

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 81/08
5089784

BETWEEN COLIN ALLEN
Applicant

AND TRANSPACIFIC
INDUSTRIES GROUP (NZ)
LIMITED
Respondent

Member of Authority: Alastair Dumbleton

Representatives: Fiona McLaren, Counsel for Applicant
David France, Counsel for Respondent

Investigation Meeting: 14 September 2007

Submissions received: 27 September 2007 from Applicant
9 October 2007 from Respondent

Determination: 10 March 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] For over nine years Mr Colin Allen worked as a driver employed by Transpacific Industries Group (NZ) Limited, but that service ended abruptly with his dismissal on Tuesday 30 January 2007.

[2] The Authority has investigated the dismissal to resolve a personal grievance raised by Mr Allen immediately after it. He claims that Transpacific's action was unjustified and he seeks from the Authority a determination in his favour and also orders for payment by Transpacific to him of lost wages and compensation for hurt feelings, humiliation and distress. Mr Allen has not sought reinstatement as a remedy for his grievance.

[3] Prior to the Authority commencing its investigation Mr Allen had tried to resolve his grievance in mediation with Transpacific but was not successful.

[4] Mr Allen was dismissed in the following circumstances. He usually worked a night shift, driving his truck from Transpacific's Plant in East Tamaki and travelling around Auckland hospitals and other facilities to collect medical waste for disposal.

[5] A Transpacific supervisor, Mr Pearce Murray, reported to management that Mr Allen had not arrived at the Plant for work until some time between 11.00 and 11.15pm on the night of Wednesday 24 January 2007. This was 1½ hours or more after Mr Allen's time card had been clocked in at 0929 hours, or 9.29pm.

[6] Mr Murray's report caused a check to be made of Mr Allen's attendance the following night, Thursday 25 January. Transpacific's Logistics Manager, Mr Wayne Dawn, reported that at about 9.45pm he had seen that Mr Allen's card had been clocked in at 0933 hours that night but Mr Allen was not on site and his truck had not left the Plant.

[7] Later that night at 10.40pm, Mr Dawn had received a telephone call from Mr Allen who said that he had needed to return home after he first arrived at work because he had left behind keys he used for entering clients' premises. When Mr Allen arrived later at the Plant he presented a new card showing 1045 hours as the time he had arrived at the Plant after he had called Mr Dawn.

[8] Mr Allen was asked to meet with management on the following day, Friday 26 January, to discuss where he had been at 0929 on the Wednesday and at 0933 on the Thursday, when his time card showed him as clocked in.

[9] Following the meeting Mr Allen was suspended on full pay until 30 January when a disciplinary meeting was to be held. After that meeting Mr Allen was dismissed on the grounds that on two occasions he had falsified company documents, namely his time card.

[10] The dismissal was confirmed in writing with the following advice:

*After due consideration of all evidence available, (including your account of events) it was concluded by management that it was highly likely that you were **not** on site and had **not** clocked in at the times on your card. Management also concluded that there was a high probability of collusion, and will investigate this as a separate item.*

Specifically relating to this investigation, we define Colin's actions as the falsifying of company documents.

[11] The letter signed by Mr Dawn also referred to the applicable Collective Employment Agreement which specified types of conduct that could lead to immediate termination of employment. Included was the conduct of “falsifying company documents,” and “deliberately falsifying timesheets” was expressed to be a particular category of that.

[12] Mr Dawn noted in his letter that as soon as the dismissal was announced to Mr Allen the possibility of a personal grievance being raised was mentioned by his union representative who regarded the dismissal as being unfair.

[13] There is no dispute in this case that Transpacific dismissed Mr Allen from his employment with the company. The investigation of the Authority has therefore focused upon the justification for that action.

[14] The legal test of justification which must be applied by the Authority in giving this determination is contained in s 103A of the Employment Relations Act 2000.

[15] In its judgment from the leading case of *Air New Zealand Ltd v. Hudson* [2006] 3 NZELR 155, the Employment Court has explained the test, noting in particular that justification for dismissal must be determined by the Authority on an objective basis and that the Authority must judge, objectively, all of the relevant circumstances prevailing at the time the dismissal occurred.

[16] It is implicit from s 103A that the relevant circumstances are those that were known to the employer at the time of dismissal.

