

**N THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2020] NZERA 63  
3063252

BETWEEN            PERRY MORRIS  
                                 Applicant

AND                    SHARDA TRANSPORT  
                                 LIMITED  
                                 Respondent

Member of Authority:    Nicola Craig

Representatives:        The Applicant in person  
                                 No appearance for the Respondent

Investigation Meeting:    13 February 2020

Submissions and Further    From the Applicant at the investigation meeting  
Information Received:        Nothing received from the Respondent

Date of Determination:    14 February 2020

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**DETERMINATION OF THE AUTHORITY**

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- A    Perry Morris was unjustifiably dismissed and discriminated against on the basis of age by Sharda Transport Limited.**
- B    Sharda Transport Limited is to pay Mr Morris the following within 28 days of the date of this determination as remedies for his personal grievance:**
- (i)    \$5,000.00 as compensation.**
- C    Sharda Transport Limited is to pay Mr Morris the following within 28 days of the date of this determination:**
- (i)    \$1,520.00 gross for unpaid notice period; and**
- (ii)    \$71.56 for the Authority's filing fee.**

**What is the Employment Relationship Problem?**

[1] Perry Morris worked as a truck driver for a short period in 2019 for Sharda Transport Limited (Sharda or the company). Sharda operated within the Auckland metropolitan area. Its sole director and shareholder is Karan Sharda.

[2] Mr Morris was referred to Sharda by Work and Income New Zealand after a brief period without work. Mr Morris claims that he was unjustifiably dismissed by the company.

[3] Mr Morris describes his motivation in pursuing this matter as being to ensure that Sharda learns the importance of complying with employment obligations. He recognises that he has advantages that some employees, including those referred by WINZ, may not have. He hoped that his goal could be achieved through discussion but that was not to be.

**What was the Authority's process?**

[4] Mr Morris filed his claim in mid-2019. There were some difficulties with getting the statement of problem served on Sharda. However, this was ultimately achieved. No statement in reply was received within the requisite period. However, at a case management conference in October 2019 Mr Sharda sought leave for the company to file a statement in reply out of time. Leave was granted. On 13 October 2019 he later filed an email which I took to be Sharda's statement in reply.

[5] A timetable was set for the filing of witness statements but nothing was received from Sharda. Shortly before the investigation meeting date the Authority, in accordance with MBIE practice, sought information regarding whether anybody attending the meeting had returned in the last two weeks from China, particularly Hubei province, in light of the corona virus, now known as Covid-19. The day before the investigation meeting Mr Sharda emailed back, advising of having a Chinese exchange student and indicating that what appeared to be quarantine was in place. The Authority replied that he was permitted to attend the investigation meeting by telephone or Skype.

[6] On 13 February 2020 I held the investigation meeting. Mr Morris attended. Attempts were made to reach Mr Sharda by telephone via a cell phone number on which he had previously been contacted. A message indicated that the number was inactive or not allocated. An email was also sent to Mr Sharda advising that the meeting was proceeding as scheduled. No response was received from Mr Sharda.

[7] I was satisfied Sharda was aware of the investigation meeting date and had been offered the opportunity of participation at a distance. I proceeded with the investigation meeting and Mr Morris gave evidence under oath.

[8] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded everything received but has stated findings, expressed conclusions and specified orders made as a result.

### **What are the issues?**

[9] The issues for investigation are:

- (a) Was Mr Morris unjustifiably dismissed by Sharda?
- (b) Was Mr Morris discriminated against in his employment by Sharda on the basis of age?
- (c) If Mr Morris establishes a grievance, what remedies, if any, should he receive?
- (d) Is Mr Morris owed any arrears of wages in lieu of a notice period?
- (e) Should either party be liable to contribute to the other party's costs?

### **What happened?**

[10] When Mr Morris initially contacted Sharda, Mr Sharda arranged for an interview with him on 24 February 2019. However, Mr Sharda cancelled the interview and told Mr Morris to turn up for work the next day. By text Mr Morris asked what the hourly rate was and was told \$19.00.

