

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2013] NZERA Wellington 48
5389499

BETWEEN MURRAY FAULKNER
Applicant

A N D MENEFY TRUCKING
LIMITED
Respondent

Member of Authority: P R Stapp

Representatives: Applicant in person
Ray Parmenter, Counsel for Respondent

Investigation Meeting: 7 March 2013 at Palmerston North

Date of Determination: 3 May 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This is an employment relationship problem claiming a personal grievance, unpaid wages and an unpaid “living away allowance” by Mr Faulkner. Mr Faulkner claims that his dismissal on 6 May 2012 was unjustified. Mr Faulkner was dismissed by Mr Bryan Menefy, the sole director of Menefy Trucking Limited (the respondent and/or Menefy) for serious misconduct based on the following:

- a. That Mr Faulkner parked his truck and trailer/tanker at his private residence instead of an assigned depot;
- b. That Mr Faulkner let another person drive his truck; and
- c. That Mr Faulkner removed petrol/product/residual fuel from the trailer/tanker unit.

[2] Mr Faulkner claims that he has not been paid \$172.50 for short hours during his last week of employment when he should have been paid the minimum of 45 hours.

[3] He is seeking compensation of \$15,000 for hurt and humiliation, and three months lost wages in the sum of \$13,455.

[4] Menefy Trucking Limited denies all Mr Faulkner's claims.

The issues

[5] As Mr Faulkner's dismissal occurred on 6 May 2012 section 103A (2) of the Employment Relations Act applies. The test to justify the dismissal is what a fair and reasonable employer could do. In addition the procedural arrangements under s 103A (3) must apply having regard to any minor and technical matters.

The facts

[6] Menefy Trucking Limited (Menefy's) is a transportation company operating throughout New Zealand. It employs approximately 13 people. The business operates a range of flat deck trucks and trailers and fuel tankers. The company has several contracts with larger companies for transportation, including fuel. It engages a human resources consultant to assist on employment matters, including pay and disciplinary matters.

[7] Mr Faulkner commenced his employment with Menefy's in June 2010 as a truck and trailer/tanker driver. He resided in a caravan at Menefy's Palmerston North yard during the week, and his home was at Napier. It is common ground that Mr Faulkner was paid \$23 per hour for the first 45 hours and thereafter \$26 per hour. This is an increase that applied to the written rates in Mr Faulkner's employment agreement. Mr Faulkner was paid a "living away" allowance of \$150 per week for some time after the Christchurch earthquake, to compensate for work that was required to be carried out as a result of the earthquake. It is common ground that that payment ceased for Mr Faulkner in March 2011. Mr Faulkner is claiming an entitlement for that allowance in the sum of \$3,000 that he says was not paid. It is for Mr Faulkner to establish the claims for the unpaid wages and "living away allowance".

[8] Mr Menefy moreover says that Mr Faulkner did not work all his hours in his last week of employment. He did accept that it was his practice to pay a minimum entitlement to wages for the first 45 hours per week. He says that the entitlement for the “living away allowance” ceased for Mr Faulkner in March 2012. It is common ground that the payment ceased in March. There was no written variation to incorporate the term in the employment agreement. It was an oral arrangement.

[9] On 4 May 2012 Mr Faulkner was phoned by Mr Menefy while he was travelling across Cook Strait from Picton to Wellington. Mr Menefy asked him to go to a meeting scheduled for 6 May. Mr Menefy says he explained the detail of the reasons why he wanted to meet with Mr Faulkner, but Mr Faulkner denies being given the detail. Mr Menefy had arranged for Mr Faulkner to be replaced with another driver and for Mr Faulkner to use the respondent’s “ute” that the other driver arrived in at the Ferry, to drive home instead of completing his run in the truck. At the meeting Mr Faulkner was given a letter that also included the allegations as set out above. Mr Faulkner says he was blindsided by Mr Menefy’s letter because the letter included more allegations than what Mr Menefy told him over the telephone when he said he needed to have a meeting or a chat. Mr Menefy says during the telephone call he told Mr Faulkner of each of the allegations and that he should have a support person in attendance at the meeting.

[10] The letter dated 4 May 2012 confirmed that a decision would be made and that Mr Faulkner faced the possibility of his employment being at risk because of the incidents alleged. Also it was explained that the events alleged potentially destroyed any trust and confidence that Mr Menefy had in Mr Faulkner. The letter confirmed that Mr Faulkner had the right to be represented.

[11] It is common ground that Mr Faulkner parked a truck and trailer/tanker at his private residence and may even have detached the truck from the trailer/tanker unit behind some trees on a vacant part of the section. Also he did allow another person to drive the vehicle. He also obtained an amount of fuel for that person. Mr Menefy believed at the time that the fuel came from his truck/tanker trailer.

[12] Mr Menefy claims that he did have an adjournment to enable him to decide on what to do. Mr Faulkner denies that there was any adjournment. Whatever that situation was, Mr Menefy dismissed Mr Faulkner.

[13] Mr Faulkner received his final pay and entitlements, except for a deduction for an extra meal Mr Faulkner had paid for on one of his trips that he had been reimbursed by Menefy. No claim has been made for the return of the deduction.

Determination

[14] Mr Faulkner is entitled to his remaining minimum pay for the last week of his work. This is because Mr Menefy disclosed that he paid everyone the minimum rate for 45 hours per week. Mr Faulkner could reasonably expect that payment in the absence of both parties agreeing on not being paid for cleaning the vehicle and any stand down that Mr Menefy relied upon for not paying the shortfall.