[17] It is clear from Mr Dawn’s letter of 30 January that the conclusion reached by Transpacific was that Mr Allen had not been on site and had not clocked in at about 9.30pm on either 24 or 25 January.

[18] In his submissions Mr France, counsel for Transpacific, was undoubtedly correct in submitting that an honest belief held on reasonable grounds that an employee has been dishonest, may warrant the employee’s dismissal for serious misconduct.

[19] Also accepted by the Authority as a correct statement of principle is the following statement from Mr France:

An employer is not required to prove the employee's dishonesty. Rather, the employer must show that it held an honest belief: that a full and fair investigation was conducted into the allegations of dishonesty and misconduct: and that the employee was given an opportunity to explain.

[20] Mr France went on to address the requirements of a full and fair investigation when carried out in a way that justifies dismissal. He referred in his submissions to the leading case of *Airline Stewards and Hostesses of NZ IUOW v. Air New Zealand Ltd* [1990] 3 NZILR (CA) 584. This was a decision under earlier legislation that was repealed in 1991.

[21] I accept that there is nothing in s 103A of the current legislation that detracts from the statement of the Court quoted by Mr France at paragraph 6.4 of his submissions. This has been confirmed by the Employment Court most recently in *Murphy v. Steel & Tube New Zealand Limited*, unreported, 16 October 2007, CC 18/07, where the Court observed at paragraph [59];

The burden on the employer remains that of showing that conclusions were reached and action taken only after a full and fair investigation was carried out and on the basis of what that investigation disclosed.

[22] In the 1990 Court of Appeal judgment there was a further relevant statement of that Court at pages 590 to 591 as follows:

The employer must have more than mere suspicion but need not have proof beyond reasonable doubt ... At the time the employer dismissed the employee the employer must have either clear evidence upon which any reasonable employer can safely rely or have carried out reasonable inquiries which left him on the balance of probabilities with grounds for believing and he did believe that the employee was at fault ...

[23] Another statement of principle which in my view continues to be good law after the enactment of s 103A of the Act, may be found in *Drummond v. Coca Cola Bottlers NZ* [1995] 2 ERNZ 229 at 234:

The initial question ... is solely this: on the basis of the inquiry that the employer carried out, was the decision to dismiss one that was open to a fair and reasonable employer? This involves a value judgement about the quality of the inquiry and about the quality of the decision based upon it.

[24] Under s 103A the Authority may make a value judgement about the quality of the employer's inquiry and the quality of the decision based upon it, but must consider

and determine, objectively, whether the employer's actions and how the employer acted were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred.

[25] Counsel for Mr Allen, Ms McLaren, submitted that dismissal was not justified because:

*... the investigation was de minimis and grossly inadequate. The evidence came nowhere near the relevant threshold for establishing dishonest conduct – and not simply dishonesty in this instance, but pre-meditated requiring a collaborator – namely, evidence “as convincing as the charge is grave” (per **Honda**). The findings of both serious misconduct and the appropriateness of dismissal were deeply flawed and neither could have been reached by any reasonable employer in the respondent's position.*

[26] I agree with the submission that implicit in the employer's conclusion that Mr Allen had falsified his time card, is a further conclusion that he had not acted alone but with a collaborator. That adds further degrees of seriousness to an already grave charge of dishonesty, or time-card fraud as Mr France termed it. As a matter of principle, the standard of 'evidence' to be relied on by the employer must equate to the seriousness of the accusation, although it is not necessarily required to be to a standard that would satisfy a Court in criminal proceedings.

[27] I do not consider, however, that before it could conclude that Mr Allen had falsified his timesheet Transpacific was required to investigate the apparent collusion to a point where it was able to identify the collaborators.

[28] After Transpacific had dismissed Mr Allen it interviewed two other employees strongly suspected of colluding but, according to the evidence of Transpacific's General Manager, Mr Manus Pretorius, insufficient information was found to identify who was responsible for clocking Mr Allen in on 24 or 25 January. That result in itself did not mean that the employer was not capable of having reasonable grounds for believing that Mr Allen had been a party to the falsification of his time card, in combination with another or others unknown.

[29] In the circumstances Transpacific did not have clear evidence in the form of an eye witness who had seen someone other than Mr Allen clocking his card in, or had seen Mr Allen at a place away from Transpacific's plant at times when his time card placed him as being on the premises. Transpacific therefore had to carry out

reasonable inquiries before it had a proper basis upon which to form a reasonable belief that the misconduct had occurred.

