

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

[2013] NZERA Christchurch 82
5394918

BETWEEN PETER DONALD LEITH
 Applicant

AND HYSLOP BLAIR TRANSPORT
 LMIITED
 Respondent

Member of Authority: M B Loftus

Representatives: Phillip de Wattignar, Advocate for Applicant
 Rachel Brazil, Counsel for Respondent

Investigation Meeting: 17 April 2013 at Dunedin

Submissions received: At the investigation meeting

Determination: 9 May 2013

DETERMINATION OF THE AUTHORITY

- A. Mr Leith was not unjustifiably dismissed.**
- B. HBT's failure to produce a written employment agreement does not warrant the imposition of a penalty.**
- C. Costs are reserved.**

Employment relationship problem

[1] The applicant, Mr Peter Leith, claims he was unjustifiably dismissed by the respondent, Hyslop Blair Transport Limited (HBT), on 4 June 2012. He also seeks a penalty for HBT's failure to provide a written employment agreement as required by s.63A and s.64 of the Employment Relations Act 2000.

[2] HBT accepts it dismissed Mr Leith but contends its actions were justified. It also accepts Mr Leith was never received a written employment agreement but contends the circumstances do not warrant the imposition of a penalty.

Background

[3] HBT employed Mr Leith as a driver in September 2011. This was the result of a request from a mutual friend of Messrs Leith and Hyslop (a director of HBT) aimed at assisting Mr Leith who was, at the time, undergoing counselling for depression. He was also receiving treatment for cannabis addiction. Mr Hyslop was made aware of the former but not the latter.

[4] All progressed well until the events of May 2012. Early that month Mr Leith requested a days' leave to go Court to support a friend. The request was approved. He made a similar request a couple of weeks later which was also approved. What he neglected to tell Mr Hyslop was he was appearing the same day as his friend (25 May 2012). He was convicted for cultivating cannabis for his own use.

[5] Mr Hyslop became aware of the conviction when it was reported in the *Otago Daily Times* the following day. He telephoned Mr Leith and said the two needed to talk. They agreed to meet on 27 May 2012 at Mr Leith's residence.

[6] The meeting was a long one (approximately an hour), and the parties agree it was conducted in a convivial manner. Mr Hyslop took brief notes of the meeting and Mr Leith agrees they accurately reflect the key points. Pertinent therein is an admission from Mr Leith he had regularly smoked cannabis for some 30 years along with a statement he never smoked and came to work as he usually limited his use to a Friday night. The notes also record the parties discussed rehabilitation programmes and the fact Mr Leith was planning to take steps to stop smoking both cannabis and tobacco. The outcome of the meeting was an agreement Mr Leith would be suspended on pay while Mr Hyslop considered his next step.

[7] The meeting was followed by a letter from Mr Hyslop to Mr Leith dated 30 May 2012. It opens by stating Mr Hyslop had concerns relating to the recent conviction before advising:

In particular I would like to hear from you on the following points:

1. *The potential danger to other motorists if you were to drive under the influence or affects of drugs. I believe cannabis can stay in the body for periods of time and lead to impairment when driving.*
2. *The potential for damage to be caused to the truck you drive, in such circumstances.*
3. *The risk of prosecution that HBT faces in the event that I knowingly allow you to drive a truck with a habit and an incident to yourself, property, or other persons occurs.*
4. *The fact that I had to read about the conviction in the newspaper, and you gave me no forewarning of your Court appearance.*
5. *That you misled me into thinking that your court appearance was for a 3rd party. I distinctly recall you told me you were appearing as a witness for a friends court case.*
6. *That the reputation of HBT may suffer by employing a convicted drug user. City Forests in particular have a zero tolerance drug and alcohol policy, and as part of your normal duties you are required to drive a log truck delivering City Forest logs.*

[8] The letter closes by advising a date and time for a meeting to discuss these concerns; that Mr Leith could bring a support person if he wished and HBT could be considering options which might include termination. The last sentence was incomplete on Mr Leith's copy due to a printing error and limited to advising HBT would *be considering our options up to and including termination of your employment*. That said, the obvious discrepancy was not questioned at the time.

[9] The meeting occurred, as scheduled, on Friday 31 May. Mr Leith chose not to bring an assistant and Mr Hyslop was accompanied by his fellow director and father. Again there are notes of the meeting, whose format essentially followed a discussion on each of the six points. The notes were again taken by Mr Hyslop and, with two exceptions, Mr Leith again accepts them as an accurate reflection of what was said.

[10] About the meeting Ms Hyslop says:

[Mr Leith's] *explanation at the meeting held on Friday 31 May 2012 was unsatisfactory. Not only did the applicant fail to see his cannabis consumption as an issue when driving trucks but when I asked the Applicant why he had lied to me about why he needed time off work, the Applicant said he had not told me as he had "done it before and gotten away with it".*

[11] Mr Hyslop says that while both issues remain factors in the dismissal it was the latter which really shocked him. This destroyed any trust and confidence he had in Mr Leith and was the key factor in the subsequent decision to dismiss.

