

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 214/09
5136402

BETWEEN WILLIAM GUTSELL
 Applicant

AND BURGESS & CROWLEY
 CIVIL LIMITED
 Respondent

Member of Authority: Paul Montgomery

Representatives: Anjela Sharma, Advocate for Applicant
 Graeme Downing, Counsel for Respondent

Investigation Meeting: 18 August 2009 at Nelson

Submissions received: 7 September 2009 from Applicant
 24 August 2009 from Respondent

Determination: 14 December 2009

DETERMINATION OF THE AUTHORITY

[1] Mr Gutsell says he was unjustifiably dismissed from his position as a truck driver with the respondent. He seeks remuneration for loss of income, compensation for hurt, humiliation and distress in the sum of \$10,000 and costs.

[2] The respondent's position is that Mr Gutsell's dismissal was justified in all the circumstances and accordingly is not prepared to grant the remedies sought.

[3] The parties were unable to resolve the problem in mediation.

The essential facts

[4] The applicant was employed on 2 July 2007 under the terms of an individual employment agreement with a probationary clause which was not invoked and the employment became permanent.

[5] There is no dispute Mr Gutsell is a well trained driver.

[6] A series of driving incidents gave rise to the matter before the Authority. The first serious incident was in November 2007 when the tailgate of the truck the applicant was driving was left open and poorly secured. The tailgate swung, resulting in the roof of an SUV being severely damaged. A verbal warning was given to Mr Gutsell on 1 November 2007 in relation to this incident.

[7] The respondent detailed other mishaps involving damage to equipment and two relating to public safety, including the tailgate incident. The company is particularly focused on safety issues following a prosecution after a death on a subdivision on which the respondent was working in 2007. The company's Code of Conduct and the individual employment agreement clearly set out the respondent's strict requirements relating to health and safety and damage to property and equipment.

[8] On 3 June 2008, the applicant was driving his truck on the Greenmeadows subdivision and knocked over a number of survey pegs. The incident followed a clear directive from Mr Walsh, the respondent's Nelson manager, to all drivers about damage on subdivision developments, specifically mentioning survey pegs. Mr Gutsell was issued with a further warning on 3 June 2008.

[9] On 4 June 2008, a further incident in which survey pegs were knocked over by the applicant's truck while he was driving led to a written warning being issued. Mr Walsh had visited the Greenmeadows subdivision following the incident and inspected the damage. He asked Mr Gutsell for an explanation but says he received none at that time. He then issued the written warning which clearly states dismissal is a distinct possibility should another incident occur. It also made clear this written warning was a final warning. Even after being issued with the warning, Mr Gutsell never accepted Mr Walsh's invitation to provide an explanation with regard to this incident.

[10] On 23 June 2008, Mr Walsh met with employees (including Mr Gutsell), and stressed heavily the need to protect the new kerbs at the Todd Bush subdivision. He issued an instruction to all drivers to enter the road to the subdivision in reverse, backing up the roadway, dispersing the load, and driving out without the need to turn

trucks. He explained the narrowness of that road made it imperative to reverse in to prevent kerb damage.

[11] In spite of a clear instruction, Mr Gutsell drove his truck into the subdivision in forward gear, attempted to turn his truck around and knocked over the kerbing. When told of the incident by the supervisors, Mr Walsh told Mr Gutsell to park the truck, go home and to meet him the following morning. Mr Walsh then spoke to those who witnessed the incident.

[12] At the meeting on 24 June 2008, Mr Walsh asked Mr Gutsell for an explanation of his actions. He says Mr Gutsell told him he did not have an explanation. Mr Walsh then told the applicant he was dismissed for misconduct. Mr Walsh agreed to pay a week in lieu of notice so the applicant's employment ended effectively on 30 June 2008.

[13] Mr Gutsell asked Mr Walsh if there was any casual work while he looked for another job. Mr Walsh said there possibly was, but it would not involve driving. Mr Gutsell in fact worked two days as a labourer in early July but then told Mr Walsh he did not want to continue labouring and asked if he could go back to driving. Not surprisingly, Mr Walsh replied *no*.

The issues

[14] To determine this matter the Authority needs to make findings on the following issues:

- Was the disciplinary process used by the respondent consistent with the employment agreement; and
- When was the dismissal notified to the applicant; and
- Was the dismissal unjustified; and
- If so, did the applicant contribute to the circumstances giving rise to the dismissal so as to warrant altering any remedies; and
- If the dismissal was unjustified, to what remedies is the applicant entitled?

The test

[15] The test for justification is set out in s.103A of the Employment Relations Act 2000 and requires the Authority to stand back and objectively assess whether what the employer did 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.

The investigation meeting

[16] At the investigation meeting, the Authority heard evidence in person from Mr Gutsell. A late statement from Mr Papke, the applicant's current employer, was presented but as Mr Papke was not present at the meeting nor aware of the complete factual matrix surrounding the dismissal, the Authority received the statement in spite of its limited evidential value.

[17] For the respondent, the Authority heard evidence from Mr Walsh, Mr Alan Smith, foreman on the Todd Bush site, Mr Wayne Harvey, subcontractor to the respondent, Mr Craig Borgfeldt, a truck driver for the respondent, and Ms Rozlyn McNeilly, the respondent's office manager.

