement of Problem was not lodged until December that year. A personal grievance had been raised on 11 July 2011 and there was some correspondence at that time. Mr Milligan remained willing from the time he raised his personal grievance to resolve matters but that did not occur.

The issues

[9] The issues before the Authority are as follows:

- (a) Was the contract between Mr Milligan and Broadway frustrated?
- (b) If the contract was not frustrated, then was Mr Milligan dismissed from his employment with Broadway?
- (c) If Mr Milligan was dismissed from his employment with Broadway, was the dismissal justifiable under s 103A of the Employment Relations Act 2000 (the Act)?
- (d) If the dismissal was not justifiable, then what remedies is Mr Milligan entitled to and is there an issue of contribution in mitigation?

- (e) Was Mr Milligan's head unit damaged when it was removed from his truck and/or in transit and was his citizen band radio missing from the container with the rest of his property and, if so, what damage arose as a result?
- (f) Is Mr Milligan owed holiday pay, and if so, how much?

What happened on 29 June 2011?

[10] Broadway supplies long haul drivers to Freight Lines Limited (Freight Lines) using trucks owned by Broadway. Mr Milligan undertook work whilst employed by Broadway in this way for Freight Lines.

[11] On the morning of 29 June 2011 Mr Milligan became upset with a despatcher/operations supervisor from Freight Lines, Alan Haugh. An argument took place it would appear in front of a customer of Freight Lines and there was strong language used. Mr Milligan said that he grabbed Mr Haugh by the scruff of his shirt. Mr Haugh in an email to Freight Lines management dated 29 June 2011 refers to being grabbed by the throat and pinned against the corner of a building. It is common ground that the customer and possibly other Freight Lines employees intervened and Mr Milligan released Mr Haugh and went to undertake some deliveries.

[12] Later that morning Mr Milligan was spoken to by his manager Alistair Booth and he was asked to attend a meeting on site with Freight Lines. The time of the meeting was about 10am on 29 June 2011 and was the only meeting held in this matter. It was attended by the Chief Executive Officer of Freight Lines, Barry Raymond, and the Christchurch Operations Manager, Christopher Wilson. Mr Milligan and Mr Booth also attended.

[13] Mr Milligan said that Mr Raymond did most of the talking at the meeting. Mr Raymond provided a written statement although did not attend the Authority meeting. Mr Milligan said that he was not told what Mr Haugh had said/written about the incident at the meeting and therefore did not respond to that. Mr Milligan said that the meeting lasted about 10 minutes and then Mr Raymond *sacked him*. Mr Raymond did not accept in his statement that he dismissed Mr Milligan. He does say in his statement that he told Mr Milligan that he was going to speak to Mr Church about the incident and that Mr Milligan was to leave Freight Lines' premises and not to return until further notice.

[14] Mr Milligan went to the truck and got some items out of it and then drove away from the workplace in his car.

[15] The following day 30 June 2011 Mr Milligan telephoned Mr Church. Mr Milligan said that Mr Church advised him that Freight Lines had sacked him and Mr Milligan said that he reminded Mr Church that he was his employer, but then Mr Church said he would not dismiss Mr Milligan. Mr Milligan said that he asked about working for Fulton Hogan but Mr Church said *no*. Mr Milligan understood although this is not accepted as the correct situation by Ms Cole that Mr Church had a contract with Fulton Hogan. Mr Milligan, I find, in all likelihood told Mr Church that he should either dismiss him or continue to pay him.

[16] Mr Milligan subsequently telephoned Mr Church to enquire about the return of property from his truck which was up in Auckland for transmission repairs. Mr Church was not prepared to provide the personal property or to let Mr Milligan's agent access the truck to retrieve it.

[17] Mr Milligan says that in subsequent calls he asked for details as to how his final pay would be made up and that he was concerned about his accumulated holiday entitlement had not been paid out. He also said in evidence that he needed Mr Church to provide a letter to indicate that he had been dismissed so that he could put in a claim to his insurers for the hire purchase contracts on two vehicles owned by him and his wife. There was no confirmation of dismissal provided.

