

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2025] NZERA 214
3219459

BETWEEN	KARL SWENSON Applicant
AND	AKITIO TRUCKING LIMITED Respondent

Member of Authority:	Claire English
Representatives:	Paul Matthews, advocate for the Applicant Digby Livingston, advocate for the Respondent
Investigation Meeting:	25 November 2024 in Napier
Submissions received:	Up to 26 March 2025 from Applicant Up to 1 April 2025 from Respondent
Determination:	16 April 2025

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Karl Swenson was employed by Akitio Trucking Limited (Akitio) as a logging driver from the beginning of 2017. On 21 December 2022, he was dismissed as Akitio reached the conclusion he had punched another driver in the face.

[2] Mr Swenson states that he did not do this and says Akitio never met with him before dismissing him. He also raises concerns regarding an issue that had arisen between him and the other driver a few days prior, where the other driver had taken equipment belonging to Mr Swenson home, which Mr Swenson believed was theft. His

view is that if Akitio had done something about that matter, the incident with the other driver that led to his dismissal would not have occurred.

[3] Akitio says that its decision to dismiss Mr Swenson was fair, that it was confident he had punched the other driver, and that it was important to make a decision quickly to avoid impacts on staff morale and to show that violence was not acceptable.

The Authority's investigation

[4] For the Authority's investigation written witness statements were lodged from Mr Swenson, and Mrs Stacy Swenson his wife; and on behalf of Akitio by its Director, Mr Edwyn Kight, its General Manager Mr Alexander Hunink, and driver Mr Robert Beale and his wife Mrs Maxine Beale. All witnesses answered questions under affirmation from me and the parties' representatives. The representatives also gave closing submissions.

[5] 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.

The issues

[6] The issues requiring investigation and determination were:

- (a) Did Mr Swenson suffer an unjustified disadvantage by the way Akitio's Operations Manager dealt with a prior issue arising between him and another driver?
- (b) Was Mr Swenson unjustifiably dismissed?
- (c) If Akitio's actions were not justified, what remedies should be awarded, considering:
 - Lost wages (subject to evidence of reasonable endeavours to mitigate loss); and
 - Compensation under s123(1)(c)(i) of the Act?
- (d) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Mr Swenson that contributed to the situation giving rise to his grievances?
- (e) Should either party contribute to the costs of representation of the other party?

Background

[7] Mr Swenson is an experienced logging truck driver who had worked for Akitio for some years. His evidence was that he would usually work Monday to Friday, starting at 2.30 am, and finishing between 3.00 to 4.30 pm each day.

[8] He knew Mr Robert Beale, and had recommended Mr Beale for a job at Akitio. Both Mr Swenson and Mr Beale gave evidence that despite this, they did not get on well, with Mr Swenson going as far as to say he disliked and avoided Mr Beale. Mr Swenson took the view that Mr Beale was looking to take his work, as they both preferred the early starts. Mr Hunink gave evidence that he considered both Mr Swenson and Mr Beale to be good and reliable workers, who could be counted on to show up for the early 2.30 am starts. He says there was a time when there was a slowing down of the work, but stated that from his perspective, all work was to be shared evenly among the drivers so there was no question of one of them being preferred over the other.

[9] Mr Swenson's evidence is that on Friday 2 December 2022, he was at the wash pad preparing his truck for a certificate of fitness inspection. He had with him a large steel towing strop weighing approximately 20 kgs, and a steel twitch bar. The strop belonged to Akitio, and the twitch bar was Mr Swenson's personal property.

[10] Mr Swenson did not have the keys he needed to access the lock-up, so he hid the two items in the long grass out of sight at the end of the day. On Sunday evening, he went back to collect them, and they were no longer there. He asked the landowner if he had seen anything, and the landowner reported he had seen Mr Beale there.

[11] Mr Swenson reported the apparent loss of the strop and twitch bar to the Operations Manager, Mr Thurston on Monday, as the strop was Akitio property. He also asked around if any drivers had seen anything.

[12] On Wednesday, he heard that another driver had seen Mr Beale with something that might have been a towing strop. Mr Swenson rung Mr Thurston, and asked him to contact Mr Beale.

[13] Mr Thurston took this seriously, and asked Mr Swenson to wait where he was while he (Mr Thurston) made enquiries. Mr Thurston called Mr Swenson back a short

time later, and told him that he had spoken to Mr Beale, Mr Beale had the items, and would leave them by his letterbox for Mr Swenson to pick up.

