IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

Determination Number: WA 90/07
File Number 5052507

BETWEEN	Brian Kessell	(Applicant)
AND	Harris Transport (1974) Limited	(Respondent)
Member of Authority	G J Wood	
Representatives	Graeme Gowland for Applicant Sharon France for Respondent	
Investigation Meeting	Wellington 27 April 2007	
Date of Determination	6 June 2007	

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Kessell claims that his dismissal by the respondent (Harris Transport) was unjustified and the warnings that preceded it constituted unjustifiable actions to his disadvantage. He also claims that Harris Transport is liable to statutory penalties for breach of contract and breach of the provisions of good faith.

[2] By contrast, Harris Transport claims that Mr Kessell was justifiably dismissed for serious misconduct following three written warnings.

The Facts

[3] Mr Kessell was employed by Mr Jason Beer, Harris Transport's principal, in September 2005 as its Operations Manager. Harris Transport focuses on relocation work. Mr Kessell's key role was to schedule the jobs available to Harris Transport amongst its various vehicles and organise the staff to run the operation. Mr Kessell was paid $750 a week for a 50 hour week.

[4] Because of the tight labour market and pay rates provided by Harris Transport, it had difficulty recruiting and retaining staff. This meant that Mr Kessell and Mr Beer, particularly as much of the work was casual or intermittent in nature, had to rely on staff that were not entirely reliable for a number of reasons.

[5] Mr Kessell was particularly concerned about alcohol and drug problems amongst staff and there were some difficulties, in Mr Kessell's opinion, with Mr Beer not taking a strong enough line against offenders. In particular, Mr Kessell had problems on two occasions with staff which turned into physical altercations. He was concerned that Mr Beer did not do enough to support him on these occasions. I am satisfied that these events, which took place well before Mr Kessell's employment was terminated, are not central to the resolution of Mr Kessell's employment relationship problem. I therefore do not refer to them again.

[6] In turn, Mr Beer had particular concerns about Mr Kessell's work habits in that Mr Beer believed that Mr Kessell took too long to do the work required and that he often forgot to undertake key tasks in terms of the scheduling of work and staff. Mr Kessell is a diabetic and unfortunately often neglected to take his medication or neglected his food and liquid intake, which led to him sometimes suffering from the effects of diabetes, often at the end of the working day. As a result, he often forgot things and muddled them up, particularly at the end of the day. This caused Mr Beer particular concern, as he was unaware of Mr Kessell's diabetic condition.

[7] Mr Beer became more and more concerned about Mr Kessell's forgetfulness, which resulted in damage to the business in that jobs were delayed or lost as a result. Matters reached a head as far as Mr Beer was concerned when he was abused for being several hours late to a job. He blamed Mr Kessell because he, Mr Beer, had not been informed of problems that had occurred. These problems were that somehow two jobs were booked for the same time and Mr Kessell could not (obviously) satisfy both clients.

[8] Mr Beer is, of his own admission, someone who prefers not to have direct confrontations with people. He also accepted that having to tell Mr Kessell of his obligations so often; it was only a matter of time in his mind before he would lose his cool. He therefore determined that it would be easier to deal with Mr Kessell over issues from then on in writing, rather than have to go back over matters with Mr Kessell and potentially lose his temper. He therefore wrote to Mr Kessell on 2 January 2006, issuing him with a written warning and reminding that it was his job to coordinate the bookings.

[9] Matters did not improve, however, from Mr Beer's perspective. Mr Kessell was required to inform clients if a vehicle was going to be late. He forgot to do so with a particular client on Saturday, 6 May. Mr Beer was already aware of this when Mr Kessell apologised to him on the following Monday. Later, however, Mr Kessell received another written warning, along the same lines as the first one, and said to be a second written warning.

[10] Problems with Mr Kessell's performance continued in Mr Beer's opinion. In September there were other issues over trucks having to be redirected after Mr Kessell had failed to inform drivers of changes in arrangements. In one case, it was possible that a driver was equally to blame as Mr Kessell. When the issues were raised with Mr Kessell, he stated to Mr Beer that he had forgotten to make the required alterations to the delivery schedules. Mr Beer took no action.

[11] For reasons that are not clear (and which Mr Beer could not recall), there was a delay of around two weeks before Mr Beer decided to issue Mr Kessell with a third written warning. The warning simply set out the mistakes that Mr Beer considered Mr Kessell was responsible for, although he accepted in evidence that one of the three was probably as much the driver's fault as Mr Kessell's.

