

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 133/07
5102435

BETWEEN ANTHONY WILLIAM
 BROWN
 Applicant

AND TRANS OTWAY LIMITED
 Respondent

Member of Authority: Philip Cheyne

Representatives: David Clark, Counsel for Applicant
 Mark Beech, Counsel for Respondent

Investigation Meeting: 24 October 2007 at Blenheim

Determination: 8 November 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Anthony Brown worked for Trans Otway Limited as a driver based in Blenheim from December 2006 until he was dismissed on 5 October 2007 and paid two weeks wages in lieu of notice. That followed an incident on 1 September 2007 that resulted in damage to goods transported for a client. Mr Brown says that the dismissal is unjustified. He seeks interim reinstatement pending a full investigation. There is an undertaking as to damages and a first affidavit from Mr Brown, affidavits on behalf of Trans Otway Limited and an affidavit in reply from Mr Brown. As is usual, the investigation meeting was limited to hearing submissions from counsel. The findings expressed in this determination are based on the affidavits untested by questions and are solely for the purpose of resolving the claim for interim reinstatement.

[2] To resolve this problem I will need to assess whether Mr Brown has an arguable personal grievance of unjustified dismissal which could be remedied by permanent reinstatement. Having done that, I must determine where lies the balance of convenience between Mr Brown and Trans Otway Limited before considering the overall justice of the case. First, it will be helpful to outline more fully what happened in September and on an earlier occasion in August.

The two incidents

[3] One part of Mr Brown's regular work once each week was to drive a trailer unit from Christchurch to Blenheim. The load regularly comprises a mix of frozen and chilled produce destined for supermarkets in Blenheim and Nelson. The trailer unit has a compartment at the front for frozen goods and a compartment at the rear for chilled goods. There is a freezer unit for the front compartment and a chiller unit for the rear compartment. The compartments are separated by a moveable curtain which is installed as part of loading the trailer. The curtain isolates the two compartments which need to be at very different temperatures.

[4] Mr Brown drove the trailer unit from Christchurch to Blenheim on Saturday 1 September 2007. On arrival at the depot in Blenheim on Saturday afternoon Mr Brown parked the trailer and finished work. It is common ground that the goods can be safely left in a trailer for 2 days or more as long as the curtain is properly installed, the goods properly loaded and the refrigeration units working.

[5] The trailer was unloaded by the night shift in the early morning on Monday 3 September 2007. The storeman found goods in the chilled compartment to be frozen. He got the night shift supervisor to inspect the goods who then rang the branch manager (Billy Smith). As requested, the supervisor inspected the trailer again and saw that the top part of the curtain had fallen forward leaving a gap of about 6 inches, sufficient to let the frozen air from the front compartment into the chilled compartment causing the chilled product to become frozen. He phoned Mr Smith again and reported that the curtain had slipped, it had not been installed properly and that it would have taken at least 24 hours for the chilled goods to become so frozen.

[6] There was an initial discussion between Mr Smith and Mr Brown on Monday 4 September. The next day Mr Brown received a letter seeking his attendance at a disciplinary meeting scheduled for Thursday 6 September. The letter describes the

area of concern as *Work performance ie correct loading procedures. I am referring to the freight damage on the unit loaded by you on Saturday 1/09/07 ex Christchurch*. It includes a caution that the employment may be in jeopardy if serious misconduct or substandard work performance is established and invites Mr Brown to bring a representative or support person.

[7] Mr Brown was represented at the meeting. There was discussion about the incident and a previous incident, more of which shortly. Notes of the meeting were made by a Trans Otway Limited employee.

[8] On 19 September Trans Otway Limited requested Mr Brown's attendance at a further disciplinary meeting scheduled for 25 September. At this second meeting the notes from the earlier meeting were read through. Mr Smith's evidence is to the effect that the notes were confirmed by Mr Brown. However, correspondence from Mr Brown's solicitor dated 1 October 2007 indicates that there was some discussion (during the 25 September meeting, I infer) to correct the notes. The letter requests an opportunity to comment further on those notes.

