

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKĀURAU ROHE**

[2024] NZERA 734  
3304301

BETWEEN                      EOIN MORRISON  
Applicant  
  
AND                              P M CASSIDY  
Respondent

Member of Authority:      Eleanor Robinson  
  
Representatives:              Dave Cain, advocate for the Applicant  
Philip Cassidy, representing the Respondent  
  
Investigation Meeting:      10 December 2024 in Auckland  
  
Submissions and/or further evidence      10 December 2024 from the Applicant and from the Respondent  
  
Determination:                12 December 2024

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]      The Applicant, Eoin Morrison, claims that he was unjustifiably dismissed on 15 December 2023 while he was on sick leave by the Respondent, PM Cassidy.

[2]      P M Cassidy confirms dismissing Mr Morrison, but claims that this was a reasonable decision in the relevant circumstances at the time. These were Mr Morrison being absent on sick leave with no indication of when he would be fit to return to work, and work demands at that time of the year.

**The Authority's investigation**

[3]      The Authority received written and, under oath or affirmation, oral evidence from the Applicant, Mr Morrison and his wife, Tania Sampson.

[4]      The Authority received written and, under oath or affirmation, oral evidence from the Respondent witnesses: Philip Cassidy and his son, Karl Cassidy.

[5] Oral and written submissions were received from Mr Cain for the Applicant and from Mr Cassidy Snr for the Respondent. While I have not referred to all the submissions made by the parties, I have fully considered them.

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

### **Issues**

[7] The issue requiring investigation is whether or not Mr Morrison was unjustifiably dismissed by P M Cassidy.

### **Background**

[8] P M Cassidy is a small business started by Mr Cassidy Snr in 1991. It is a Sales Commission Operator which collects eggs from a farm and delivers them to customers in Asian stores, supermarkets and wholesale suppliers. It had four employees at the time Mr Morrison was employed, being Mr Cassidy Snr, Mr Karl Cassidy, Mr Morrison and one other, whom I shall refer to as Mr X.

[9] Mr Cassidy Snr operated the business, including the sales and recruitment. Mr Karl Cassidy performed the invoicing, the logistics of the deliveries, shrink wrapping the egg pallets and making deliveries. Mr X had been a driver but was no longer licensed to drive at the time Mr Morrison was employed, and had been considering retiring.

[10] Mr Morrison was employed as an HT Driver and Labourer on 29 May 2023. His role was to shrink wrap the egg pallets, load, and deliver them.

### *The Employment Agreement*

[11] Mr Morrison was employed pursuant to an individual employment agreement which was signed by both him and Mr Cassidy Snr (the Employment Agreement). The Employment Agreement out that Mr Morrison would report to Mr Cassidy Snr, work 40 hours a week and receive \$30.00 per hour.

[12] The Employment Agreement stated at clause 8.4 that in the event of sickness absence, proof might be required.

[13] At clause 14 it set out the procedure to be followed in the event of employment relationship problems occurring. This included raising the problem with the other party and both parties meeting to discuss: "possible solutions".

[14] Shortly after his employment commenced Mr Morrison said he could not perform the egg wrapping due to it hurting his legs. Mr Karl Cassidy explained that wrapping the egg pallets can be strenuous work involving walking and bending.

[15] At that time Mr Morrison had suggested that P M Cassidy might like to replace him but this suggestion was rejected. Instead Mr X was requested to defer his retirement to perform the egg pallet shrink wrapping in order that it could be completed and the pallets be ready to load before Mr Morrison arrived at work.

[16] Despite Mr Morrison not being able to perform all the duties of his role, no issue had been raised with this because Mr Cassidy Snr explained that P M Cassidy was finding it difficult to recruit drivers and most importantly, Mr Morrison was a good driver. This was so valuable to the business because egg pallets are a delicate cargo and Mr Morrison was able to transport them without damaging any of the pallets.

#### *Injury November 2023*

[17] During November 2023 Mr Morrison fell and hurt his hip whilst out on a delivery. He telephoned Mr Karl Cassidy who asked how he was feeling and Mr Morrison said he was able to drive the truck back to the farm.

[18] The following day Mr Morrison said he had recovered and returned to work.

[19] Two weeks later Mr Morrison suffered an injury to his leg when loading a pallet onto a truck, following which he was absent on sick leave.

[20] Mr Morrison provided a medical certificate to P M Cassidy which certified him as unfit to work until 3 December 2023.

