IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2011] NZERA Auckland 419
5342372

	BETWEEN	JOSHUA AITKEN
	AND	CARTER HOLT HARVEY LIMITED T/A CARTERS

Member of Authority:	Yvonne Oldfield
Representatives:	Richard Upton for applicant Daniel Erickson for respondent
Investigation meeting	28 July 2011
Further information received	8 August 2011
Submissions:	15 August, 24 August 2011 for applicant 22 August 2011 for respondent
Determination:	26 September 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Aitken is a young man in his mid twenties who worked for the respondent (Carters) from April 2010 to February 2011. Because his role as "express representative" involved delivery work he was supplied with a company vehicle (a "Ute.") Some personal use of this vehicle was permitted.

[2] His employment was terminated for serious misconduct arising out of an incident which occurred one Friday night on his return home from an evening drinking in a bar in West Auckland. He attempted to take a chicane at a speed of at least 50 km, lost control of the Ute, and hit a tree. He left the scene on foot without waiting for police to arrive. After attending the accident the police visited his home (a

five minute walk from the accident scene) but he was not there. He visited the local police station on the Saturday afternoon to provide an account of the accident.

[3] Mr Aitken was dismissed the following Thursday, after a brief investigation. He was later told, in a letter confirming the termination of his employment, that Carters had found that he "*drove a Carters vehicle in a reckless manner*" and that this was deemed to be serious misconduct which had damaged the employment relationship to such an extent that it was not possible for it to continue. Mr Aitken now claims that this dismissal was both procedurally and substantively unjustified.

[4] In the same letter, Carters advised that its motor vehicle policy stated that:

> *"the driver will repair at their own cost damage arising from reckless or deliberate misuse of the vehicle."*

[5] The losses associated with the damage to the vehicle in question were almost $29,000.00. Carters has recovered part of those losses but counterclaims the balance.

Issues

[6] The test for justification in place at the time Mr Aitken was dismissed was whether the employer acted as a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[7] In submissions for Mr Aitken it is argued that the respondent's procedure was unfair in a number of respects. It was also argued that the dismissal was not substantively justified because "*his actions would not be seen by a fair and reasonable employer as constituting serious misconduct*."

[8] The first issue for determination is therefore whether the disciplinary process and the reasons given for dismissal were fair. If not, questions relating to contributory conduct and remedies will fall to be determined.

[9] The final issue for determination relates to the respondent's counterclaim for damages for the cost of repairs to the vehicle.

(i) The dismissal

[10] Mr Aitken's manager, Mr Jared McQuinn, first became aware of what had happened on the evening of the accident (Friday 18 February) when Mr Aitken telephoned to tell him. At the time Mr Aitken had left the vehicle and was on foot in the streets between the accident scene and his home. Mr McQuinn told the Authority that Mr Aitken was shaken at the time and his first concern was to establish that he was not hurt and to calm him down.

[11] The next morning Mr McQuinn visited the accident site and the tow truck yard with Mr Aitken and took photos of both the scene and the vehicle. Mr Aitken says Mr McQuinn assured him that "his interests would be looked after" with the result that Mr Aitken failed to appreciate the seriousness of the situation. In particular, he said this comment was one reason why he subsequently failed to obtain representation in the disciplinary process.

[12] Mr McQuinn said that the tree Mr Aitken hit did not seem to be badly damaged and there was nothing else at the crash scene to indicate the seriousness of the matter. (He said this only became clear to him when he saw the vehicle and how badly it was damaged.) This influenced the tone of what he said to Mr Aitken at first. I am satisfied that in the period before he saw the vehicle, Mr McQuinn made some comments that could have been taken to mean that there was not too much for Mr Aitken to worry about. This was however in a context where he did not have a true picture of the situation because Mr Aitken had given no indication of the extent of the damage to the vehicle. In such circumstances, Mr Aitken cannot hold Carters responsible for the fact that Mr McQuinn misapprehended the seriousness of the situation and expressed the view that things would be all right. No unfairness arises out of this point.

