

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2026] NZERA 360  
3376323

BETWEEN SELWYN MCDONALD  
Applicant

AND TRAFFICA ROADING  
SERVICES LIMITED  
Respondent

Member of Authority: Matthew Piper

Representatives: David Feist, advocate for the Applicant  
Sanjay Sharma, counsel for the Respondent

Investigation Meeting: 24 and 25 February 2026 in Auckland

Submissions received: 4 March 2026 from the Applicant  
12 March 2026 from the Respondent

Determination: 9 June 2026

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Selwyn McDonald was summarily dismissed from his role at Traffica Roding Services Limited (Traffica) during a heated verbal exchange with Traffica's Director Bashir Ahmed.

[2] Mr McDonald claimed he was unjustifiably dismissed and that he was unjustifiably disadvantaged by being bullied by Mr Ahmed on previous occasions. He sought lost wages and compensation for hurt and humiliation.

[3] Traffica denied Mr McDonald's claims and said he was not entitled to any remedies.

## **The Authority's investigation**

[4] For the Authority's investigation written witness statements were lodged from Mr McDonald, other employees of Traffica Thisula Kithulagoda, Andrew Siriwardena and Adam Taylor, and Traffica's Director Mr Ahmed. All witnesses answered questions under oath or affirmation from me and the parties' representative. Written submissions were lodged after the Authority's investigation meeting.

[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:

- (i) Was Mr McDonald unjustifiably dismissed?
- (ii) Was Mr McDonald unjustifiably disadvantaged in his employment?
- (iii) If Traffica's actions were not justified (by disadvantaging and/or dismissing Mr McDonald), what remedies should be awarded, considering:
  - (i) Lost wages; and
  - (ii) Compensation under s 123(1)(c)(i) of the Act?
- (iv) If any remedies are awarded, should they be reduced under s 124 of the Act for blameworthy conduct by Mr McDonald that contributed to the situation giving rise to his grievance?
- (v) Should either party contribute to the costs of representation of the other party.

## **Background**

[7] Traffica is a civil construction company founded by Mr Ahmed. Mr Ahmed continues to be a director and shareholder of the company. Traffica employs approximately 120 people.

[8] Mr McDonald is an experienced concrete worker. He worked for Traffica between May 2022 and April 2024 as a foreman. This meant that Mr McDonald was

responsible for a team of workers who were deployed to various sites to undertake work.

[9] Mr McDonald claimed that during some meetings in 2023 regarding the provision of appropriate tools and equipment, Mr Ahmed was aggressive with him. Around the same time, Mr McDonald had a number of other personal issues that caused him stress and difficulty relating to the health of others in his family and the impact of the 2023 Auckland floods on his living arrangements.

[10] Mr Ahmed denied ever being aggressive with Mr McDonald and said Mr McDonald never raised this as an issue with him. Mr Ahmed further said that the issues regarding tools were delegated by him to other employees to deal with. Mr Ahmed also said that he had provided Mr McDonald with additional support around the time he was having personal difficulties, including additional paid time off and allowing him to use company vehicles to move property following flooding.

[11] In early 2024 Traffica began work on a large subdivision project. Mr McDonald was one of the Traffica employees performing concreting work on the project. The project continued for a number of months, including after Mr McDonald's employment terminated.

[12] On 18 April 2024 Mr McDonald was involved in an incident in a dairy near the site he was working on. Mr McDonald told the authority that a security guard had unreasonably racially profiled him and followed him around the dairy, which led to a confrontation between Mr McDonald and other staff working at the dairy. At the time of the confrontation, Mr McDonald was said to have used strong language and the dairy owner was left unhappy with the situation.

[13] Later that day the dairy owner contacted Traffica to complain and was put through to Mr Kithulagoda, who spoke with Mr McDonald about the incident. Mr Kithulagoda conveyed to Mr McDonald what the dairy owner had said, and Mr McDonald responded to Mr Kithulagoda with his version of what had happened, including that he had been verbally aggressive with the dairy owner after having been unfairly treated.

