

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2013] NZERA Wellington 38  
5382582

BETWEEN                      DARREN JONAS  
   Applicant  
  
A N D                              MENEFY TRUCKING  
   LIMITED  
   Respondent

Member of Authority:      G J Wood  
  
Representatives:              Caroline Rieger for Applicant  
   Ray Parmenter for Respondent  
  
Investigation Meeting:      5 March 2013 at Wellington  
  
Submissions Received:      5 March 2013  
  
Date of Determination:      26 March 2013

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]      The applicant, Mr Darren Jonas, claims that he was unjustifiably suspended and then dismissed from his position as a truck driver by the respondent (Menefy). In addition, he claims that he was underpaid during the course of his employment for hours worked in excess of his logbook hours, for time spent on interisland ferries and \$1,600 in improper deductions from his pay, including his final pay.

[2]      During the course of the investigation meeting Menefy agreed that it should have paid Mr Jonas for the one day that he was not at work while Menefy investigated allegations against him, but otherwise claims that he was treated fairly throughout his employment.

**Factual discussion**

[3] Menefy is a line haul operator employing around 13 staff. It has engaged a human resources advisor to assist it in its employment relations. Mr Jonas started work for Menefy as a truck driver on 14 November 2011. In the first four months of his employment there were a number of incidents of concern to Menefy, as a result of alleged negligence by Mr Jonas. The first involved a plastic coil falling off his truck onto State Highway One. The second involved damaging the tyres of his truck at a petrol station. The cost of repairs to the tyres was \$1,456.39. Mr Jonas admits that he was negligent, resulting in the tyre damage, but does not accept full responsibility for the coil incident.

[4] In March there were a number of disputes over Mr Jonas' hours of work, which he supplies by timesheet, resulting in deductions from his claimed hours of work. It is not straightforward to determine whether these deductions were legitimate, but they led to discussions over whether Mr Jonas should have been taking his truck cab home. It is not however necessary to determine this particular issue in dispute.

[5] On 15 March the principal of Menefy, Mr Bryan Menefy, issued a written warning to Mr Jonas for using "*company equipment for personal use*". Menefy then decided to deduct \$100 from Mr Jonas' next pay, for misuse of the truck. I find that Mr Menefy simply telling Mr Jonas that this was what was going to happen and him not disputing the matter does not constitute agreement. I therefore conclude that Mr Jonas never agreed to this deduction.

[6] Issues were then overtaken by an event at a customer's premises that Mr Menefy had recently become aware of. On 29 March 2012 he wrote to Mr Jonas, stating as follows:

*Dear Darren*

*I require you to attend a meeting with me on Monday 2 April 2012 at 8am so that I can hear, and consider, your explanation for the incident that occurred on 22 March 2012, when you drove over a customer's gate and gate-post when exiting their site. I am concerned that this is your third significant event of damage when driving one of our trucks.*

*Prior to the event you advised me over the telephone that you would have trouble exiting the site due to the restricted access way. However you did manage to enter without any problem, through the same gate. I advised you to arrange for the exit to be cleared during*

*the hour that it took to discharge your truck, something that you failed to do. The site supervisor was within speaking distance of you at that time. After discharging the load you then drove out of the site flattening the gate and the gate-post. You did not stop after this and instead continued driving and you did not report the damage to the customer.*

*Approximately 15 minutes later you spoke with Steve (our dispatcher). You informed Steve that you knew what you had done at the time. Steve said that you had a careless attitude. Steve has provided me with written description of the conversation. I have attached a copy of Steve's description for your reference.*

*I am also concerned that you did not stop and check the condition of the truck and whether it was safe to operate on the road.*

*This is an event that concerns me considerably, you have been reckless, careless and it would seem, have acted deliberately. The allegations that I put to you are:*

- *You have demonstrated a negligent approach to your driving.*
- *You have demonstrated a serious breach of your obligations as an employee to operate a truck safely.*
- *Your actions and conduct have potentially brought Menefy Trucking Ltd into disrepute.*
- *Your actions appear to be deliberate and have caused significant damage to a customer's property and to our truck.*

