

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2026] NZERA 290  
3413064

	BETWEEN	MACFARLANE SEYMOUR Applicant
	AND	HILTON HAULAGE LIMITED Respondent
Member of Authority:	Eleanor Robinson	
Representatives:	Itania Nikolai, advocate for the Applicant David Traylor, counsel for the Respondent	
Investigation Meeting:	14 and 15 April 2026 in Rotorua	
Submissions and/or further evidence	21 and 28 April 2026 from the Applicant 24 April 2026 from the Respondent	
Date of Determination:	11 May 2026	

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The Applicant, Macfarlane Seymour, claims that he has been unjustifiably disadvantaged during his employment by the Respondent, Hilton Haulage Limited (Hilton).

[2] Mr Seymour also claims that Hilton breached the duty of good faith it owed him.

[3] Hilton denies that Mr Seymour has been unjustifiably disadvantaged in his employment, or that it breached the duty of good faith it owed to him.

**The Authority's investigation**

[4] The Authority received written and, under oath or affirmation, oral evidence from the Applicant, Mr Seymour and from Ms Nikolai, his advocate.

[5] The Authority received written and, under oath or affirmation, oral evidence from the Respondent witnesses: Hayden Gardiner, Tom Bryant, Ayden Pearce-Davies, Michael Gubb, Nick Adams, Justin Conway and Catherine Prescott.

[6] Oral and written submissions were received from Ms Nikolai for the Applicant and from Mr Traylor for the Respondent. Whilst I have not referred to all the submissions made by the parties, I have fully considered them.

[7] 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**

[8] The issues requiring investigation are whether or not:

- Mr Seymour has been unjustifiably disadvantaged in his employment.
- Hilton breached the duty of good faith it owed to Mr Seymour.

### **Background**

[9] Hilton is a transport company, transporting primarily milk, but also meat. It employs 550 employees, of whom approximately 450 are drivers. Hilton has operations in 17 locations in the North Island.

[10] Hayden Gardiner is the Operations Manager for the Central North Island, responsible for all the truck operations that run out of Tokoroa. The three shift supervisors based at Tokoroa report to him, these include Mr Pearce-Davies and Mr Conway.

[11] During his five and a half year's employment with Hilton Mr Gardiner said he had worked as a driver, moving to a Shift Supervisor role before being appointed as Operations Manager. Prior to moving to Hilton Mr Gardiner said he had driven trucks professionally for over 20 years, and was very familiar with the routes normally driven by the Hilton drivers based in Tokoroa.

[12] Mr Gardiner said the drivers employed by Hilton drove 58-tonne trucks and Hilton was very aware of the risks and dangers posed by driving such trucks not only for the driver, but for other road users. Accordingly, Hilton placed a high priority on health and safety to keep not only its employees, but other road users safe.

[13] He said that driving a truck required steady judgment and driving speed, and a willingness to accept and adjust, and also to retrain if necessary. High risks for drivers were speed (going too fast for the conditions) and driver fatigue in addition to risks posed by other road users. Mr Gardiner said that under speeding (or going too slowly for the road speed or

conditions) was also a risk since other road users became frustrated and more likely to take overtaking risks which could prove fatal.

[14] Mr Seymour was employed on 15 July 2025 as a driver. He was based at Tokoroa and worked initially on the shift operated by Mr Conway, and subsequently on the shift operated by Mr Pearce-Davies.

[15] Mr Seymour was issued with an individual employment agreement (the Employment Agreement) on 17 June 2024 which contained an acknowledgement that he had read and understood the terms and conditions of employment, and that he had read and agreed to comply with the Employer's rules, standards, and policies. Clause 15 of the Employment Agreement stated that these included: the Employer's Handbook, Policies, Health and Safety Manual, and relevant Standard Operating Procedures (SOP's).

[16] The Employment Agreement stated at clause 17 that: The Employee will:

17.3.1 take all reasonably practicable steps to prevent harm to themselves or any other person in the workplace;

...

17.3.4 ensure that health and safety related rules, policies, procedures, instructions and directions given by the employer are followed at all times. Failure to comply with these may be considered serious misconduct.

17.3.5 complete all required training and induction material (both initial and refresher) within a timely manner.

[17] Mr Seymour was issued with a job description. The Milk Tanker Driver's job description set out that Mr Seymour was:

- To operate all company vehicles and equipment competently safely, ensuring adherence to all New Zealand traffic legislation, regulations and rules.
- Work efficiently and smartly to ensure timely delivery of services to the customer, working within all legal requirements.
- To safely, considerately and efficiently collect milk from suppliers.
- Undertake all tasks stated in the applicable Driver Procedures Manual, relevant standard operating procedures and other company issued documentation.

[18] The Dairy Introduction Procedures Manual which Mr Seymour confirmed he had received, set out the requirement that a yearly refresher assessment was to be undertaken for all drivers. It stated:

- If an employee is deemed to be not competent for any part of the assessment, then re-training is to occur within one week, and reassessment is to occur within two weeks. During this period the employee may not undertake the tasks they are deemed not competent in without direct supervision.

