

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 84/08  
5081507

BETWEEN

ROBERT TAIGEL  
Applicant

AND

BROADWAY GENERAL  
CARRIERS LIMITED  
Respondent

Member of Authority: Philip Cheyne

Representatives: Paul Brown, Advocate for the Applicant  
Christopher Twigley, Counsel for the Respondent

Investigation Meeting: 20 June 2008 at Christchurch

Determination: 23 June 2008

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Mr Taigel worked for Broadway General Carriers Limited as a driver from 24 July 2006 until he was dismissed by being given notice on 9 February 2007. Mr Taigel says that he was unjustifiably dismissed and seeks compensation of \$20,000.00, reimbursement of lost wages up to June 2007 and arrears of two days pay when he was sick. There is also a claim for a penalty against Broadway for the lack of a written employment agreement. Broadway says that Mr Taigel worked on a trial basis and did not become a permanent employee, that he was given several warnings then a letter pointing out his failings before it became clear that he was not a satisfactory employee and he was dismissed. Furthermore, Broadway says that it has no assets, is no longer trading and has substantial debts.

[2] Despite mediation this problem was not resolved.

[3] Keith Church is the principal of Broadway and is based in Auckland. He is apparently not well enough to travel. Mr Church and Mr Twigley participated in the investigation meeting by phone, Mr Taigel having decided to proceed despite Broadway's apparent insolvency.

### **Trial period**

[4] Mr Taigel accepts that there was an oral agreement initially for a three month trial period expiring on 30 October 2006. It is also common ground that he was given a letter on 30 October 2006 recording an agreement between Mr Taigel and his manager to extend the trial period for four weeks until 30 November 2006. The letter says *...we will sit down on 30.11.06 to re-evaluate your conduct and ability to carry out the tasks ...to the standard required .... If ...you have progressed to these standards you will be offered a full time contract, if you have not reached the above stated requirements, a full time contract will not be offered.*

[5] While there is mention in this letter about *verbal warnings* there is no evidence available to the Authority to support that as a finding of fact. Broadway did not provide any statements of evidence before the investigation meeting despite that being required.

[6] Come 30 November 2006 Mr Taigel kept working and nothing more was said about his employment status. It follows that Mr Taigel cannot be regarded as a probationary employee in February 2007 when the dismissal occurred.

### **Dismissal**

[7] Mr Church phoned Mr Taigel on Friday 9 February 2007 and dismissed him. There is some dispute about what was said between the two men but no disagreement about what triggered the phone call. A day or two earlier Mr Taigel had returned to the yard after his trip and drove over some logs which resulted in a mudflap being ripped off the truck. Mr Taigel's evidence is that he did not notice this at the time. Some time later the supervisor spoke to Mr Taigel about the damage to the truck and Mr Taigel eventually conceded that he must have caused it. He says he offered to repair the mudflap. Having heard about the incident, Mr Church decided to dismiss Mr Taigel essentially on the basis that he had not proven himself a satisfactory employee meriting permanent employment. The mudflap incident was the final straw.

[8] In general I prefer Mr Church's recollection of the phone call to the extent that it differs from Mr Taigel's. There was mention by Mr Church that his client (Freightline) would not accept Mr Taigel working on any of its contracts. I also accept that Mr Church told Mr Taigel that there were three other trucking companies who might have work for him. There was discussion and agreement about Mr Taigel working out a week's notice. However, it is clear that Mr Church pre-determined the dismissal and did not give Mr Taigel an opportunity to put his side or mitigate his fault. Mr Taigel had no forewarning about the call.

[9] It is common ground that Mr Taigel requested the dismissal in writing and there is a letter dated 9 February 2007. It does not set out the reasons for the dismissal. There is subsequent correspondence with Mr Taigel's representative. There, Broadway says that Mr Taigel never became a permanent employee, that he was given several verbal warnings but he never proved satisfactory.

[10] Mr Taigel worked part but not all of the following week. Nonetheless he was paid for the week and also received his holiday pay after he finished up.

### **Unjustified dismissal**

[11] Broadway fell short of what is required of a fair and reasonable employer in how it dealt with the matter because Mr Church predetermined the dismissal. Nor am I satisfied that a fair and reasonable employer would have dismissed Mr Taigel in the circumstances. Mr Taigel should have been treated as a permanent employee. He had not been given any formal warnings during the employment and the incident was not serious misconduct.