[14] Mr McDonald was then asked to visit Mr Ahmed at the company depot. Mr Ahmed spoke to Mr McDonald about the incident at the dairy and Mr McDonald provided his version of events. Mr Ahmed was concerned that Mr McDonald had used strong language in a confrontation with dairy staff while wearing his Traffica uniform and told the Authority he considered Mr McDonald's actions represented a pattern of poor behaviour. Mr Ahmed said he told Mr McDonald that this sort of incident cannot happen again. He also asked Mr McDonald to undertake a drug and alcohol test.

[15] The next day, on 19 April 2024, Mr Ahmed issued Mr McDonald with a letter containing a final written warning. The letter said that it related to serious misconduct concerning abusive behaviour and a number of road rage incidents, one of which was said to have occurred more than a year prior.

[16] Mr Ahmed's letter noted that the behaviour constituted serious misconduct and that Mr McDonald's behaviour must improve, including in particular his anger management. The letter warned Mr McDonald that his employment would be terminated if his actions did not improve sufficiently, or if there was a repeat incident or a failed drug test.

[17] The letter ended by saying that Mr Ahmed wished to speak to Mr McDonald again in the next month to "review his progress" and that if he wished to respond to the formal warning he should do so by replying in writing.

[18] Mr McDonald did not query or challenge the final warning at the time or in his statement of problem. He told the authority that he understood the kind of behaviour that he had shown in the dairy was not acceptable but considered that he was under pressure for a range of personal and work reasons and that it had built up and come out in an inappropriate context. Mr McDonald also believed he had been treated unfairly by the dairy owner when being followed around the shop and said that he had brought proceedings against the dairy owner in relation to that matter.

[19] In between being given the final written warning on 19 April 2024 and the termination of his employment on 14 May 2024 Mr McDonald told the Authority that work on site had continued as normal.

[20] On 22 April 2024 Mr McDonald's drug and alcohol test returned and showed a positive result for THC, which Mr McDonald said reflected legitimate medicinal use.

[21] Traffica's view was that Mr McDonald's work, including during this final period, was not of an adequate standard. This was not necessarily because he wasn't capable of undertaking the concreting work required of him, but because he was regarded as being consistently obstinate and because he refused to follow instructions based on the requirements of counsel inspectors who regularly visited the site.

[22] Under questioning from the Authority Mr McDonald expressed reservations regarding the appropriateness of an inspector, being a person who hadn't necessarily laid concrete in the past, telling him how to do his job. It was clear that he continued to hold these views. It is therefore likely that Mr McDonald expressed similar views when given instructions by Traffica and did not readily undertake work as directed.

[23] Each of the witnesses for Traffica provided evidence that Mr McDonald had a tendency to overreact when challenged about work issues. Although it was accepted that construction sites may be environments where colourful language is used, Mr McDonald was described as being unnecessarily aggressive and reactive to other employees and to his own team.

[24] Mr Taylor, a senior supervisor for Traffica, told the Authority that Mr McDonald would not follow the plans as prescribed by engineers and that this would cause problems. He told the authority that sometimes Mr McDonald's response would be in strong language even when he was just trying to speak to him about how to do jobs.

#### *The dismissal*

[25] On 14 May 2024 Mr Taylor told the authority that he had had discussions with Mr Ahmed about concerns he had with Mr McDonald's work. He said he told Mr Ahmed that he was finding Mr McDonald was not listening and was uncooperative, making him hard to handle on site. Mr Ahmed told Mr Taylor that he would talk to Mr McDonald.

[26] As Mr Ahmed was driving through the subdivision, he saw Mr McDonald walking up the road. He turned his car towards Mr McDonald and called him over. Mr

McDonald and Mr Ahmed have different accounts of what happened next. What is clear, however, is that there was a heated exchange regarding concerns Traffica had with Mr McDonald's work and his resistance to doing the work in the way required of him.

[27] Mr McDonald told the authority that in response to these concerns being raised with him by Mr Ahmed he decided to walk away in order to de-escalate the situation.

[28] Mr Ahmed said, by contrast, that rather than walking away Mr McDonald used explicit language with racial connotations, which referred to where Mr Ahmed "had come from". Mr Ahmed said that he told Mr McDonald, that if he could not hold a decent conversation about his work he could no longer work for Traffica.

[29] Mr Ahmed then summarily dismissed Mr McDonald, telling him to pack his tools and go home, which he did.

