



[4] The employment relationship began on 5 May 2008. Mr Argue said personal use of a horse transport vehicle was permitted as a term and condition of his employment.

[5] A written employment agreement was produced to the Authority. Mr Argue denied receiving or even having seen it before or during his employment. PHTL says it was provided to Mr Argue at or about the commencement of his employment. The document produced to the Authority was signed on behalf of PHTL and dated 5 May 2008, but there was no employee signature. The agreement was silent on personal use of a horse transport vehicle.

[6] The evidence concerning when the agreement was first provided to Mr Argue took the form of the conflicting assertions of the respective parties. I am unable to resolve the matter of when Mr Argue received the agreement on the basis of those bare assertions. It has not been necessary to further investigate that matter because I am able to determine the existence of the term Mr Argue alleges without reference to the written agreement.

[7] Mr Argue's evidence was that he discussed the matter with James Lilburne, who is the son of the company's director and shareholder Bob Lilburne and participates in the management of the company. The discussion occurred during the negotiations prior to entry into the employment agreement. Mr Argue said James Lilburne was aware he had two horses of his own because permission had been given for him to graze the horses at PHTL's property. Mr Argue also said there was a discussion about the fact that his girlfriend, Philippa Kinsey, had property at Matakana. Mr Lilburne told him he could use the company's vehicle to take his horses there, or to the beach.

[8] Mr Argue said further that there was a discussion about how his horses could be transferred from Christchurch – where Mr Argue then lived – to Auckland. It was common ground that Julie Hapeta, a friend of Mr Argue's who was present at the time, offered the use of her horse truck. Mr Argue said again that James Lilburne told him he could use the PHTL vehicle to transport horses for recreational use on his days and afternoons off.

[9] Finally, Mr Argue said he was not under any obligation to seek permission to use the vehicle beforehand and he was unaware of any rules or policies regarding personal use.

[10] James Lilburne denied that personal use of the vehicle was permitted as a term of Mr Argue's employment. He denied having any discussion about the company's vehicle, or about taking it to the beach or to Matakana. He pointed out, too, that Ms Kinsey had a horse truck, and that Mr Argue could ride at home as the property had 15 acres. As for Ms Hapeta's offer of the use of her truck, James Lilburne said the offer was wider than simply transporting horses from Christchurch to Auckland. Mr Argue acknowledged that he was sure Ms Hapeta would lend her truck if asked.

[11] From that I conclude nothing more than a generalised offer of access to the vehicle was made. I am not persuaded that such an offer acquired the status of a term and condition of Mr Argue's employment. It was a privilege. If I am wrong in this, and there was a term permitting Mr Argue's personal recreational use of the vehicle, it is inherently unlikely that any employer would allow unrestricted personal use of a business vehicle without an accompanying requirement even to advise the owner or seek permission before taking the vehicle. I do not accept that such unrestricted access can reasonably be inferred here.

[12] Indeed Mr Argue had already used a company vehicle for his own or friends' horses, with permission, on two occasions when the incident leading to his dismissal occurred.

[13] That incident began early on the afternoon of 28 May 2008, when Mr Argue decided to go riding again. Messrs James and Bob Lilburne were attending a race meeting out of Auckland that day, together with James Lilburne's partner. One of the company vehicles was already being used elsewhere, and it was common ground that no work had been booked for the remaining vehicle. It was also common ground that Mr Argue had completed the work scheduled for the day, and been given the rest of the day off.

[14] Mr Argue took the remaining vehicle and used it, without advising either of the Messrs Lilburne he was doing so or seeking permission. He was accompanied by

Ms Kinsey and Ms Hapeta. Mr Argue used the PHTL vehicle because Ms Hapeta's vehicle was not large enough to transport three horses.

[15] Meanwhile another driver had contacted James Lilburne requesting the use of the remaining vehicle. Mr Lilburne assented. The driver went to the property to collect the vehicle, only to find it was not there. He contacted Mr Lilburne to advise of this. Since Mr Lilburne's partner was already on her way back to Auckland, Mr Lilburne asked her to find out where the vehicle was. Meanwhile he attempted to contact Mr Argue by cellphone, but was not able to do so.

[16] Mr Lilburne's partner arrived at the property late in the afternoon, just after Mr Argue had returned. He was unloading the vehicle. She reported the matter to James Lilburne, who returned to Auckland later.

[17] At or about midday on 29 May James Lilburne spoke to Ms Hapeta's husband, Shane Hapeta. The Hapetas were neighbours of the Lilburnes'. Mr Lilburne asked Mr Hapeta if Mr Argue had used the PHTL vehicle. Mr Hapeta advised that he had.