[15] Mr Faulkner is not entitled to the “living away allowance”. He has not established that the payment was a regular payment. It certainly was not written down. Also there is the evidence from Mr Menefy that it was a particular payment for circumstances relating to the earthquake and applied by Menefy’s with a principal contractor involved with work for Shell during the earthquake period. Mr Faulkner has not provided any details of where his work was for the period of his claim, or any details of living away arrangements and actual travel for me to grant him his claim. It is probable that as the payment was provided as an oral arrangement relating to the earthquake that it was not a permanent payment.

[16] I accept that Mr Menefy’s decision to convey the details of his allegations to Mr Faulkner over the phone was inadequate, especially since Mr Faulkner denies that Mr Menefy told him of each of the allegations. The production of the letter is not proof that he did tell Mr Faulkner of each of the allegations. Mr Menefy could not explain why he could not have made arrangements to provide the letter to Mr Faulkner before the meeting either on the Friday and or the Saturday. His explanation that he could not fax it for privacy reasons does not explain why he could not have made some other arrangement at least on the Saturday and or Sunday morning for Mr Faulkner to receive it before the meeting. This put Mr Faulkner at an unfair disadvantage.

[17] However, it is common ground that Mr Faulkner, upon advice from his wife, did contact an employment advisor but decided to go to the meeting with his wife as his support person. This makes it more likely than not that Mr Menefy provided Mr Faulkner with enough information for Mr Faulkner to know that there was a serious

problem that could impact on his employment. At the meeting Mr Faulkner had an opportunity to read the letter silently first, and then Mr Menefy read the letter out aloud. Mr Faulkner admitted he took the truck and trailer/tanker to his home in Napier. He admitted allowing another person to drive it. He has added another explanation since then. I will comment on each in turn.

[18] Mr Faulkner did provide an explanation on each of the allegations and made admissions. Mr Menefy was entitled to dismiss the explanations and to rely on the admissions at the time that he parked the truck at home, that he allowed another person to drive the truck and that he gave that person some fuel, I hold. Mr Faulkner's explanations attempted to minimise and mitigate his actions. However as Mr Menefy's company owned the truck he reasonably did not accept Mr Faulkner's explanation. Given that Mr Menefy's business involved trucking hazardous and dangerous goods such as petroleum it is more likely than not that there were arrangements in place for parking the truck and such an arrangement involved a Napier depot. Also, there was an opportunity to provide an explanation to the allegations, I hold.

[19] Mr Menefy was entitled as a fair and reasonable employer to reject Mr Faulkner's explanation that he parked the truck so that it could not be seen at the back of the section and behind some trees. Mr Faulkner did not provide sufficient details that Mr Menefy condoned parking the truck privately, given the hazardous and dangerous goods carried.

[20] Mr Menefy was entitled to expect Mr Faulkner to drive his truck and not to permit anyone else to drive it. Mr Menefy was entitled to reject Mr Faulkner's explanation that the driver was adequately licensed and only drove a few metres. Mr Faulkner accepted that the truck belonged to the business. First it was not Mr Faulkner's truck to make such a decision to let somebody else drive it. Second there was a difference of opinion about what license the person actually had at the time. Third the distance the driver went was immaterial because the company would always be responsible if anything untoward happened, given that the business operates in a serious regulatory environment.

[21] Mr Menefy genuinely and reasonably believed that Mr Faulkner did provide fuel to another person from the tanker having regard to Mr Faulkner's explanation at

the time. His first admission to Mr Menefy at the time makes it more likely than not it was Menefy's fuel. His later explanation is more likely than not implausible I hold.

[22] Mr Menefy's decision to dismiss Mr Faulkner based on Mr Faulkner's admissions alone was a decision within the range of responses open to a fair and reasonable employer, I hold. Indeed Mr Faulkner's admissions and the way Mr Menefy conducted the meeting on 6 May means that any prior unfairness and prejudice to Mr Faulkner, relating to him not receiving the letter before the meeting, was remedied, I hold. Mr Menefy's decision that he could not trust Mr Faulkner was genuinely founded on Mr Faulkner's admissions I hold. Further, I hold that Mr Menefy had not predetermined an outcome because he permitted Mr Faulkner to read the letter first, Mr Menefy read it aloud, Mr Menefy then sought a response from Mr Faulkner, and then Mr Menefy made his decision. The letter does not indicate a predetermined outcome. Indeed Mr Menefy appears to have closely followed the advice prepared by his human resources consultant, to avoid such a trap.

[23] I hold that Mr Menefy gave Mr Faulkner the opportunity to comment on the allegations, albeit at the meeting. Given Mr Faulkner's admissions a fair and reasonable employer could, on those grounds alone, make a decision to dismiss without having to provide a separate process for any discussion on other options, and a discussion on dismissal. In this instance this applies because there were three matters which each on their own could justify dismissal, but taken together were very serious.

[24] Mr Faulkner's claim for unjustified dismissal is dismissed.

Order of the Authority

[25] Menefy Trucking Limited is required to pay Mr Faulkner the shortfall in pay of \$172.50

Costs

[26] The matter of costs was discussed during the Authority's investigation meeting and left to be dealt with now. Costs are to fall where they lie. This is because both parties have had some success in the outcome. They both facilitated the Authority's investigation and the meeting was dealt with quickly and in a timely fashion.

P R Stapp
Member of the Employment Relations Authority