[19] Mr Gardiner carried out his induction with Mr Seymour and said he considered that they had a very good working relationship. During the first six months of his employment Mr Gardiner said Mr Seymour was a model employee, he was a good driver who was very patient

with older drivers who struggled a little with working with the technology aspect of their role. Mr Seymour completed all transport runs well within the average times.

[20] However, on or about Christmas 2024 Mr Gardiner said there was a change in Mr Seymour's behaviour. The Shift Supervisors as well as the other drivers noticed that he was taking longer to complete his runs, the same runs as he had been previously completing well within the average time for them.

[21] Mr Conway, who had been Mr Seymour's Shift Supervisor when he commenced working at Hilton, said he observed that Mr Seymour began completing his runs below the average time taken for these runs and was completing one rather than the previous two runs daily he had been completing. There did not appear to be any obvious reason why this was occurring.

[22] Mr Conway said he and the other Shift Supervisors discussed the change in Mr Seymour's driving between themselves; however, he did not raise it directly with Mr Seymour but with Mr Gardiner as the appropriate person to address the concern.

[23] Mr Gardiner said having been made aware that the slower driving times were becoming a fairly regular occurrence, he began having informal conversations with Mr Seymour to try to understand what was happening.

[24] Mr Gardiner said that it is not uncommon with issues to arise with drivers from time to time. The most common situation causing a change in driving behaviour is where a driver has had an accident or a near-miss which impacts their driving confidence and speed. Another reason he explained was drivers deliberately padding out work hours in quieter off-season periods.

[25] Mr Gardiner said during their conversations, Mr Seymour did not indicate that there was an issue of either type affecting his driving speed, but said it was a matter of safety, that he was taking the time he needed to drive safely to the conditions on the day.

[26] Mr Seymour confirmed that he and Mr Gardiner had spoken about the issue. Mr Seymour said that after he moved to a shift for which Mr Pearce-Davies was the Shift Supervisor, he was having to drive different trucks which contributed to his slower driving times. In addition, on occasion there were new farms added to his runs, and/or the farmers had not finished milking when he arrived to do the pickup so he had to wait until they were finished.

[27] Mr Gardiner said as Mr Seymour had denied there was a critical confidence situation affecting him he let the situation continue for a little while but it reached the point where he could only give Mr Seymour one run a day rather than the previous two he had been completing

prior to Christmas 2024. He said new trainee drivers were completing the same runs as Mr Seymour in significantly less time.

*Late April/May 2025*

[28] Mr Gardiner said after a shift in late April or early May 2025 Mr Seymour reported to him that he had had an accident in his truck when driving along a farm track. Mr Gardiner said he had therefore downloaded the footage from the in-cab camera system that is installed in all Hilton trucks to see what had happened, where it had happened, and what steps needed to be taken to prevent it occurring again.

[29] Mr Gardiner explained that Hilton has various in-cab monitoring systems, but not all are running all the time.

*(i) Guardian cameras*

[30] The Guardian cameras work specifically to detect signs of driver fatigue by monitoring the driver's eye area and position. If signs of fatigue are detected, a trigger is sent to vibrate the driver's seat and take a video which is sent through to the camera company. If the camera company thinks the alert is or may be genuine, it will call the shift supervisor to report a fatigue issue.

*(ii) ERoad cameras*

[31] The ERoad cameras give a view of the driver and the drivers view to the front. These cameras are recording constantly but the footage or part of it is only sent to Hilton in one of three situations:

- i. If the driver or a passenger presses a button in the cab;
- ii. In a harsh acceleration, cornering or braking incident; or
- iii. Requested footage of every driver which has to be requested within 72 hours of it being recorded otherwise it is automatically overwritten and cannot be obtained.

[32] Mr Gardiner said that because Mr Seymour reported his near-miss incident to Hilton on the day, the ERoad footage was able to be requested.

[33] Mr Gardiner said on viewing the footage, it was possible to see that Mr Seymour appeared to be driving very slowly and was regularly pulling over to let people pass rather than increasing his speed. There was no reason that could be perceived for his doing so.

[34] Additionally, although Mr Seymour had reported that he had been almost driven off the road and thrown about badly, there was no evidence on the footage of anything untoward having occurred.

[35] Mr Gardiner said he had a conversation with Mr Seymour about what had been seen from the footage, but Mr Seymour did not accept what Hilton claimed to have seen.

*Ride along 17 and 18 May 2025*

[36] As a result of his concern about the slow driving speeds Mr Gardiner decided to ask Mike Gubb to carry out a 'ride-along' with Mr Seymour on 17 and 18 May 2025. Mr Gubb is a Shift Supervisor. He is also a qualified driving instructor, qualified to teach others to drive heavy vehicles, but was not employed in that role by Hilton.

[37] Mr Gubb said that he knew Mr Seymour, but not well since he was not part of his shift. He said he was aware from the other Shift Supervisors that Mr Seymour appeared to have started 'dragging chain a bit': i.e. taking longer to do things, including his runs, than other drivers.