[14] Mr Swenson then went past Mr Beale's letterbox and collected the items. This took about 35 minutes as all the properties were close together.

[15] Mr Swenson formed the view, which he made very clear at the investigation meeting, that Mr Beale had stolen the items. He formed this view because he believed Mr Beale knew who the items belonged to, and because Mr Beale had not proactively sought to return them. Mr Swenson also said that he had been standing on a trailer when he had been speaking with Mr Thurston, and could see from that vantage point into Mr Beale's back yard. He says he saw Mr Beale go into his shed and bring something out of it. He believes that Mr Beale had hidden the items in his shed, with no intention of returning them.

[16] Mr Swenson was very upset by this. Mr Swenson told Mr Thurston that he wanted Akitio to "deal with it". Mr Swenson explained that he wanted Mr Thurston to "discipline and talk to" Mr Beale in some way "before it escalated".

[17] Mr Thurston undertook some further investigation into the matter. He called Mr Swenson back again the next day, Thursday, to tell him that he had followed matters up. Mr Thurston told Mr Swenson that no further action would be taken, and that this was Mr Swenson's own fault for leaving the items unattended in a field by a busy stop/wash station. Mr Swenson was angry and disappointed, and explained to me that he considered it clearly proven that Mr Beale stole the items, because he'd "concealed" them.

[18] Mr Beale gave evidence, and denies stealing the items. He says he picked them up and took them home because he saw them in the grass and was concerned they would be stolen as it was a busy stop. He cannot explain why he did not proactively draw this to anyone's attention, and said it had slipped his mind.

[19] A few days later, Mr Swenson and Mr Beale were on the same track, and had an argument over radio over which truck had the right of way at a particular steep section. They both stopped at the same place, and Mr Swenson invited Mr Beale to exit his truck so that they could sort matters out. Mr Swenson's evidence is that he said to Mr Beale that "if you keep on pissing people off, you'll end up getting a smack in the

ear”. Mr Swenson then climbed up the side of Mr Beale’s cab and yelled at him while poking his finger at the closed window, before getting back down.

[20] Mr Beale then unwound his window and said something to Mr Swenson. Mr Swenson got back up on the cab, and got his arm through the partially open window. Mr Beale’s in-person evidence is that Mr Swenson was throwing or moving his hand around, and that Mr Swenson hit him twice. Mr Swenson denies that he hit Mr Beale. He says Mr Beale was leaning away, although his hand may have contacted Mr Beale once or twice. Mr Beale wound the window up, and Mr Swenson had to remove his hand. They both then left the site.

[21] Mr Swenson called Mr Hunink when he was within telephone range. He says he knew Mr Beale would try to use this incident against him, and he wanted to be upfront and honest with Mr Hunink.

[22] As a result of that conversation, Mr Hunink spoke with Mr Beale and Mr Thurston by phone. Mr Swenson said he “had a go at” Mr Beale. Mr Hunink’s evidence was that he took that to mean Mr Swenson had assaulted or punched Mr Beale.

[23] Mr Hunink then carried out an investigation. He called Mr Thurston formally, recording the call and typing it up subsequently. He then called Mr Swenson, asked him for his account formally, and again recorded and typed up the conversation. He did the same for Mr Beale. He provided the transcripts to each, for each to confirm accuracy. Mr Swenson disputes some of the accuracy of his transcript.

[24] Mr Swenson was suspended on pay and invited to a disciplinary meeting. He sought legal advice. There was some back and forth between the parties’ legal advisors about how and when the meeting would occur.

[25] In the end, Akitio scheduled a meeting for 21 December 2022. Mr Swenson wanted the meeting to be held on 22 or 23 December, and said that this would have made a difference for him, because he was getting two written statements from two others who had been working when the incident occurred, and he just had not had sufficient time to get their statements typed, signed, and returned, so one or two days would have allowed that to occur.

[26] Akitio took the view that it could not delay meeting any longer. Mr Hunink explained that this was for several reasons. Firstly, he and Mr Kight had formed the view that Mr Swenson and his representative were deliberately delaying the meeting to take advantage of the upcoming statutory holidays. Mr Hunink also said that “rumour spreads quickly” and the matter was impacting team morale and could not continue, and it was important to move quickly to show Akitio did not accept physical violence in the workplace. Mr Hunink said that he had already spoken to everyone involved and he had a pretty clear picture of what had happened. Under cross examination, he explained that the two statements Mr Swenson referred to “wouldn’t have changed my mind”. Mr Hunink noted that one of these people had already spoken to him and given a brief statement, which was different from the statement this person later provided to Mr Swenson, and Mr Hunink took the view that he would have preferred the earlier statement provided to him which was less supportive of Mr Swenson.