[30] Mr Ahmed told the authority that his decision to dismiss Mr McDonald was motivated by the fact that he felt that the seriousness of the disrespectful comments made by Mr McDonald meant the relationship had soured to such an extent there was no point in any further discussion with him.

[31] In deciding between these two accounts of what happened when Mr McDonald was called over to Mr Ahmed's car, on the balance of probabilities, I prefer Mr Ahmed's version of events. This is because it is the most consistent with each party's pattern of behaviour up to that point and because it explains Mr Ahmed's decision to dismiss Mr McDonald on the spot.

[32] I record that I have considered all evidence provided by the parties in which their account of these events was set out, including what were said to have been contemporaneous materials.

[33] The dismissal occurred on site and in a context which was observed by others. Mr McDonald was required to walk through the site to remove his tools from a car and ask another co-worker for a ride home, because he no longer had use of the company vehicle.

[34] Mr McDonald said that news of his dismissal spread around the industry because truck drivers on site were aware of it and spoke to others about it. He also said that the dismissal had a profound impact on him and caused him to feel upset, distressed and humiliated in front of both his peers and his son who was also on site.

[35] Mr McDonald's summary dismissal was confirmed in writing on 15 May 2024. The dismissal letter cited as reasons for Mr McDonald's dismissal the exchange with Mr Ahmed, his failing to improve his anger management and following of instructions, and the failed drug test.

### **Was Mr McDonald unjustifiably dismissed?**

[36] During the authority's investigation meeting Mr Ahmed accepted that he had dismissed Mr McDonald on the spot because of his response when Mr Ahmed had attempted to talk to him about issues with his work.

[37] Section 103A of the Act provides the test for justification the Authority must take into account when considering whether a dismissal was justifiable. The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[38] In making this assessment, the Authority must, while having regard to the resources available to the employer, consider whether the employer sufficiently investigated the allegations against the employee before dismissing them. This means the employer needs to have raised concerns with the employee, given them an opportunity to respond and considered their response before dismissing them.

[39] By dismissing Mr McDonald on the spot in the circumstances set out above, Traffica failed to comply with the requirements of s 103A of the Act. Mr McDonald did not have a fair opportunity to respond to Mr Ahmed's concerns in relation to his language. I consider it likely that Mr McDonald would have provided a response if he was given the opportunity to do so. Traffica would have been obliged to consider that response before deciding to dismiss him. These procedural defects were not minor and resulted in unfairness to Mr McDonald.

[40] Mr McDonald has established that he has a personal grievance for unjustified dismissal.

### **Was Mr McDonald unjustifiably disadvantaged in his employment?**

[41] Mr McDonald claimed to have been unjustifiably disadvantaged by what he said was Mr Ahmed's aggressive behaviour toward him during meetings in 2023. He said that Mr Ahmed's behaviour in this regard caused him stress.

[42] Mr McDonald has not established that he was bullied by Mr Ahmed or otherwise disadvantaged in his employment during 2023. It is more likely that other matters in Mr McDonald's personal life contributed to his being stressed at that time.

[43] Accordingly, Mr McDonald has not established that he was unjustifiably disadvantaged in his employment.

### **Remedies**

[44] Having established a personal grievance for unjustified dismissal, Mr McDonald is entitled to a consideration of remedies in relation to Traffica's unjustified actions. He seeks lost wages and compensation for emotional distress.

#### *Lost wages*

[45] Mr McDonald sought reimbursement of a sum equal to the wages he said he lost as a result of his unjustified dismissal. Such a remedy is potentially available to him under ss 123 and 128 of the Act, which say the Authority may order an employer to reimburse an employee who has a personal grievance the lesser of the remuneration lost or 3 months' ordinary time remuneration. The Authority may, under s 128(3) of the Act, exercise a discretion to order an employer to pay the employee a greater sum.

[46] The evidence provided by each of the company's witnesses demonstrated that there was increasing tension on site flowing from Mr McDonald's approach to following the instructions of council inspectors and management. This evidence was accepted by the Authority after Mr McDonald maintained his view that it was reasonable for him to resist instructions from the company to comply with inspector's directions where he thought they were incorrect.

[47] Mr McDonald also told the Authority that he considered his team was under resourced and that he was becoming increasingly stressed at work as a result. It is more likely than not that additional confrontation with colleagues would have ensued.