[13] On Monday 21 February Mr Aitken and Mr McQuinn met with Mr McQuinn's manager, Marcus Longford-Lee. Mr Aitken gave an account of the events of the Friday. Notes were taken of this meeting and were provided to the Authority. Respondent witnesses say it was not intended as a disciplinary meeting but rather as a preliminary investigation meeting. Mr Aitken now says that he thought this meeting was "off the record" but Mr Upton does not argue that Mr Aitken was materially

prejudiced in any way by what he said at the meeting (it was, in any event, consistent with what he later said in the formal disciplinary meeting.)

[14] At the end of the meeting Mr McQuinn and Mr Longford-Lee told Mr Aitken that their next step would be to speak with Human Resources and North Island Regional Manager Paul Bull. Mr Aitken also says he was suspended at that point. The respondent denies this and says that Mr Aitken chose not to come in to work until matters were resolved. Either way, Mr Aitken has not sought to bring a separate grievance in relation to the alleged suspension.

[15] On Thursday 24 February Mr Aitken received a letter calling him to a disciplinary meeting the next day. If I have understood the applicant's submissions, no issue is taken with the content of that letter (which followed a standard format) except that the allegation to be put to Mr Aitken was that he had:

> *"Driven a company vehicle while under the influence of alcohol, and or at speed, resulting in a car accident which had written of [sic] the company vehicle. This happened at 10.00pm on Friday 18 February."*

[16] It is a matter of concern to Mr Aitken that this allegation is not expressed in the same terms as the reason which was later given for the dismissal (and recorded in paragraph [3] above.) It was also pointed out that he was not charged with reckless driving, and received only a ticket for the much lesser charge of failing to keep within his lane.

[17] The respondent says that there is no difference between the allegation put and the reason given for the dismissal. It says driving "*while under the influence of alcohol, and or at speed, resulting in a car accident which had written of [sic] the company vehicle"* amounts to driving "*in a reckless manner."*

[18] "Reckless" is defined in the Oxford Dictionary as:

> *"heedless of danger or the consequences of one's actions…rash and impetuous…"*

[19] I agree that the reason as expressed in the letter of dismissal was simply a paraphrasing of the allegation, consistent in meaning with it. The fact that the

allegation was put in more detailed and specific terms than those in which the eventual reason is expressed does not create any unfairness (as it would if it were the other way round.) I am satisfied that if the allegation can be shown to have substance, the reason as expressed will have been made out.

[20] The disciplinary meeting proceeded as planned on 25 February with Mr Longford-Lee, Mr McQuinn and Human Resources Manager Joan Watson in attendance for the company. Mr Aitken arrived alone and when asked if he wished to proceed without a representative confirmed that he did. He was also told that dismissal could be an outcome of the meeting.

[21] Mr Aitken gave a similar account of the events of Friday evening as he had previously. Notes taken by Ms Watson were confirmed as correct by Mr Aitken. They record as follows:

> *"Josh explained: he was at Black Salt in New Lynn between about 5.30 to 9.30. He had been drinking about one glass for every jug bought. Then he went to King Dick's in New Lynn (by the BP station) and then drove home. He turned down West Coast Road as he normally does for going home as the lights are too short phasing at Brandon Road. From West Coast Road onto Clayburn. He took the chicane too fast and lost control when turning onto Brandon.*
>
> *When he hit the tree he panicked. He left the scene to walk up the road to ring Jared from his flatmates phone. His flatmate was with him. A tow truck drove past so he told his flatmate to go back and deal with the car.*
>
> *He stayed where he was on the road for about half an hour as he was in an emotional mess – he knew he had broken his contract with Carters. He was either one over or one under the limit.*
>
> *He said again he was in bit of a mess and didn't want to deal with the situation. He stayed for about half an hour then walked home the long way. Police had been around to his home during the time he had been delaying going home.*
>
> *He rang the police in the morning.*
>
> …
>
> *He said he took the first chicane at the normal speed 30/40 and the second at 50/60*[1] *- it was a bad judgement. He has done it fast before but not at night time and not when he had been drinking. When he realised he was losing control he braked and turned instead of breaking* [sic] *and going straight ahead. The ute started to slide and over corrected.*
>
> *He said he had been drinking about one or two glasses and* [sic] *hour – he would have been borderline for driving.*

[1] There is no dispute that there are two chicanes a short distance apart on Clayburn Road.

