

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Errol Cameron (Applicant)

AND Stan Semenoff Transport Limited (Respondent)

REPRESENTATIVES Rowland Ingram, Advocate for Applicant
Stuart Henderson, Counsel for Respondent

MEMBER OF AUTHORITY Leon Robinson

INVESTIGATION MEETING 28 March 2006

SUBMISSIONS RECEIVED 11 April 2006
12 April 2006

DATE OF DETERMINATION 1 June 2006

DETERMINATION OF THE AUTHORITY

The problem

[1] Mr Errol Cameron (“Mr Cameron”) was employed by Stan Semenoff Transport Limited (“the company”) as a driver from March 2003 until his dismissal on 25 September 2004.

[2] Mr Cameron says that his dismissal was unjustified. The company disagrees and says the dismissal was justified because Mr Cameron had been previously warned that his employment was liable to be terminated.

[3] These proceedings were initially lodged as against Stan Semenoff Sand Supplies & Transport Limited. I have the parties’ consent through their representatives to amend the name of these proceedings to correctly identify the respondent.

The issues

[4] By letter dated 25 September 2004, the company’s transport manager Mr Eric Howard (“Mr Howard”) wrote to Mr Cameron as follows:-

Dear Errol

This is to advise that your employment with Stan Semenoff Sand Supplies (Transport) Limited is to terminated (sic) immediately.

The reason for this termination is that, despite a final warning given to you on 16 August 2004 for dangerous overtaking and speeding we have on the 24 September 2004 received a letter regarding another dangerous overtaking manoeuvre.

*Yours
Eric Howard
Transport Manager*

(the “dismissal letter”)

[5] The issue now requiring determination is whether the company’s decision to dismiss Mr Cameron was justifiable.

The facts

[6] On 14 August 2004, an off-duty constable Grant Money (“Constable Money”) telephoned Mr Howard. Constable Money informed Mr Howard he had observed Mr Cameron driving and he was not impressed. He reported to Mr Howard that Mr Cameron had failed to indicate and pulled in front of a vehicle attempting to overtake Mr Cameron’s truck. He further reported that Mr Cameron had overtaken a petrol tanker in an unsafe manner.

[7] Mr Howard issued Mr Cameron a verbal warning on 16 August 2004 and confirmed the same in writing by letter of the same date. That letter stated:-

16 August 2004

To Errol Cameron

This file record confirms a final warning was given to you on 16 August 2004 at a meeting held with you in respect of your behavioural practices. The reason for giving this warning was: serious misconduct.

Dangerous overtaking and speeding

The misconduct in question was witnessed by an off duty CIVUI Officer who advised that the conduct was ticketable. Had you been ticketed, your employment would have been terminated immediately

This warning was given in the present of Eric Howard

You are further advised that if there are any further incidence of unsatisfactory conduct by you, or any other breach of the Company Rules that warrant a warning, your employment will be terminated.

*Yours faithfully,
Stan Semenov
Manager*

[8] I find that Mr Howard called Mr Cameron and informed him of Constable Money’s call. Mr Cameron was told to see Mr Howard the following Monday. Mr Howard did not tell Mr Cameron the seriousness of the situation nor did he give any advice of Mr Cameron’s entitlement to take advice and have support for the meeting.

[9] At the meeting held on Monday 16 August, I find that Mr Howard simply issued Mr Cameron with a verbal warning and Mr Cameron protested by disputing the constable’s report of events. I find that Mr Cameron was not asked for his response prior to the issue of the verbal warning. He was simply handed the prepared written record of verbal warning.

[10] I have no doubt the written record was already prepared and consider that fact evidence of the employer's closed state of mind. In those circumstances, there could not have been any unbiased consideration of any response Mr Cameron might have had.

[11] I answer Mr Cameron's criticism of Mr Semenoff's signature of the written record of warning by noting Mr Howard was authorised to give the actual verbal warning issued to Mr Cameron. Mr Semenoff merely signed the record of verbal warning but he did not issue it.

[12] However unsatisfactory all those matters are, Mr Cameron did not challenge any matter relating to the verbal warning. He cannot do so now and I say no more about it.

[13] On 23 September 2004, the manager of Paragon Haulage Limited telephoned Mr Howard to complain. He complained that a driver Mr Howard later learned was Mr Cameron, had overtaken a Paragon truck in an unsafe manner. The complaint was confirmed in writing later that same day by facsimile in the form of an incident report.