[18] Mr Milligan was able to obtain part-time employment quickly with another firm as a driver but he said only on a part-time basis.

[19] On 11 July 2011 Mr Milligan's then solicitor Craig Fletcher sent a letter to Mr Church raising a personal grievance and asking for copies of Mr Milligan's employment agreement, correspondence about the dismissal, a meeting of any minutes held in relation to the dismissal and a copy of final pay calculations including holiday pay entitlements. There was a request in the letter for the return of 46 personal items from the truck set out in an attached list. The reasons for dismissal were also requested. There was no written response to that letter and further inquiries were made by a letter dated 17 August 2011 about the property and whether Broadway would be prepared to attend mediation.

[20] By a letter dated 26 August 2011 Mr Church responded. He advised that Mr Milligan's property was in storage and would not be released until Mr Milligan repaid a personal loan of \$2,000 cash. He wrote that he did not accept Broadway had terminated Mr Milligan's employment although Mr Milligan had tried to get Broadway *to dismiss him on several occasions*. Mr Church wrote that there was no position available after Mr Milligan committed an assault on a senior company employee of Freight Lines that Broadway contract to on their premises and *they dismissed him on the spot*. Mr Church attached a copy of a letter dated 30 June 2011 from Freight Lines referring to it as a letter *of the disciplinary action taken against Graham Milligan*. Mr Church advised that Broadway did not see any possibilities of mediation on the matter.

[21] Mr Fletcher made in a letter dated 6 September 2011 for the personal items requested by Mr Milligan and the information requested in the earlier letter of 11 July 2011.

[22] In November 2011 it was clear that Broadway were not willing to attend mediation.

Was the contract between Mr Milligan and Broadway frustrated?

[23] The doctrine of frustration arises when the foundation of the contract is destroyed so that its performance is in effect that of a different contract. The Court of Appeal in *A Farmer v A Worker* [2010] NZCA 547 considered the doctrine of frustration in relation to contracts of employment stating at [21] that it is only if the employment contract does not make sufficient provision for what occurred that the doctrine of frustration will apply. There was reference in that case to the seriousness of the allegations and the difficult situation the employer in that case was in as a result. It was held it was nevertheless not such a situation that the employee could not be afforded the benefit of the statutory processes in the Employment Relations Act 2000. The Court of Appeal was not persuaded by an argument that following the statutory process would have been pointless and found it must be at least conceivable that some resolution may have been able to be reached.

[24] Ms Brugeyroux referred me to some earlier cases on frustration in relation to employment contracts. I find that *A Farmer* is the leading judgment in that respect

and I find no basis on which to distinguish it. The situation with Mr Milligan also involved serious allegations.

[25] The evidence supports Mr Milligan drove exclusively for Freight Lines in a truck owned by Broadway but with a Freight Lines logo on it. He wore a uniform with Freight Lines on it. He worked from Freight Lines premises and was expected to follow their policies and procedures. Freight Lines did not want him to drive for it after the altercation with their employee. There were obvious difficulties for Broadway in that situation, I accept.

[26] Even taking those into account I find as the Court of Appeal did in *A Farmer* that there are statutory provisions in s 103A of the Act informed by the good faith obligations that are capable of addressing a situation where it is alleged serious misconduct has occurred even with limited options for continuation of employment. Broadway was able to hold its own disciplinary meeting and hear from Mr Milligan about the events of 29 June 2011 as to why matters escalated to the point that they did.

[27] I do not find that the contract in this particular case was frustrated. It is necessary to consider whether Mr Milligan was dismissed and if he was then it is necessary to apply the test in s 103A of the Act whether the dismissal was justified.

Was Mr Milligan dismissed from his employment with Broadway?