Marcus asked why did he drive if it was borderline.
Josh replied he didn't think he was not able to drive. It was when he crashed he knew he was in trouble and didn't know how to deal with it.

During further discussions he said he drinks most weekends – often to the point where he can't drive but he doesn't drive home in those situations."

[22] The meeting adjourned while Mr Longford-Lee, Mr McQuinn and Ms Watson discussed what they had heard. When the meeting resumed it was put to Mr Aitken that the preliminary view was that his employment should be terminated. Mr Aitken replied that he "*had broken the contract and that is the way it is.*" The decision to dismiss was then confirmed.

[23] It is argued for Mr Aitken that the evidence has revealed that in coming to the decision to dismiss, Mr Longford-Lee and Mr McQuinn took into consideration matters which were not put to Mr Aitken for comment. These included that fact that he left the scene (with the possible inference that he did so to avoid police) the extent and potential cost of the damage to the vehicle, and because the vehicle bore signage (and was full of smashed beer bottles) the risk of damage to Carters' reputation.

[24] Carters does not deny that these matters formed part of the whole picture which was considered by its managers. It responded to this submission by saying very simply that all this was information that was provided by or at least known to Mr Aitken.

[25] It is not necessary for an employer to put an employee on notice that it will take into consideration the answers he or she gives to questions asked in a disciplinary process. There was only one point here which needed to be put to Mr Aitken specifically: the potential inference that he left the scene to avoid the police. However, the respondent has been clear that this element was not decisive of the dismissal and for this reason I do not consider it to be a procedural flaw of significance.

[26] It has also been argued that Carters drew unreasonable conclusions from certain admissions by Mr Aitken. These conclusions were:

i. that when he said he had "*breached his contract*" it meant he understood he could be dismissed;

ii. that when he said he was travelling 50-60 kph through the chicanes it meant that he had hit speeds of 60 kph, and

iii. that when he said he was "*borderline*" that meant that he could have been over the legal alcohol limit.

[27] This submission is rejected. It was open to Carters to construe each of these statements (in context) as it did.

[28] The next concern raised on behalf of Mr Aitken was whether the respondent adequately considered alternatives to dismissal. The respondent says that other alternatives to dismissal were not appropriate because Carters was unable to have confidence that the behaviour would not be repeated.

[29] The respondent's conclusion on this point was borne out by Mr Aitken's evidence at the Authority meeting. As before, Mr Aitken acknowledged that 50-60 kph was too fast to drive through a chicane, but gave no explanation for his decision to do so. He confirmed that he drank about six glasses of beer between finishing work and leaving the bar but refuted any possibility that this could have impaired his judgement or been a factor in his poor decision making. With somewhat circular logic, he said that he was not unfit to drive because if he had been, he would not have driven.

[30] Overall Mr Aitken offered no explanation for the accident and appeared to have learnt nothing from it. He seemed to see it as something which befell him rather than something he, as the driver, caused. Given his attitude it was entirely reasonable for the employer to think something similar could happen again.

[31] It was also argued for Mr Aitken that the respondent could have addressed its concerns by giving him a warning and putting him in a non-driving role. I was provided with evidence that this had been done at least once before (in 2008) when a staff member had been convicted of a drink-driving charge and lost his licence. Mr Upton argued that there was a disparity of treatment between that case and Mr Aitken's case.