[21] On 3 December 2023 Mr Cassidy Snr text messaged Mr Morrison asking when he thought he would be able to return to work. Mr Morrison responded that he was finding it difficult to walk and was returning to the doctor for more medication. Mr Cassidy Snr asked to be kept updated. He added: "With no backup driver I need to find someone to cover you."

[22] Mr Morrison said he had not queried this comment by Mr Cassidy Snr.

[23] Mr Cassidy Snr said he had tried to recruit a temporary driver to cover Mr Morrison's absence but he realised that since it would take two weeks to train someone, and it was difficult

to find temporary drivers, this was not a solution to the situation which had arisen due to Mr Morrison's absence. He referred to his concerns in an email to Mr Morrison on or about 3 December 2023:

That's not good. I will need to pay for another week off, then you'll have to apply for acc. My problem is Karl can't do 3 trips a day every day. Maybe for 1 week only so I'll have to find another driver if your injury is going to be a long one. No blame on you.

[24] On 10 December 2023 Mr Cassidy Snr text messaged Mr Morrison asking if there was any improvement. Mr Morrison responded that the injury had been "bad over the weekend", he was returning to the doctor the next day, physiotherapy had been suggested and there was the possibility of an MRI scan.

[25] On 11 December 2023 Mr Morrison provided a medical certificate certifying him as unfit to work for another week.

[26] By this point in December the business was very busy, and Mr Karl Cassidy told Mr Cassidy Snr that he exhausted trying to cope with his own work in addition to covering for Mr Morrison's role. As a result Mr Cassidy Snr decided he needed to advertise and recruit another full-time driver.

[27] Mr Morrison said he had seen the advertisement placed by P M Cassidy which concerned him because it appeared to be an exact match for his own position. He did not raise this concern with Mr Cassidy Snr.

#### *Dismissal 15 December 2023*

[28] On the morning of 15 December 2023 Mr Morrison sent a text message to Mr Cassidy Snr stating:

Been to physio thru the week. Phil. Will be back at doctor on Monday. Have improved from behind of week. Could possibly be back. Next week. Cheers

[29] Mr Cassidy Snr said that Mr Morrison had not been able to provide him with a definite date of return. He said that if Mr Morrison had not been cleared as fit to return to work the next week, the business would be placed in an untenable position. He had interviewed a driver who was very interested in accepting the position, but he needed a decision if he was to start prior to Christmas.

[30] It was on that basis that Mr Cassidy Snr made the decision to terminate Mr Morrison's employment. He text messaged Mr Morrison that same day, 15 December 2023, stating:

Hi Eoin. Because of this situation I have employed another driver. Week b4 xmas we will be very busy and too hard with 1 driver and no definite return date from you .. I

will continue to pay you for 2 more weeks as I owe you holiday pay. I don't have enough work for 3 driver at the moment so I'm afraid I will have to let you go. I'm really sorry it's come to this.

[31] Mr Morrison said the dismissal text message shocked him. He found it particularly upsetting as on 18 December 2023 he was certified as fit to return to work.

[32] Mr Cassidy Snr said he and Mr Morrison exchanged some further text messages after the one on 15 December 2023. These were cordial in nature and as a result, he had no reason to suspect Mr Morrison had not accepted his decision until he received a letter from Sacked Kiwi on 16 January 2024 on behalf of Mr Morrison, raising a personal grievance for unjustifiable dismissal.

[33] A Statement of Problem was lodged with the Authority on 19 June 2024.

### **Was Mr Morrison unjustifiably dismissed by P M Cassidy?**

[34] Mr Morrison was dismissed from his employment with P M Cassidy on 15 December 2023. Justification for dismissal is stated in the Employment Relations Act 2000 (the Act), which at s 103A sets out the Test of Justification as:

#### ***S103A Test of Justification***

- i. For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).
- ii. The test is 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.

The Test of Justification requires that the employer acted in a manner that was substantively and procedurally fair. An employer must establish that the dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

[35] I find there was no substantive justification for Mr Morrison's dismissal. Whilst Mr Morrison could not physically perform all aspects of his role, P M Cassidy had chosen to accept his limitation. There had been no disciplinary issues raised with Mr Morrison during his employment.

[36] Mr Morrison was on sick leave at the date of his dismissal. An employer may dismiss an employee who is on sick leave, but this will typically arise in a situation in which an employee has been on sick leave for some significant period of time with no indication of an

imminent return, and then discussion with the employee and full medical evidence will be expected prior to any decision to dismiss is taken.

