

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2013] NZERA Auckland 205
5392711**

BETWEEN

MOHAMMED HASSAN
Applicant

A N D

HAMILTON TAXI SOCIETY
LIMITED
Respondent

Member of Authority: James Crichton

Representatives: Applicant in person
Glenys Steele, Advocate for Respondent

Investigation Meeting: 13 March 2013 at Hamilton

Date of Determination: 21 May 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Hassan) alleges that he was unjustifiably dismissed from his employment as Chief Executive Officer of the respondent (Hamilton Taxis). That claim is resisted by Hamilton Taxis.

[2] Mr Hassan was employed as Chief Executive Officer on 7 June 2011 and served in that capacity until his dismissal on 28 June 2012.

[3] Hamilton Taxis has 59 shareholders and is run by an elected Board of Directors. While he was in the employment of Hamilton Taxis, Mr Hassan was its most senior employee and reported to the Board of Directors.

[4] There had been issues between Mr Hassan and the Board of Directors prior to the events leading up to the termination of his employment. Specifically, Mr Hassan had been given a warning in respect to an allegation that he had dealt inappropriately

with information relation to one of the Directors. A second warning was given him for opening correspondence addressed to the Board Chair. These warnings were subsequently withdrawn by the Board.

[5] The events leading up to the termination of the employment commenced with a disciplinary meeting on 24 May 2012. Hamilton Taxis were concerned that it appeared Mr Hassan had allowed an unauthorised vehicle to operate as a taxi on 30 March 2012 and 16 April 2012 and that at the relevant time, the vehicle was not being operated by its owner or an individual duly authorised to operate such a vehicle.

[6] Mr Hassan's position essentially was that on the days in question, Hamilton Taxis needed a van to service a particular client, that the vehicle concerned was a van, did comply with the relevant rules and was being driven by a member of Hamilton Taxis, albeit not either the owner of the vehicle or indeed anyone specifically approved by the owner of the vehicle to drive the vehicle in question.

[7] Hamilton Taxis maintain that the governing documents for its operation are threefold, vis

- (a) the rules of Hamilton Taxis;
- (b) the operating rules of Hamilton Taxis; and
- (c) the Land Transport rule: Operating Licensing 2007.

[8] So far as Hamilton Taxis were concerned, Mr Hassan's decision to allow the operation of the van on 30 March 2012 and 16 April 2012 broke various of the ordinances in one or other of the three formative documents.

[9] In particular, Hamilton Taxis alleged (correctly) that the vehicle in question was not owned by a current member of Hamilton Taxis, that the van had not been specifically approved by Hamilton Taxis to operate as a taxi, and that the driver of the vehicle on the days in question did not have the owner of the van's specific authority to drive the vehicle at the relevant time.

[10] Mr Hassan was designated as the person in control of Hamilton Taxis and having that status under the Land Transport Operating Rules, Hamilton Taxis' view was that it was all the more important that Mr Hassan not only obeyed the rules himself, but also was an example to the members of the Society.

[11] There was a subsequent meeting between the parties on 31 May 2012 at which Hamilton Taxis sought further particulars from Mr Hassan in relation to the matters complained of.

[12] Subsequently on 12 June 2012 Hamilton Taxis intimated by letter what their preliminary decision was and the final decision to dismiss Mr Hassan was made and conveyed to him on 28 June 2012.

[13] The remedies that Mr Hassan now seeks are all monetary in nature; when the matter first was filed in the Authority, Mr Hassan was seeking interim and permanent reinstatement as well, but those claims have subsequently been withdrawn.

[14] In addition, in its statement in reply, Hamilton Taxis raise a counterclaim seeking a penalty and *exemplary damages* in the amount of *no less than \$5,000* in respect to an alleged breach of confidentiality in relation to a record of settlement reached between Hamilton Taxis and another former employee. It is claimed for Hamilton Taxis that Mr Hassan deliberately breached confidentiality by referring to that matter in his claim to the Authority.

Issues

[15] The issues that the Authority needs to consider and decide are as follows:

- (a) Was Mr Hassan unjustifiably dismissed?
- (b) Should the counterclaim be granted?

Was Mr Hassan unjustifiably dismissed?

[16] The Authority must decide whether a good and fair employer could have concluded that Mr Hassan was guilty of serious misconduct and thus able to be dismissed for the actions that he took. In order to reach a conclusion in this matter, the Authority will need to have recourse not only to the employment agreement between the parties but also to the various documented rules that govern the operation of the business that is Hamilton Taxis.

[17] It is appropriate that the Authority record that the evidence is plain, that Hamilton Taxis is not a particularly happy enterprise and that there appear to be significant undercurrents within the membership and clear splits between the

members who support the Board and the group that does not support the Board and its decision making.

