Determination Number: CA 105/05
File Number: CEA 411/04

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE

BETWEEN	Kevin Patrick Breen (Applicant)
AND	Tulloch Transport Limited (Respondent)
REPRESENTATIVES	Craig G Fletcher, Counsel for Applicant Don Rhodes, Advocate for Respondent
MEMBER OF AUTHORITY	James Crichton
INVESTIGATION MEETING	6 July 2005
DATE OF DETERMINATION	3 August 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Breen) alleges that he was unjustifiably dismissed and/or unjustifiably disadvantaged by the respondent, Tulloch Transport Limited (TTL) who denies both allegations.

[2] The parties attended mediation but were unable to resolve their differences.

The unjustifiable disadvantage claim

[3] Mr Breen was employed by TTL for about nine years, the last three of which were as a dispatcher. He was employed on an individual employment agreement. The letter of offer contains a provision relevant to the employment relationship problem and it is this:

> *C Vehicle*
>
> *The utility currently in use will be made available for you to use for work related activities and transport to and from work. It must also be left at work whilst you are on holiday. Any use of the vehicle outside the above is at the discretion of your manager.*
> …

[4] In September 2003 Mr Breen was advised that the use of this company vehicle was withdrawn because during an immediately preceding period of annual leave Mr Breen had had the vehicle at his home. Mr Breen was told that his actions constituted *serious misconduct*.

[5] Mr Breen argued that, in keeping the vehicle at home while he was on annual leave, he was simply following longstanding custom and practice and, that he had done the same before without repercussions from the employer. He told me in his evidence that he was *bewildered* by what he saw as the employer's change in policy.

[6] Mr Breen agreed that his actual practice with the vehicle while he was on annual leave was different from the written terms and conditions of his employment. He said that he had always done things that way. He relied on that custom and practice argument in relation to his own circumstances as well as a like argument in relation to another employee who had previously held his position.

[7] For its part TTL said through its Christchurch manager, Ian Shirley, that it was unaware of any custom and practice and acted to challenge the behaviour of Mr Breen as soon as it became aware of it. Mr Shirley told me he had been appointed manager at roughly the same time as Mr Breen had been appointed dispatcher and so he was simply unaware of anything that happened before then.

[8] Despite numerous attempts by Mr Breen to have the vehicle returned by his employer, he was ultimately unsuccessful and his employment ended by dismissal before he had successfully resolved the vehicle issue.

[9] It is this so called vehicle issue which grounds Mr Breen's claim for an unjustified disadvantage.

The unjustifiable dismissal claim

[10] Mr Breen says that immediately following the withdrawal of his company vehicle, TTL raised performance issues with him and then sought to link the return of his company vehicle to a performance plan to address his alleged performance deficits.

[11] Mr Breen says that the criteria for achieving a positive outcome in respect to this performance plan was never clear and he was never given any opportunity to have the assistance of TTL in achieving the outcomes which it desired for him.

[12] TTL agrees that it made the return of the company vehicle to Mr Breen conditional on his improving his performance but it denies that there was anything obscure about the targets that it set for him or the process it adopted to try to get him to what it considered to be an acceptable standard. TTL at all times maintained that Mr Breen was capable of achieving its aspirations for the position of dispatcher but consistently failed to deliver those aspirations.

[13] In the result, TTL were not satisfied by Mr Breen's performance, offered him an alternative position which he declined and then terminated his employment.

Issues

[14] The issues I am required to resolve are as follows:

(a) Does the withdrawal of the company vehicle constitute a disadvantage?;
(b) Did TTL deal with the performance issues adequately?

The disadvantage claim

[15] It is clear that Mr Breen was shocked when the vehicle was removed from him by TTL. It is equally clear that he had used it in the past in exactly the same way without any response from the company and so it is not surprising that Mr Breen should have regarded the withdrawal of the vehicle privilege in the way that he did.

[16] The company's explanation for the apparent change of position was somewhat muddled. On the one hand, Mr Shirley noted that he had not physically been employed when Mr Breen's predecessor was working in the company and therefore he had no knowledge of any precedent

there. However, Mr Shirley also told me that he had appointed Mr Breen to the position of dispatcher so he would have had access to information about what Mr Breen's process had been concerning the company vehicle, in previous spells of annual leave.

[17] Mr Breen gave unchallenged evidence that he had previously taken the vehicle home when on annual leave and that it had remained there while he was on annual leave and that there had been no response from the company. While not challenging that evidence, the company's position was that they took those factors into account when considering the penalty that ought to be imposed on Mr Breen when they did decide to act.

