

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2022] NZERA 5
3115712

BETWEEN	ANTHONY HENRY Applicant
AND	HARBOUR FISH LIMITED Respondent

Member of Authority: Andrew Dallas

Representatives: Jenny Guthrie, counsel for the Applicant
Brenda Thom, counsel for the Respondent

Investigation Meeting: 30 June 2021 at Dunedin

Submissions and other: Up to, and including, 24 September 2021
material received:

Determination: 17 January 2022

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Anthony Henry was employed by Harbour Fish Limited (Harbour Fish) as a Boat Unloading Supervisor until 31 May 2019, when he was dismissed for serious misconduct. Mr Henry said he was unjustifiably dismissed and claimed statutory remedies including for lost wages and compensation for hurt, humiliation and injury to feelings. Harbour Fish denied Mr Henry's claims and resisted his remedies and said his dismissal was procedurally and substantively justified.

The Authority's Investigation

[2] During the investigation meeting, I heard evidence from Mr Henry, his grandmother and former lawyer. For Harbour Fish, evidence was given by director, Aaron Cooper and accounts/payroll manager, Maree Goddard. Further affidavit evidence, and other information, including in relation to a police complaint made by Harbour Fish about Mr Henry, was also provided to the Authority.¹ Some of this material was requested by the Authority at or after the investigation meeting. Some was not. Ultimately, and notwithstanding these collateral issues, I have concentrated on resolving the employment relationship problem extant between the parties.²

[3] Not surprisingly then, and as permitted by s 174E of the Employment Relations Act 2000 (the Act), this determination does not record all the evidence and submissions received, and fully considered, during the Authority's investigation but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result. Regrettably, this determination is issued outside of the statutory three month timeframe. However, to the extent that exceptional circumstances are required to exist for this to be issued, these do exist.

Issues

[4] The following are the issues for investigation and determination:

- (i) Was Mr Henry's dismissal, and how the decision was made, what a fair and reasonable employer could have done in all the circumstances at the time?;
- (ii) If Harbour Fish's actions were not justified what remedies should be awarded, considering:
 - (a) compensation for humiliation, loss of dignity and injury to feelings under s 123(1)(c)(i) of the Act;
 - (b) compensation for lost wages under s 123(1)(b) of the Act?
- (iii) If any remedies are awarded, should they be reduced under s 124 of the Act for blameworthy conduct by Mr Henry that contributed to the situation giving rise to the grievance;

¹ In his statement of problem, Mr Henry also sought withdrawal of the police complaint made by Harbour Fish. However, the Authority lacks jurisdiction to entertain this; notwithstanding any public policy considerations.

² Employment Relations Act 2000, s 160(3)

- (iv) Should either party contribute the cost of representation of the other?

What caused Mr Henry's employment relationship problem?

[5] There was some confusion in the evidence about when Mr Henry commenced his employment. An ad hoc arrangement seemed to commence in late 2017. On 7 March 2018, Mr Henry received a letter "confirming employment" as "Boat Unloading Supervisor", a job description for "Fish Receiving Supervisor" and a "general terms & conditions of employment". During his employment, Mr Henry was paid \$20 per hour. He said this was \$3 less than the boat unloaders he was supervising. This was a point of contention throughout his employment and was unresolved upon his dismissal.

[6] Mr Henry also said that he was not provided with appropriate personal protective clothing during the course of his employment. He said he was always wet and attributed this, at least in part, to his ill-health which saw him take a number of days sick leave. Harbour Fish said Mr Henry was provided with appropriate, and bespoke, personal protective clothing.

[7] Mr Henry says his duties at Harbour Fish included using his private motor car to pick up and deliver goods. Mr Henry said that in order to facilitate these duties a "casual" agreement was in place between himself and Mr Cooper. Mr Henry said the agreement was reached at a Christmas function on 24 December 2018 and allowed him to use a company fuel card for up to \$100 a week in petrol to recompense him while his hourly wage issue was being worked through. Mr Henry would further claim during the investigation meeting the use of the fuel card was also to recompense him for working for 90 hours a week. In any event, regardless of why the agreement was made, its existence was denied by Mr Cooper.

[8] Harbour Fish's fuel cards, which were linked to fuel supplier McKeown Group, were invoiced monthly. Mr Henry said these invoices were provided to managers and Mr Cooper would occasionally comment on fuel usage at monthly meetings. Mr Cooper also denied this.

[9] The fuel card that Mr Henry said he was authorised to use by Mr Cooper expired in April 2019. Mr Cooper said he saw this expired fuel card in Mr Henry's office and asked him about it. He said Mr Henry told him he meant to destroy it. Mr Cooper then destroyed the fuel card but would discover later it had been used.

[10] On 3 May 2019, Mr Henry, who was about to undertake some deliveries, said he advised Mr Cooper he needed petrol. He said Mr Cooper told him to get the fuel card from the “cray truck”. Mr Henry either took the fuel card at that point and/or, according to the company’s CCTV footage, returned to the workplace on 5 May 2019 and uplifted the card. In any event, Mr Henry used the fuel card to purchase petrol on 5 May (a Sunday) and again on 10 May (a Friday). Between 7 and 10 May, Mr Henry was on sick leave without pay (due to previously exhausting his allocation) but was intending to go to work on 11 May and undertake his usual Saturday deliveries; hence the reason he put more petrol in his car.