*I consider that these matters might constitute serious misconduct and, should they be established, destroy the trust and confidence I have in you to safely drive our truck, and to act in the best interests of Menefy Trucking. If, after hearing and considering your explanation, I determine that these matters do constitute serious misconduct then you might be subject to disciplinary action, up to and including summary dismissal.*

*You are welcome to bring a representative with you to this meeting, should the date and time of this meeting not suit you, please let me know as soon as possible so that we can arrange an alternate time.*

[7] The attachment stated:

*I had a phone call from Darren. He told me that he hit the gate on the way out of the customers. I asked was he alright, yes Darren said.*

*I then asked about the damage. I've bent a pole and taken the gate off it's hinges. I asked how he did that. Darren said he went inside to ask the staff to move their cars, four cars were moved. Darren said after hitting the gate/pole that they should have moved more cars.*

*I told Darren if he need the extra cars moved he should have stopped and gone back in to the reception and asked. I asked what he did next. Darren said he drove off, the gate was near the fence. I asked him if he reported the damage to the customer, 'no' was the reply. I asked where he was and Darren replied on the motorway.*

*I said that he should have told the customer about the damage for safety reasons and that it also looks bad for Menefy's company. He replied 'oh yeah' what's my next job.*

[8] Mr Jonas received the letter on the Friday and the meeting was scheduled for Monday. His representative was not available until the next day, Tuesday 3 April. Mr Jonas was not offered any work on 2 April and was not paid, although this will be remedied by Menefy.

[9] Mr Menefy told Mr Jonas that he did not want him at work driving his trucks while the whole matter was being sorted out. In addition, Menefy cut off the work cell phone Mr Jonas had been provided with, thus making contact with him more difficult.

[10] Unfortunately the meeting, which was run by Mr Menefy, degenerated into a shouting match between Mr Menefy and Mr Jonas, particularly towards the end, with both men angry and swearing at each other. This reflects badly on both of them, but particularly Mr Menefy, who was responsible for controlling the meeting, yet appeared to be more of an aggressor than Mr Jonas, who took his lead from Mr Menefy.

[11] Despite the angry exchanges, the prime issue, namely what happened at the customer's site, was adequately covered off at the meeting. In particular, Mr Jonas was able to explain that there were problems with access and exiting the customer site, that a number of cars had been shifted in order to help remedy this, but that insufficient numbers had been shifted. He was also able to explain that he had made a genuine error in hitting the gate. Mr Jonas accepted that he should have returned to the customer to inform them of the damage to the gate, but stated that he was flustered and that he was pushed for time, because he had other jobs to do that day.

[12] Mr Jonas's representative at the time (not Ms Rieger) called an adjournment at one point because the parties were so angry at each other. He went to talk to Mr Menefy in the corridor and claims that at that point Mr Menefy made statements that showed that he had predetermined dismissal. It was Mr Jonas' representative's evidence that he then engaged Mr Menefy in a without prejudice discussion on how to resolve matters, after explaining to Mr Menefy what without prejudice meant. Mr Menefy denies that he made any such comments.

[13] I find both the representative and Mr Menefy to be credible witnesses. On the balance of probabilities I conclude that the representative is mistaken as to when these statements were made. I find that Mr Menefy's alleged comments were made, but during the course of the without prejudice discussions, and thus the representative was mistaken about the timing of the comments. I conclude that this is the most likely explanation because Mr Menefy was under clear instructions from his human resources advisor not to make any comments that would evidence predetermination, and because Mr Jonas's former representative never raised predetermination as a claim when raising the personal grievance with Menefy, or in filing the statement of problem on Mr Jonas' behalf in the Authority. Given that I have concluded that the comments were made during without prejudice discussions, they are not admissible and can not be taken into account.

[14] At the resumption of the meeting Mr Menefy made it clear that he did not want Mr Jonas driving while the investigation process was in train. Mr Jonas' representative claimed that this was the continuation of an unlawful suspension, to which Mr Menefy responded that Mr Jonas could come in and sweep the yard. Mr Jonas made it clear that he could not work the rest of that day because he had to get home and take his representative home, both of them living in Wellington - the place of work and the meeting being Palmerston North. There was no discussion about work the next day.