[12] Unfortunately, that very same day there was a problem with a pick up in Taumarunui as a result of Mr Kessell changing long haul rosters and schedules without fully informing all the drivers. As a result, a day's work for one truck was lost. This made Mr Beer very angry. He wanted to discuss the matter with Mr Kessell that evening. Mr Beer, in his own words, tore strips off Mr Kessell for repeatedly failing to follow instructions regarding the long haul timetable and holding trucks behind schedule. Mr Kessell became very upset and decided that he was best to leave for the evening, given Mr Beer's temper and the tone of his remarks.

[13] The next day, Mr Kessell did not attend work because of illness. Mr Beer's evidence was that he was not surprised that Mr Kessell did not turn up, given that he had run out of patience with Mr Kessell the night before, the tone of voice and the bad language that he had used and that Mr Kessell had "stormed off".

[14] Mr Kessell sent an email to Mr Beer the next Monday, informing him of his illness. Mr Beer wrote back the same morning stating:

> *"Good morning Brian,*
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> *As of today, 25 September 2006, Harris Transport (1974) Limited gives notice that, due to performance issues your employment will cease.*
>
> *Your contract states two weeks' notice must be given and as such you will be paid for this period, while not being required to work.*

At the end of the above period all holiday pay owing will be paid.

Harris Transport requires that all uniforms, keys etc be returned as soon as possible.

Regards,

Jason Beer
Manager"

[15] Despite this email, in its statement in reply, Harris Transport categorised Mr Kessell's dismissal as dismissal for serious misconduct.

[16] Mr Kessell was unable to find alternative work for another two months, when he obtained his present position. Unfortunately that position pays less than his job as Operations Manager for Harris Transport.

[17] The parties have attended mediation but were unable to resolve the employment relationship problem that flowed from Mr Kessell's dismissal. It therefore falls to the Authority to make a determination.

The Law

[18] An employer's actions must be assessed in terms of events that took place at the time and for the reasons given at the time (Section 103A refers). Dismissal for serious misconduct is different from dismissal for misconduct, such as for poor performance in that, in the latter, warnings and notice must be given. In the employment agreement between the parties, a distinction is drawn between general termination and termination for serious misconduct. Serious misconduct includes, but is not limited to, serious or repeated failure to follow reasonable instructions.

[19] In *Trotter v. Telecom Corporation of New Zealand Ltd* [1993] 2 ERNZ 659, the Employment Court set out the following conditions in relation to dismissal for poor performance, as summarised in the head note below:

> *"(2) … These requirements mean that the employee, who may potentially be dismissed for poor performance, must be given specific reasons for the dissatisfaction and a reasonably specific and measurable improvement should then be demanded by the employer, giving a reasonable period to establish whether the employee is able to achieve the improvement. The trial of the employee's work must be fair and the results at the end of the trial period considered dispassionately. The employer should take into account an employee's previous good record and the possibility of redeployment.*
>
> *(3) Without a fair trial of the employee's capacity the employer has no reasonable basis for reaching a conclusion adverse to the employee and must be treated as if it had not in fact reached such a conclusion (*Airline Stewards*, below).*
>
> *(4) If poor performance is established by a fair trial/investigation, the employer must still consider whether the employee is so deficient as to entitle a fair and reasonable employer to dismiss.*

> *(5) Warnings for poor work performance should be explicit and fair. They should describe how an employee's behaviour is deemed to be unsatisfactory, give clear information about what improvement will meet the employer's requirements, and how improvement will be measured. Their purpose is to give an employee an opportunity to improve, and to enable dismissal to be averted. They may not be used to create a pretext for dismissal.*
>
> *(6) The following list (not necessarily exhaustive) of questions should be asked when considering dismissal for poor performance:*
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> *(a) Did the employer in fact become dissatisfied with the employee's performance?*
>
> *(b) Did the employer inform the employee of the dissatisfaction and set out the expected standard?*
>
> *(c) Were the criticisms and future requirements objective and readily comprehensible by the employee?*
>
> *(d) Was reasonable time allowed for the attainment of the required standards?*
>
> *(e) After the above had been done, did the employer turn its mind fairly to the question whether the employee had achieved what was expected, including:*
>
> *(i) Using an objective assessment of measurable targets;*
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> *(ii) Giving the employee an opportunity to answer the conclusions arising from the trial period;*
>
> *(iii) Listening to the employee's explanation with an open mind;*
>
> *(iv) Considering the explanation and all favourable aspects of the employee's service record and any fault on the part of the employer in terms of poor training, management, or promotion;*
>
> *(v) Exhausting all possible remedial steps such as training, counselling, and redeployment?"*

[20] Although penalties may be awarded for breaches of good faith, such penalties are not to be added to remedies awarded for unjustifiable dismissal in the normal course of events, because to do so would result in double counting.