Employment investigation

[11] On 10 May 2019, Mr Henry said he got a text message from Mr Cooper telling him someone else was organised to cover his work the next day and asked him to attend a meeting about his “attendance” on 14 May 2019 (Mr Henry did not work on Mondays). Mr Henry said that Mr Cooper subsequently changed the date of the meeting to 16 May and told Mr Henry to bring his medical certificates covering all his absences. Mr Cooper equivocated about the existence of the text messages. They were not produced by either party.

[12] During this period the evidence disclosed that there was a lot of activity behind the scenes as Harbour Fish reviewed fuel card statements, CCTV footage and consulted with its (then) lawyer.

Meeting on 16 May 2019

[13] Mr Henry attended the meeting with Mr Cooper on 16 May 2019. It was common ground Mr Henry was handed a letter pre-prepared by Harbour Fish’s lawyer. The letter set out the allegation (dishonest use of a Harbour Fish fuel card on 5 and 10 May 2019), detailed the evidence the company was relying on to support the allegation, requested a meeting with Mr Henry and a representative of his choosing on 20 May 2019; proposed Mr Henry’s suspension and advised that if the complaint was substantiated a complaint to the Police might be made.

[14] After the meeting, which on the evidence was brief, Mr Henry contacted a lawyer. Mr Henry said Mr Cooper then sent him a text asking him to return all his company property the next day. Seemingly in response, the text message not being produced despite requests, Mr Henry's representative emailed Harbour Fish's lawyer about the request to return company property and suggested a predetermined dismissal outcome of the investigation process. Concern was also expressed about the classification of Mr Henry's conduct as "serious misconduct".

Meeting on 23 May 2019.

[15] Mr Cooper, Mr Henry and the parties then lawyers met on 23 May 2019 to discuss the allegation. Mr Henry provided an explanation about the fuel card use, which he did not deny, summarised as follows:

- (i) Mr Cooper reached a "verbal" agreement with him during a Christmas function on 24 December 2018 which allowed Mr Henry to use a company fuel card to put no more than \$100 of petrol in his own private car after he had used it for work related deliveries;
- (ii) Mr Cooper gave him a fuel card for this purpose;
- (iii) he used the fuel card approximately six times between December 2018 and May 2019 and advised Ms Goddard of each use;
- (iv) he put \$50 petrol in his car on 5 May 2019, after making deliveries in the Mosgiel area;
- (v) he put a further \$40 petrol in his car on 10 May 2019 because he was on unpaid sick leave and could not afford to put petrol in his car and the agreement Mr Cooper was "loose and flexible" so as to allow such additional fuel purchases;
- (vi) he did not have the opportunity to advise Ms Goddard of the purchases because he had not been at work;
- (vii) he did not intend to "steal" from Harbour Fish or otherwise act dishonestly;
- (viii) he knew the petrol purchases would show up in invoices provided to the company, he would be questioned about these and this was evidence of a lack of dishonest motivation;
- (ix) he had a fuel card in his possession from December 2018 to April 2019, when Mr Cooper destroyed it and that was the reason he had to acquire another company fuel card on 5 May 2019.

[16] In a letter dated 27 May 2019 setting out the outcome of the meeting and its subsequent investigations, Harbour Fish rejected Mr Henry's explanation and view of the facts and circumstances. The company said:

- (i) it had now discovered Mr Henry had used fuel cards on eight occasions between December 2018 and May 2019;
- (ii) this was broadly consistent with Mr Henry's admission he had used the fuel cards on approximately six occasions;
- (iii) it only paid reimbursement for work related expenses upon receipt which was consistent with Mr Henry's employment agreement;
- (iv) Ms Goddard denied any knowledge of being advised by Mr Henry about fuel purchases;
- (v) there was no agreement between Mr Cooper and Mr Henry allowing him to use company fuel cards.

[17] Notwithstanding, the company said there was no agreement between Mr Cooper and Mr Henry, Harbour Fish refined its allegation against Mr Henry to that of dishonest use of a company fuel card on 10 May 2019 (while he was on unpaid sick leave) and stating his card use was known about and authorised by Ms Goddard.

[18] Harbour Fish said it accepted Mr Henry's explanation as to the reason for the petrol purchase on 10 May 2019 was because he was on unpaid sick leave and viewed this as dishonest and serious misconduct. Harbour Fish further said that this purchase (and the other seven purchases) was not known about by Ms Goddard nor authorised by her.

[19] Harbour Fish also rejected Mr Henry's disparity of treatment argument because the employee who Mr Henry said conducted himself in apparently similar circumstances, had self-reported to Mr Cooper the next day and was reprimanded by him at a meeting.