[15] On 4 April Mr Menefy emailed Mr Jonas's representative suggesting a further meeting with Mr Jonas, either in person or by telephone conference. This followed a telephone discussion whereby the representative told Mr Menefy there was little point in another meeting when it was clear that Mr Menefy had already made his decision to dismiss Mr Jonas. The email noted this conversation, but asked whether there were any further matters that Mr Menefy should take into consideration before a final decision was made. He also asked for comments on the response of the customer, who had said that on the day there were fewer obstructions to entry and exit than usual. Mr Menefy also sought comment on the fact that Mr Jonas had previously driven through the gate without problems, as had other drivers.

[16] Mr Menefy also made it clear that it "*seems likely that I will dismiss Darren. However, before I make that decision I would like to ask Darren whether there is any further explanation he can provide*".

[17] There was no response and on 5 April Mr Menefy emailed Mr Jonas' representative informing him that Mr Jonas was to be dismissed, effective immediately. Mr Jonas was dismissed because of his responsibility to inform the customer of an accident. Following a final act of serious misconduct Mr Menefy concluded that given there had been three accidents in the course of a little over four months involving Mr Jonas there was no reason that he should not be dismissed.

[18] Mr Jonas did not receive his final pay for over two months, despite the requirement under the Holidays Act 2003 for immediate payment. When he was finally paid, deductions were made of \$805 for the repair of the gate and \$775.95 for new keys for the business. I accept that Mr Jonas either returned his set of keys or they never left Menefy's premises, which in either case means that he was not responsible for their loss.

[19] Mr Jonas never received back his own property that was left in his vehicle. Nevertheless I accept that it was available for him to uplift at Menefy's Palmerston North premises.

## **Determination**

### *Unpaid wages*

[20] Clause 8.6 of the parties' employment agreement states:

*[8.6] The employee accepts that they may frequently be required to stay away from home. Off duty time while staying away shall be unpaid.*

[21] Clause 9.0 deals with meal and rest intervals. It states:

*Drivers are only permitted meal and rest intervals which are:*

- i. required to comply with traffic regulations; or*
- ii. at the request of the employer; or*
- iii. needed to ensure health and safety, and the employer has been advised. These meal and rest intervals are unpaid.*

[22] The employment agreement does not provide directly for what happens when a driver takes a truck across the Cook Strait, as Mr Jonas was required to do on many occasions. I accept from the New Zealand Transport Agency's rules and fact sheets

that, for the purposes of logbook hours, work time includes both driving and all other work related activities and that rest time is all time that is not work time and is not spent in a moving work vehicle. The provisions specifically provide for ferry crossings, which can be counted as a rest break, although actual ferry departure and arrival times must be recorded as the start and end of a rest break.

[23] Given ferry crossings may be counted as rest breaks, that the employment agreement states that rest breaks are not paid and that Mr Jonas never claimed for these payments during the course of his employment, I conclude that he is not entitled to lost remuneration during those periods. I also do not accept Mr Jonas' claim that he was waiting for 11 hours in his truck for a load in Auckland, on the basis that he did not make a claim for this period at the time.

### ***Deductions***

[24] Clause 10.4 of the employment agreement states:

*It is agreed by the employee that the employer may make deductions from the salary of the employee for:*

- a. Traffic fines imposed against vehicles under the responsibility of the employee;*
- b. Damage to vehicles or other property caused by the employee's negligence;*
- c. Other items which the employee agrees that the employer should pay and then have deducted from the employee's wages;*
- d. The value of non-returned tools, equipment, clothing or other property of the employer (at a fair value to be determined by the employer) upon determination of employment ...*

[25] Mr Menefy was not entitled to deduct \$100 from Mr Jonas' pay for parking and using the company's truck to get to and from the work depot, as he did not agree to it, and this is required under clause 10.4. Menefy is also not entitled to deduct \$775.95 for the keys as Mr Jonas did not fail to return them. Menefy was entitled, however, to deduct \$805 for the repairs to the gate, because Mr Jonas did agree that he was negligent in causing that damage and has never disputed the cost of the repairs.