[48] When each of these factors is considered alongside Mr McDonald's inappropriate comments to Mr Ahmed, a counter-factual emerges where it is more likely than not that Mr McDonald would not have remained employed by Traffica for more than a further month.<sup>1</sup>

[49] Proof was provided of Mr McDonald's attempts to mitigate his loss.

[50] Mr McDonald was paid \$40 per hour and was contractually entitled to 40 hours per week. I therefore award one month's lost wages of \$6,400.00 gross under s 128 of the Act.

*Humiliation, loss of dignity and injury to feelings*

[51] Mr McDonald seeks compensation pursuant to s 123(1)(c)(i) of the Act. In assessing whether such an award should be made, the Authority must quantify the harm and loss caused by any humiliation, loss of dignity and injury to feelings arising out of the unjustified actions.<sup>2</sup>

[52] Mr McDonald's unjustified dismissal was abrupt, loud and occurred in front of his colleagues, including his son. He was humiliated by having to go back through the worksite to retrieve his tools and said it was clear to others that he had just been dismissed on the spot by Mr Ahmed.

[53] Mr McDonald also said his reputation was damaged because others in the industry became aware of his dismissal, in part, because it occurred in front of or around a number of concrete truck drivers, who he said laughed at him at the time.

[54] Mr McDonald's personal issues continued at the time of his dismissal and a reasonable level of detail of those issues was known to Mr Ahmed.

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<sup>1</sup> *Sam's Fukuyama Food Services Ltd v Zhang* [2011] NZCA 608 at [37].

<sup>2</sup> *Richora Group Ltd v Cheng* [2018] NZEmpC 113.

[55] Mr McDonald was humiliated by Traffica's unjustified actions, and he suffered injury to his feelings and loss of dignity. The evidence shows that an award of \$15,000 in distress compensation is just in all the circumstances.

### **Contribution**

[56] Where it has awarded remedies in respect of a personal grievance, the Authority must, in deciding both the nature and extent of the remedies to be provided, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the grievance.<sup>3</sup>

[57] Where there is relevant contribution, the Authority may reduce the remedies awarded. In this regard, more than simple cause and effect is required. The employee's actions must be blameworthy or wrongful which, when assessed in a commonsense way, contributed to the situation giving rise to the grievance.

[58] Mr McDonald's actions in making the comments that he did to Mr Ahmed were blameworthy and contributed significantly to the circumstances giving rise to his grievance.

[59] The Court has indicated that reductions of 50% should be reserved for exceptional cases, and that care should be taken before imposing a reduction of 25%.<sup>4</sup> The case law indicates that proportionality is also an important consideration when applying a reduction for contribution.<sup>5</sup>

[60] Mr McDonald's conduct was serious because in all the circumstances it would have had the effect of materially undermining the trust in his employment relationship with Traffica.

[61] Taking into account these considerations, I find that a reduction of 40% is appropriate in all the circumstances and that this reduction should be applied to all remedies awarded to Mr McDonald.

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<sup>3</sup> Section 124 of the Act, as it was when the proceedings were commenced by Mr McDonald on 6 May 2025.

<sup>4</sup> *Maddigan v Director-General Of Conservation* [2019] NZEmpC 190.

<sup>5</sup> *Xtreme Dining Limited t/a Think Steel v Dewar* [2016] NZEmpC 136 at [176].

## **Costs**

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

[63] If they are not able to do so and an Authority determination on costs is needed Mr McDonald may lodge, and then should serve, a memorandum on costs within 28 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Traffica 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.

[64] 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>6</sup>

## **Summary and orders**

[65] Mr McDonald has established a personal grievance for unjustified dismissal and has been awarded the remedies set out above. The Authority has found a 40% reduction to remedies for contribution is appropriate.

[66] Accordingly, within 28 days of the date of this determination, Traffica Roding Services Limited is ordered to pay Selwyn McDonald:

- (i) \$9,000.00 in compensation under s 123(1)(c)(i) of the Employment Relations Act 2000; and
- (ii) \$3,800.00 (gross) in lost wages under s 128 of the Employment Relations Act 2000.

Matthew Piper  
Member of the Employment Relations Authority

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<sup>6</sup> See [www.era.govt.nz/determinations/awarding-costs-remedies](http://www.era.govt.nz/determinations/awarding-costs-remedies).