[18] Clearly, given an intention to now address Mr Breen's behaviour with the vehicle while on annual leave, TTL had a range of options available to it.

[19] At one end of the continuum, they could simply have required Mr Breen to conform to the terms of his employment agreement, ie to leave the vehicle at the depot when he was on annual leave. Mr Breen told me in evidence that he would have accepted that without any quarrel.

[20] Next, they might have said to Mr Breen that, given his breach of the written terms of his employment agreement, the company no longer had confidence in Mr Breen in the limited respect of being able to be trusted with a company vehicle on agreed terms and conditions and accordingly proposed to withdraw the vehicle but to pay Mr Breen a compensatory sum for the loss of that benefit. This is the option Mr Breen sought in his numerous attempts to have the matter addressed after the vehicle was withdrawn.

[21] This option reflects the fact that the provision of a company vehicle has a value to Mr Breen which can be quantified in money terms. If Mr Breen does not have access to a company vehicle then of necessity he has transport costs which he would not otherwise have.

[22] Both of those options were contemplated by the company's own employment documents and policies and procedures. Mr Evan Williams who gave evidence for Mr Breen and who acted as a support person in some of Mr Breen's meetings with TTL, was clear that the option that TTL adopted (of withdrawing the vehicle) was not something contemplated by the company's own policies and procedures.

[23] Mr Williams also gave evidence that he did not think that TTL's manager, Mr Shirley, had turned his mind to the financial consequences for Mr Breen of the withdrawal of the vehicle and when I spoke to Mr Shirley when he was giving his evidence, he tacitly agreed with that. Mr Shirley said to me: *I don't recall considering that this decision* [the decision to remove the vehicle] *would cost Kevin* [Mr Breen] *money.*

[24] The fact is that the decision did cost Mr Breen money. Mr Breen drew the company's attention to that cost in writing, quantified the amount that he thought the vehicle was worth to him and sought a resolution of the issue by the company paying him that sum. The company declined.

[25] I consider that there has been an unjustifiable action to Mr Breen's disadvantage in the removal of the vehicle from Mr Breen in circumstances where that action was not contemplated by the company's policies and procedures, Mr Breen could point to a history of custom and practice which was at variance to his employment agreement provision and Mr Breen had actually suffered a financial loss as a consequence of the company's decision.

Mr Breen's performance

[26] Mr Breen said that there were no performance issues until the dispute about the vehicle. Mr Shirley for TTL says that he raised with Mr Breen performance anxieties before the dispute about the vehicle.

[27] Either way, both parties agree that the performance issues escalated significantly once the parties were in dispute about the vehicle issue.

[28] In his evidence, Mr Shirley for TTL gives a list of matters which he says he raised with Mr Breen in terms of his performance.

[29] He says that he raised these matters at a meeting with Mr Breen in early November 2003, that is two months after the removal of the company vehicle from Mr Breen's care.

[30] Mr Shirley says that there were performance issues before the removal of the company vehicle in September 2003 and these were raised formally with Mr Breen. If they were, Mr Breen seems less than clear about that. His evidence was that there were *talks* about performance but that matters *flared up* more when he *put the pressure on* about the return of the vehicle. Mr Breen said that he had had a number of talks with Mr Shirley and that there were some things that he was good at and some things that he was not good at but none of the things that he talked to Mr Shirley about which the latter thought were a problem were in Mr Breen's words *very serious*.

[31] When Mr Shirley spoke to Mr Breen in November 2003 to raise these performance issues, Mr Breen had with him Mr Williams who attended many of the meetings that Mr Shirley and Mr Breen had together from November 2003 down to Mr Breen's dismissal in March 2004.

[32] There was a particular meeting between the parties on 26 November 2003 at which Mr Shirley told Mr Breen that he was prepared to consider returning the company vehicle to Mr Breen or financially compensating Mr Breen for the loss if Mr Breen achieved certain performance criteria which were spelled out in writing. A copy was provided to me at the investigation meeting. The timeline for this performance improvement was to be the end of March 2004.

[33] That meeting ended with Mr Breen undertaking to refer the matter to his then representative, Mr Lindsay Chappell. Mr Chappell is a union official and an experienced one at that. However, it appeared that he was acting for Mr Breen in the matter in a personal capacity as Mr Breen was not a member of the union.