### *Suspension*

[26] It is clear that Mr Jonas was suspended, at least until the disciplinary meeting. While Mr Jonas raised no separate personal grievance over his claims that the suspension was unjustifiable, Menefy has been on notice of this issue throughout, as part of his unjustified dismissal claim. Section 122 provides that personal grievances may be of another type than alleged – here unjustified disadvantage rather than dismissal. Suspension without consultation or pay in circumstances such as these, without contractual sanction, can not be justified.

[27] Mr Jonas is entitled to be paid up until the date of dismissal, namely 5 April, constituting four days pay, and this would be so on a contractual as well as disadvantage basis. This is because Menefy had made it clear that they did not want Mr Jonas back during the course of the investigation, prior to the disciplinary meeting. At the end of the disciplinary meeting Mr Menefy did make a suggestion that Mr Jonas could sweep the yard, but it was clear that Mr Jonas had to return to Wellington with his representative. He made no further attempts to contact Mr Jonas, which he would have done had he expected him to come to work. In addition, Mr Jonas was a truck driver and Mr Menefy was not going to allow him to drive Menefy's trucks. I therefore conclude that his offer to allow Mr Jonas to sweep the yard for the next two or three days to not be genuine. Mr Jonas is therefore entitled to lost remuneration of 32 hours pay, namely \$704 gross.

[28] Mr Jonas gave limited evidence about how he felt that his suspension meant that he was likely to be dismissed, and his annoyance about not being paid. In these circumstances compensation of \$1,000 is appropriate.

### *Dismissal*

[29] I accept Mr Menefy's evidence that he dismissed Mr Jonas on the basis of his hitting the customer's gate, which was negligent, and then, crucially, failing to inform the customer of the serious damage to the gate. The previous warnings and other errors of judgment were simply background reasons as to why dismissal was the option chosen once serious misconduct had been found, rather than any other option such as a final warning.

[30] Mr Menefy stuck to the script provided by his advisor, to the extent at least that the above issue was properly canvassed between the parties. It was open to

Menefy as a fair and reasonable employer to decline to accept Mr Jonas's explanation about the accident, because he and others had got through those gates with a vehicle like his on many previous occasions without accident. Furthermore, Mr Jonas' embarrassment was no good reason to fail to inform the customer that its gate had been damaged and left open. The customer's security could have been put at risk.

[31] It was also open to Menefy to conclude that it was no excuse that Mr Jonas was busy with other jobs, and that to simply inform the dispatcher later was insufficient action on his part. Menefy was therefore entitled to conclude that it could no longer have trust and confidence in Mr Jonas to do his job properly when he had made such a fundamental series of errors.

[32] I accept Menefy's evidence that the least one could expect of a driver in these circumstances was to contact the customer directly. No doubt it was simply out of embarrassment that Mr Jonas failed to do so. Given the other incidents throughout Mr Jonas' short term of employment, there were therefore sufficient grounds to also justify the conclusion that Menefy could not have trust and confidence in him to carry out his duties to a reasonable standard in the future.

[33] The procedure adopted by Menefy was not ideal. Certainly Mr Menefy's behaviour at the investigation meeting was unreasonable and was unlikely to enable him to properly assess the allegations against Mr Jonas. However, on the evidence, particularly that of Mr Jonas' own representative, there was sufficient investigation of the allegations, and Mr Jonas clearly knew what was being investigated and had a reasonable opportunity to respond.

[34] I also accept that Mr Jonas' explanation was genuinely considered by Mr Menefy. He did not predetermine the matter. It was open to him, however, as a fair and reasonable employer, to consider that the matter was serious and could have justified dismissal in the absence of a good explanation. That is not predetermination.

[35] I conclude that any defects in the process set out above were therefore minor and did not result in Mr Jonas being treated unfairly. I therefore dismiss the claim for unjustified dismissal.

**Remedies**

[36] I therefore order the respondent, Menefy Trucking Limited, to pay to the applicant, Mr Darren Jonas, the following sums:

- \$704 gross for lost remuneration during the period of suspension;
- \$1,000 in compensation under s.123(1)(c)(i); and
- \$875.95 net in unlawful deductions from his pay.

**Costs**

[37] Costs are reserved.

**G J Wood**  
**Member of the Employment Relations Authority**