[18] To some extent, this unhappiness impacts on the decision that the Authority must make. The present Board seems to have adopted a strategy of endeavouring to tidy up compliance with the various governing rules and while in principle the notion of an entity operating within its legal remit must be entirely desirable, the Authority heard evidence which suggested that not all of the members were happy with the way in which the Board was going about its task. There was evidence, for example, of members being fined by the Board for trivial rules breaches. It is axiomatic that any governance body must ultimately take the members with it or it will fail to fulfil its obligations at law.

[19] This perceived officiousness of the Board is one of the explanations for the dismissal of Mr Hassan. He himself initially welcomed the Board's engagement with him on the subject which led to his dismissal, although he was very clear that, while he wanted to see the Board more actively involved in what might loosely be entitled "policing the rules", he considered that in his own circumstances, the Board had gone too far. Indeed, Mr Hassan's position is that if he was at fault, his failings did not constitute serious misconduct and thus could not justify a dismissal.

[20] But perhaps more importantly, Mr Hassan maintained throughout the disciplinary process with Hamilton Taxis and in his evidence to the Authority that the Board of Directors of Hamilton Taxis had fundamentally misunderstood the rules and/or misapplied them.

[21] The appropriate place to start is with Mr Hassan's employment agreement. There is a written employment agreement and a job description. Mr Hassan is required to report to the Board. His duties are those set out in Schedule 1 which is the job description. In addition, at clause 10 there is a provision styled *Company policy, procedures and rules* which requires Mr Hassan to abide by the employer's policies, procedures and rules, and refers particularly to the Staff Handbook.

[22] His remuneration is expressed to be a base salary of \$41,000 per annum, but then goes on rather curiously in the following terms:

The wages shall be increased to be in between the salary range of \$45,000 to \$48,000.

[23] The Authority will revert to that issue later.

[24] The employment agreement provides for dismissal either on or without notice. The job description places the emphasis clearly on administrative and accounting functions. Amongst other things, it has this to say:

The Chief Executive Officer ... is the person who has responsibility for the management and oversight of administrative business as usual activities ... (and) is responsible for leading, coordinating, advising and facilitating the overall direction of the accounting function. ... to be successful the Chief Executive Officer will need to be respected by internal and external stakeholders as a person who has strong accounting skills who is able to provide timely and relevant financial information and reporting to meet the needs of the business.

[25] On the face of it then, the parties contemplated a strong accounting focus in Mr Hassan's role. Further, there is nothing in the employment agreement that identifies any particular delegations which the Chief Executive Officer had from the Board of Directors, nor any suggestion of any inherent authority to act without the involvement of the Board.

[26] As part of his role as Chief Executive Officer, Mr Hassan was the person in control for the purposes of the New Zealand Transport Agency which, pursuant to the Land Transport Act 1988 and the Land Transport Rule; Operator Licensing 2007, approved Hamilton Taxis Society Limited as a taxi organisation. Part of the basis for that approval is the requirement by the New Zealand Transport Agency that it approves the person in control. It is plain on the documentary evidence before the Authority that Mr Hassan passed the requisite tests of the New Zealand Transport Agency.

[27] The current operating rules of Hamilton Taxis includes a definition of manager as the person appointed by the organisation to manage its day-to-day affairs, but also includes a definition of *authorised officer* as any *director, executive officer, administration officer and any person appointed by the organisation on whom authority has been conferred to enforce these rules.*

[28] The operating rules require that each member who operates a taxi service holds the relevant passenger service licence and member is defined as an operator or

licensee authorised to drive a taxi for Hamilton Taxis. Drivers of taxis, not being members, are required to have employment agreements in writing.

[29] The rules also require compliance *with any lawful direction of management* and with any breaches of the rules to be reported to *management*. Where there are alleged breaches of the rules these are to be referred to *the manager or authorised officer*.

[30] Mr Hassan's evidence is that as the Chief Executive Officer responsible for managing the affairs of Hamilton Taxis, and particularly its financial affairs, he had certain inherent powers which were not specifically delegated to him by the Board of Directors. The Authority has studied the extensive documentation on which Hamilton Taxis base their defence and reached the conclusion that it is available to a Chief Executive Officer or manager in Mr Hassan's position to conclude that the position occupied does have some inherent powers which are not subject to explicit delegation by the Board of Directors. This is because of the frequent references in the documentation, some examples of which have just been referred to, for the manager to act in respect to complaints or in respect to alleged breaches of rules. On that footing, the Authority is satisfied that Mr Hassan could have formed the view that he had certain powers which were not explicitly delegated to him by the Board.

[31] Furthermore, the context in which Mr Hassan was operating was that when he was appointed as Chief Executive Officer of Hamilton Taxis, the organisation was in a financial mess. His evidence, unchallenged on this point, was that he had significant difficulty in getting things back into order. The Authority accepts that Mr Hassan was working in a very challenging environment and there is ample evidence of the financial stresses on Hamilton Taxis during Mr Hassan's employment.