[38] Mr Gubb said that driving heavy trucks like the Hilton trucks too slowly is a genuine concern and a hazard out on the road. If the truck is being driven too slowly for the conditions and the situation, the other road users behind the truck become frustrated and may try to overtake dangerously.

[39] Mr Gubb understood he was being asked to drive along with Mr Seymour because he had some knowledge from the other Shift Supervisors of the issue, and because he was a Shift Supervisor and also a qualified driving instructor.

[40] Mr Gubb said 'ride-alongs' frequently happen and are completely different in nature to the annual refresher training assessments.

[41] Mr Seymour said he understood the ride-along with Mr Gubb to be his annual refresher driver assessment, and that at the end of the two days Mr Gubb told him he had driven well and would not need to be assessed for another two years.

[42] Mr Gubb denied telling Mr Seymour it was his annual assessment and said he recalled telling Mr Seymour he was just there to observe. He said Mr Seymour drove well over the two days and he had told him that. He did not know why Mr Seymour had believed it was the annual driver refreshment assessment.

[43] Mr Gardiner said he realised from the drive-along that there was no issue either with Mr Seymour's driving or doing so at an appropriate speed, which meant it appeared to be a behaviour issue.

*Meeting 26 May 2025*

[44] Mr Gardiner met with Mr Seymour on 26 May 2025. The meeting, which was lengthy, covered off route adherence, punctuality and time management, and the slow driving seen on the ERoad footage pulled after his reported incident. Mr Gardiner said he also included some simple time comparisons in terms of recent runs performed by Mr Seymour.

[45] Mr Gardiner said he prepared notes of the meeting afterwards which were provided to Mr Seymour who made changes to them. However, Mr Seymour refused to sign them even after the changes he wanted had been incorporated.

[46] Mr Gardiner said he had set out his expectations during the meeting but he felt the meeting to have been unproductive.

[47] On or about 26 May 2025 Ms Nikolai said she was travelling to meet Mr Seymour who had instructed her because he was unhappy about the process, when she telephoned Mr Seymour and overheard part of a conversation which she believed to be between Mr Seymour and another unidentified person. She said it appeared to be a discussion about driving and work-related issues and the tone sounded serious.

*Annual Refresher driver assessment Friday 11 July 2025*

[48] Mr Gardiner said that the annual driver refresher assessments are conducted during a period when Hilton is not as busy. The assessments are undertaken by the Lead Driver on each shift and as drivers are rostered on shift.

[49] Mr Pearce-Davies said the annual driver assessments had been in progress in July 2025 and he had been told it was Mr Seymour's turn. At the daily toolbox meeting held with the drivers on Friday 11 July 2025 he told Mr Seymour that Mr Adams was coming to Tokoroa that day to carry out his annual assessment. Mr Seymour confirmed that was what Mr Pearce-Davies had told him.

[50] Mr Pearce-Davies explained that the drivers do a pre-start check before driving out each day. Because it takes an hour to complete that check, and Mr Adams lives in Hamilton so has travelling time to get to Tokoroa, he agreed when Mr Seymour asked if he should do his pre-check before Mr Adams arrived.

[51] Mr Adams, an experienced Lead Driver who had owned his own trucking business before joining Hilton in 2019, said he had been the shift Health and Safety Representative when he was based at Pokeno and he took health and safety very seriously. He regularly carried out the annual driver assessments.

[52] During his assessment drive with Mr Seymour on 11 July 2025 he said the speed at which Mr Seymour was driving was outside the accepted and reasonable run completion. The run that day was very straightforward, the rural roads driven were long and straight and wide enough to accommodate two trucks passing if necessary.

[53] Mr Adams said there were three farms on the route on the road taken which was about 5 km long. He said Mr Seymour pulled out of one farm and onto the road but did not appear to be accelerating at all, and was driving at around 20km/h below the speed limit.

[54] Looking in his side mirror Mr Adams said he could see traffic building up behind them and could see some drivers were showing signs of impatience, pulling out to see if they could pass, and one or two actually did so.

[55] He said he had asked Mr Seymour if that was how he usually drove, and Mr Seymour responded that it was a health and safety issue, which surprised him as from a professional driver's perspective as well as having been a health and safety representative, there was no health and safety reason for the slowness of Mr Seymour's driving.

[56] Mr Adams said this was not an isolated incident but happened several times during the day.

[57] As a result of Mr Seymour's driving Mr Adams said his own driving hours were impacted because he needed to return to Hamilton and it was becoming late to be able to do so. As a result, when they stopped at Wahoroa, he got into a Hilton truck heading back to Tokoroa, leaving Mr Seymour to complete his shift. He said that was not an issue as by that stage he had seen sufficient to complete the driving and milk transfer assessments.

[58] Mr Adams said he did not have a work tablet or computer at home so he could not enter Mr Seymour's assessment into Zambion, the Hilton record management system, on 11 July 2025. He completed the form on Monday 14 July 2025.

*Events following the annual driver assessment*

[59] Mr Bryant, General Manager Safety, Quality, is part of the Executive Leadership team and received a notification of the completed assessment form for Mr Seymour.