[32] Carters being a large company, the decision makers had no personal knowledge of the 2008 case at the time they were considering whether to dismiss Mr Aitken. Ms Watson said she had researched similar cases in the two year period prior to Mr Aitken's case (and established that they had resulted in dismissal) but did not go as far back as 2008.

[33] The details of the 2008 case have subsequently been confirmed by the company however it was noted that there were differences between it and Mr Aitken's case in that there was no accident and no indication that the person's driving was actually impaired.

[34] I am not satisfied that any unfairness arises out of any apparent differences in the way the 2008 case was handled and the way Mr Aitken was treated. It would appear that there were material differences in the facts of the two cases but even if that were not the case, almost three years passed between them. An employer is not bound to maintain the same approach in perpetuity. The evidence indicated that over the two years before Mr Aitken was dismissed the respondent had approached similar cases in a similar way.

Conclusion

[35] Mr Aitken's own account of the events of Friday 18 February established that he drove a Carters vehicle while under the influence of alcohol, and at speed, resulting in a car accident which seriously damaged a company vehicle. The allegation put to Mr Aitken was made out. It does not create any unfairness that this was later expressed more economically as being that he drove "*in a reckless manner.*" That is also accurate. The reason given for the dismissal was not materially different to the allegation put to him.

[36] I am satisfied that Mr Aitken's actions would be seen by a fair and reasonable employer as constituting serious misconduct.

[37] I am not persuaded that there were any material shortcomings in the disciplinary process. I record for completeness however that if I were wrong about

this (if for example some unfairness arises out of the preliminary meeting of 21 February) I consider this to be a clear case for 100% contribution.

[38] It follows that Mr Aitken's claim for unjustified dismissal must fail.

(ii) **Counterclaim**

[39] The respondent counterclaims damages of $26,693.12, saying Mr Aitken breached the employment agreement by failing to make payments required under its terms. Two questions fall to be determined in relation to this cause of action: whether Mr Aitken is liable for the cost of the damage to the vehicle he crashed and if so, what the quantum is.

Liability

[40] Clause 10 of the employment agreement provides:

> *"It is your responsibility to ensure that you have read and are familiar with all CHH Policies that are relevant to your employment…."*

[41] The Carters' Vehicle Policy Drivers Agreement (which Mr Aitken signed on 6 November 2009) provided that he agreed to:

> *"Drive the Motor Vehicle with due regard for traffic regulations, safety of pedestrians, other road users and Company property.*
>
> *Not drive the vehicle while under the influence of alcohol or drugs (prescription or otherwise) – in line with the relevant legislation….*
>
> *Repair at own costs damage arising out of reckless or deliberate misuse of the vehicle."*

[42] When signing the Policy the applicant declared he had read, understood and agreed to the conditions there. It is argued, for the respondent, that the provisions of the policy form part of the employment agreement and are consistent with the common law principle of indemnification.[2] These submissions are accepted. Mr

[2] *Lister v Romford Ice & Cold Storage Co Ltd [1957] 1 All ER 125*, and *ANZ National Bank Ltd v Hussain ERA Auckland AA 34/10, 28 January 2010*

Aitken is bound by the obligation to repair (at his own cost) damage arising out of reckless or deliberate misuse of the vehicle.

[43] I have already set out, in relation to the dismissal issue, my findings that it was reasonable for the employer to conclude (at the time of dismissal) that Mr Aitken drove "*while under the influence of alcohol, and or at speed, resulting in a car accident which had written of [sic] the company vehicle"* and that it was reasonable to conclude that this amounted to driving "*in a reckless manner*."

[44] No new evidence has emerged to rebut the conclusions the employer reached then, and there is no suggestion that Mr Aitken has met his obligations in respect of the repair costs (at least not in full.)

[45] Mr Aitken is therefore liable for damages for breach of his employment agreement.