[28] Mr Church maintained that Broadway never dismissed Mr Milligan. He did advise Mr Milligan on 30 June 2011 that there was no further work because Mr Milligan had been dismissed by Freight Lines. There was no clear response to Mr Milligan's concern that he was not employed by Freight Lines. Consistent with the conversation Broadway did not offer Mr Milligan further work and he was not paid after that date.

[29] Mr Church relied on Mr Milligan having been dismissed by Freight Lines in the conversation on 30 July 2011 rather than undertaking a process and making a decision as to any disciplinary outcome himself. I find that Mr Church's reliance on a third party having dismissed Mr Milligan and his advising of the same viewed together with the fact that no further work or payment was provided amounts to a dismissal.

[30] Mr Milligan was dismissed from his employment with Broadway.

Was the dismissal unjustified?

[31] Section 103A of the Act contains the test of justification. The test requires the Authority objectively assesses whether the employer's action and how the employer acted was what a fair and reasonable employer could have done in all the circumstances at the time the dismissal took place. There are four procedural factors that the Authority must consider at s 103A (3)(a) to (d) and the Authority may in addition consider any other factors but must not determine a dismissal unjustifiable solely because of defects in the process if they were minor and did not result in an employee being treated unfairly.

[32] Ms Brugeyroux submits that a fair process was followed because Mr Booth spoke to Mr Milligan who admitted he had done wrong and then Freight Lines conducted its own investigation. As part of that investigation it met with Mr Milligan who had the opportunity to comment on the incident and then Freight Lines advised Broadway of its decision to revoke Mr Milligan's approved driver status and ban him from which was communicated to Mr Milligan.

[33] I do not with respect agree with Ms Brugeyroux that there was a fair process in this matter. The test of justification in s 103A is concerned with how the employer acted. Mr Milligan was not employed by Freight Lines. I do not find that Broadway sufficiently investigated the allegation of assault, raised concerns with Mr Milligan and enabled him to respond to them and genuinely considered that response before taking any action. The procedural requirements of the test in s 103A (3) (a) to (d) are not met. The procedural flaws were not of a minor nature. They did cause significant unfairness to Mr Milligan.

[34] Ms Brugeyroux submits that Mr Milligan's altercation with Mr Haugh was one that a fair and reasonable employer could find amounted to serious misconduct. There are cases in the employment area where a physical assault has been held to be serious misconduct. I accept that holding another person against their will is conduct that a fair and reasonable employer could find serious misconduct.

[35] I do not accept the submission that dismissal without any investigation in the circumstances could be justified. There was no ability for Mr Milligan to explain to Mr Church his view about the incident. Mr Milligan in his evidence said that the

matter became heated because Mr Haugh told Mr Milligan he *would have his job by the end of the day*. Further Mr Milligan said that he grabbed Mr Haugh by the scruff of his shirt and not as Mr Haugh in his email said around the throat. Mr Haugh wrote in his email that he got on well normally he thought with Mr Milligan and described him that morning as having *simply lost the plot*. A fair and reasonable employer could be expected to have wanted to know why the change in the relationship occurred. There were matters I find that Mr Milligan could have put forward if there had been a fair process. Good faith obligations required Broadway to be communicative and responsive to Mr Milligan about his future with the company but it fell short of those good faith requirements.

[36] *Howard v Carter Holt Harvey Packaging Limited* [2014] NZEmpC 157 is an Employment Court judgment about an employee who admitted punching another employee. Notwithstanding that serious misconduct had occurred it was found that the procedural defects in the investigation were sufficiently fundamental to deny the employee a fair opportunity to establish he should not have been dismissed. Mr Howard though unlike Mr Milligan did have some opportunity to explain. Mr Howard's remedies were reduced by 70% to recognise his contribution to the situation.