[60] Mr Bryant said Hilton is certified to ISO45001 health and safety management standard and because of the hazards associated with heavy trucks and road driving, it takes meeting that standard very seriously.

[61] He said the heavy transport industry is inherently hazardous. The most critical risks from a health and safety perspective are on-road driving, including speed, driver fatigue and other road users. Under speeding or going too slowly when there is no reason to do so is not so prominent in terms of risk but it becomes a concern in respect of other users on the road who become frustrated at having to sit behind a slow-moving, 58-tonne truck and become more likely to take risks to overtake the truck that could easily become fatal.

[62] Mr Bryant said that during an audit some two to three years earlier a gap in the Hilton system was identified. As a result, an annual refresher driver assessment was introduced across all the Hilton driving operations. Assessments are not recorded using the in-cab cameras and the procedure does not require that. Being failed on an annual assessment happens very rarely and as a result he said it might not be common knowledge among Lead Drivers or Shift Supervisors what happens if a driver fails an assessment.

[63] Once a failed assessment is completed and entered into Zambion, Mr Seymour said he was the first person to receive it. He said a failed assessment does not necessarily mean that an assessor has to immediately stop the driver from driving, the only time that would occur is when there is a critical safety issue. That was not the case in regard to Mr Seymour.

[64] However, where an assessment is failed, and until retraining has been undertaken and a successful reassessment has been completed, steps need to be taken to ensure that the driver concerned is not placed in a position where they are at risk of the issue reoccurring.

[65] Mr Bryant said he first knew of Mr Seymour's failed assessment when he received an automated message in his email inbox in the late afternoon on 14 July 2025. He knew Mr Adams to a highly experienced assessor and an excellent driver and made note that he had stated in the assessment form that Mr Seymour's speed had been "consistently lower than posted limit speeds used"; "at times inconsistent speeds" had been demonstrated by Mr Seymour, and that "inconsistent speeds during the day could potentially lead to operational and safety issues".

[66] Mr Bryant said Mr Adams had assessed Mr Seymour as not being a good representative of Hilton, and in his opinion, had not represented Hilton in a professional and positive manner.

[67] Once he had read the assessment, he called Mr Gardiner to let him know that Mr Seymour had failed the annual refresher driver assessment and needed retraining and reassessment. At that stage he said he believed it would be an easy fix, with Mr Seymour only requiring a few days of retraining.

*Post failed assessment events*

[68] Mr Seymour said he was told by Mr Conway on 14 July 2025 that he had been stood down when they were in the yard and this took place in front of his peers.

[69] Mr Conway said he had been on leave when Mr Seymour failed his driving assessment. He returned to work on 14 July 2025. He was in Mr Gardiner's office when Mr Seymour returned to the yard. Mr Gardiner told him that Mr Seymour was not meant to be driving and to return to the yard and ask him to meet with him (Mr Gardiner).

[70] Mr Conway said he was not aware that Mr Seymour, who had been doing a 'ride-along' with another driver that day, should not have been driving solo. He returned to the yard, spoke to Mr Seymour, told him he should not be driving and asked him to see Mr Gardiner. He said there was no one near them when he spoke to Mr Seymour.

[71] Mr Conway denied he had told Mr Seymour he was 'stood down'. However, he had heard subsequently from other drivers that Mr Seymour had told them he had been stood down.

[72] Mr Seymour returned to the yard after speaking with Mr Gardiner and drove off.

[73] Mr Gardiner said that after he learnt about Mr Seymour's failed assessment on 14 July 2025, Mr Seymour had been out driving with another driver and he also drove with that driver the following day.

*Subsequent events*

[74] Mr Gardiner said he spoke to an HR Advisor during the morning on 15 July 2025 for guidance. He told Mr Conway to ask Mr Seymour to come to see him when he returned to the yard. When he did so, Mr Gardiner said he told Mr Seymour that he had failed the annual driver refresher assessment and as a result, could not drive alone until he had been reassessed. Mr Seymour was due to leave on his rostered days off so Mr Gardiner said he suggested that they meet to discuss matters on his return to work.

[75] Mr Gardiner said he had not told Mr Seymour he was suspended because he had not been.

[76] Mr Seymour was rostered off work from 16 to 18 July 2025, worked his shifts on 19 and 23 July riding with another driver, and attended Hilton funded Health and Safety Representative training on 22 July 2025.

[77] On 21 July 2025 Mr Gardiner sent an email to Mr Seymour attaching a draft performance improvement plan (PIP). Mr Gardner stated in the email:

Following the conversation I had with you on **15 July 2025, ...** I would like to arrange a meeting with you at **9am on Thursday 24 July 2025 ...** to discuss your performance at work and my proposal for us to put in place a Performance Improvement Plan.

... we will now be taking a more formal approach to support your development. The purpose of this is to improve your performance, provide guidance and support to assist you.

My issues of concern relate to your ability to display appropriate speeds considerably and consistently which is causing concerns around your driving practices. ...

I have developed a draft Performance Improvement Plan (PIP) attached for you to read and think about before the meeting.