[30] I consider that the inquiry carried out by Transpacific into Mr Allen's alleged misconduct was not full enough to the level required by the serious accusation of dishonesty made against him. The inquiry did not produce 'evidence' that was sufficiently convincing to a standard that would support the serious allegation made against Mr Allen of dishonesty on two separate occasions.

[31] That conclusion has been reached by the Authority because Transpacific failed without reasonable cause to interview a material witness, Mr Harry Sylva, whose name and particular involvement was raised by Mr Allen when Transpacific was inquiring into his actions.

[32] When the Authority was considering what consequence this failure should have to the justification for Mr Allen's dismissal, it had earlier been provided with statements made by Mr Sylva, although they were obtained after Mr Allen was dismissed.

[33] Although Transpacific did not interview Mr Sylva before dismissing Mr Allen, several months afterwards it pressed him to make a statement which he signed and which was produced to the Authority. Further, in preparation for the investigation meeting, Mr Sylva provided to the Authority a statement of his written evidence. Mr Sylva also gave, on oath, oral evidence to the Authority at the investigation meeting.

[34] It is quite clear from s 103A that the Authority may not speculate about what Mr Sylva would have or might have said if he had been interviewed by Transpacific before the dismissal of Mr Allen. The Authority is bound to consider justification in the light of all the circumstances as known to exist at the time the dismissal occurred. Clearly, a statement that Mr Sylva might (or might not) have given if he had been asked, is not a circumstance that was known to Transpacific when it dismissed Mr Allen.

[35] The subsequent statements of Mr Sylva put in evidence to the Authority are however relevant to the question of contribution which arises upon consideration of any remedies Mr Allen may be held entitled to. This arises only in the event his dismissal is found to have been unjustified.

[36] The significance of Mr Harry Sylva to this case and its determination is as follows. When Mr Allen was interviewed on 26 January 2007 in relation to his whereabouts and movements on Wednesday 24 January, he named Mr Sylva as someone he had had contact with then. Mr Sylva had driven a truck that night as an employee of Transpacific and had been at the Plant at certain times.

[37] At the interview on 26 January it was put to Mr Allen that on Wednesday 24 January he had not arrived at the Plant until 2300 hours although he had been clocked in at 2129 hours.

[38] Mr Allen maintained that he had been on site at 2129 hours when his card was clocked in. The Minutes of the interview record him as stating;

*... Mark [Cebalo] and Piu [Haangana] be witnesses to that time.
Harry [Sylva] was on site at 2200 hours.*

[39] Clearly Mr Allen in his response had given the names of three people who were possibly witnesses to him being present at 2129 the clock-in time, or at 2200 an hour before 2300 when according to Mr Murray he had arrived.

[40] In his evidence Mr Mervin de Rozario, Transpacific's Operations Manager at Transpacific's plant, confirmed the accuracy of the interview Minutes. His evidence of what Mr Allen had told them was:

He said that Harry Sylva had also seen him on site at around 22:00 hours.

[41] After the meeting on 26 January, Mr De Rozario and Mr Dawn spoke to Mr Mark Cebalo and Mr Piu Haangana to check Mr Allen's statement that they were witnesses to his being on site at the time his card had been clocked in.

[42] Mr Cebalo signed a statement that he had not seen what time Mr Allen had clocked in and that he could not recollect the time at which he first saw Mr Allen that night. Mr Cebalo also said that he could not recollect whether he saw Mr Allen before or after the other drivers had started working. Mr Haangana signed a statement that he did not see Mr Allen clock in or see him at the plant until some time after 2300 hours, or 11 pm, on 24 January.

[43] Of course if Mr Allen was not at the plant before 2300 hours then neither Mr Haangana nor Mr Cebalo would have seen him before that time. Alternatively, if

Mr Allen was there before 2300 hour and did see Mr Cebalo and Mr Haangana, they may not have seen him.

[44] However, and as confirmed in the evidence of Mr de Rozario, Mr Allen had explained that Mr Sylva had seen him on site at around 2200 hours on 24 January. Unfortunately Mr Sylva was not asked about this before Mr Allen was dismissed.