[37] In this case, Mr Morrison had been on sick leave for only three weeks at the time of his dismissal. He had kept his employer informed throughout by text messages and provided medical certificates. He had texted Mr Cassidy Snr on 15 December 2023 to state that he was hoping to return to work the following week. In fact he was certified as fit to return to work on 18 December 2023.

[38] A fair and reasonable employer will follow a fair and reasonable process when considering any form of disciplinary action against an employee.

[39] P M Cassidy did not hold any meeting with Mr Morrison to discuss the situation. It did not inform him that his position might be at risk as a result of his continued sickness absence, or seek further medical evidence to establish his likely date of a return to work. Nor did it provide Mr Morrison with the opportunity to provide any further information.

[40] I appreciate that Mr Cassidy Snr was in a difficult situation given the busy time of the year and the corresponding pressure of that, combined with the extra delivery driving by Mr Karl Cassidy necessitated by Mr Morrison's absence. However I find that steps which could have been taken to address the situation were not taken. I find that P M Cassidy did not behave as a fair and reasonable employer could behave in a similar situation.

[41] I determine that Mr Morrison was unjustifiably dismissed by P M Cassidy.

## **Remedies**

### *Unpaid wages*

[42] Mr Cassidy Snr confirmed that Mr Morrison had not been paid the two weeks contractual notice to which he was entitled under clause 13.1 of the Employment Agreement.

[43] I order that P M Cassidy pay to Mr Morrison the sum of \$2,400.00 gross (calculated as 2 weeks at 40 hours per week x \$30.00 per hour) in respect of unpaid notice period.

### *Lost Remuneration*

[44] Mr Morrison made significant efforts to obtain alternative employment after his employment with P M Cassidy ended. He managed to obtain employment with a car transportation company in March 2024, however resigned from that employment due to concerns about its operation and road safety.

[45] I order that P M Cassidy pay Mr Morrison the sum of \$15,017.88 gross (calculated as 13 weeks at 40 hours per week x \$30.00 per hour minus \$582.12 earned in the period) as lost remuneration pursuant to s128(3) of the Act.

#### *Compensation*

[46] Mr Morrison's evidence was that the termination of his employment caused him significant distress. It affected his sense of self-worth and undermined his confidence. He had difficulty sleeping and interacting with others. It caused him financial distress, especially coming as it did during the Christmas and New Year period.

[47] Mr Morrison's evidence was that he felt pressurised to find alternative employment very quickly, even applying for a job on Christmas Day rather than enjoying the time with his family.

[48] I order that P M Cassidy pay to Mr Morrison the sum of \$15,000.00 as compensation for humiliation, loss of dignity and injury to feelings pursuant to s 123(1)(c)(i) of the Act.

#### *Contribution*

[49] I am required under s. 124 of the Act to consider the issue of any contribution that may influence the remedies awarded.

[50] Parties in an employment relationship are expected to behave towards each other in good faith. That involves them being, amongst other things, responsive and communicative. <sup>1</sup>

[51] It is unfortunate that Mr Morrison had not contacted Mr Cassidy Snr when he saw the advertisement for a driver because the evidence is that the working relationship between them was good. P M Cassidy had valued Mr Morrison's driving skills and Mr Morrison had been a reliable employee who kept his employer updated when on sick leave.

[52] Had Mr Morrison raised his concern at seeing what appeared to be his job advertised, that might have averted the situation which followed.

[53] Nonetheless the onus was on P M Cassidy to behave reasonably in the situation in which Mr Morrison was on sick leave. It did not do so. I find that Mr Morrison did not contribute to the situation which resulted in his dismissal, and there is to be no reduction from the remedies ordered.

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<sup>1</sup> Employment Relations Act 2000 s 4(1A)(b).

## Orders

[54] I have made the following orders P M Cassidy is ordered to pay Mr Morrison:

- **the sum of \$2,400.00 gross in respect of unpaid notice pay.**
- **the sum of \$15,017.88 gross in respect of lost wages pursuant to s 28(3) of the Act.**
- **the sum of \$15,000.00 in respect of compensation pursuant to s 123(1)(c) of the Act.**
- **All payments are to be made within 28 days of the date of this determination.**

## Costs

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

[56] If they are not able to do so and an Authority determination on costs is needed Mr Morrison may lodge, and then should serve, a memorandum on costs within 28 days of the date of issue of the written determination in this matter. From the date of service of that memorandum P M Cassidy would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[57] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[58] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>2</sup>

[59] **P M Cassidy is also ordered to pay Mr Morrison \$71.56 in respect of the Authority filing fee.**

Eleanor Robinson  
Member of the Employment Relations Authority

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<sup>2</sup> *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].