[18] The Authority records its thanks to those who attended and gave evidence and to counsel for their assistance and their submissions which I have considered in coming to this determination.

[19] At issue during the meeting was the credibility of Mr Gutsell's evidence on matters of fact. On the clear evidence put before the Authority, I have no hesitation in preferring the evidence of the respondent's witnesses, each of whom was able to provide accurate, cogent eye-witness accounts of key incidents involving Mr Gutsell's actions.

Analysis and discussion

[20] There are many conflicts of evidence on many points in this matter.

[21] In the letter of 1 August 2008 notifying the alleged grievance, Mr Gutsell made several inaccurate statements, including his being employed by the respondent for two years, his having a clean driving record with no performance issues while employed by the respondent, his being employed on a fixed term agreement and his being surprised with Mr Ted Walsh told him on 12 July 2008 that his employment had

been terminated two weeks earlier. These allegations were repeated in the statement of problem.

[22] In a statement of evidence dated 5 August 2009 and received by the Authority on 12 August, five further allegations were made in defence of his actions.

[23] Without canvassing each, the significant two relate to his allegation the Scania truck he was driving was unsafe, to such a degree that one employee, Mr Borgfeldt, had refused to drive it and the workshop servicing the vehicle supported this view. The other, in respect of the damaged kerb, was that Mr Smith told him to drive the truck up the subdivision road and then turn.

[24] In respect of the truck issue, Mr Gutsell originally drove the Scania for a few months and then transferred to a newer Isuzu truck leased by the company. Mr Borgfeldt told the Authority he was not employed to drive the Scania but was happy to do so as he was familiar with the model in question. He said *I still drive the Scania and enjoy driving it* and went on to refute the applicant's allegations about various aspects of that vehicle. The Authority was also provided with a letter from Lloyd Heslop Motors Limited confirming it serviced the Scania according to the manufacturer's recommendations and specifications and that any repairs advised by Heslops to the respondent company were authorised and carried out as recommended.

[25] With regard to the kerb damage, Mr Gutsell told the Authority:

My recollection is that there was a meeting in early July where we were told to back up trucks in the subdivision area where we were working.

The ground where we were working on that day in question was very slippery and muddy, and not ideal working conditions.

The foreman Allan Smith told me to drive up and assess whether I could turn the truck in the designated area. I followed his instruction.

Having driven up, my assessment of the situation was that I believed I could turn the truck in the area in front of me. From what I observed there was sufficient room to do this.

The reason I hit the kerb was because my boots were covered in mud and my foot slipped on the clutch. I accept that I caused a minimal amount of damage to the kerb which could have been easily fixed by the on site drainlayer. I deny knocking the entire kerb over as alleged by Ted.

[26] In reply, Mr Smith, the site foreman, told the Authority:

I was on site when Bill knocked over the subdivision pegs on 3 June 2008, shortly after a staff meeting where everyone had been told to take care not to damage the pegs and other subdivision works. I was aware Bill received a verbal warning from Ted Walsh over that incident. I was also on site when Bill knocked over more pegs on 4 June 2008. I was aware Bill received a written warning from Ted Walsh over that incident.

As far as Bill's statement that I instructed Bill to drive up the "rock lined" road (no mud), and try to turn his truck around – this is just simply untrue. I am horrified and shocked by his allegations that I instructed him to do so. We had just had a safety meeting, with strict instructions that no trucks were to drive forward up the road, all must reverse. I was on site that day (23 June). As I was leaving the site, I saw Bill on the public road, Todd Bush Road. He was facing forward into the subdivision. I told him to turn his truck around and back into the subdivision, as he had been told earlier to do. I understand he didn't follow my instructions and damaged the kerb. As a result he was dismissed.

[27] There is no doubt that Mr Gutsell failed to follow the instruction issued to him and all drivers regarding access to the Todd Bush subdivision, when asked for an explanation of his actions Mr Gutsell did not provide one and only belatedly claimed that as the ground being worked on that day was *very slippery and muddy* his foot slipped on the clutch. Mr Smith's evidence is clearly that the road on which Mr Gutsell was driving was rock lined and therefore devoid of mud.

[28] In considering all the evidence in front of the Authority, I find Mr Gutsell's evidence is not believable.

Determination

[29] Returning to the issues as set out above in this determination, I find:

- the disciplinary process used by the respondent was consistent with the employment agreement and was conducted fairly. In particular, I accept that on the occasions in question, Mr Walsh provided the opportunity for Mr Gutsell to give an explanation but the applicant failed to do so at the time:
- I find the dismissal was notified to the applicant verbally at the close of the meeting on 24 June 2008 and that the company paid the applicant one week's wages and did not require him to work out that notice period.
- The dismissal was justified in all the circumstances and Mr Gutsell does not have a personal grievance. The Authority is unable to assist him further.

Costs

[30] Costs are reserved. The representatives are to confer on the matter of costs. If they are unable to agree, Mr Downing is to lodge and serve his memorandum within 28 days of the date of issue of this determination. Ms Sharma is to have a further 14 days within which to lodge and serve her submission in reply.

Paul Montgomery
Member of the Employment Relations Authority