[32] In that context then, when a request was received for a van service on the two days in question from a single established client of Hamilton Taxis, Mr Hassan thought his obligation was to try to provide that service with the sort of vehicle requested, notwithstanding the fact that it was common ground between the parties that there was no existing Hamilton Taxis' van available, on these occasions.

[33] What Hamilton Taxis say Mr Hassan ought to have done was simply refer the job to one of the other taxi organisations in Hamilton. Mr Hassan, conversely, took the view that Hamilton Taxis could ill afford to lose any revenue given their financial

strictures, and he thought that the better course was to use his discretion to provide a Hamilton Taxis vehicle.

[34] What he did was ask an existing and reputable member of Hamilton Taxis to use his unique modem in the subject van in order to provide the customer with the service.

[35] The van was owned by a former member of Hamilton Taxis who at the relevant time was not even in New Zealand. But Hamilton Taxis knew (as did Mr Hassan) that the owner of the van wished to have the vehicle as part of the Hamilton Taxis fleet and he himself sought to return to Hamilton Taxis on his return from overseas. When the owner of the van had left New Zealand, he had left the van on the understanding that it would be made ready to become operative as a taxi.

[36] The Authority is satisfied that by the time the vehicle was used to provide the hires in dispute, it complied with all of the relevant regulations. However, it is true that the driver of the vehicle was not specifically authorised so to do by the owner of the vehicle, although there was an informal authority from the vehicle owner to the driver to get the vehicle ready for taxi service.

[37] It is also true that the vehicle had not been through the process of formal checks to ensure that it complied with the various rules, although in fact it did comply. The process of compliance was typically attended to by members of the Board of Hamilton Taxis and one of their complaints about Mr Hassan's actions is that he attended to the compliancing of this vehicle himself.

[38] On the evidence, that is correct, but it is also correct that the vehicle complied with the regulations, the rules and the law. If the New Zealand Transport Agency had done a spot check of that particular vehicle during one of the hires in dispute, they would have found that the vehicle complied.

[39] Mr Hassan maintained at the investigation meeting that the Board had inducted the vehicle into the fleet at its February 2012 meeting but the Authority does not accept that evidence preferring the evidence of Hamilton Taxis on that point. The Authority is satisfied that Mr Hassan attended to the matter himself.

[40] The owner of the vehicle did not know that his vehicle was being used as a taxi for the three hires in question; nor did the owner know that one of the other

members of Hamilton Taxis was driving his vehicle during the three disputed hires, although that driver did have an informal authority from the owner to get the vehicle ready for taxi service.

[41] The very kernel of Mr Hassan's defence of his position is that it is the member of Hamilton Taxis that is the pivotal aspect, not the vehicle. In the three hires in dispute, a member in good standing, using his own modem, provided the service to the customer and on Mr Hassan's evidence, that complied with the spirit and intent of the rules even if it is also true that the vehicle being used had not been formally approved as a taxi by the Board of Directors (although it complied) and the owner of the vehicle, although he anticipated the vehicle becoming a taxi on his return to New Zealand, had not specifically authorised its use for hire on these three occasions, nor had he specifically approved the driving of his vehicle by another member of Hamilton Taxis.

[42] The Authority has been persuaded that Mr Hassan's understanding of the position is to be preferred over the understanding of Hamilton Taxis. They have taken what might be called a "bolt and braces" approach to the rules and sought to identify all of the alleged breaches committed by Mr Hassan. But the reality is that what Mr Hassan did was facilitate further business for Hamilton Taxis in the context of providing a service on what might be said was an innovative basis, but without in any way fundamentally breaching either the law or the various rules.

[43] In particular, the Authority is persuaded that Mr Hassan's reliance on the guiding principle being the member of the Society rather than the nature of the vehicle, is the appropriate one in all the circumstances. As a matter of fact, the vehicle did comply with the rules although it was not formally complied by the Board of Directors, as the rules seem to require.

[44] Mr Hassan's evidence is that in any event, he had some implied authority as the manager to vary those arrangements in exceptional circumstances.

[45] The Authority agrees with that view. The rules are full of examples where there is a reference to the manager having the authority to deal with breaches of the rules or deal with complaints from customers. It is difficult to see how, in the particular circumstances, of these three hires, Mr Hassan should have had to have

recourse to the Directors in order to ensure that Hamilton Taxis retained this particular piece of business.

[46] If, as Hamilton Taxis contend, Mr Hassan breached various of the rules, then in the Authority's opinion those breaches are more apparent than real and the essence of what Mr Hassan did was to ensure that the Society was able to fulfil its legal obligations to provide a 24 hour 7 day a week service with a longstanding existing customer using a van that complied with the law being driven by a member of the Society using his unique modem for the work in question.