[37] I find as in *Howard* that Mr Milligan was denied any fair process including an opportunity to explain why the incident occurred and why he should not have been dismissed. There was no opportunity to consider any other options after the dismissal. It was not beyond the realms of possibility that Mr Church could have spoken to Freight Lines about the possibility of reinstatement of Mr Milligan as an approved driver on strict conditions if he had heard from Mr Milligan. I could not though be satisfied that driving for Fulton Hogan was an option. Ms Cole had no understanding that her father supplied trucks to that business and she checked her understanding with the accountant who was likewise unaware of any relationship between that company and Broadway.

[38] I do not find in those circumstances notwithstanding there was serious misconduct that the decision to dismiss with no fair process was what a fair and reasonable employer could have undertaken in all the circumstances. I find that Mr Milligan was unjustifiably dismissed.

[39] Mr Milligan has a personal grievance that he was unjustifiably dismissed and is entitled to remedies.

Lost Wages

[40] Mr Milligan was able to obtain driving work with Bullet Freight on a casual part-time basis from the Monday after 29 June 2011 and then he was employed full time on 12 September 2011. Despite Ms Brugeyroux's requests for details of earnings from Bullet Freight and the Authority requests at the investigation meeting, Mr Milligan has not provided that information. Even if the information is difficult to obtain a loss of wages must be established.

[41] I cannot, in the absence of records as to earnings from 30 June 2011, be satisfied that there was a loss and I make no award under this head of claim.

Compensation

[42] The claim under this head for compensation for humiliation, loss of dignity and injury to feelings relates in the main to Mr Church not responding to Mr Milligan about whether he was dismissed or not and in turn not dealing with issues that arose as a result of dismissal. Mr Milligan in his Statement of Problem said that he felt he did not mean anything to Broadway after all the work he had done for them including extra and double runs. Mr Milligan was not allowed to retrieve his personal items from his truck. These were in fact not returned until June 2014. He was not told about his holiday pay and why that had not been paid out. He wanted a letter confirming that he was dismissed so he could put in a claim to his insurers for the hire purchase on two vehicles belonging to him and his wife. Mr Milligan said that Mr Church told him that was his problem and both vehicles were subsequently repossessed and sold at a loss. Mr Milligan's marriage ended shortly after his dismissal and his wife left with the children. Mr Milligan did acknowledge that his marriage was already in some trouble at the time he was dismissed.

[43] I accept that Mr Milligan did suffer hurt and humiliation because his employer simply did not respond to him and there was no proper process. Mr Milligan had worked for almost five years at that time for the company but there was no attempt to talk to him and deal with matter appropriately. There was a very strong likelihood even with a fair process that Mr Milligan's employment may not have continued and I

take that into account in this case. Subject to issues of contribution I find a suitable award is \$6,000.

Contribution

[44] The Authority is required if it determines that an employee has a personal grievance to consider the extent to which the actions of the employee in deciding the nature and extent of the remedies to consider whether the actions contributed towards the situation that gave rise to the personal grievance.

[45] Ms Brugeyroux says that contribution should be 100%. That though fails to recognise that Broadway simply failed to communicate with Mr Milligan and respond to his concerns and instead simply relied on a third party as the reason the relationship could not continue. Had Mr Church dealt with the issue at the time then it is unlikely matters would ever have progressed to the lodging of a personal grievance. There was contribution by Mr Milligan in terms of the physical assault and the compensatory award I find is to be reduced to \$4,000.

Order as to compensation

[46] I order Broadway General Carriers Limited to pay to Graham Milligan the sum of \$4,000 without deduction being compensation under s 123 (1)(c)(i) of the Employment Relations Act 2000.

Property

[47] Mr Milligan says that when his property was returned to him the citizen band (CB) radio was missing and the head unit for DVD's was destroyed because the wiring was cut. Ms Cole does not accept that and says that the items were stored at the time on a pallet and wrapped in plastic wrap. She took photos at the time and says that they show the radio and stereo in the box. In his oral evidence Mr Milligan sought the sum of \$2,400 for the damage and the CB radio.

