

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

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

[2022] NZERA 219  
3109773

BETWEEN                      ANTONY SIMPSON  
First Applicant

AND                              MOVE LOGISTICS GROUP LIMITED  
Respondent

Member of Authority:        Michele Ryan

Representatives:             David Balfour, advocate for the Applicant  
Chelsea Stevens, on behalf of the Respondent

Investigation Meeting:      25 May 2021

Submissions [and further    9 June 2021 from the Applicant  
Information] Received:      14 June 2021 from the Respondent

Date of Determination:      27 May 2022

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     Antony (Anton) Simpson worked for the Otaki branch of Move Logistics Group Ltd (“the “company”), previously known as TIL Logistics Group Ltd, for almost four and a half years as a truck driver. He resigned in October 2019. Several months later he raised a number of personal grievances.

[2]     The first of the grievances concerned the break-in of Mr Simpson’s vehicle while it was parked at the company’s Otaki yard. Mr Simpson’s complaint regarding this issue was not raised within 90 days of the date in which the event occurred, and it is therefore not a matter the Authority may determine.

[3] Next, Mr Simpson said he had been constructively dismissed. This claim was withdrawn in the lead up to the Authority's investigation meeting.

[4] Three remaining claims allege he was unjustifiably disadvantaged by a range of actions that occurred between 13 and 23 September 2019 following a road accident in which Mr Simpson was involved. He seeks \$12,000 as compensation for hurt and humiliation,<sup>1</sup> and costs.

[5] In the alternative, Mr Simpson says the company's actions were a breach of good faith. The claim was not explained in the statement of problem, nor was it advanced in Mr Simpson's evidence or submissions. I have not considered it any further.

[6] The company says there is no merit to Mr Simpson's claims.

### **The events leading to Mr Simpson's claims.**

#### ***Friday 13 September 2019***

[7] The accident occurred on Friday 13 September 2019 whilst Mr Simpson was on the Desert Road driving south towards Waiouru. He says he had been following an army truck for approximately 3 km when it indicated it was pulling over to the left and began to slow down. Mr Simpson attempted to pass the vehicle but it suddenly turned right and connected with the passenger side of Mr Simpson's cab, causing the wing mirror to collide with the cab window, which shattered. Both vehicles came to a halt on the other side of the road.

[8] Mr Simpson stayed at the accident site for approximately 35 minutes, providing a statement to Military Police and, in due course, the Police. Over this period several phone calls were exchanged with his manager, Mr Roman Murray.

[9] He subsequently drove to Waiouru (approximately 15 minutes away) under the escort of the police officer. The broken mirror was secured in Waiouru.

[10] Mr Simpson reports he was then instructed by Mr Murray to drive the truck and trailer to Central Automotive Services in Levin by 5.30 pm, which he did.

[11] During his journey back to Levin, Mr Murray advised Mr Simpson that he would need to undertake a post-incident drug and alcohol test.

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<sup>1</sup> Mr Simpson revised the quantum of compensation he sought to \$12,000 when questioned by the Authority.

***The company's alcohol and drug testing policy***

[12] Mr Simpson accepts the company has a drug and alcohol testing policy that was mandated at cl 13 in the then current collective agreement, as follows.

**Drugs and alcohol**

The Union acknowledges and supports the employer's drug and alcohol testing policy, which requires the employer to inform staff about the policy and requires the employee to give their consent for testing procedures.

TIL agree ... the drug and alcohol procedure which includes saliva and breath testing as an agreed method of testing.

[13] The relevant portions of the drugs and alcohol testing policy provides:

**TESTING**

- A licensed collector will use an approved device in a manner that maintains confidentiality
- ...
- **Drugs** A level of drugs in your urine that exceeds the cut-off levels prescribed by the Australian/New Zealand Standard 2008 (or any successor) is prohibited while at work.
- A spit sample is taken. If the initial test is clear you may return to work. If not, further laboratory testing will occur and you will be suspended pending the results.
- If testing remains positive there are two options. Agreed and approved participation in voluntary rehabilitation or termination of employment.

...

**FAILURE**

- Refusal to comply with a reasonable request for testing can be cause for disciplinary action or decline of the position. ...

**POST-INCIDENT**

- If an employee is involved in an accident, near miss, or situation that causes damage, they will be required to undergo drug and alcohol testing.

...

**POST TREATMENT**

- A two year random testing regime will form part of the Rehabilitation Contract.
- Failure to comply or producing a positive test during rehabilitation may result in dismissal.

[14] Notably, Mr Simpson was aware of the company's testing procedures and the availability of a rehabilitation programme if a positive drug test was produced as he had, at

some time prior to the events relevant to this determination, been involved in a rehabilitation programme under this policy.

