New Zealand Employment Relations Authority Decisions

Liu v Blackwell Motors Limited (Christchurch) [2012] NZERA 1243; [2012] NZERA Christchurch 243 (6 November 2012)

Last Updated: 18 April 2017

Attention is drawn to the order prohibiting publication of certain information

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2012] NZERA Christchurch 243
5353155

BETWEEN	JENKIN LIU Applicant	
A N D	BLACKWELL LIMITED Respondent	MOTORS

Member of Authority: David Appleton

Representatives: Jeff Goldstein, Counsel for Applicant

Dean Kilpatrick, Counsel for Respondent

Investigation meeting: 19 September, 24 and 25 September 2012

Submissions received 25 September 2012 from both parties

Date of Determination: 6 November 2012

DETERMINATION OF THE AUTHORITY

A. **The Applicant was unjustifiably dismissed and, accordingly, is awarded remedies in accordance with this determination.**

B. Costs are reserved. Prohibition from publication

[1] The evidence heard in this investigation meeting included details of the

registration number of a truck which was serviced by the applicant. The truck's owner was also identified. It is not necessary for these details to be published, as the truck's owner played no part in the proceedings. Accordingly, I prohibit those details from publication.

Employment relationship problem

[2] Mr Liu claims that he was unjustifiably dismissed from his employment with the respondent on 26 April 2011 and that the respondent has failed to meet its good faith obligations. He seeks reimbursement of lost wages, interest, compensation for humiliation, loss of dignity and injury to feelings and a contribution towards his legal costs.

[3] The respondent denies that Mr Liu was unjustifiably dismissed or that it failed to meet its good faith obligations.

[4] The evidence of Mr Liu and his wife was given on the second day of the investigation meeting with the assistance of an interpreter as they are speakers of Cantonese but are not fluent in English. On the first and third days of the investigation meeting, Ms Lim, one of the witnesses supporting Mr Liu, was present to translate for Mr Liu when he needed to understand what was being said. The respondent did not object to this arrangement.

Brief account of the facts leading to the dismissal

[5] Mr Liu had been employed by the respondent since 1996 as a mechanic. He specialised in servicing trucks. On or around 25 March 2011, a Mack truck was booked in for a pre-Certificate of Fitness (COF) inspection. The truck was allocated to Mr Liu to carry out the work. Once a truck is inspected by the respondent, and any necessary repairs carried out, it then goes on to VTNZ for a certificate of fitness inspection. When a pre-COF inspection is carried out, a check list is completed by the mechanic which indicates a number of tasks that he needs to fulfil. One of these tasks is to jack up all the wheels and to check the wheel bearings and the king pins.

[6] Mr Liu performed the pre-COF inspection on the Mack truck on 5 April 2011 when he found that the truck failed the inspection because the king pins needed to be repaired. Mr Liu found other faults as well. Mr Liu's evidence is that, when he found the king pins were *no go*, he told the receptionist Rex Poulson, who told him to go to the Parts Department and order a king pin kit.

[7] Mr Liu's evidence was that he had also noticed that the grease around one of the wheel bearings (on the right front wheel) was very black, which indicated that it needed to be replaced. Mr Liu's evidence was that he had explained this to Mr Poulson as well, who told him to deal with replacing the grease at the same time as he replaced the king pins, when the parts came in. Mr Liu said that Mr Poulson also told him that the client needed the vehicle urgently and had to take it back.

[8] Before the truck was taken back by the owner, Mr Liu did some minor work on the truck, including adjusting the wheel bearings (which did not involve dismantling them) but he was not able to replace the king pins or the grease (which would have involved dismantling the wheel bearings) as the vehicle was removed by the owner before the new king pins arrived. Around three days later the truck was brought back to the respondent company with the front right hand side outer wheel bearing having disintegrated and the race fused to the stub axle. This was regarded as a serious fault by the respondent which could have caused a serious accident. Another mechanic carried out work to replace the wheel bearing and repair the stub axle.

[9] The vehicle was then taken to VTNZ for its COF inspection but it failed because of a problem with one of the front king pins being worn (and another unrelated issue). These faults were rectified and the vehicle finally passed its COF inspection on 13 April.

[10] The evidence of all the witnesses was that the standard way to check wheel bearings, on both cars and trucks, is to jack up the vehicle and spin each wheel by hand, listening and feeling for vibration and roughness with the help of a bar, which would indicate worn or damaged bearings. There was a fundamental disagreement, though, between the evidence of two witnesses on behalf of Mr Liu on the one hand and the respondent's witnesses on the other as to the reliability of the test.