[12] It follows that Mr Taigel was unjustifiably dismissed and has a personal grievance.

### **Remedies**

[13] Mr Taigel failed to mitigate his loss by looking for alternative employment. His evidence is that he made no formal applications for work until the position he obtained in June 2007. He initially said *I asked a few friends to ask around but to be honest I wasn't feeling up to working after being told I was fired like that*. When questioned later he said that driving jobs are not available at that time of year and that he was going through a custody case that took up a lot of his time. Mr Church said

and I accept that there was a constant shortage of drivers in the South Island at the time and that Mr Taigel could have obtained employment if he had looked for work or approached the three companies mentioned by Mr Church at the time of the dismissal. I find that the lost remuneration suffered by Mr Taigel was due to his own decision not to actively seek replacement employment rather than attributable to the dismissal.

[14] There is a claim for \$20,000.00 compensation for humiliation, lost dignity and injury to feelings. To some extent the claim is advanced on the basis that it is warranted by Broadway's allegedly objectionable behaviour but punishment is not the purpose of an award of compensation.

[15] In his oral evidence Mr Taigel said that he was depressed following the dismissal but there was no medical evidence to support that assertion. Mr Taigel's statement of evidence has him saying *This situation has caused me a great deal of distress and humiliation* and he goes on to refer to the financial strain that resulted from the dismissal.

[16] No doubt there were emotional effects for Mr Taigel that flowed from the dismissal but he does himself a disservice by an obviously inflated claim and a lack of objectively verifiable evidence. The situation calls for a modest award of compensation which I set at \$5,000.00. I have put aside the information about Broadway's financial position since it is no longer trading and this assessment of compensation makes no practical difference to its situation.

[17] It is accepted by Mr Taigel that he was at fault in his driving that resulted in the mudflap being ripped off. In that way Mr Taigel contributed in a blameworthy manner to the circumstances giving rise to his grievance so it is necessary to reduce the compensation that would otherwise be awarded to him: see section 124 of the Employment Relations Act 2000. The point of controversy is whether there was substandard performance by him prior to this incident and its current relevance.

[18] While it is clear that Mr Church acted on the basis of earlier unsatisfactory performance by Mr Taigel there is insufficient evidence in front of the Authority to determine to the required standard that Mr Taigel's earlier conduct was blameworthy. That arises because of Broadway's limited participation in the investigation meeting and its failure to lodge any evidence in advance.

[19] In dismissing Mr Taigel Broadway treated him as a probationary employee when he was not. There was no fault on Mr Taigel's part in this. Nor was Mr Taigel responsible for Mr Church's pre-determination of the dismissal. Set against that is Mr Taigel's careless driving causing some easily repairable damage to the truck. I find that Mr Taigel's contribution is relatively minor and assess the appropriate reduction at 10%.

### **Penalty**

[20] There was no written employment agreement initially but there was apparently something in writing signed by Mr Taigel about working on Broadway's client's run and a letter extending the probationary employment. Broadway's failure was to deal fully in writing with the employment agreement. In addition, the company is apparently insolvent, does not employ anyone currently and is unlikely to do so again before it is wound up. In these circumstances there is no merit in the claim for a penalty to be imposed.

### **Arrears**

[21] Mr Taigel's evidence is that he was away sick on 2<sup>nd</sup> to 7<sup>th</sup> January and *had two days sick pay owed*. During the investigation meeting, I pointed out that there was no statutory entitlement to sick pay because Mr Taigel had not completed six month's service in early January 2007. This claim therefore fails.

### **Summary**

[22] Mr Taigel was unjustifiably dismissed and he has a personal grievance.

[23] Broadway General Carriers Limited is to pay compensation to Mr Taigel of \$4,500.00 pursuant to section 123 (c) (i) of the Employment Relations Act 2000.

[24] Mr Taigel's other claims fail.

[25] I see no reason why Mr Taigel should not have a costs award in his favour and propose making an order that the respondent pay him costs of \$500.00. Either party can take issue with this by lodging a memorandum within 14 days. Any reply should be lodged within a further 7 days and I will then determine any dispute about costs. If neither party disputes the proposed costs award within 14 days, then it will become the Authority's order of costs in this matter.

Philip Cheyne  
Member of the Employment Relations Authority