***Monday 16 September 2019***

[15] There is a dispute about when the drug test should have been taken, which I shall return to, but I am satisfied Mr Simpson was advised a drug test was scheduled for at 8.00 am the following Monday morning. As it transpires, Mr Simpson did not attend the appointment. Instead, he called Mr Murray on Monday morning at 7.30 am (or thereabouts) and advised he was not available to be tested. He said he was feeling stressed by the accident and had made arrangements to see his GP. He agreed to call in to the office after he had seen the doctor.

[16] After the doctor's appointment Mr Simpson returned to the company's premises and furnished Mr Murray with a medical certificate that provided him with a week off work.

[17] There is consensus between Mr Murray and Mr Simpson that Mr Murray advised a drug test still needed to be undertaken "*to dot the i's and t's*". Mr Murray went on to tell Mr Simpson he was waiting for TDDA to advise when a tester would be available, and that he would be in touch. Mr Simpson said he might not hear his phone as he needed to sleep, and he left the depot soon after.

[18] Mr Murray says TDDA agreed it could perform the test at Mr Simpson's home in Levin, rather than have Mr Simpson travel to Otaki. Mr Murray is said to have called Mr Simpson several times later in the morning to let him know of the arrangement, but Mr Simpson had turned his phone off.

[19] Mr Murray and TDDA arrived at Mr Simpson's home on or about mid-day that Monday and Mr Simpson undertook a drug test soon after. The test produced a failed result. Mr Simpson then told Mr Murray that he had smoked marijuana over the weekend to alleviate his anxiety about the incident. Mr Murray advised he would speak to HR about the matter.

***Monday 23 September 2019***

[20] Mr Simpson remained on sick leave until 23 September 2019 when he obtained a clear drug test reading and went to the Otaki depot to report this result. Mr Murray, alongside Mark Raukawa (Manager) and Alana Murray (Human Resources) were each in the office at that time.

[21] Mr Murray then provided Mr Simpson with a draft “Drug Rehabilitation Agreement” (the “Rehabilitation Agreement”). Mr Simpson was of the view that it was unfair to be subjected to a Rehabilitation Agreement when the Desert Road accident had not been his fault.

[22] A discussion ensued about Mr Simpson’s dissatisfaction with a range of matters pertinent to the employment relationship between the parties, including that he held doubts as to whether he wanted to continue working for the company.

[23] It is accepted that Mr Murray told Mr Simpson he did not want him to resign or be dismissed. He advised the Rehabilitation Agreement was part of the company’s procedural response to a failed drug test, particularly where he wanted Mr Simpson to continue working for the company. To this end Mr Murray asked Mr Simpson to take the Rehabilitation Agreement home to consider, and the discussion came to an end.

[24] Later in the day Mr Simpson returned to the depot having obtained another medical certificate which put Mr Simpson off work for a month.

[25] It is clear from the content of both interactions between the parties on 23 September 2019 that Mr Simpson was experiencing a range of challenging personal circumstances at the time. It has not been necessary to detail those matters in this determination. The company offered Mr Simpson access to a confidential counselling service.

### ***October 2019***

[26] On 9 October 2019 Mr Simpson advised the company he has secured another job with a higher rate of pay. His resignation was confirmed in writing on 13 October 2019.

### ***The Authority’s investigation***

[27] The parties have been unable to resolve their differences and the Authority was required to investigate Mr Simpson’s remaining claims.

[28] Mr Simpson, Mr Murray, Mr Raukawa, and Ms Murray each attended the Authority’s investigation. Each witness provided a written statement in advance of the meeting and gave further oral evidence by answering questions from the Authority and, where asked, the parties’ representatives.

[29] As permitted by s 174 of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law to allow the claims to be disposed. It has not been necessary to record all of the evidence and/or submissions received. This determination has been issued outside the usual statutory period where the Chief of the Authority decided exceptional circumstances exist.<sup>2</sup>

### **The issues**

[30] As foreshadowed, Mr Simpson alleges he was unjustifiably disadvantaged by the company's actions. He says the company:

- (i) failed to support him on the day of the road incident;
- (ii) inappropriately required him to undertake a post-incident drug test three days after the incident; and
- (iii) subjected him to disciplinary action with no prior notice and was not given an opportunity to obtain a support person.

[31] Section 103(1)(b) of the Act governs the threshold by which a disadvantage grievance may be made out. It states:

#### **103 Personal grievance**

- (1) For the purposes of this Act, **personal grievance** means any grievance that an employee may have against the employee's employer or former employer because of a claim—
  - (a) ...
  - (b) that the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer; or
  - ...