[11] Mr Liu's witnesses, both experienced mechanics, said that the wheel spinning test will not detect all faults. The respondent's witnesses, also experienced mechanics, said that the test is an industry wide accepted way of testing for wheel bearing faults and so is reliable. On balance, taking into account all the evidence, I am satisfied that this is an accepted method of testing a wheel bearing and that it is usually a reliable way of detecting faults, especially serious ones such as must have been present in the bearing on the truck in question. I also accept, however, that not

every fault will be picked up by this method, including ones that result in failure, but believe that such exceptions are rare.

[12] Mr Liu's evidence is that he did test the wheel bearings by spinning the wheels after he had adjusted them, but that the test did not reveal any problems. The respondent's conclusion was that Mr Liu could not have spun the wheel that failed as, if he had, he would have detected such a serious fault.

[13] The General Manager of the respondent company, Mr Grenfell, wrote to

Mr Liu on 12 April 2011 in the following terms:

You are requested to attend a meeting in my office on Friday 15 April at 11.00am.

I will be seeking your explanation to the following allegations:

1. that you have been intimidating another staff member;

2. that after being involved with the servicing of a Mack heavy vehicle, registration.[deliberately left blank] *belonging to* [deliberately left blank] *you failed to notice that the right front wheel bearing was on the verge of failure before returning the vehicle to the customer.*

The client's vehicle was towed back 3 days later with a collapsed right front wheel bearing, which upon inspection, was so badly damaged that the right front wheel was in danger of detaching from the vehicle. Had this occurred, the result could have been catastrophic with loss of life a definite possibility.

You are reminded that in May of last year you were requested to attend a meeting with the then afters ales [sic] m*anager, Stewart Hardy, with respect to insufficient gear box oil being used after an Isuzu vehicle service resulting in the vehicle being returned as the gear box was noisy. Although the findings were inconclusive, it is worth noting that it was the very same client.*

Further, you have been spoken to about leaving work early on a Saturday afternoon without your supervisor's permission and you have also been spoken to about drinking alcohol in the cafeteria within working hours.

In the position of a qualified service technician a great deal of confidence and trust is held and expected by the Company from its staff. You are invited to, and the Company recommends that do, bring a representative to the meeting. In the event that the allegations are proven and your explanations are unsatisfactory disciplinary action will occur which may result in termination of your employment.

Yours faithfully

[14] Mr Liu attended the meeting with his sister-in-law, Ms Lim, to assist him to understand what was being said to him and to express himself. The evidence of Ms Lim was that no information was given prior to the meeting other than that stated in the letter and that, during the meeting, Ms Lim asked for a copy of the job card for the truck but was told that the company could not find it. The respondent denies this and states that copies of the job card and the check list were made available to Mr Liu and Ms Lim at the second meeting on 19 April.

[15] Ms Lim read out a statement on behalf of Mr Liu at the disciplinary investigation meeting which stated that he had been working as a vehicle mechanic for more than 30 years and been employed by the respondent for more than 15 years, and that he believed that he had the fundamental and essential knowledge of how a wheel bearing can effect the roadworthiness of a vehicle. The statement said that, for that particular repair work, Mr Liu had checked the bearing and, at that moment, the bearing had been working fine but had found that the king

pin was loose and needed to be repaired. He said that he had told the receptionist, Mr Poulson, that the king pin needed to be repaired before the vehicle could be retrieved but that he was told that the client needed the vehicle urgently and had to take it back.

[16] Mr Liu's statement went on to say that he was sure that he had performed the necessary check and inspection of the bearing, including spinning the wheel at that particular moment, and that he found that the bearing was fine.

[17] The evidence of Mr Grenfell was that Mr Liu had said that he had been assisted by another member of staff, Mr Sy, when he was checking the wheel in question. Mr Grenfell said that he and the after sales manager of the respondent, Mr Mills, went to speak to Mr Sy who had confirmed that he had assisted Mr Liu by using a lift bar to move the wheel while Mr Liu had inspected the movement from underneath the vehicle. Mr Grenfell says that, when asked whether Mr Liu had spun the wheel while he was assisting him, Mr Sy had said that he had not. Mr Mills' evidence, however, was that Mr Sy had not seen Mr Liu spin the wheel but that he had assumed that he had because the end cap was off the wheel bearing.

[18] Ms Lim's evidence was that she had asked the company to speak to Mr Poulson as well as Mr Sy, because Mr Liu had spoken to Mr Poulson and told him about the black grease. (The black grease would indicate a potential problem with the

bearing, as it would be old, and therefore not working effectively as a lubricant). Ms Lim says that whilst Mr Grenfell and Mr Mills gave them feedback about what Mr Sy had said, they never mentioned speaking to Mr Poulson. The statements of evidence of the two men also do not refer to them doing so and Mr Liu's counsel asserts that this is because they did not do so. Mr Grenfell and Mr Mills asserted in their evidence at the investigation meeting that they did do so.