At the meeting you will be able to provide feedback, along with any explanations or comments you have about the issues and concerns I have raised. After the meeting I will consider your feedback and comments before any plan is finalised.

[78] The parties did not meet on 24 July 2025 due to subsequent events.

*Subsequent events and correspondence after 22 July 2025*

[79] Ms Nikolai emailed Mr Gardiner on 22 July 2025 on behalf of Mr Seymour requesting information including a copy of the truck camera footage. Ms Nikolai raised an issue about “the procedural fairness of the PIP implementation” and suggested that it was a possible retaliation for Mr Seymour’s health and safety work responsibilities. Ms Nikolai also advised that she had work commitments on 24 July 2025 and was not available to meet.

[80] Ms Prescott, General Manager People, said Mr Gardiner and the HR Advisor had been trying to hold a meeting with Mr Seymour to discuss what had occurred and the proposal for retraining and reassessment as set out in the draft PIP. The intention was to quickly carry out any necessary retraining and have Mr Seymour driving again within a short space of time.

[81] The HR Advisor wrote to Ms Nikolai on 23 July 2025 explaining that the PIP was a draft only, and that Mr Seymour’s health and safety responsibilities were not relevant. She also explained that whilst any assessment documentation would be made available, the in-cab footage was no longer available. Ms Nikolai was asked to provide an alternative date to meet given her unavailability on 24 July 2025.

[82] Ms Nikolai responded via a lengthy email on 24 July 2025 reiterating concerns about the assessment, the missing in-cab camera footage and a lack of training provided to Mr Seymour in his role as Health and Safety Representative.

[83] Ms Prescott said that following Ms Nikolai’s involvement the situation became more complex, and she took over the handling of the matter from the HR Advisor.

[84] Ms Prescott said a failed assessment is not a suspension situation, the drivers still received their full pay and are expected to attend work and undertake normal duties. While they are required to ‘buddy up’ for driving, that of itself is not an unusual situation and can occur for a variety reasons, particularly in Hilton’s quieter seasons.

[85] Ms Prescott said at the stage she became involved, Mr Gardiner and the HR Advisor had been trying unsuccessfully to set up a meeting with Mr Seymour to discuss what had occurred and what had been proposed in terms of retraining and reassessment with the aim of getting Mr Seymour driving solo again.

[86] On 25 July 2025 Ms Nikolai stated that she and Mr Seymour, who had leave planned for 28 July to 5 August 2025, would be available for a “brief meeting” on 28 July or 7 August, to take place by Zoom. Ms Prescott responded that same day confirming that Mr Gardiner and the HR Advisor would meet with them on 7 August 2025.

[87] Ms Nikolai emailed on 28 July 2025 asking that Hilton provide Mr Seymour with special paid leave up to and including the date of the agreed meeting on 7 July 2025 rather than Mr Seymour taking his arranged annual leave.

[88] Ms Prescott said after discussion with Mr Gardiner, she became aware that Mr Seymour had booked his annual leave prior to the failed assessment. In addition, Hilton had no policy on discretionary or paid special leave, so the request was not approved. Ms Nikolai was informed of this by email on 30 July 2025.

[89] Ms Prescott said she also clarified that Mr Seymour was expected back to work on 6 August 2025, and the roster had been organised so he would be driving with an experienced driver.

[90] On 31 July 2025 Ms Nikolai wrote to Ms Prescott commencing the lengthy email by stating:

I am formally escalating serious concerns regarding the treatment of Mac Seymour concerning the disputed Performance Improvement Plan (PIP), the lack of transparency around key decisions, and the recent direction for him to return to driving duties with an experienced driver as a passenger – evidence that he is stood down from normal duties. It is also premature as we have not had the meeting scheduled for 7 August 2025.

[91] In the email Ms Nikolai alleged that Hilton were pressurising Mr Seymour to return to duties before his concerns had been resolved, and that Hilton were withholding relevant records. Ms Nikolai alleged that this reflected a “toxic and unsafe workplace culture”.

[92] Ms Nikolai stated that it was inappropriate for her and Mr Seymour to meet with Mr Gardiner and the HR Advisor, but that she wanted to meet with Ms Prescott and Mr Bryant instead. Ms Nikolai also stated that as a Health and Safety Representative Mr Seymour had additional rights to request documentation and “seek appropriate investigations where worker safety may be compromised”.

[93] Ms Prescott responded and confirmed that whilst Mr Bryant was not available to meet on 7 August 2025, she would be, and the intention was to share the footage and data that needed to be shared at that time. Ms Prescott said a lot of information was shared with Mr Seymour on or about that time.

[94] However, before the meeting scheduled for 7 August could take place, Ms Nikolai emailed stating:

... the meeting scheduled for today at 4.30 pm was contingent on our ability to review the full information requested in sufficient time ...

[95] Ms Prescott responded and proposed amending the agenda of the meeting for that day to focus on “communication, working arrangements and leave processes”, and postponing the PIP discussion.

[96] In response Ms Nikolai advised that she and Mr Seymour had lodged health and safety concerns with Worksafe. Hilton received a medical certificate from Mr Seymour, certifying him as unfit for work from and including 7 to 15 August 2025.