Determination

[21] This was clearly a dismissal for poor performance, as Mr Beer's own email and evidence demonstrated. I conclude that the statement in reply and Mr Beer's written evidence were merely attempts to justify a dismissal where the basic tenets set out in *Trotter* were not followed. In any event, the test set out in the employment agreement, of serious or repeated failure to follow reasonable instructions, requires an element of deliberateness by an employee. As Mr Beer himself acknowledged, the problem was with Mr Kessell's memory and not any deliberate failure to follow instructions on his part.

[22] The whole disciplinary and dismissal procedure adopted by Mr Beer was fundamentally flawed because Mr Kessell had minimal involvement in it. The reasons for the warnings, for instance, were only raised with Mr Kessell cursorily, if at all. While they described what was

unsatisfactory about his performance, they did not give clear information about what improvements would meet Harris Transport's requirements or how any improvement would be measured, including the fixing of any time periods for a trial.

[23] Thus, while Harris Transport did in fact become dissatisfied with Mr Kessell's performance, and he was informed of the dissatisfaction, and the expected standards were set in minimal terms, no time period was allowed for the attainment of the required standards. Following that flawed process, Mr Kessell was not at all involved in any reasoned assessment of the final issue that led to his dismissal and he was thus given no fair opportunity to answer Harris Transport's concerns. Such opportunity should have involved a disciplinary meeting at which he could have been represented, for instance. At that point he may well have disclosed his medical problems, which may have altered Mr Beer's perspective on his behaviour. All these failures mean that Mr Kessell's dismissal was unjustified, in particular as how Harris Transport acted was not how a fair and reasonable employer would have acted in the circumstances (s.103A applied).

[24] Mr Kessell was greatly distressed by his sudden dismissal, taking place as it did by email. His wife's evidence clearly set out the impact of the ongoing series of warnings and the dismissal on him, which involved him suffering from depression and financial hardship. In all the circumstances, I conclude that the impact on Mr Kessell was such as to warrant compensation of $12,000.

[25] Mr Kessell is also entitled to claim lost remuneration for the two months that he was unemployed, and for reduced remuneration he has received for the balance of the period since. In all the circumstances of this case, it is appropriate to therefore consider the statutory period of three months' lost remuneration as being appropriate, given that in his new job Mr Kessell has not been required to work as many hours as he did at Harris Transport.

[26] These remedies must, however, be reduced if the actions of Mr Kessell contributed towards the situation which gave rise to the personal grievance. In this case, even although Mr Kessell's forgetfulness was occasioned by a medical condition for which he should not be punished, there are two reasons why his poor performance in these areas may be construed as blameworthy enough to constitute actions that contributed to his dismissal. First, Mr Kessell, not Harris Transport, is responsible for the proper management of his diabetic condition. If he had managed his condition better, he may not have suffered from the memory problems that did result from his diabetes. Second, while Mr Kessell has to live with his diabetes, Harris Transport is not required to pay for the results of his illness on Harris Transport's business and it could have alleviated matters in part if Mr Kessell had informed it of his condition.

[27] In this case, I am satisfied from Mr Kessell's own evidence that he was responsible for many of the issues that Mr Beer had concerns over and therefore he must take responsibility for some of the problems that befell him in his employment. On the other hand, Mr Kessell was not at all responsible for the gross breaches of fair and reasonable treatment by Harris Transport highlighted above. In all the circumstances of this case, I conclude that an appropriate reduction is one third.

[28] In these circumstances I conclude that penalties are not required in addition to the above awards to meet the justice of the case.

[29] I therefore order the respondent, Harris Transport (1974) Limited to pay to the applicant, Mr Brian Kessell, $8,000 in compensation and $6,500 gross in lost remuneration.

Costs

[30] Costs are reserved.

G J Wood
Member of the Employment Relations Authority