[9] Mr Brown's solicitor sent a further letter on 3 October. A third meeting was held on 4 October. At the end of that meeting Mr Brown was told that his employment was terminated and that the reasons would be given in a fax to be sent later. A letter (wrongly dated 5 October) was later sent to Mr Brown. It says that the reason for the dismissal is *the incident of the damaged freight on the 1st September 2007*. It records that the trailer was in perfect working order beforehand; that it was loaded in Christchurch and checked in transit, on arrival and during the weekend all by Mr Brown; that early Monday morning the chilled freight was all found frozen and damaged; that two weeks before a load of chilled freight had been frozen on Mr Brown's run, that having been talked about; and that *as a result of this incident we no longer have the necessary trust and confidence ...*

[10] The earlier incident relates to the same trip on 18 August 2007. Mr Brown did not unload the trailer on arrival at Blenheim. On the morning on 20 August those unloading the trailer discovered that the chilled freight was partially frozen. There was an investigation but Mr Brown did not receive any warning. There appears to be nothing in writing at the time describing the outcome. Beyond that there is conflict in the evidence of Mr Brown and Mr Smith. To summarise, Mr Smith says that he had previously instructed Mr Brown to unload the trailer on arrival, an instruction which

he repeated as part of their exchanges over the August incident. However, he gave the benefit of the doubt to Mr Brown since there may have been a wrong setting on the chiller compartment for which Mr Brown was not responsible. Mr Brown says that he was not given any instruction to unload on arrival until after the 1 September incident.

[11] Against that background I turn to consider the extent to which there is an arguable case of unjustified dismissal.

Arguable case?

[12] There is a written employment agreement. Under its terms the employment may be terminated by giving two weeks' notice in writing but the employer may make a payment in lieu of notice. The employer has the right to summarily dismiss the employee for serious misconduct. Damage to company or clients' vehicles, building or property as a result of negligence can constitute serious misconduct. The agreement also empowers the employer to suspend an employee on pay while an investigation into alleged misconduct is conducted. It appears that there was no express reference to the terms of the employment agreement during the disciplinary process but the parties can be taken as knowing the relevant provisions.

[13] Mr Brown says that he was not told during the August incident that he must unload the trailer on arrival at Blenheim. His practice had been not to unload the trailer because Dave McConway (formerly employed by Trans Otway Limited as a supervisor) told him not to. There is reference to apparently cogent reasons for such an instruction. Mr Brown says that he continued with the practice of not unloading for the seven months that he did this particular run without any criticism or contrary instruction. I note that the *Trans Otway Ltd Depot Instructions* sheet contemplates loaded trucks being parked overnight in the yard. The 6 September meeting notes also indicate that Mr Smith knew that unloading on arrival *used to be a policy, but it hasn't happened for a while, and [Mr Smith] didn't know why it had changed*. The same notes clearly record an instruction from then on for the trailer to be unloaded on arrival but do not record any suggestion that the same instruction had been given at the time of the August incident or earlier. In these circumstances, and despite the evidence of Mr Smith, I accept that it may be proven in due course that Mr Brown was told by Mr McConway not to unload the trailer and never received any instruction to the contrary. Accordingly the 1 September incident may have resulted from Mr Brown adhering to rather than ignoring unloading instructions.

[14] Mr Brown puts considerable emphasis on the dispute between the parties about the cause of the damage on 1 September, as disclosed by the statements and affidavits. He says that the cause of the curtain slipping was either its poor quality or inadequate maintenance, neither of which was his responsibility. Evidence for Trans Otway Limited is to the effect that the curtain was in adequate condition and that Mr Brown said as much during the 6 September 2007 meeting. That evidence is supported by the notes. It nonetheless remains arguable that Mr Brown's evidence on this point will eventually be upheld but it is a weak argument at this point.

[15] Mr Brown says that he checked the trailer during the journey, on arrival at the depot and on the Sunday afternoon and found the temperatures within the expected range and the equipment operating properly. Evidence for Trans Otway Limited is that activities around Blenheim over the weekend made it unlikely that Mr Brown could have accessed the depot on the Sunday. Trans Otway Limited did not accept Mr Brown's claims about checking the trailer during the trip based on an assessment of the time required to achieve the extent of freezing found on the Monday morning. However, the affidavit evidence of the supervisor is that that it would have taken at least 24 hours for the chilled goods to freeze. On that assessment, the curtain must have been dislodged by early morning Sunday 2 September 2007 at the latest. That does not necessarily count against Mr Brown's evidence (and explanation) of monitoring the load during the trip and on arrival. It may also be the case that data is available from the chiller/freezer units to verify when the temperature in the chiller compartment changed. Given all that, I find that Mr Brown may be able to prove that he did monitor the load during the trip and on arrival. If that is proven, there is a strongly arguable case of unjustified dismissal because it bears directly on negligence or its extent on his part.