[97] This was followed by further medical certificates and at the time of the Investigation Meeting, Mr Seymour was still absent from work on certified sick leave.

[98] Following the initial medical certificate Ms Prescott and Ms Nikolai were in communication over whether Mr Seymour wished to use his sick leave and/or annual leave to cover his period of absence. However Mr Seymour did not provide a response.

[99] Ms Prescott said she suggested that mediation would be an appropriate and beneficial step forward and she applied to the MBIE Mediation Service, obtaining a prospective date for 18 August 2025.

[100] Ms Prescott said that by this stage Hilton had provided all of the information required to discuss Mr Seymour’s assessment, apart from the in-cab camera footage which Ms Nikolai repeatedly requested, but which had been repeatedly explained to her did not exist.

[101] On or about mid-August 2025 Ms Prescott said Hilton instructed its lawyers to take over communications with Ms Nikolai as responding to the volume and pace of her emails was too time consuming of Ms Prescott's time.

[102] On 20 August 2025 the lawyers wrote to Ms Nikolai confirming:

- Mr Seymour's absence was being treated as unpaid leave;
- There would be no further engagement in writing on matters which had already been responded to in writing;
- Mediation had been applied for; and
- Hilton had provided all the information that existed or was retrievable within the scope of the requests she had made on Mr Seymour's behalf to that point.

[103] Ms Nikolai responded by email that same day claiming that Mr Seymour's absence from work was an exercise of his right under s 83 of the Health and Safety at Work Act 2015 (HASWA) to cease or refuse unsafe work.

[104] In the same email, Ms Nikolai again requested that Hilton provided all outstanding information. She repeated the request in an email to Mr Bryant on 22 August 2025.

[105] On 23 August 2025 Ms Prescott said Ms Nikolai sent to Hilton a lengthy (and in parts legally incorrect) health and safety investigation report which she said had been written by Mr Seymour in his role as Health and Safety Representative. This set out Mr Seymour's view of what Hilton had done incorrectly during his assessment and the following process.

[106] On 24 August 2025 Ms Nikolai sent, in Mr Seymour's name, a provisional improvement notice (PIN) which stated it had been issued in his role as Health and Safety Representative under HASWA.

[107] Ms Prescott and Mr Bryant said they discussed the PIN, which neither considered had been validly issued. They also considered the issues raised were employment relationship issues personal to him and not health and safety issues.

[108] Mr Bryant said he had reviewed the PIN carefully to see if it identified any genuine health and safety or hazard-related concerns, but did not identify any such concerns.

[109] He said PINs are generally used for significant health and safety issues affecting a wide range of workers. In this case Mr Seymour appeared to have issued the PIN because of psychological health and safety concerns he considered had arisen for him personally as a result

of Hilton not having provided him with satisfactory information relating to his failed assessment.

[110] It also appeared to be asking for the same information Ms Nikolai on behalf of Mr Seymour had already asked for and which had either been provided, or a response had been provided to the request.

[111] Hilton requested that Worksafe New Zealand (Worksafe) review the PIN, which was granted. Worksafe's decision was to cancel the PIN. Mr Seymour challenged Worksafe's decision, but Mr Bryant said Worksafe did not uphold his challenge. This confirmed the removal of the PIN.

[112] Ms Prescott said that Hilton received a communication from Worksafe that it had received a report regarding a mentally unsafe workplace from Mr Seymour, which it was not taking any further.

[113] Hilton received further requests from Ms Nikolai on behalf of Mr Seymour for information under HASWA and the Privacy Act 2020. Ms Prescott said Hilton responded to the requests and provided such information as it was able to do, given the rights of other persons which were protected under the provisions of the Privacy Act 2020.

[114] Ms Nikolai made repeated requests for information during September 2025 to all of which Hilton responded.

[115] Ms Nikolai did not agree for Mr Seymour to attend mediation, confirming this in an email to the Mediation Service on 4 September 2025.

[116] On 14 October 2025 Ms Prescott said Hilton received Mr Seymour's Statement of Problem which was the first time Mr Seymour had made Hilton aware that he was raising a personal grievance

[117] On 17 October 2025 Ms Prescott said Ms Nikolai provided a further medical certificate for Mr Seymour and made further allegations of unfairness and unreasonableness in relation to the way in which Mr Seymour's information requests were being treated.

[118] Hilton's lawyers emailed a response that same day confirming that information relating to Mr Seymour's latest request would be provided to the extent that it was about him.

[119] Hilton lodged its Statement in Reply in the Authority on 28 October 2025 and subsequently were directed by the Authority to Mediation. The matter did not resolve at mediation.

## **Was Mr Seymour unjustifiably disadvantaged in his employment by Hilton?**

[120] Mr Seymour claims that he was unjustifiably disadvantaged in his employment as a result of a failed annual refresher driving assessment and Hilton's subsequent handling of the matter.

[121] Section 103 (1)(b) of the Act is applicable to disadvantage grievances and states:

That 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;

[122] The elements of s103 (1) (b) are twofold:

- a. An unjustifiable action by the employer, which
- b. Affected the employee's terms and conditions of employment, and this was to the employee's disadvantage.