[11] From 27 February 2019 Mr Morris undertook several days' work for Sharda. This involved riding with Mr Sharda in a Sharda truck to a large transport depot, picking up goods, dropping them off and picking up others to return to the depot. Mr Morris assisted with the loading and unloading and on one occasion drove the truck.

[12] The depot belonged to a major transport company. Mr Sharda told Mr Morris that Sharda was on a retainer from the transport company which Mr Morris understood to be the usual owner/driver situation.

[13] Mr Morris understood that he was to be a Sharda employee and that there would be a minimum of 40 hours' work a week, Monday to Friday.

[14] Although Mr Morris sought an employment agreement by text on 5 March 2019, none was provided. Mr Sharda messaged in response that they would have a meeting on Friday but never arranged one.

[15] At Sharda's instruction, on 5 March Mr Morris undertook a drug test, which he passed. Mr Sharda told Mr Morris to attend a dangerous goods course the next day. Mr Morris went to the course and passed.

[16] Mr Morris offered at the investigation meeting to set the costs of his drug test and dangerous goods course off against whatever the company owes him. However, I do not consider that appropriate. There was no agreement that Mr Morris would have to bear those costs personally. The costs were incurred for the benefit of Sharda, as Mr Morris needed a clean drug test and the dangerous goods' certificate to undertake his work for the company. The fact that Sharda chose to end Mr Morris's employment shortly thereafter should not be Mr Morris's responsibility.

[17] On 8 March 2019 Mr Sharda texted Mr Morris that he had a truck accident and was in hospital. He noted that he would call Mr Morris shortly. However, there was no call.

[18] Having not heard anything, on 14 March Mr Morris texted Mr Sharda saying "I'm guessing from the lack of communication that there is no job".

[19] On 15 March 2019 Mr Sharda replied "9am work". However, a few minutes later he texted:

Sorry wrong message due to work and personal matters with truck being off road and will be looking for a fit young person all the best.

[20] This was followed shortly by:

I'm very sorry could not offer you a job no hard feelings mate my apologies and I wish you all the best thanks.

[21] Mr Morris replied that Mr Sharda needed to the talk to Mr Morris's case worker from WINZ, which Mr Sharda replied that he had done.

[22] With the assistance of the WINZ case worker, on 23 March 2019 Mr Morris received payment into his bank account from Sharda for his work. No tax was paid by the company in relation to that money.

[23] Fortunately Mr Morris was able to find other trucking work shortly after finishing at Sharda which he still holds to this day.

**What was Mr Morris's status?**

[24] Sharda's statement in reply acknowledged that Mr Morris was hired through WINZ and described it as "training work".

[25] There was no substantial discussion between Mr Sharda and Mr Morris regarding appointment. No employment agreement was provided. However, Sharda had contacted WINZ regarding work available as a truck driver. The job itself was clear.

[26] Mr Sharda offered an interview but then chose not to proceed with one, instead having Mr Morris begin work. Mr Sharda advised Mr Morris what the pay rate was Mr Sharda made no mention of Mr Morris being on a trial period or of the arrangement being anything other than employment. Later Sharda paid Mr Morris for his work.

[27] In summary Sharda offered Mr Morris work which he accepted by undertaking it. The nature of the job, the pay rate and the start date were agreed. I am satisfied that Mr Morris was employed by Sharda.

**Was Mr Morris dismissed and was that justified?**

[28] Clearly Mr Morris was dismissed by Sharda. His work was cut off. He was told that he would not be offered a job, although I have found that he was already employed. Sharda sent Mr Morris away, thus terminating his employment.

[29] The test for justification of dismissal, as set out in s 103A(2) of the Act, is whether an employer's actions and how the employer acted were what a reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[30] I must consider the things set out in s 103(3) of the Act. That is, whether the employer:

- (a) having regard to its resources, investigated any allegations before dismissing; and
- (b) raised any concerns with the employee before dismissing; and
- (c) gave the employee a reasonable opportunity to respond to any concerns; and
- (d) considered any explanations from the employee before dismissing.

[31] It is clear that Sharda did none of those things. It also failed in the duty of good faith which it owed to Mr Morris under s 4 of the Act to be communicative in actively and constructively maintaining a productive employment relationship.