[34] Mr Chappell and Mr Shirley met on 3 December 2003 without Mr Breen present. Mr Shirley's evidence was that Mr Chappell had requested that Mr Breen not be physically present. Mr Shirley indicated that Mr Chappell told him that the company's action in withdrawing the privilege of the vehicle was unreasonable and that the time from the company taking the vehicle in September to the end of March when the company was prepared to consider returning it, was too long. Mr Shirley also gave evidence that Mr Chappell referred to the custom and practice argument as a strong one and indicated that the company would not have a leg to stand on if the matter went to any sort of formal hearing.

[35] In an endeavour to meet these points, Mr Shirley agreed to change the review date to the end of January 2004.

[36] Mr Chappell agreed to recommend this proposed alteration to Mr Breen but it seems that Mr Breen never accepted the proposed agreement. Actually Mr Breen's evidence was that he was not even sure that he knew about the so-called agreement.

[37] In any event on 30 January Mr Shirley for TTL endeavoured to promote a meeting with Mr Breen to discuss progress. Mr Shirley had a number of issues which he wanted to discuss with Mr Breen. The meeting does not seem to have gone well. Mr Breen said that he did not know what Mr Chappell had agreed on his behalf and the evidence really is that the meeting was so inconclusive that Mr Shirley tried to organise a further meeting in mid-February after Mr Breen had had another period of annual leave.

[38] This subsequent meeting took place on 17 February, this time without either of Mr Breen's advisors present. TTL raised a number of performance issues which Mr Breen did not answer to their satisfaction. Mr Shirley for TTL said that he would go away and think about the issues again and the decision seems to have been reached that dismissal was the only course of action that was possible.

[39] However, Mr Shirley's evidence is that he tried one last time to get an alternative strategy in place and sought to interest Mr Breen in an alternative position which Mr Breen refused to accept. On that basis, after an extensive effort from Mr Shirley to have Mr Breen seriously consider the new job offer, there was a meeting on 5 March 2004 at which Mr Breen was dismissed.

[40] TTL seems to have tried very hard to find an appropriate way to deal with Mr Breen's perceived performance deficits. However by intermingling ordinary performance concerns with the issue about the potential return of Mr Breen's company vehicle, TTL presided over a fatally flawed process.

[41] Even setting aside the confusion engendered by the introduction of the car issue into the performance equation, the process that TTL followed is still flawed because it relies on a purported agreement between itself and Mr Breen which never existed.

[42] At a critical point in the performance management process, which I described above, TTL made an agreement with Mr Chappell who represented that he was acting on behalf of Mr Breen. TTL and Mr Chappell reached certain understandings which Mr Chappell undertook to convey to Mr Breen and obtain his consent to. That consent was never obtained. It follows that the very party whose agreement to these arrangements was fundamental is excluded from the loop. The understandings which were referred to by the participants at the investigation meeting as the Chappell agreement, is in truth no agreement at all.

[43] Further, Mr Breen seemed genuinely confused about what he was supposed to do to meet TTL's aspirations, and by what time-line. Based on the evidence produced to me, I do not blame him. That confusion is fatal to a proper process.

Determination

[44] For the reasons that I have advanced in each of the two preceding sections of this determination, I consider that:

a. Mr Breen has made out his claim for a disadvantage by an unjustifiable action of TTL; and

b. Mr Breen has been unjustifiably dismissed by TTL.

[45] In relation to the disadvantage matter, given that I have found the disadvantage in a legal sense has been proved by Mr Breen, he is entitled to recover as compensation the value of the loss that he has sustained. His estimate of the value of the vehicle of which he was deprived is $5,000 per year. The length of time that he was deprived of the company vehicle down to the point at

which he was dismissed by TTL is six months so I award Mr Breen $2,500 in compensation for the loss of the company vehicle under section 123 (c)(ii) of the Employment Relations Act 2000.

[46] I have also found that Mr Breen has been unjustifiably dismissed because the employer used a performance management process which both confused the performance issue with the motor car issue, and failed to provide an adequate framework by which Mr Breen's performance could be evaluated, supported and improved.

[47] It follows that Mr Breen is entitled to be compensated for the unjustified dismissal and I award him the sum of $3,000 in that regard.

[48] I am required to consider the question of contribution. I do not think that Mr Breen contributed in any way to either the unsatisfactory process for assessing this performance which ended in his dismissal or for the failure of the employer to deal properly with the motor car issue. It follows that there is no deduction for contribution.

[49] Mr Breen was out of work for a short period following on from his dismissal and his claim is for two weeks' wages in that regard amounting to a total of $1,400 gross. I award him that sum in lost wages.

[50] TTL is ordered to pay those sums to Mr Breen.

Costs

[51] Costs are reserved.

James Crichton
Member of Employment Relations Authority