[123] Section 103 A further states at (5):

The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were –

- (a) Minor; and
- (b) did not result in the employee being treated unfairly.

a. *An unjustifiable act?*

[124] Mr Seymour is a driver for Hilton. In that capacity he was employed to drive heavy vehicles. Hilton, as a responsible employer and as is appropriate given the high risk associated with heavy vehicle driving, placed a strong emphasis on health and safety for its operations and in particular in its driving operations. This is reflected in the terms and conditions of the Employment Agreement and the policies and procedures provided to Mr Seymour.

[125] The Employment Agreement stated at clause 17.3.4 that Mr Seymour agreed to follow "health and safety related rules, policies, procedures, instructions and directions given by the employer".

[126] Those policies and procedures included the Dairy Introduction Procedures Manual from which Mr Seymour was aware that he was required to undertake a yearly refresher driver assessment. Further that if he was deemed not competent, he would be retrained within one week, and reassessed, within two weeks.

[127] On 17 and 18 May 2025 Mr Gubb accompanied Mr Seymour while he was driving. Mr Seymour said he understood that to be his annual assessment. While Mr Seymour said Mr Gubb told him it was his annual assessment, Mr Gubb denies this.

[128] On 11 July 2025 Mr Adams carried out Mr Seymour's annual driving assessment. In considering whether or not Mr Seymour's belief that Mr Adams was not undertaking his assessment because Mr Gubb had already undertaken was credible, I note as pertinent the following:

- i. Mr Pearce-Davies' evidence that the annual assessments had been taking place in July 2025;
- ii. Mr Adams, who was based in Hamilton, was known by the drivers to be travelling to Tokoroa during July to carry out the annual assessments;
- iii. Mr Pearce-Davies' evidence that he had informed Mr Seymour his assessment was to take place that day during the daily toolbox meeting, and Mr Seymour's confirmation during the Investigation Meeting that this was what he had been told;
- iv. Mr Seymour had asked Mr Pearce-Davies if he should do his pre-start check before Mr Adams arrived at the site and that had been agreed.

[129] Mr Seymour was assessed by Mr Adams as not having reached the required standard for safe driving. I find that Hilton was entitled to assess Mr Seymour on an annual basis. It did so. This was not an unjustifiable action.

[130] I find no unjustifiable disadvantage arising from Hilton undertaking the annual assessment which it was contractually entitled to do.

[131] Mr Seymour was required during the period until he was successfully reassessed, to drive accompanied by another driver. This was in accordance with the Dairy Introduction Procedures Manual and was moreover something which occurred on occasion.

[132] Indeed, it occurred for Mr Seymour himself on the occasion of Mr Gubb's drive with him, and later on 14 July 2025. The evidence established that 'drive-a longs' were not an unusual occurrence particularly at that time of the year when Hilton business was in a quieter period. I observe that Mr Seymour made no objection to being accompanied on those previous occasions by another driver nor did he make any claim that he had been unjustifiably disadvantaged on those previous occasions.

[133] Apart from the requirement to be accompanied on his drives, there was no change to Mr Seymour's rate of pay, or to his work tasks. There was no disciplinary process to be undertaken, nor was Mr Seymour's continued employment in jeopardy.

[134] Mr Seymour has claimed that Mr Adam's assessment of him was wrong.

[135] In assessing whether or not this view is sustainable I observe that Mr Adams, a Lead Driver, was a very experienced truck driver and both qualified by his position as Lead Driver and experienced in undertaking driving assessments, having completed approximately 50.

[136] His conclusion of Mr Seymour's driving speed during the assessment as noted on Zambion was of "inconsistent speeds during the day" which "could potentially lead to Operational and safety issues".

[137] There is no evidence that he was influenced to provide an adverse assessment of Mr Seymour's driving. In fact, the GPS data obtained later and provided in evidence supported Mr Adams assessment in that it showed that Mr Seymour was consistently below the posted speed limit during the drive.

[138] Mr Seymour claimed that the assessment was invalid because Mr Adams did not observe the pre-start check or complete the drive with him. I find these do not invalidate the driving part of the assessment.

[139] I find it was incumbent on Hilton to take the failed assessment and its observed potential for safety very seriously. The process Hilton proposed was re-training and reassessment within a short window of time after which period Mr Seymour would be back to driving solo. Hilton was contractually entitled to do both as set out in the Dairy Introduction Procedures Manual.

[140] Mr Seymour failed the assessment on 11 July 2025 but the assessment was not loaded into Zambion until 14 July 2025. That was the date Mr Bryant was notified of it, and in turn advised Mr Gardiner.

[141] Mr Gardiner communicated the outcome to Mr Seymour on 15 July 2025. At that time Mr Seymour had driven solo on one day, 13 July 2025.

[142] I find there was no unjustifiable disadvantage to Mr Seymour in driving unsupervised on that one day.

[143] The effect of the delay between the assessment and it being acted upon was that the camera footage was not available because of its being automatically overwritten within 72 hours.