Preliminary decision to dismiss

[20] The letter concluded by advising Mr Henry that Harbour Fish had arrived at the preliminary decision to dismiss him and invited him to provide comment on that decision by either attending a meeting on 28 May 2019 or providing a written response, which was also required by 28 May.

[21] Seemingly in response to receiving the letter, Mr Henry's lawyer requested an extension and provided brief comment on Harbour Fish's letter including some inaccuracies, one of which was accepted (that Mr Henry attended the meeting where Mr Cooper reprimanded the other employee for company fuel card use). In response, Harbour Fish proposed a further meeting. This offer was rejected by Mr Henry's lawyer on the basis that Mr Henry could not afford a further meeting and, in effect, the decision to dismiss had already been made. A further email exchange occurred and Mr Henry was provided with fuel invoices. However, Mr Henry did not provide a substantive response to Harbour Fish's letter of 27 May 2019, either in person or in writing.

Decision to dismiss

[22] On 31 May 2019, Harbour Fish's lawyers issued a letter confirming the preliminary decision to dismiss Mr Henry, which was undertaken on a summary basis.

Personal grievance raised

[23] A personal grievance for unjustified dismissed was raised by Mr Henry's current solicitor on 29 August 2019. However, this was not settled by either informal means or mediation and the matter proceeded to the Authority for investigation.

The Authority's view of the employment relationship problem

[24] Harbour Fish submitted it carried out a fair process when investigating allegations of Mr Henry's serious misconduct including compliance with statutory and employment agreement obligations. Harbour Fish said the process it followed was fair and reasonable and within the scope of what a reasonable employer could have done in all the circumstances. I accept this submission.

[25] It certainly may have been prudent for Harbour Fish to be clearer in its initial communication with Mr Henry. However, the purpose of the first meeting, which both parties accept was short, was to provide a letter detailing Harbour Fish's allegations against Mr Henry and the next steps in the investigation. Specifically, the letter set out the allegations, identified the currently available evidence supporting these, requested a meeting with Mr Henry and a representative of his choosing and proposing Mr Henry's

suspension. Harbour Fish then delayed the meeting to accommodate the availability of Mr Henry's lawyer on 20 May 2019, the proposed date for the meeting.

[26] During the meeting, Mr Henry actually admitted to more conduct than was initially alleged – that is, use of the fuel cards approximately six times as against twice as alleged by Harbour Fish – and said this had been authorised by Ms Goddard. Subsequent investigation by the company confirmed Mr Henry used of the fuel card eight times over a seven month period. Further, Ms Goddard vehemently denied knowing, let alone authorising, Mr Henry's use of the fuel cards; including during her written and oral evidence to the Authority.

[27] There were a number of inconsistencies in Mr Henry's evidence between what he said at the disciplinary meeting, in his witness statement and at the Authority's investigation meeting which could not be reconciled. For example:

- (i) Mr Henry said during the investigation meeting the use of the fuel card was also to recompense him for working for "90 hours a week" which was not supported by wage and time records;
- (ii) Mr Henry also said reference to "90 hours a week" in his written evidence was a typographic error;
- (iii) Mr Henry also said he was on "ACC" at the time he was asked to attend a meeting on 16 May 2019 by Harbour Fish;
- (iv) Mr Henry accepted he knew about Harbour Fish's reimbursement procedure and had been reimbursed for petrol use through it during his employment.

[28] Finally, for completeness, Mr Henry also raised the issue of disparity of treatment between himself and another employee. However, upon assessment of the evidence provided by the parties, I find Mr Henry's argument falls at the first hurdle of the test enunciated by the Court of Appeal in *Chief Executive of the Department of Inland Revenue v Buchanan*³ being that there must have been a disparity of treatment.

³ (No 2) [2005] ERNZ 767 (CA)

Could a fair and reasonable employer have reached in all the circumstances the decision to dismiss Mr Henry?

[29] I find that Harbour Fish carried out fair and adequate employment investigation.⁴ I further find, Harbour Fish's investigation yielded a proper and substantive basis to justify Mr Henry's dismissal including in circumstances where aspects of the misconduct were admitted.

[30] A fair and reasonable employer could have concluded Mr Henry's actions in this matter amounted to misconduct that was so serious so as to deeply impair or destroy trust and confidence and justify dismissal. Consequently, I find that the decision to dismiss Mr Henry was one a fair and reasonable employer could have reached in all the circumstances at the time.

[31] Having found Harbour Fish was justified in dismissing Mr Henry, it is not necessary to consider remedies.

Costs

[32] Costs are reserved. I understand Mr Henry had a grant of legal aid to bring these proceedings in the Authority. Consequently, the question of costs may be subject to the requirements of ss 45 and 46 of the Legal Services Act 2011.

[33] If a determination of the Authority is required on costs, Harbour Fish may lodge a memorandum within 28 days of the date of this determination and Mr Henry would then have 14 days from the date of service to lodge a memorandum in reply. No submissions on costs will be considered outside this timetable, unless prior leave has been sought.

Andrew Dallas
Chief of the Employment Relations Authority

⁴ Employment Relations Act, s 103(A)