[48] Mr Milligan explained that the truck cab is a large one and that he would occasionally sleep in it. It was in Auckland at the time of his dismissal having some work performed on it. Mr Milligan suggested a friend of his obtain the items from it for him. Mr Church would not permit that to occur. The truck cab had a bed, microwave, television, refrigerator, wardrobe and a cupboard. I accept Mr Milligan

had a lot of personal items in the truck and he was deprived of their use from June/July 2011 until June 2014 including a small fridge and photos of his children.

[49] I could not be satisfied that the CB radio was included with the other items from the photograph. The head unit if it was damaged was in all likelihood damaged when it was removed from the truck. The difficulty is the absence of any evidence except for Mr Milligan's view of the value of the items and the damage to the head unit. In those circumstances it would be near possible to conclude what a fair award would be and I am not minded to make one.

Holiday Pay

[50] Mr Milligan says that he took no holidays aside from a week when his daughter was born in March 2009 and six days off at Christmas 2010. He did accept in oral evidence that he was paid out for one week's holiday.

[51] Ms Cole relied on some notes made by her father on Mr Milligan's new employee form to conclude that he took 3 weeks of leave around October/November 2007 and 2 weeks of leave around March/April 2008. The week Mr Milligan says he took in March 2009 is not recorded. Ms Cole also said that Mr Milligan cannot be right about only having taken leave over one Christmas period because his run did not operate over Christmas and she said that he would not have been assigned alternative duties for the whole of the Christmas period. Further Ms Cole says that Broadway made payments to Mr Milligan totalling \$9,557.60 and she had taken these payments to be the pay out of holiday pay. Ms Cole also says that Mr Milligan was paid when his licence was suspended in September 2009.

[52] Iain McLennan is an accountant and he was asked by Broadway to calculate the holiday pay entitlement for Mr Milligan and has made allowances for six days holiday each Christmas, the notes written on the new employee form and has deducted the full amount of additional payments to conclude that there is no holiday pay owing.

[53] As well as an absence of a holiday record it was unclear what salary Mr Milligan was receiving. His evidence was that he received about \$1,000 net per week but that he was never supplied with pay slips and as earlier stated there is no written employment agreement. I was grateful to Ms Cole for the supply of further

information after the investigation meeting which assisted in clarifying what payments were made to Mr Milligan each week.

[54] I will start with the salary payments to Mr Milligan. Mr Milligan's net pay increased from \$800 to \$850 on 14 April 2008. I agree with Ms Cole that from the bank statements and monthly schedules it is likely that this was done by increasing the non-taxable allowance paid and decreasing the base salary.

[55] For example for the year 1 April 2007 to 31 March 2008 Mr Milligan's gross income from his IRD summary of earnings was \$41,688 and he also received each week a non-taxable allowance of \$175.00. For the year 1 April 2008 to 31 March 2009 Mr Milligan's gross earnings are \$34,528.88 but he received a non-taxable allowance of \$350. He was therefore receiving more net per week although his base salary had dropped reasonably significantly. It was not until February 2011 that the base salary went back up almost to the 2008 level at \$621.17 with a \$350 non-taxable allowance.

[56] When Mr McLennan calculated the holiday it was on the annual salary of \$34,320 which did not take into account the allowance. I do not agree that it is appropriate to use the base salary payments as the base for calculations without including the allowance. I am not satisfied that the allowance was simply to reimburse Mr Milligan for actual costs incurred. I find that it was part and parcel of his ordinary weekly pay for working an ordinary working week and should be taken into account in calculating holiday pay.

[57] I agree with Mr McLennan as to his calculation of leave accrued as at 31 March 2007 of 6.3 days. On 1 April 2007 under the Holidays Act 2003 the annual holiday entitlement increased from three to four weeks. If no leave was taken or paid out the leave days accrued at 29 June 2011 from the date Mr Milligan commenced were 90.9 days or 18.19 weeks.