[47] Although Mr Hassan does not make this point himself, it seems to the Authority appropriate to observe that there was nothing in this transaction for Mr Hassan personally. There is no suggestion that Mr Hassan benefited financially or in any other way from the provision of this particular service to this particular client. All he was doing was trying to fulfil his obligations to the employer.

[48] Mr Hassan was the person in control of the Hamilton Taxis for the purposes of the New Zealand Transport Agency. The evidence suggests that the Agency had a good opinion of Mr Hassan and the Authority is satisfied that he knew as much about the rules as anybody.

[49] Looking at the position from Hamilton Taxis' standpoint, they see a breach of various rules. First, they say that the owner of the vehicle did not know that the vehicle was being used as a taxi. That is true, but the owner of the vehicle intended that the vehicle become a taxi in the short future. Second, Hamilton Taxis say that the owner of the vehicle had not specifically approved the driver of the vehicle. Again that is true and in a technical sense there is a breach of the rules which require that drivers of vehicles who are not also the owners of those vehicles have an executed employment agreement with the owner. But there was an informal authority between the two men which goes some way to satisfying this requirement. Third, Hamilton Taxis say that the vehicle was not specifically complied by the Board of Directors before it became part of the fleet. Again, that is true, but as a matter of fact, the Authority is satisfied on the evidence that the vehicle did comply with the appropriate rules and that Mr Hassan had satisfied himself that that was the position.

[50] In all the circumstances then, even if Mr Hassan is found to have breached each of the rules that the Board of Hamilton Taxis identify, the Authority is not

persuaded that that would be grounds for a good and fair employer to reach the decision that they could dismiss on the grounds of the conduct just described. Indeed, in the Authority's opinion, a good and fair employer could not have concluded that it was competent to dismiss in the particular circumstances of this case. At best, a good and fair employer could have concluded that Mr Hassan should have been perhaps warned about the prospects of overreaching his enthusiasm to do the job, but it seems to the Authority that to dismiss on the basis of this evidence goes far too far.

What about the counterclaim?

[51] The Board seeks a penalty and exemplary damages in respect to a breach by Mr Hassan of a record of settlement reached with another employee. The Authority is not minded to contemplate a penalty in the circumstances. The reference to the record of settlement was probably inadvertent and certainly fleeting and accordingly the Authority is not persuaded the matter needs to be dealt with in a formal sense.

[52] In the same general connection are allegations that Mr Hassan somehow falsified his salary entitlement and paid himself more than he was actually entitled to. For the record, the Authority is not persuaded that is the position at all. The evidence before the Authority suggests that the salary increase was approved by the previous Board, but in any event, that allegation was not part of the basis for dismissal and therefore is not something that the Authority needs to deal with as part of this determination.

[53] Similarly the Board make allegations about Mr Hassan's role in raising a loan, again during the period of the previous Board. The current Board is right to say that the approval for the loan in question was informal, but to blame that entirely on Mr Hassan is, frankly, a little rich. The Authority is absolutely clear that elected Board members were every bit as much involved in the process of obtaining this loan and, in any event, the need for the loan was self-evident; Mr Hassan simply drew to the attention of the then Board the fact that there were outstanding financial obligations which Hamilton Taxis had which could not be properly dealt with without additional debt funding.

[54] Again, the allegations levelled at Mr Hassan in respect to this loan were not part of the reason to dismiss him and need not be dealt on by the Authority now.

Determination

[55] The Authority has found that Mr Hassan has a viable personal grievance because he has been unjustifiably dismissed from his employment, the Authority being satisfied that Hamilton Taxis could not have concluded that Mr Hassan's behaviour was serious misconduct warranting summary dismissal. It follows that Mr Hassan is entitled to have remedies considered, subject to any issues of contribution.

[56] There is nothing in Mr Hassan's conduct that would give the Authority reason to believe that he contributed in any way to the circumstances giving rise to his grievance.

[57] All that can be said is that Hamilton Taxis is a house divided on itself and the various factions within the employer probably did little to assist good employment relationships. That said, there is nothing in the evidence which suggests that Mr Hassan was in any sense the architect of his own misfortunes.

[58] The Authority is satisfied that Mr Hassan is entitled to remedies then and those remedies will be by way of compensation and a contribution to wages lost as a direct result of the loss of the employment.

[59] Mr Hassan claims the entirely fanciful figure of \$100,000 in compensation. That sum is simply outside the remit of the Authority and a much more modest figure is appropriate.

[60] The remedies the Authority awards are as follows:

- (a) Compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 in the sum of \$5,000, the Authority being satisfied that that sum adequately compensates Mr Hassan for his humiliation, loss of dignity and injury to feelings; and
- (b) A contribution to lost wages in the sum of \$11,245 gross being 13 weeks at \$865 per week gross.

Costs

[61] Costs are reserved.

James Crichton
Member of the Employment Relations Authority