[14] Mr Howard raised the matter with Mr Cameron on 25 September 2004. Mr Howard was not given any prior notice of the details or seriousness of the allegation against him nor any advice of his entitlement to representation and support.

[15] I find that Mr Howard approached Mr Cameron with one Mr Trigg. Mr Howard handed the Paragon Haulage Limited incident report to Mr Cameron to read. I find that Mr Cameron then responded that the other driver should have let him in. I find that Mr Howard then handed Mr Cameron the dismissal letter and advised him to leave his keys in the truck and to remove his personal belongings.

The merits

[16] In investigating the employment relationship problem, the Authority is guided by established legal principles. It must first be satisfied that there was a dismissal. It then examines whether the employer's decision to dismiss was justified.

[17] I have reached the conclusion that the dismissal letter was prepared in advance of the meeting with Mr Cameron. I regard that finding as evidencing a closed mind by the employer. I find that Mr Cameron was not formally asked to give his response prior to his dismissal and the response he did actually make was rather a voluntary one entirely at his own initiative by way of protest rather than a invitation formally elicited by the employer that he respond to the allegation against him. For these reasons, I tend to the view that in those circumstances, there could not have been any unbiased consideration of any response Mr Cameron might have made.

[18] I am mindful too of my conclusion that Mr Cameron was never advised prior to his dismissal, that he was facing a serious allegation that could lead to his dismissal or that he was entitled to seek advice and have representation.

[19] In fairness and good faith, Mr Cameron ought to have been treated better than he was. The manner in which Mr Cameron was dismissed was not the actions of a fair and reasonable employer. **I therefore find that Mr Cameron was unjustifiably dismissed. He has a personal grievance and it is appropriate to resolve the employment relationship problem by granting remedies to him.**

[20] Having made that finding and in considering both the nature and the extent of the remedies to be provided, the Authority is bound by section 124 of the Employment Relations Act 2000 (“the Act”) to consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance, and if those actions so require, to reduce the remedies that would otherwise have been awarded accordingly.

[21] I am satisfied that Mr Cameron’s driving with respect to both the cited incidents against him occurred. I conclude that he conducted himself in such a way to raise complaints about his driving from an off-duty police constable and another transport company. I regard the incidents alleged against Mr Cameron as proved and his conduct in both situations is rightly categorised as blameworthy conduct. That conduct requires a reduction in the extent of the remedies to be awarded to Mr Cameron. His remedies shall be reduced by fifty per cent to reflect his own contributory conduct to his unjustifiable dismissal.

[22] Mr Cameron seeks 12 weeks wages. I award him 6 weeks in the gross sum of \$3,000.00 (40 hours @ \$12.50 per hour). **I order Stan Semenoff Transport Limited to pay to Errol Cameron the gross sum of \$3,000.00 as reimbursement of lost wages.**

[23] Mr Cameron says that he was stressed, hurt and humiliated and he could not accept the way that his employment had been terminated. He says that he has been driving trucks for 40 years and he has never been charged with or convicted of any form of careless, dangerous, negligent, or unsafe driving. He believes his dismissal was grossly unfair and he has suffered greatly. He tells the Authority the dismissal placed a huge financial strain on him. He had to sell his car and purchase a less expensive one. He fell behind with his bills. He had to seek assistance from Work and Income New Zealand.

[24] I accept that Mr Cameron has suffered hurt and humiliation as a result of his dismissal. But this is a case where a dismissal has been found unjustifiable essentially on procedural grounds¹. I am guided by recently established principle in stating that in my view, Mr Cameron’s employment would have been justifiably terminated had it not been for the procedural irregularities I have identified. Having stated that view, I am bound to say too that Mr Cameron is not then entitled to an award of compensation out of proportion to his actual loss. Accordingly, having regard also to his evidence, the nature of the personal grievance and his service with the Company, I consider a compensation award of \$5,000.00 is appropriate but reduced for contribution by 50%. **I order Stan Semenoff Transport Limited pay to Errol Cameron the sum of \$2,500.00 as compensation.**

[25] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Mr Ingram is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Mr Henderson is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination. I will not consider any application outside that timeframe.

Leon Robinson
Member of Employment Relations Authority

¹ Although the law has long held established there is no sharp dichotomy between procedural and substantive unfairness.