Quantum

[46] Mr Aitken told the Authority that he might have been able to accept that clause 10 could be applied to him if it was limited to repayment of the insurance excess. However, as respondent witnesses explained, Carters has opted out of traditional fleet insurance with an insurance provider. Instead it is "self-insured" which means that an amount equivalent to the cost of insurance is set aside to create a fund to meet vehicle repair and replacement costs. I was provided with evidence to show that this practice has a sound commercial basis and is not uncommon in organisations with large fleets. Over time, this arrangement costs Carter less than it would to insure its fleet in the usual way.

[47] It does however mean that it carries the full costs of any individual accident. Respondent witnesses explained that staff are not generally asked to contribute to costs arising out of accidents in Carters vehicles, even when they are at fault. They noted that clause 10 applies only in situations of reckless or deliberate misuse - the sort of situation where Carters would be vulnerable to having cover refused if it had conventional insurance. The respondent's position is that this is such a situation: one

where the loss to Carters would be the full cost of repair even if it were not self-insured and therefore where Mr Aitken would be liable for that full cost.

[48] I accept that the quantum payable is the net cost to Carters of the damage to the vehicle. The respondent's claim is based on the following calculation of loss:

	GST inclusive	GST exclusive
Value obtained for sale of wreck	$5,524.96	$5,449.95 (not all items salvaged were subject to GST)
Less: Value of new vehicle written off	$39,639.88	$34,469.46
Less: Salvage costs	$332.00	$280.00
Total loss incurred	$34,436.92	$29,299.51
Less monies recovered from final pay		$2,643.80
Balance		**$26,693.12,**

[49] When Mr Aitken's employment ceased he was paid out the employee contributions to the company superannuation scheme but the employer contributions ($5,100.00) were withheld from him. The respondent has noted in submissions that the applicant is not entitled to the employer contributions (pursuant to the rules of the superannuation scheme) because his employment was terminated summarily. While I was not provided with evidence about the rules of this particular scheme, I accept that this is standard practice.

[50] At an earlier point in the history of this employment relationship problem Carters was prepared to deduct the employer contributions from the outstanding balance of $26,693.12. By the time of these proceedings it was no longer prepared to do so. It says it is entitled to retain the employer contributions and to claim the full amount of its losses in relation to the vehicle.

[51] I am not persuaded of this. The employer's entitlement to retain its contributions arises out of the very same facts as the claim for damages. But for the accident, it would not have the $5,100.00. The net loss to Carters arising out of Mr Aitken's conduct is not, therefore $26,693.12, but $21,593.12.

[52] **Mr Aitken is therefore ordered to pay to the respondent, Carter Holt Harvey limited, the sum of $21,593.12 damages for breach of contract.**

[53] Carters has also claimed interest on the damages. The recently amended Clause 11 of Schedule 2 of the Employment Relations Act 2000 provides as follows:

> *"**Power to award interest***
>
> *(1) In any matter involving the recovery of any money, the Authority may, if it thinks fit, order the inclusion, in the sum for which judgement is given, of interest at the rate prescribed under section 87(3) of the Judicature Act 1908, on the whole or part of the money for the whole or part of the period between the date when the cause of action arose and the date of payment in accordance with the determination of the Authority."*

[54] The Authority thus has a discretion to order interest on the damages recovered at the rate prescribed under section 87 (3) of the Judicature Act 1908 (8.4% per annnum.)

[55] Mr. Aitken told the Authority that he had considerable difficulty finding employment after he was dismissed from Carters. He also pointed out that as a young person he had very little in the way of assets or savings. He said that the respondent's counterclaim would bankrupt him.

[56] In circumstances where Mr. Aitken's ability to pay is constrained and some sort of instalment payment will no doubt need to be worked out I consider it futile to order interest on the damages awarded. I am satisfied that in this case the proper exercise of the Authority's discretion is to decline interest.

Costs

[57] The question of costs is reserved. Any application for costs should be made within 28 days of the date of this determination.

Yvonne Oldfield
Member of the Employment Relations Authority