[32] There are two elements to a claim of unjustified disadvantage. First, there must be an action by the employer which is unjustifiable, noting that whether an employer's action (under s 103A(2) of the Act) is justifiable is objectively assessed against what a notional fair and reasonable employer could have done circumstances at the time the action occurred. Next, the

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<sup>2</sup> Employment Relations Act 2000, s 174C(4)

unjustifiable action must affect the employee's terms and conditions of employment, such that the employee was disadvantaged.

[33] Mr Simpson must therefore establish there was an unjustifiable action or actions by the company which affected his terms and conditions of employment to his disadvantage.

[34] I need to note it is accepted by the Employment Court that unjustified disadvantage grievances are not necessarily confined to actions that breach the contract between the parties.<sup>3</sup> In *Downer v New Zealand Ltd v Jones*<sup>4</sup>, Judge Smith observed:

Some aspect of an arrangement between an employer and an employee could, ... be a "condition" of employment while not being a term of the contract.<sup>5</sup>

***Was Mr Simpson unjustifiably disadvantaged by the company's actions in the immediate aftermath of the accident.***

[35] Mr Simpson alleges he was unjustifiably disadvantaged in the following ways:

- (a) The company did not undertake sufficient welfare checks on him following the accident.
- (b) It should not have been left up to him to decide how or whether he was safe to return home and the responsibility lay with the company to ensure he remained safe.
- (c) The company should have sent a relief driver to the accident site to pick him and the truck up.
- (d) It was unfair of the company to require him to return the truck to Levin by 5.30 pm in the circumstances.

[36] It is common ground that there were, at a minimum, two phone calls between Mr Simpson and Mr Murray whilst Mr Simpson remained at the crash site. Mr Simpson's written evidence accepts that on initial contact with Mr Murray, he was asked whether he was okay. He does not deny that he told Mr Murray he "had got a fright but was okay". He accepts also that Mr Murray then offered to have a relief driver travel to the crash site to pick him up. Mr

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<sup>3</sup> *ANZ National Bank Ltd v Doidge* [2005] ERNZ 518 at [45]

<sup>4</sup> *Downer New Zealand Ltd v Jones* [2018] NZEmpC 77

<sup>5</sup> Above at [104]

Simpson declined the offer. Mr Simpson says he felt alright at the time, but says he understood a driver was being sent in any event.

[37] On balance I am satisfied the company adequately conducted welfare checks in the immediate aftermath of the accident. There was also no dispute that Mr Murray contacted Police at that time to report the incident and that he was advised that Police were already aware of the event and had someone travelling to the site.

[38] As already noted, Mr Simpson was escorted by a police officer to Waiouru. He says that when he reached Waiouru he started to feel “*the effects of shock*”, that he was very “*shaky*”, and was concerned about his ability to drive. During the Authority’s meeting Mr Simpson also said, for the first time, that the Police officer told him he was “*not fit to drive*”.

[39] I accept Mr Simpson’s evidence that his reaction to the incident altered whilst he was in Waiouru.

[40] The difficulty for Mr Simpson’s claim in respect of the company’s actions is that, at no point over the four-hour period (or thereabouts) between his arrival at Waiouru and reaching Levin, did he inform the company of the changes he perceived in himself, or that he had been told by Police not to drive. Mr Simpson accepts there was (at least) three phone calls between him and Mr Murray over this timeframe.

[41] Against a context where Mr Simpson had previously advised Mr Murray that he was not injured and he was fine to drive, I find the onus was on Mr Simpson, as a matter of good faith communication, to inform the company that his health status had changed. It was not clear from Mr Simpson’s written evidence why he did not advise Mr Murray of that during any of these interactions. But his answer during the Authority’s investigation on this point is telling. When asked why he did not advise the company of the deterioration to his health Mr Simpson advised “*all I wanted to do was go home*”.

[42] It is understandable that Mr Simpson’s simply wanted to go to the relative safety and comfort of his home as soon as possible. But he had a contractual<sup>6</sup> and statutory obligation to report to the company any hazard which may impact on his safety or others, including if he felt unsafe to drive.

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<sup>6</sup> Clause 27 of the Collective Agreement

[43] It follows I am unwilling to conclude Mr Simpson was unjustifiably disadvantaged by the company's response to him following the accident when he did not inform it that there was a problem. His failure to do so, meant that the company was unaware of the potential risk to Mr Simpson, and to it, if he continued to drive, and therefore no opportunity to remedy or minimize the risk.

[44] That things changed for Mr Simpson is entirely possible but without communicating that to his employer, I am unwilling to consider it should bear any responsibility for an omission that was not made known to it. I am further satisfied by the evidence given on behalf of the company that had there been any indication that Mr Simpson was unwell it would have acted upon that immediately. It simply did not have any information which would, objectively, lead it to consider amending its response to the matter.