[27] In the event, the meeting was held on 21 December 2022. Neither Mr Swenson nor his representative attended. The meeting was between Mr Hunink, Mr Kight, and Akitio’s representative Mr Livingston.

[28] Mr Kight’s evidence was that he was the ultimate decision-maker as the director of the company, however he was clear that employment matters were operational matters within Mr Hunink’s domain. He says he relied on the transcript of Mr Swenson’s formal conversation with Mr Hunink to support his decision to dismiss. Mr Hunink’s evidence was that he talked to Mr Kight and “we agreed” that dismissal of Mr Swenson was the correct choice.

[29] Mr Hunink was very clear that he believed that Mr Swenson had punched Mr Beale, and that this was not something that could be tolerated and was “majorly impacting team morale”. Mr Hunink further explained that when considering who to believe, he took into account that Mr Swenson had a violent temper, had yelled at him (Mr Hunink) over the phone, that he had heard the dispatcher say that Mr Swenson had a temper, and that Mr Beale was very gentle, very reliable, and he had never heard others say “a bad word” about Mr Beale.

[30] Mr Swenson was dismissed, by way of email to him from Akitio’s representative Mr Livingston. He says that after being dismissed, he was not in a good frame of mind, he could not talk to anyone, he withdrew and could not be involved even

at Christmas time. Mr Swenson says that he was the major breadwinner for the family, and this was financially difficult to lose a job just prior to Christmas. A planned Christmas holiday was cancelled, and planned renovations over the Christmas break was cancelled. He was able to find another job through his personal contacts, starting on about 18 January 2023.

[31] Mrs Swenson said that the impact on Mr Swenson had been severe. She described him as a talkative, energetic, and outgoing man, an involved father, and someone who was always active on their lifestyle block and volunteering. She said she was shocked and worried about how withdrawn he became, and watched him closely as she was concerned about self-harm. She described having to tighten belts, and put spending on a credit card which was still being paid off.

Analysis

Unjustified disadvantage re prior incident

[32] I will consider Mr Swenson's unjustified disadvantage claim first. He claims that he asked Mr Thurston to take some action to "deal with" Mr Beale's theft of his items so as to stop matters escalating. He says that if this had occurred, the incident as between him and Mr Beale which lead to his dismissal might not have occurred.

[33] Mr Swenson said he wanted Mr Thurston to speak with Mr Beale and/or to impose disciplinary action on him.

[34] Mr Thurston did not give evidence, however there is no dispute about what happened. Mr Swenson reported to Mr Thurston on Wednesday that he had heard Mr Beale had taken the two items. It is apparent that Mr Thurston actioned this quickly. He contacted Mr Beale, received confirmation that Mr Beale did have the items, and arranged for them to be left for pick up. He then called Mr Swenson back as he had told Mr Swenson he would, and gave instructions for the retrieval of the items.

[35] Mr Swenson's own evidence is that this took 35 minutes, and certainly suggests that Mr Thurston took the matter seriously and acted promptly. Mr Swenson's real concern is what happened next, in that Mr Thurston then made further inquiries, and decided that there was no further action which should be taken. He reported back to Mr Swenson that this was because it was because "it was his own fault" for leaving the items unattended in the grass in a paddock.

[36] In both his written and in-person evidence, Mr Swenson was adamant that Mr Beale had stolen the items. He did not consider it significant that he himself had left the items unattended for two days in an open field “alongside an open truck fuel stop and things quite often went missing”¹.

[37] Mr Swenson fails to recognise that there is simply insufficient evidence to demonstrate that Mr Beale had stolen the items, particularly in circumstances where they were returned promptly. Mr Swenson also gives evidence that he spoke to the police but was essentially told in the same vein “good luck”, or that there was not enough to go on.

[38] Even if Akitio had taken disciplinary action against Mr Beale, there is no guarantee that Mr Swenson would have been advised of this, much less been a part of that process, or that it would have changed what happened subsequently between him and Mr Beale, given that both said that there was a long-running relationship problem and lack of trust between them.