[144] Mr Seymour claims that he was disadvantaged because the footage was not available. However the GPS data was made available to him, and Mr Seymour's evidence was that in any event Hilton offered at an early stage in the process to let him undertake another driving assessment with camera footage which would be made available to him to discuss.

[145] I am not persuaded that in light of the other information made available to him, and the offer to retake the assessment with footage from that assessment made available to him, Mr Seymour was unjustifiably disadvantaged by the lack of camera footage. If he was, then the defect was minor and did not result in him being treated unfairly in light of the process steps.

*The process steps*

[146] Mr Gardiner proposed a PIP which he sent to Mr Seymour. I note that in his accompanying email dated 21 July 2025, Mr Gardiner stated that it was a draft on which he anticipated Mr Seymour would provide feedback at a meeting to be held on 24 July 2025 before it was finalised.

[147] I find that this was a reasonable action. As observed Hilton had a responsibility to take the assessment observations and the potential for any risk to public health and safety very seriously. Moreover, the proposed PIP was a draft only. It would not be finalised or confirmed before Mr Gardiner had the opportunity to provide feedback.

[148] It is clear from the evidence that Hilton wanted to meet with Mr Seymour to obtain his input before any plan for retraining and reassessment was commenced. Its evidence was that truck trainers are a valuable part of its operation, and it wanted Mr Seymour back on the road as quickly. It is unfortunate that its efforts to achieve that end were unsuccessful.

[149] The initial meeting proposed for 24 July 2025 did not take place. Hilton offered to meet on 7 August 2025, including with the members of management Ms Nikolai wanted present.

[150] While Ms Nikolai did accept the offer to meet made by Hilton, the meeting did not take place because Mr Seymour refused to meet until some information was provided.

[151] During August 2025 Hilton took the positive step towards resolution of applying for mediation, but Mr Seymour refused to attend. In fact, no mediation took place until the Authority directed it.

[152] I find that Hilton was contractually entitled to require Mr Seymour to undertake retraining and reassessment. That was not an unjustifiable action on the part of Hilton.

[153] Its efforts to meet with Mr Seymour as a means of achieving that end were unsuccessful.

*b. Affected Mr Seymour's terms and conditions of employment to his disadvantage.*

[154] The failed assessment had no impact on Mr Seymour's rate of pay or his duties.

[155] While Mr Seymour was required during the (initially anticipated short) period until he was successfully reassessed to be accompanied by another driver, this was not an unusual occurrence for Hilton drivers and Mr Seymour had not objected to this when it had happened previously.

[156] I also note the evidence that drive-alongs were not unusual, they happened on occasion, particularly during the quieter periods, one of which was July when Mr Seymour's assessment had taken place. There was therefore no reason for adverse comment on it occurring from the other drivers.

[157] I have considered Mr Seymour's evidence that he was informed he was 'stood down' publicly on 14 July 2025 by Mr Conway. Mr Conway denied there had been anyone else within earshot when he spoke to Mr Seymour. In addition, Mr Seymour was not suspended, nor was this proposed as part of the process at any time.

[158] Mr Seymour claimed that Hilton's process post the assessment disrupted his progress towards becoming qualified as a health and safety representative. However, that is not substantiated by the evidence that he was invited to attend a meeting on 21 July 2025 to discuss the process, and attended, and completed successfully, health and safety training the following day, 22 July 2025.

[159] I find no adverse impact on Mr Seymour's terms and conditions of employment resulting from the annual assessment or the process Hilton adopted following it.

[160] I determine that Mr Seymour has not unjustifiably disadvantaged in his employment by Hilton.

**Did Hilton breach the duty of good faith it owed to Mr Seymour?**

[161] The duty of good faith is set out in s 4 of the Act. That section sets out that both parties must deal with each other in good faith.

[162] It is accepted that the in-cab camera evidence was not available to Mr Seymour. Mr Seymour confirmed that Hilton had recognised that was a problem for him and at an early stage in the process had offered to undertake another driving assessment and it would provide all the footage from that assessment.

[163] The correspondence substantiates that Hilton responded in a timely manner to all communications from Ms Nikolai even though these were lengthy and required time and resources to do so. It did provide such requested information as was available to Mr Seymour.

[164] I observe that the duty of faith is a two-edged sword. During the process following the failed assessment, Hilton made a number of attempts to meet with Mr Seymour. Mr Seymour is under a duty to act in good faith towards Hilton, this required him to be 'active and constructive' in maintaining a productive employment relationship.

[165] At no stage following 21 July 2025 did Mr Seymour meet with Hilton despite its many attempts to meet with him in order the situation could quickly be resolved. Rather he refused all offers to meet, raised a PIN and refused to attend mediation which Hilton offered to do in order to assist the process to a resolution. I find these were not the actions of an employee acting in good faith.

[166] I determine that Hilton did not breach the duty of good faith it owed to Mr Seymour.

### **Costs**

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

[168] If they are not able to do so and an Authority determination on costs is needed Hilton may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Mr Seymour 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.

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

[170] 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>1</sup>

Eleanor Robinson  
Member of the Employment Relations Authority

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