[45] In any event, Mr Simpson arrived in Levin at 5.30pm. He says he was instructed to make sure the truck arrived in Levin at that time, but that instruction must be seen in the context that the company considered there was no impediment to Mr Simpson doing so.

[46] Mr Simpson was not unjustifiably disadvantaged by the company's actions on the day of the accident.

***Was Mr Simpson unjustifiably disadvantaged when the company required him to undertake a drug on the third day after the accident?***

[47] There are three components to Mr Simpson's claims concerning the drug test. Mr Simpson:

- (a) takes issue with the company and TDDA attending his home to perform the test.
- (b) alleges argues that the post-incident drug test was not taken in a timely manner and it was unreasonable of the company to insist the test be taken 3 days (or thereabouts) after the accident.
- (c) says he was subjected to disciplinary action without notice or given an opportunity to obtain support.

***Was Mr Simpson unjustifiably disadvantaged by the way in which he was tested?***

[48] Mr Simpson statement of problem alleged he was forced to take the "drug test outside his home, on the street, in view of patrons entering the hotel directly opposite". He says anyone

observing him enter the van would have been aware that he was being drug tested. I do not agree.

[49] The van bore no markings to indicate who it belonged to, or its activities. I do not accept it would be objectively apparent to anyone who observed Mr Simpson enter the van that it was for drug testing purposes, and there is no basis for such a conclusion.

[50] Mr Simpson, in his written evidence, says he felt bullied into agreeing to a drug test but when questioned he revised his evidence and said Mr Murray was insistent about having a test. Mr Simpson was not bullied into taking the drug test.

*Was it reasonable of TIL to require Mr Simpson to undertake a post-incident drug and alcohol test three days after the event?*

[51] I agree with Mr Simpson's submission that the drugs and alcohol testing policy does not provide a time-period within which a drug or alcohol test must be conducted after an incident. However, I am unwilling to conclude that the absence of a prescribed timeframe for a post-incident test invalidates the policy per-se.

[52] Mr Simpson argues the delay between the incident and the test was unreasonable and therefore the company's action in requiring him to undertake a drug test was unjustifiable. Against that position the company says at the very least it was required to have Mr Simpson undertake a test as this was a requirement of its insurer.

[53] I was not provided with evidence (expert or otherwise) from either party as to what would constitute a reasonable timeframe in which to test an employee post an incident or near miss. I do accept however that a delay in testing may impact on an employer's ability to reasonably link a non-negative result as being causative of, or contributory to, an incident.

[54] I have some doubts as to the reasonableness of the company's requirement to have Mr Simpson undertake a post incident drug test three days after the event. But in the circumstances of this case it is not necessary to reach a conclusion as to whether that action was justifiable or not. This is because I am not satisfied that Mr Simpson was disadvantaged by the company's actions in having Mr Simpson drug tested for the following reasons.

[55] The company's response to the positive test was to:

- (i) propose to Mr Simpson consents to a rehabilitation agreement (and programme);
- (ii) provide him with a draft agreement about how the programme would operate; and;
- (iii) ask him to consider that option.

[56] There is no evidence that the company took any action to advance the rehabilitation agreement nor did it impose disciplinary action against Mr Simpson in respect of the test result before Mr Simpson resigned. It follows that I have been unable to identify a term or condition of Mr Simpson's employment which was affected to his disadvantage by the company's requirement to have him undertake a drug test three days after the incident.

*Was Mr Simpson unjustifiably disadvantaged by the meeting on 23 September 2019?*

[57] My reasons in finding Mr Simpson was not unjustifiably disadvantaged by the company's actions in having Mr Simpson drug tested apply also to my finding that he was not unjustifiably disadvantaged by the meeting on 23 September.

[58] Moreover Mr Simpson agrees he was not given a warning in the meeting of 23 September. Nor was he dismissed. He was not required to provide an explanation or respond to any matter. He was simply given a draft copy of a proposed Rehabilitation Agreement document and asked to review and consider that matter.

[59] I have some sympathy for Mr Simpson given the personal challenges he was facing at the time but I am unwilling to conclude that the meeting on the 23<sup>rd</sup> was disciplinary in nature. Mr Simpson was not disadvantaged by an omission by the company to advise he has a right to bring a support person when that was not the nature of the meeting.

### **Outcome**

[60] Mr Simpson's claims that he was unjustifiably disadvantaged by the company's actions following the road incident have not been established. His personal grievance claims against the company are dismissed.

Michele Ryan  
Member of the Employment Relations Authority