[39] An unjustified disadvantage is defined in s 103(1) of the Act as a claim that the employee’s employment, or a condition of that employment, has been affected to the employee’s disadvantage, by some unjustified action of the employer.

[40] In all the circumstances, I find that it was not unjustified of Akitio to decide to take no further action in circumstances where Mr Swenson’s allegations of theft could not be properly demonstrated. I am also of the view that no condition of Mr Swenson’s employment was adversely affected. It may be said generally that Mr Swenson was entitled to have his concerns taken seriously, but I find that Akitio did this. Mr Thurston arranged for the prompt return of the items, and then carried out some further investigation which was relayed to Mr Swenson and discussed with him. Mr Swenson did not like the results of that investigation, but he cannot claim that Mr Thurston or Akitio ignored the matter.

[41] No claim of unjustified disadvantage is made out, and no orders are made.

¹ Paragraph 12 of Mr Swenson’s witness statement.

Unjustified Dismissal

[42] I will now consider whether Mr Swenson was unjustifiably dismissed. The test of justification is set out in s 103A of the Act, and requires that Akitio:

- a. Sufficiently investigated the allegations against Mr Swenson before dismissing him;
- b. Raised the concerns that it had with Mr Swenson before dismissal;
- c. Gave Mr Swenson a reasonable opportunity to respond; and
- d. Genuinely considered any explanation provided by Mr Swenson before deciding to dismiss him.

[43] When considering the steps taken by Akitio, Akitio properly investigated the allegations against Mr Swenson. Mr Swenson himself telephoned Mr Hunink to let him know that something had happened that was serious enough that Mr Hunink needed to be promptly informed. Mr Hunink then acted promptly. He spoke briefly and informally to Mr Beale and Mr Thurston. He then decided matters were serious enough they needed to be formalised, so he conducted a more formal interview with each of Mr Swenson, Mr Beale, and Mr Thurston, which were typed up and sent out so that each could view, confirm, and/or add comments or corrections.

[44] Mr Swenson was invited to a disciplinary meeting. There was no confusion about the allegations against him, that he had hit a fellow employee, Mr Beale.

[45] Mr Swenson did not attend the disciplinary meeting, despite being represented at the time. Mr Kight reached the conclusion (as set out explicitly in his witness statement) that Mr Swenson's representative had no credible reason for delay, and that Mr Swenson should have sought other representation that Mr Kight considered would have made themselves available, thus in Mr Kight's view, there was no reason to wait any further for Mr Swenson or his representative. None of these assumptions were discussed with Mr Swenson.

[46] This resulted in the unusual situation where the two decision-makers, Mr Kight and Mr Hunink, were able to speak only to each other, and did not have any opportunity to speak with Mr Swenson. This creates an obvious difficulty in that both Mr Kight

and Mr Hunink were liable to support each other's view and Mr Swenson's perspective was not represented at all.

[47] Importantly, there were comments from Mr Hunink which I am not confident were properly put to Mr Swenson for his response including that Mr Hunink believed that when Mr Swenson said he had "had a go" at Mr Beale, this amounted to an admission that he had punched or hit Mr Beale, and that when it came to assessing credibility about the conflicting or unclear statements, Mr Hunink took into account that Mr Swenson had a violent temper, had yelled at Mr Hunink over the phone, that the dispatcher considered Mr Swenson had a temper, and in contrast his view of Mr Beale was that Mr Beale was very gentle, very reliable, and he had never heard others say "a bad word" about him.

[48] These adverse views of Mr Swenson and correspondingly positive views of Mr Beale were never properly put to Mr Swenson, and prevented Akitio from genuinely considering Mr Swenson's explanations. This is demonstrated by Mr Hunink's in-person evidence when he explained that even if he had been prepared to wait for Mr Swenson to provide further statements, these would not have changed his mind. This as well as the decision to hold the key meeting without Mr Swenson suggests the decision to dismiss Mr Swenson was not one made with an open mind.

[49] It follows that Mr Swenson's dismissal was unjustified, and he is entitled to remedies.

[50] Having said this, it is equally clear that Mr Swenson contributed to his dismissal. His own in-person evidence at the investigation meeting was that he had had a heated altercation with Mr Beale where he twice climbed up onto Mr Beale's cab and reached his hand inside the cab towards Mr Beale. Although Mr Swenson's evidence was that he only moved his hand around inside the cab and that Mr Beale was leaning away from him, such that the contact his hand made with Mr Beale could not have been a hit or punch as alleged, he fails to appreciate that even if his own account is considered to be accurate, this does not excuse his behaviour in physically and verbally berating a co-worker.