[45] Mr de Rozario explained why Transpacific's inquiry into Mr Allen's movements on 24 January had not extended to asking Mr Sylva what he had seen. Mr de Rozario and Mr Dawn apparently concluded that Mr Sylva "could not have been back at the East Tamaki site until some time after 2200 on the night of 24 January." Because of the conclusion drawn that Mr Sylva could not have been there, Mr Sylva himself was not asked whether in fact he was.

[46] The reason why Mr de Rozario said he "knew" that Mr Sylva could not have been back at the plant until after 2200 was because Mr Sylva was known to have been at the North Shore Hospital at around 2130 hours on 24 January, and Mr de Rozario believed that it might take, "between 35 to 40 minutes to drive a truck from the North Shore to the site at East Tamaki."

[47] Therefore Mr Sylva was excluded from the inquiry because of a crude hypothesis made about the time it may take a truck to travel from one part of Auckland to another along certain roads, including the Southern Motorway, at a particular time of night.

[48] Even if it was reasonable for the employer to have taken this unscientific approach in this most serious situation relating to Mr Allen's employment, it should not have been done to exclude Mr Sylva from the inquiry. To begin with, the evidence of Mr de Rozario was that Mr Sylva had been at the North Shore Hospital "at around" 2130 hours and, he said, it takes "between 35 to 40 minutes" to drive from the Shore to the East Tamaki Plant. As 2127 hours is "around" 2130 hours, it could not be regarded as impossible or inconceivable that given favourable traffic conditions and fast driving, the journey might take 33 minutes instead of 35. In that case it would have been possible for Mr Sylva to have been at the Plant at 2200 hours after all.

[49] Mr Sylva was an employee of Transpacific and he had been available to be interviewed before the final conclusion was reached about Mr Allen's whereabouts

and movements on 24 January. A disturbing feature about the exclusion of Mr Sylva is that Transpacific decided to interview two witnesses whose names were given by Mr Allen, one or both of whom had fallen under strong suspicion of dishonestly clocking in Mr Allen. Mr Sylva was not under that suspicion because it was known that he had been on the North Shore at 2130 on 24 January, when the card said Mr Allen had clocked in, yet Mr de Rozario decided not to obtain his evidence even although it was readily at hand.

[50] Mr Allen had explained that after he had clocked in at 2129 he had loaded his truck and then parked it while he went in his own car for half an hour to a local Wendy's to get his dinner before going back to the Plant and taking his truck out on his run. If that is true, it would have explained why Mr Murray did not see Mr Allen.

[51] Transpacific went to Wendy's to see whether a visit by Mr Allen on 24 January had been recorded on any closed-circuit television in operation, but it was found that no CCTV was used in the drive through area. It seems strange that Transpacific went to the trouble of looking for evidence obtained by CCTV but failed to take the small effort required to speak to Mr Sylva.

[52] The impression gained by the Authority is that Mr Sylva was not interviewed because Mr de Rozario and Mr Dawn were afraid to hear what he might say to verify Mr Allen's account.

[53] Mr de Rozario on 26 January when he interviewed Mr Allen, and on 30 January when he dismissed Mr Allen, suspected that either or both of Mr Cebalo and Mr Haangana had acted dishonestly by clocking Mr Allen's card in. Transpacific did not fully investigate that suspicion until after Mr Allen had been dismissed and therefore the statements of those two should have been treated with caution by Transpacific in reaching conclusions about where Mr Allen had been at 9.29 pm on 24 January.

[54] As Mr Pretorious noted in his evidence about the statements given by Mr Cebalo and Mr Haangana, the vagueness of them is "quite pointed." That is a fair description of those statements and little weight should have been placed on them, especially when the makers remained under suspicion even after Mr Allen had been dismissed.

[55] When Mr Pretorius stepped into the decision making role part way through the disciplinary inquiry, he did not correct the failure to interview Mr Sylva and he must bear responsibility for not conducting a full investigation by carrying out reasonable inquiries.

[56] In this regard Transpacific breached an obligation under the Collective Employment Agreement at clause 23.5 to consider Mr Allen's explanation. Doing so properly, required that Mr Sylva be interviewed.

[57] Without interviewing Mr Sylva, Transpacific was left with the statement made by Mr Murray that around 2015 hours he had noticed the driver of Run 3 (Mr Allen) was not at work, because his car was not there and his truck was still parked in the same place. Mr Murray said in his statement that Mr Allen had still not arrived at 2300 hours and he said he had heard the truck driving out of the Plant at approximately 2315 hours on 24 January.