[18] After Mr Lilburne's visit Mr Hapeta telephoned Ms Kinsey. One of the two commented to the other that Mr Argue may be in trouble. Ms Kinsey was concerned that Mr Argue was in trouble because of her, so on the morning of 30 May she and Mr Hapeta visited Bob Lilburne to discuss the matter. Ms Kinsey apologised, and said Mr Argue believed he was entitled to take the company vehicle. Bob Lilburne's reply was that would not change the way he felt and the apology was 'shutting the stable door after the horse had bolted'. Mr Lilburne's attempt in evidence to portray those statements as other than indicative that he already had a view of the incident - and it would not change - was unconvincing.

[19] On the afternoon of 29 May James Lilburne advised Mr Argue he wished to see him on 30 May to 'discuss work issues'. Mr Lilburne should at least have advised Mr Argue that the meeting was being held to discuss Mr Argue's actions in taking the vehicle, that it was disciplinary in nature and that dismissal may result. He should also have kept an open mind as to whether there was a reasonable explanation for Mr Argue's actions. Instead he envisaged ambushing Mr Argue by catching him out in a false denial that he had used the vehicle. At the same time (and inevitably)

Mr Argue's friends had made Mr Argue aware of the purpose of the meeting and indicated their view of its likely outcome.

[20] The meeting went ahead at or about 5 pm on 30 May. Mr Argue attended with Ms Hapeta as a support person.

[21] James Lilburne's evidence was that he asked Mr Argue why he had taken the vehicle without first seeking permission, to which Mr Argue responded that he was sorry, he was wrong, and had not seen his actions as a problem. When Mr Argue was asked about that account he said that, as recorded in his written statement, he was asked whether he had used the truck, and replied that he had. He added that Mr Lilburne told him the truck had been hired out, to which he responded that he was sorry, he did not know the truck had been hired out. He also said that, when asked why he had not telephoned before he took the truck, he did not reply. He said in the Authority that the reason he had not telephoned first was that he had the afternoon off and did not believe he needed to telephone.

[22] It was common ground that the meeting ended with Mr Lilburne asking Mr Argue whether there was anything he wished to say or ask. Mr Argue did not respond. He said in the Authority the reason was that he considered it obvious Mr Lilburne's mind was already made up.

[23] It was also common ground that the meeting was brief. Mr Lilburne told Mr Argue he would discuss the matter with Bob Lilburne, and decide what action to take.

[24] James Lilburne said the outcome of the discussion with his father was a decision to dismiss. He and his father considered Mr Argue was still proving himself, and they did not know whether the incident was an isolated one or whether it was likely to occur again. Mr Argue's responses left them uncertain of whether Mr Argue would act in such a way again. They needed to be able to trust Mr Argue to act responsibly when they were absent, and to make personal use of business equipment only with permission. They were not confident that Mr Argue would behave accordingly. Indeed James Lilburne said in evidence that he gained the impression Mr Argue did not accept he was wrong to take the vehicle.

[25] Since that was also the effect of the position Mr Argue advanced during the Authority's investigation it is probable that Mr Lilburne had reasonable grounds for that view. Although in submissions there was a shift in emphasis to the possibility of a misunderstanding, the position advanced up to that time was based on the existence of an entitlement to unrestricted access to the vehicle.

[26] On 1 June 2008 Mr Lilburne met with Mr Argue and told him of the decision to dismiss. The dismissal was as a result of Mr Argue's unauthorised use and movement of company property. Mr Argue was given one week's notice of the termination of his employment.

[27] Mr Argue consulted Ms Harris-Scoble. An initial conflict in the evidence concerning when Ms Harris-Scoble first approached James Lilburne was resolved after further investigation led to a consensus that the approach was made at a race meeting on 2 June 2008. Ms Harris-Scoble advised Mr Lilburne that she would be representing Mr Argue. She asked him to take no action until the parties had met and discussed what had occurred and the options available. By then, however, the decision to dismiss had been made and Mr Lilburne was not prepared to retract it.

### **Whether the dismissal was justified**

[28] The test of the justification for a dismissal is set out in s 103A of the Employment Relations Act 2000 as:

“... 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.”