[32] The company did not act as a fair and reasonable employer would have done. Sharda appears to have been a small employer, but having a discussion about the reason why an employee's employment was being terminated should not have been beyond it. Rather it relied on a text message. It also did not allow Mr Morris to work out a notice period or pay him in lieu of notice.

[33] Different reasons were offered by Sharda at various points as to why Mr Morris was dismissed. These included Mr Morris's age and fitness, the truck being off the road and difficulties with the Sharda's transport company. Mr Morris had done nothing to justify a dismissal on the grounds of performance or misconduct. He has been able to perform the same job satisfactorily for another employer since then.

[34] I cannot be satisfied in the absence of evidence from Sharda that Mr Morris's position was redundant. Had Sharda been concerned about the viability of Mr Morris's position, it should have discussed that with him and consulted him. It did not do so.

[35] Mr Morris's dismissal by Sharda was unjustified.

### **Was Mr Morris discriminated against?**

[36] Under the Human Rights Act 1993 it is unlawful for an employer to discriminate in employment against a person on several grounds, including age.<sup>1</sup> This includes terminating their employment in circumstances in which other employees in work of that description would not be terminated.<sup>2</sup>

[37] Employees are entitled to bring a personal grievance claim on the basis of age discrimination, including dismissal.<sup>3</sup> The text message from Mr Shards provides proof that he was dismissing Mr Morris because of his age. There is no evidence of Sharda being able to establish that this situation came within one of the exceptions in s 30 of the Human Rights Act.

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<sup>1</sup> Section 22 of the Human Rights Act 1993.

<sup>2</sup> Section 22(1)(c) of the Human Rights Act.

<sup>3</sup> Section 103(1)(c), 104 and 105 of the Employment Relations Act.

[38] I conclude that Mr Morris was discriminated against in his employment on the grounds of his age.

**What remedy should Mr Morris receive?**

[39] I now deal with the remedies for Mr Morris's grievances. As the facts overlap, I will deal with the remedy issues together rather than making separate awards for each grievance.

[40] Mr Morris obtained other work within two weeks of finishing at Sharda. I deal with the issues of the notice period below. Once the notice period is taken into account, Mr Morris was not without wages and therefore I make no award of lost wages.

[41] Mr Morris seeks compensation under section 123(1)(c)(i) of the Act for humiliation, loss of dignity and injury to feelings. Although he did not specify a figure, he made it clear that he was not looking for a large amount. He described being annoyed by Sharda's actions in taking him on, only to dismiss him a short time later. He found it humiliating to have it suggested that at his age he was not up to doing the work. He felt that Mr Sharda was messing him around and offering excuses which did not always seem genuine.

[42] I note Sharda's apology both in the texts at the time of dismissal and in its statement in reply email. It also indicated that it did not intend to disrespect or humiliate Mr Morris.

[43] I have considered where in the spectrum of cases his situation sits and consider that a fair and just award would be at \$5,000.

[44] I do not consider that Mr Morris can be said to have contributed to the situation which lead to his dismissal. There was no evidence of any difficulties with his work at Sharda. He has successfully been able to maintain his later work in a trucking role for almost a year now.

[45] I order Sharda Transport Limited to pay Mr Morris the sum of \$5,000.00 under section 123(1)(c)(i) of the Act within 28 days of the date of this determination.

**What about the notice period?**

[46] Mr Morris was not paid for a notice period on his termination. Considering the nature of his work I consider two weeks to be a reasonable notice period. This is the period which Mr Morris's current employment agreement provides for.

[47] I order Sharda Transport Limited to pay Mr Morris the sum of \$1,520.00 gross for the unpaid notice period within 28 days of the date of this determination. That is calculated at 40 hours a week for two weeks at Mr Morris's hourly rate.

**Any costs?**

[48] Mr Morris was successful in his claims and is entitled to be reimbursed by Sharda for the Authority's filing fee. I order Sharda Transport Limited to pay Mr Morris \$71.56 for the filing fee within 28 days of the date of this determination.

**Nicola Craig**  
**Member of the Employment Relations Authority**