[58] In his evidence Mr Murray said that Mr Sylva had been back at the Plant when he returned at "about 2215 hours." Mr Allen had said he had seen Mr Sylva and Mr Sylva had seen him at the plant at 2200 hours. Perhaps Mr Allen was mistaken about the time and it was 2215 when Mr Sylva had seen him, if indeed he did see him. If Mr Sylva had been able to confirm that, Mr Murray's statement that Mr Allen had not been at the plant before 2300 would have been contradicted, not just by Mr Allen but by Mr Sylva as well.

[59] I therefore find that the inquiry conducted by Transpacific was unfair to Mr Allen because despite him giving the name of a witness to his movements on the night of 24 January, without good cause Transpacific did not ask that witness to assist in the inquiry or try to get a statement from him. Mr Sylva of course was an employee of Transpacific and there is no reason why it would have been impracticable or difficult to question him about events that had occurred only two nights earlier. Further, the weight of Mr Murray's evidence on its own fell short of providing satisfactory proof that Mr Allen had not been present although unseen before 2300 hours on the night of 24 January.

[60] It cannot, and may not, be said by the Authority that speaking to Mr Sylva would have made no difference to the outcome in this case. That is impermissible speculation.

[61] I therefore conclude that how the employer acted in reaching conclusions about Mr Allen's conduct on 24 January, was not what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred.

[62] As held by the Court in *Air New Zealand Ltd v. Hudson* (above), in reaching a determination on an objective basis the matter is to be viewed from the point of view of a neutral observer. I consider that a neutral observer would have regarded it as unfair and unreasonable of Transpacific to restrict inquiries about events on 24 January to the witnesses who were spoken to or who had statements taken from them, without speaking to Mr Sylva as well. This would have hardly placed an unreasonable burden on the intellectual and financial resources available to Transpacific or to any other employer.

[63] All of the above relates to the inquiry conducted by Transpacific about Mr Allen's actions on 24 January and not to what he did on the following day. It is clear, however, from the written confirmation of dismissal that Mr Allen was dismissed for the combination of his conduct on both days and I reject any argument that the actions of Mr Allen on 25 January may be looked at by themselves to provide justification for his dismissal. It is clear to the Authority that his actions on the two days were regarded as a continuing course of misconduct. The employer felt supported in its conclusions about the actions of Mr Allen on the 25th by what it had decided he had done the day before.

[64] Again, it is not a matter now for speculation as to what decision Transpacific might have reached if it had absolved Mr Allen of any misconduct on the 24th but found he had falsified his timesheet on the 25th.

[65] For the above reasons, the determination of the Authority is that Mr Allen's dismissal was unjustified.

[66] In considering whether Mr Allen is entitled to any remedies for his unjustified dismissal the Authority must apply s 124 of the Act, which requires that remedies are to be withheld or reduced where there has been contribution or fault on the part of the employee. The Authority may regard as a matter of contribution any blameworthy conduct of the employee that is causally connected to the situation that gave rise to the personal grievance.

[67] The Authority has therefore considered whether Mr Allen did anything blameworthy on 24 or 25 January, or at any time, that was causally connected to the employer's conclusion that he had falsified his timesheets on both dates, and to the employers consequent action of dismissal.

[68] In this regard the Authority must establish the facts in relation to any sighting of Mr Allen by Mr Sylva on 24 January.

[69] The several accounts given by Mr Sylva of his movements on the night of 24 January 2007 and any contact he had with Mr Allen at that time, are perplexing. Mr Sylva has given an account of this on three separate occasions:

1. On 10 May 2007 when he signed a statement requested by Transpacific.
2. On 28 August 2007 when he had his evidence briefed in written form and provided the Authority with a copy.
3. On 14 September 2007 when he gave oral evidence at the investigation meeting and was examined by counsel and the Authority.

[70] The 10 May statement was the closest account given by Mr Sylva in time after the dismissal of Mr Allen. It was provided to Mr Dawn and Mr de Rozario and it was signed by Mr Sylva.

[71] In that statement Mr Sylva said he had arrived at the Plant "at approx 22.15" after driving from the North Shore Hospital. As to sighting Mr Allen at any time, the signed statement records, "Harry did not see Colin until after he had finished unloading & was leaving the building at approx 2300 hours. When he did see Colin, he was by his car."