[16] Mr Brown considers that Trans Otway Limited's investigation was flawed in various ways. He says that there is an element of pre-determination. However, there is no other evidence to support that assertion at this point. He says that data could have been gathered from monitoring equipment in the vehicle to identify when the temperature in the chiller compartment changed. It is not necessary to take that point any further given the finding above. Mr Brown complains that Mr Smith did not speak directly to the storeman who first discovered the damage but relied on the supervisor's reports. In the solicitor's correspondence of 3 October 2007, a point is made that the storeman's description to Mr Brown suggests equipment failure. It is

also said that, on inspection, the curtain was not up to standard. Whether equipment problems were a material part of the cause of the damage was an important aspect in assessing Mr Brown's culpability. The issue was clearly raised before the dismissal and it is arguable that Trans Otway Limited should have done more to investigate the point.

[17] From all this I conclude that there is arguable case of unjustified dismissal. Some aspects of the claim appear to be strongly arguable at this point. If a grievance is established, it is strongly arguable that reinstatement should be ordered.

Balance of convenience

[18] Mr Brown's evidence is that he bought a property in Blenheim and that settlement date was 12 October 2007. He committed to that transaction based on his level of income from Trans Otway Limited and he has not been able to find alternative employment in Blenheim at the same level of income since his dismissal. He also points out that he continued to operate his truck for Trans Otway Limited after the incident until his dismissal about a month later without incident.

[19] Trans Otway Limited adduced evidence to suggest that Mr Brown's assertions about the availability of alternative employment as a driver are wrong. However, that does not address the point made by Mr Brown that there is not available employment that provides remuneration at the level of his earnings from Trans Otway Limited.

[20] Mr Brown says that the incident that resulted in his dismissal has not caused any rupture in personal relationships with others in the Blenheim depot. That is countered by Mr Smith who says that he no longer has trust in Mr Brown. However, justification for Mr Smith's stance is based on the view that Mr Brown was at fault especially in the second incident. The question of fault is the major part of the forthcoming investigation meeting. Putting fault to one side, there is nothing about the personal relationships to count against interim reinstatement. On the other hand, re-establishing an employment relationship now will facilitate permanent reinstatement if that eventually is ordered.

[21] Trans Otway Limited says that the client whose goods were damaged is an important client and there is a risk that the business will be lost should there be a further incident. That would have dire consequences for the Blenheim depot. That concern is based on the view that Mr Brown cannot be trusted to follow procedures,

there having been two instances of damage on his runs. Whether there was an instruction about unloading prior to the 1 September 2007 incident is in contention, as is whether there was fault on Mr Brown's part (or its extent) in respect of the second incident. At present, Trans Otway Limited cannot establish that there was fault on Mr Brown's part in respect of the first incident since it took no action against him at the time. What is certain is that there was no problem for the month or so that Mr Brown worked after the second incident. The work included the Saturday run. In addition, Trans Otway Limited would be perfectly entitled to give Mr Brown any additional training or instruction required to guard against a further incident.

[22] There are two other options open to Trans Otway Limited to mitigate the risk of a further incident involving Mr Brown should he be reinstated. Mr Brown is open to the possibility of not being deployed on the particular run which has been the subject of the two incidents. He also would accept a period of garden leave pending resolution of his substantive grievance.

[23] I conclude that the balance of convenience favours Mr Brown.

Overall justice

[24] Counsel submitted that the matter boils down to Mr Brown being dismissed for not unloading the trailer on arrival in Blenheim. It is more complicated than that because the produce should have been safe in the trailer for the time it was left. However, Trans Otway Limited did act on the basis that Mr Brown breached instructions and procedure by not unloading the trailer when it may be proven that he acted in compliance with instructions and practice. Attention will then need to be given to the level of Mr Brown's culpability (if any) for the damage to the produce in the second incident. At worst, he may have been careless with installing the curtain. However, that carelessness may not be at a level sufficiently grave to warrant dismissal without any warning. Viewed in that broad way, there is nothing about the case that counts against Mr Brown succeeding with interim relief.

Interim reinstatement

[25] In reliance on Mr Brown's undertaking as to damages, I order Trans Otway Limited to reinstatement Mr Brown to his former position pending the determination of his personal grievance. This order is subject to the following conditions:

- (a) Trans Otway Limited may elect to place Mr Brown on paid garden leave for some or all of his normal driving duties.
- (b) This order takes effect on Monday 12 November 2007.

[26] I note that the parties have agreed to participate in mediation. If not already done, the applicant should initiate arrangements without delay.

[27] The Authority will contact the parties shortly to confirm arrangements for an investigation meeting for December 2007.

[28] I should acknowledge the timely way in which the parties dealt with this matter. For personal reasons I was not able to complete this determination sooner and I regret any problem that may have caused.

[29] Costs are reserved.

Philip Cheyne
Member of the Employment Relations Authority