[29] The Employment Court has said:

“In each case the Court considers all circumstances. In a list not meant to be exhaustive ... the Court considers: the conduct of the worker; the conduct of the employer; the history of the employment; the nature of the industry and its customs and practices; the terms of the contract

(express, incorporated and implied); the terms of any relevant agreements; and the circumstances of the dismissal.”<sup>1</sup>

[30] Regarding Mr Argue’s conduct I have found there was no entitlement to unrestricted access to the PHTL vehicle, despite Mr Argue’s insistence when giving evidence that Mr Lilburne entered into such an arrangement. Not only was such unrestricted access inherently unlikely, but on two earlier occasions during his employment Mr Argue had sought permission before using the vehicle. I do not accept that he was unaware that he should do so again on 28 May.

[31] The absence of a policy on the use of company vehicles was pointed out. However the vehicle was not provided to Mr Argue as a term and condition of employment. It is not sufficient to rely on the apparent absence of any express policy requiring him to seek permission before using it.

[32] I consider it likely Mr Argue simply decided for his own reasons that there was no need to do approach his employer about the use of the truck on that occasion, and acted accordingly. In that respect he was culpable.

[33] Further to PHTL’s actions, including its investigation of the matter and the decision to dismiss, there was a generalised acknowledgement that the procedure it followed was less than ideal. In particular I consider it likely James Lilburne’s mind was made up once he confirmed that Mr Argue had taken the vehicle. That was certainly the case for Bob Lilburne.

[34] Further, Mr Argue was not formally advised of the purpose of the meeting, its disciplinary nature and the possible outcome, as he should have been. However the impact of that flaw is reduced because Mr Argue was aware of these matters in any event. He should have acknowledged that awareness frankly in evidence, but was reluctant to do so. Such acknowledgement would not have amounted to a concession that there was no flaw at all, and would have been appropriate.

[35] There were also certain concessions which the Messrs Lilburne should have made. Indeed several of the witnesses gave less than frank accounts of events overall,

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<sup>1</sup> **Air New Zealand Limited v Hudson** [2006] 1 ERNZ 415, 432, quoting the Arbitration Court in **Wellington Road Transport IUOW v Fletcher Construction Co Ltd** (1982) ERNZ Sel Cas 59

in that they filtered their accounts through their own views of what might harm the respective 'cases'. I would characterise that approach as more misguided than deliberately dishonest. However it did not assist the 'case' of either party.

[36] Returning to PHTL's actions, I do not accept the submission that Mr Argue was not given the opportunity to consider and respond to any allegations. He was given that opportunity at the meeting with James Lilburne. Even if he felt Mr Lilburne's mind was already made up, Mr Argue should have answered the questions put to him. They were reasonable questions. In not answering them Mr Argue deprived himself of an opportunity to change Mr Lilburne's mind, and reinforced Mr Lilburne's conclusions.

[37] I do not accept the submission that Mr Argue was denied the opportunity to be properly represented. He was accompanied by a support person. If he felt he needed a greater degree of representation at the meeting he could have said so.

[38] There were additional detailed submissions regarding the procedure followed. In the absence of any disciplinary policy or agreed disciplinary procedure, for the most part they were more relevant to best practice than lying at the heart of the employer's obligation to act fairly. This is particularly so in the context of a small employer without specialist human resource management support. It does not mean that a small employer is excused from the obligations of procedural fairness.

[39] There was a further submission that a better procedure would have allowed the parties an opportunity to explore their differing understanding of Mr Argue's entitlement to recreational use of the vehicle. I consider that unlikely in the light of Mr Argue's insistence in the Authority that it was a term of his employment that he was entitled to use the vehicle without seeking permission, and his denial of any wrongdoing.

[40] In any event I do not accept that Mr Argue acted as he did because of a misunderstanding. I consider it likely he was simply careless of his obligations in the matter.

[41] In summary, Mr Argue used the employer's business vehicle without first seeking permission. He should have sought permission.

[42] As for PHTL's approach to addressing the matter, there was no dispute that Mr Argue used the vehicle as he did. I have taken into account what were probably the angry responses of the Messrs Lilburne, and the likelihood that their minds were closed to the possibility that there was an explanation which should at least be considered.

[43] However I am also influenced by Mr Argue's refusal to acknowledge he had done anything wrong. I have concluded that the procedural flaws do not outweigh Mr Argue's culpable actions.

[44] I therefore conclude the dismissal was justified.

### **Costs**

[45] Costs are reserved.

[46] The parties are invited to reach agreement on the matter. If any party seeks a determination from the Authority there shall be 28 days from the date of this determination in which to file and copy to the other party a written statement setting out the amount sought, and why. The other party shall have 14 days from the date of receipt of the statement in which to file and copy a written reply.

R A Monaghan

Member of the Employment Relations Authority