[72] In his unsigned brief of evidence dated 28 August 2007, Mr Sylva said he had returned to the plant from the North Shore by 9.45pm, or 2145 hours. He said in the statement he had known this because he had checked his watch to see how long the run had taken him to complete, something he usually did. He said he had left the North Shore at 9.30pm. I note that on those times the trip back to the Plant took only 15 minutes.

[73] As to sighting Mr Allen, Mr Sylva said in his draft brief, “after I had unloaded the bins I pulled out of the depot gate just after 10pm. As I turned right I saw Colin.” Mr Sylva continued, “we saw each other, nodded and I said ‘Colin, how is it?’ ” Further, Mr Sylva said, “at around 11pm, I had another talk with Colin. Colin called me over and asked me if Pearce [Murray] was back yet.”

[74] Further in the draft brief Mr Sylva talks about the statement he made on 10 May. He said, “I told Wayne [Dawn] what I saw at the depot on 24 January 2007. I said I saw Colin after I finished unloading just after 10pm. Wayne wrote this down.”

[75] When Mr Sylva was sworn in on 14 September 2007 and commenced giving his evidence, he advised the Authority he had not seen the draft brief of 28 August 2007. After taking time to read it he made a number of changes to the brief. He did not change the statements in the brief about having returned to the plant from the North Shore by 9.45pm or having seen Mr Allen at just after 10pm. He did not change the statement that around 11pm he had again seen Mr Allen, although he did delete the rest of the statement about having spoken to Mr Allen with regard to whether Mr Murray had arrived back at the plant.

[76] Neither did Mr Sylva change the part of the brief which said that he had told Mr Dawn what he had seen on 24 January 2007, which included seeing Mr Allen just after 10pm. He did not change the part of his brief which said that Mr Dawn had written down what he had told him.

[77] When Mr Sylva started giving oral evidence and was questioned on it, his answers were consistent with the contents of the draft brief and the amendments he had made to that. Then his account of what had happened on the night of 24 January began to change. In answer to one question he said it could have been 10.50 to 11.00pm when he had seen Mr Allen. When questioned by Mr France he agreed that he had not seen Mr Allen until he was leaving the plant at around 2300 hours. Questioned further by Mr France he said, “I saw Colin only the once, around 10.50 to 11.00pm.”

[78] I have considered the several times put forward by Mr Sylva in his three accounts of when he had had contact with Mr Allen on 24 January. I do not consider that Mr Sylva has tried to mislead the Authority or has deliberately given false

evidence. Mr Sylva, I find, has done his best to assist the investigation, but clearly all of his answers cannot stand together as being correct.

[79] What is likely to have happened is that the draft brief dated 28 August was prepared on the basis of instructions it was believed Mr Sylva would give, but he did not have an opportunity to read his brief and to correct it before the Authority meeting on 14 September. The brief was apparently prepared by a lawyer (not Ms McLaren) who was in Wellington and who therefore received Mr Sylva's instructions from a distance. As often happens, once witnesses have read a draft brief they find themselves unable to swear that all of its contents are true and they will change the evidence in it, usually before presenting the brief.

[80] It is not satisfactory to simply ignore Mr Sylva's accounts and put them all aside as being unreliable. Some weight should be attached to the first account he gave on 10 May, because of its proximity to the dismissal and because it was given in a signed statement. It has not been satisfactorily explained why Mr Sylva said that he had told Mr Dawn and Mr de Rozario that the time of sighting Mr Allen was 10pm yet he signed a statement on 10 May saying that the time was "approx 2300 hours," or 11pm. This was the evidence he ultimately gave to the Authority, that he had not seen Mr Allen until he was leaving the plant at around 2300 hours and that he had seen Mr Allen only once, at around 10.50 to 11.00pm.

[81] I therefore find from the evidence that Mr Sylva did not see or talk to Mr Allen before about 10.50 to 11.00pm on the night of 24 January 2007.

[82] Mr Sylva's evidence does not accord with that of Mr Allen about their meeting on the night of 24 January. Mr Allen made no corrections to his brief at the parts where it says that after clocking-in at 9.29pm he had spent about 15-20 minutes loading bins and, "I then had a conversation with another driver, Harry Sylva." It can be inferred from this part of his evidence that the conversation took place at around 10pm. Further in his sworn brief, Mr Allen said, "At about 11pm, I had another talk with Harry."