[12] Mr Leith's evidence about the meeting is:

... They asked me about my history of cannabis use. I do not recall Tom asking me on the Sunday or at the Wednesday meeting if I was still smoking cannabis. From the time I started work with the Hyslops there had been no drug use.

At the meeting I also made them aware that during my counselling for depression with Family Mental Health ("FMH") it became clear I had been a cannabis user. FMH arranged for me to undergo a Community Alcohol and Drug Services (CADS) Programme through Waikare Hospital which I did.

During my time of employment with the company I was attending the drug rehabilitation course with CADS. During the discussion on 31 May I told them repeatedly that if they were concerned about my possible drug use I would be willing to be drug tested as frequently as they deemed necessary. There was no response to this offer.

[13] Following the meeting the Hyslops discussed the responses and decided to dismiss. Mr Hyslop says he did not want to tell Mr Leith of the outcome by telephone or letter and advice of the dismissal was given when Mr Hyslop visited Mr Leith on 4 June.

Determination

[14] As already said HBT accepts it dismissed Mr Leith. In doing so it also accepts it is required to justify the dismissal.

[15] Section 103A of the Employment Relations Act 2000 (the Act), states the question of whether a dismissal is justifiable:

... must be determined, on an objective basis, [by considering] whether the employer's actions, and how the employer acted were what a fair and

reasonable employer could have done in all the circumstances at the time the dismissal ... occurred.

[16] In applying that test the Authority must consider whether:

- a. Having regard to the resources available to the employer, the employer sufficiently investigated the allegations;
- b. The employer raised its concerns with the employee prior to taking action;
- c. The employer gave a reasonable opportunity for response;
- d. The employer genuinely considered the explanation before taking action; and
- e. Any other appropriate factors.

[17] Before progressing I turn to the two factual disputes (9 above). Mr Leith says he no longer used drugs (12 above) and claims he told HBT that during the second meeting. This argument is tendered in support of a claim he was willing and able to rehabilitate himself. Mr Hyslop has a different view and claims Mr Leith confirmed continuing use but tried to minimise both the level of use and the effect on his ability to work safely.

[18] I prefer Mr Hyslop's recollection. I do so for a number of reasons. Mr Leith's claim is undermined by the preceding sentences of his brief which suggests the question was never asked (also 12 above). There is then the fact the admission is recorded in notes of the first meeting which Mr Leith accepts as accurate. It is again referred to in contemporaneous notes of the second interview. I have no reasons to doubt their accuracy and note Mr Leith's claim he no longer used drugs and said so was totally undermined by subsequent admissions when giving oral evidence. Final confirmation the claim of abstinence was inaccurate comes in the form of a further conviction following the dismissal.

[19] An ancillary issue concerns Mr Leith's claim he underlined his willingness to rehabilitate by saying he would take frequent drug tests but this was undermined by

immediately advising the Hyslops tests would be meaningless as cannabinoids remained in the system for some time after use and his infrequent use could lead to positive results. I also note this evidence again undermines his claim he no longer used drugs.

[20] The second point of difference concerns the *gotten away with it* comment which became a significant factor in the decision to dismiss. Mr Leith claims it was taken out of context. He says he was referring to his use of cannabis and not misleading Mr Hyslop as to why he sought leave. Again I prefer Mr Hyslop's evidence. It is supported by the notes and Mr Leith's attempts to explain the context were confused while Mr Hyslop's evidence was not.

[21] Turning to the requirements of s.103A. I have considered the issue of resources and note HBT is a small employer which conducted this process without professional assistance. I do not therefore expect an example of perfection but, that said, I conclude the process was acceptable and met the requirements of the Act.

[22] The acceptance of Mr Hyslop's evidence leads me to conclude he had reason to be concerned about Mr Leith's ability to perform his duties safely and was, during the investigation process, given reason to question whether he could trust Mr Leith. The answers given by Mr Leith and recorded in the meeting notes are such that Mr Hyslop could, and did, reach a conclusion his concerns were warranted.

[23] The evidence also leads me to conclude HBT complied with the requirements of sections 103A(3)(b) to (d). HBT's concerns were enunciated in both the letter and the meeting. They were discussed and Mr Leith had an opportunity to respond with his answers being fully considered before a decision was reached.

[24] For these reasons I conclude the decision to dismiss was one a fair and reasonable employer could have reached in the circumstances. Mr Leith's claim of unjustified dismissal therefore fails.

[25] Turning to the claim HBT's failure to provide a written employment agreement warrants the imposition of a penalty. Despite HBT's admission I do not consider a penalty appropriate. A penalty is a punishment for a deliberate impropriety. There is no evidence of such behaviour in this instance. To the contrary,

the evidence is the arrangement was entered into relatively informally in response to a request from a mutual friend that HBT assist Mr Leith. There is also no evidence Mr Leith requested a written agreement and therefore no evidence HBT failed to respond.

[26] Costs are reserved.

Mike Loftus

Member of the Employment Relations Authority