[58] I find under s 83 of the Holidays Act 2003 that the failure to keep a holiday record in this case did prevent Mr Milligan from bringing an accurate claim. There is some evidence though as to payments made and holidays that Broadway says must have been taken by Mr Milligan and I shall consider all that evidence.

[59] The first issue is whether Mr Milligan took 6 days holiday every Christmas when there was a close down of the run. Mr Milligan did not accept that he took

holidays other than the public holidays over the Christmas period except in 2010. He said that he continued to drive freight over that period including carrying freight for other companies.

[60] There is no record of any holidays taken over Christmas period however Mr Milligan agrees that he did take six days leave in 2010 over that period. In the absence of clear records I do not find that six days leave over Christmas should be deducted for other than the 2010 period.

[61] There is then the hand written note on Mr Milligan's new employee form which states 30/10/07 *3 wk!* and 30/3/08 *2 wk should be 4th M.* Mr Milligan does not accept that he took leave in 2007 or 2008. There is also reference to 3 weeks loss of licence and evidence that Mr Milligan continued to be paid whilst his licence was suspended in September 2009.

[62] Mr Milligan says that he only used a week of leave at the most at the time before he received a limited licence.

[63] I could not be satisfied that the entries in handwriting on the new employee form related to requests for leave. I would have expected Mr Milligan to have recalled a leave period of three weeks in 2007. He was adamant that he did not take leave for that period or in 2008. If the notes were recording leave then it must be asked why there was no entry made for March 2009 when Mr Milligan said he took a week's leave. There was reference to the limited licence that same year. In fact having considered various payments that were made to him particularly in 2008 it could well have been simply a note about what leave had accrued.

[64] In all likelihood a week's leave was used in 2009 before the limited licence was obtained. Mr Milligan accepts that he took a week's leave in March that same year. There were six days leave over the Christmas 2010 period.

[65] I also find it likely that Mr Milligan received the following net payments in respect of holiday pay because the bank account showing the amounts paid into Mr Milligan's account either have "H Pay" or "advance H Pay" besides them as below.

19 March 2008 H Pay \$1,600

15 June 2008 Advance H Pay \$1,700

12 May 2010 H Pay \$2,457.60

10 May 2011 H Pay \$2,000

[66] I find that Mr Milligan took 16 days leave during his employment. He was also paid the equivalent of two weeks leave in March 2008 and then a further two weeks which reflects his net ordinary payments had increased to \$850 per week on 15 June 2008. He was then paid \$2,457.60 on or about 12 May 2010. That is about \$152.10 short of three weeks payment based on what Mr Milligan received net at that time of \$869.88. Taking into account the next payment which is a little over the net income at that time I round this payment up to three weeks leave. On 10 May 2011 Mr Milligan received just over \$2,000 which is a little over the equivalent of two weeks at the net income Mr Milligan received at that time per week of \$973.46.

[67] I have then added together the 3 weeks and one day leave taken by Mr Milligan and the 9 weeks leave was paid to Mr Milligan for holiday pay to reach a figure of 61 days or 12 weeks 1 day's leave either taken or paid out.

[68] As at the date of termination of the relationship on 29 June 2011 I have deducted 61 days from what would have been the total leave entitlement at 29 June 2011 if no leave had been taken or paid of 90.9 days. On that basis Mr Milligan I find is owed holiday pay for 29.9 days or 5.98 weeks.

[69] I have calculated this amount on Mr Milligan's net pay at the date of termination which was \$973.46 per week and I have then multiplied that by 5.98 weeks to arrive at a figure for holiday pay owed of \$5,821.30 net.

[70] I order Broadway General Carriers Limited to pay to Graham Milligan the sum of \$5,821.30 net being holiday pay.

Costs

[71] I reserve the issue of costs. The parties may be able to reach an agreement about these failing which Mr Peters is to lodge and serve submissions as to costs by

26 September 2014 and Ms Brugeyroux is to lodge and serve submissions in reply by 10 October 2014.

Helen Doyle
Member of the Employment Relations Authority