[83] At para 37 of the brief, Mr Allen gave the following evidence:

At the meeting [26 January], I told the company what had happened. I told them that on the night of 24 January 2007 I had spoken with Harry at 10pm before I left for my meal, and that I had also seen two

other employees, Mark and Piu Haangana, who may have seen me in passing.

[84] For reasons given above, I have found that Mr Allen is incorrect in saying that he had spoken to Mr Sylva at 10pm, or at any other time before 10.50 to 11.00pm. I have considered whether the inconsistency in the evidence is because Mr Allen is just mistaken or whether he has deliberately lied to the Authority. Reluctantly, I must conclude it is the latter. The reasonably precise account he purported to give of the timing of his movements between 9.30 and after 11.00pm when he drove his truck out of the plant, leaves no room for him to have become muddled about times.

[85] I conclude that Mr Allen has given false evidence to cover up his absence from the plant on 24 January at 2129 hours, or 9.29pm, when his card was clocked in. I find it likely that someone else clocked the card in and not Mr Allen. I therefore find that his actions in knowingly allowing that card to remain unaltered as to the true time he arrived at work, amounted to falsification of company documents. This was serious misconduct for which the Employment Agreement provided dismissal as a punishment.

[86] Consideration must be given to the possibility that Mr Allen's actions on 25 January were not blameworthy despite his conduct the previous day.

[87] I accept the evidence of his wife as truthful when she said that he had returned home and she had passed out the window to him the keys and a notebook. The unavailability of her evidence to Transpacific before the decision to dismiss was made must be entirely Mr Allen's responsibility, as Transpacific could not have known that she was a potential witness unless Mr Allen offered that she could confirm that he had returned home.

[88] Given my findings about the nature of Mr Allen's evidence in relation to 24 January, I conclude that he has not told the truth about clocking in at 2133 on 25 January either. On balance, I consider it likely that Mr Allen did not clock in at 2133 hours, or 9.33pm, that night as shown on his timecard. Someone else presented his timecard for that purpose. Mr Allen's actions were blameworthy in allowing the card to record that he had clocked in at the time shown.

[89] Even if I am wrong in this conclusion about 25 January, I consider Mr Allen was blameworthy to a high degree in leaving the plant without clocking out and in

consequently travelling back to his house in his employer's time. It seems to me that if he did clock in and then return home, he did so with intention that the trip would not be discovered and he would not forfeit the time from his wages. He was also blameworthy in not leaving a clear message with a supervisor that he was going home and why, and he was blameworthy in not remaining in cellphone contact while he was on this journey so that a supervisor could find out why he was not at work.

[90] The employer's conclusions that there had been serious misconduct were based on its findings as to what Mr Allen had done on both 24 and 25 January. I consider, however, it is probable that if Mr Allen's explanation about 25 January had been accepted he still would have been dismissed because of the employer's belief that he had falsified records on 24 January. The major driver of the decision to dismiss was, in my view, the finding by the employer of misconduct on 24 January. On that date the Authority finds that Mr Allen's actions were blameworthy to a high degree. Those actions were directly causally linked to the decision made to dismiss.

[91] Mr Allen did not contribute to the employers failure to interview Mr Sylva, which omission I have found gave Mr Allen a sustainable personal grievance. However it would be unjust for Transpacific to be ordered to remedy that grievance in the circumstances.

[92] The degree of contribution by Mr Allen for his actions on 24 January alone is, in my view, so high that there should be no entitlement to any remedies.

[93] In summary, the determination of the Authority is that Mr Allen has a sustainable claim of personal grievance because he was unjustifiably dismissed. Further the determination of the Authority is that because of his near total contribution to the situation that gave rise to the grievance, Mr Allen is not entitled to recover any remedies.

[94] Costs will be reserved. It is hoped that the representatives will, after discussion, be able to reach some agreement as to the disposal of this issue. If an application is made to the Authority, consideration will need to be given to the omission of Transpacific to interview Mr Sylva as part of the inquiry conducted between 26 and 30 January. It seems to me that if this simple step had been taken, the need for this hearing might have been completely avoided altogether.

A Dumbleton
Member of the Employment Relations Authority