[51] When considering whether Mr Swenson's actions contributed towards the situation that gave rise to his personal grievance of unjustified dismissal, I find that they

did so, and that they were blameworthy. His actions require that I reduce the remedies that would otherwise be awarded to him.

Remedies

[52] Mr Swenson has claimed for remedies of lost wages and compensation for hurt and humiliation.

[53] Mr Swenson initially claimed for four weeks lost wages, being the period from 21 December to 17 January 2023, when he started new employment. He has quantified this loss as being \$8,400, based on what he says were his average earnings of between \$2,000 to \$2,200 per week gross. Akitio submits that Mr Swenson's lost wages were less than this. It states that Mr Swenson's final pay was made up to 3 January 2023, and that even though he started work on 17 January 2023 at Napier Port, the port did not open to accept logs until 9 January, meaning that his lost wages should be calculated as being for only 6 days.

[54] I inquired of the parties about this difference of approach. In response, it was submitted for Mr Swenson that the relevant period for assessing lost wages was from 21 December 2022 to 17 January 2023, but that during that period, 5 days were paid being 21 December, 25 December, 26 December, 1 January, and 2 January. The respondent advised the Authority that after reviewing this, the respondent had nothing further to add. Although there was reference to a final payslip, none was provided.

[55] I reject the argument made on behalf of Akitio that the port closure dates should be taken into account to reduce the amount of wages considered to be lost. If Mr Swenson had not been unjustifiably dismissed, he would have remained employed by Akitio and therefore entitled to the payment of wages over this period. It is therefore appropriate that the period up to 17 January is included in the calculation of lost wages.

[56] In light of the further information as to the 5 days of payment listed above, Mr Swenson revised his claim for lost wages to three weeks' loss. My view is that this fairly represents his actual loss. Using Mr Swenson's own calculation of his average wage of \$2,100 per week, this means that his actual loss was \$6,300.00 gross.

[57] Mr Swenson has claimed the sum of \$30,000 in compensation for hurt and humiliation. While I accept his evidence as outlined above that the dismissal was

difficult for him, I am not persuaded that this is an appropriate amount in the circumstances. Akitio took steps to substantively engage with Mr Swenson during the disciplinary process, and to deal with him in a respectful manner. I am also influenced in this view by Mr Swenson's own in-person evidence which was heavily focused on his upset around his view that Mr Beale had stolen the strop and twitch bar after Mr Swenson had left them in the grass, and his view that Akitio had taken no action in respect of this, which are views that I have found are not made out.

[58] In all the circumstances, my view is that a compensatory sum of \$15,000 is adequate and appropriate. For the reasons set out above, I now need to consider a reduction on the grounds of contribution. The court has found that a 25% reduction in remedies is of significance². On balance, I consider a reduction of 25% to be appropriate. Mr Swenson's contribution was significant, and a reduction of 25% reflects this and is in line with other cases where contribution has been ordered.

[59] The compensatory sum of \$15,000 is to be reduced by 25% in recognition of Mr Swenson's contribution to the circumstances which he found himself in, as discussed above. This results in a compensatory award of \$11,250. My view is that that the remedies for lost wages made above should also be reduced by 25%. Orders are made accordingly.

Orders

[60] Mr Karl Swenson's personal grievance claim of unjustified disadvantage is not made out. No orders are made.

[61] Mr Karl Swenson's personal grievance claim of unjustified dismissal is made out, as his dismissal was procedurally unjustified.

[62] Akitio Trucking Limited is ordered to pay to Karl Swenson within 28 days of the date of this determination:

- a. The sum of \$4,725.00 gross as compensation for lost remuneration taking into account the reduction already made for contribution.

² *Xtreme Dining v Dewar*, [2016] NZEmpC 136

- b. the sum of \$11,250.00 without deduction as compensation for hurt and humiliation taking into account the reduction already made for contribution.

Costs

[63] Costs are reserved. The investigation meeting occupied half a day. The parties are encouraged to resolve any issue of costs between themselves bearing this in mind.

[64] If the parties are unable to resolve costs, and an Authority determination on costs is needed, the applicant may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum the respondent will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[65] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.³

Claire English
Member of the Employment Relations Authority

³ For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1