[19] On 19 April, Mr Grenfell wrote a letter to Mr Liu stating the following:

The Company has now concluded its investigation into the allegation first put forward in the letter to you dated 12th April, namely:

1. That after being involved with the servicing of a Mack heavy vehicle, registration.[deliberately left blank] *belonging to* [deliberately left blank] *you failed to notice that the right front wheel bearing was on the verge of failure before returning the vehicle to the customer.*

The Company has found the allegation proven.

Your explanation to the allegation was that both king pins were faulty (rather than the wheel bearing) as you claim to have earlier successfully adjusted the wheel bearing. You also stated that following the adjustment you had spun the wheel and used a bar to check for any vibration or rough running of the bearing. Further, you stated that you did this with assistance of Mark Sy and claim that Mark himself visibly checked the movement and confirmed that it was the king pin allowing the movement in the wheel.

Following our meeting we met with Mark and asked him what assistance he gave you. Mark stated that his assistance was limited to using a bar to lift/move the wheel while you inspected the movement from under the truck.

Mark was specifically asked whether he himself visibly checked the movement under the vehicle or spun the wheel to check the smooth operation. Mark confirmed he did not do either as he had seen you adjust the wheel bearing earlier. Further to this we can confirm your RO write up and COF check sheet that clearly shows that the wheel bearing had been checked, adjusted, marked as being 'OK' and that only the right hand king pin was faulty and required replacement.

The severity of the collapsed bearing (only the inner bearing remained intact, the outer bearing was missing completely except for the inner roller ring that had welded itself to the stub axle) together with the state of the grease and adjusting washer clearly shows that the wheel hub had been running on the washer only for some time, as evidenced by the centre of the washer being worn into an oval shape.

On the basis of these facts it is the opinion of the Company that although you may have adjusted the wheel bearing, you failed to perform the fundamental and absolutely essential act of spinning the wheel to ensure that the bearing was running smoothly. Had you

attempted to do so resistance would have been noticed as would have lateral wheel movement.

The public's impression of Blackwell Motors is formed by encounters with the Company's staff, at any time, both on and off the premises but particularly through experiences of the quality of work performed.

Through a gross oversight on your part the road-worthiness of a client's vehicle could, at the least, have been brought into question. Further, given appropriate circumstances, someone's life could, potentially, have been endangered.

Under no circumstances will Blackwell Motors tolerate workmanship of this standard on any vehicle that leaves its premises.

A reasonable level of trust and confidence is considered crucial to a continuing employment relationship between the Company and any of its employees. This is especially so in the case where a technician working on components fundamental to the safe operation of clients' vehicles. Further, the Company believes that the standard of workmanship provided in this instance was, given your years of experience and qualifications, below that able to be expected.

Your action is considered by the Company to constitute serious misconduct and for this reason the Company is contemplating summarily dismissing you from its employment. Prior to a decision being made the Company invites you to submit in writing any reasons why the Company should step back from this course of action including any mitigating factors and any circumstances which might otherwise dissuade the Company from terminating your employment.

Your submissions are requested to be forwarded to the Company on or before 5pm Thursday 21 April. Following receipt of your submissions the Company expects being in a position to make a decision on Tuesday 26th April.

[20] Mr Liu took advantage of the opportunity to make some submissions and wrote a letter of the same date reiterating that he had checked the bearing, that it was working fine but had found the king pin was loose and needed to be repaired.

[21] By way of a letter dated 26 April 2011, Mr Grenfell wrote to Mr Liu in the following terms:

The Company is now satisfied that you have been provided with adequate opportunity to forward submissions as to why the Company should contemplate not summarily dismissing you from its employment and that the Company has satisfied its legal obligation to thoroughly and fairly investigate the allegation made against you on

12 April.

The Company has, at all times, accorded you every opportunity for input and has carefully considered all relevant information.

For your information the Company has below restated the initial allegation made against you.

"That after being involved with the servicing of a Mack heavy vehicle, registration [deliberately withheld] *belonging to* [deliberately withheld] *you failed to notice that the right front wheel bearing was on the verge of failure before returning the vehicle to the customer."*

The Company has taken into account your length of service and mechanical experience which, under the circumstances of the alleged act, only serves to re-inforce the Company's opinion that the fault should have been noticed owing to the condition of the grease under the wheel bearing cap and would have been noticed had the wheel been spun.

The allegation has therefore been found to be proven on the balance of probabilities and in light of the weight of evidence.

Additionally, in that same correspondence, the matter of a breach in trust and confidence was also outlined. Again, this is restated below for your information.

"In the position of a qualified service technician a great deal of confidence and trust is held and expected by the Company from its staff."

As a result of this investigation the Company has, on the balance of probability, found that the allegation against you is proven. Owing to the seriousness of the oversight on such a fundamental task and its potential consequences, the Company believes that such conduct amounts to serious misconduct sufficient for your instant dismissal. None of your submissions have dissuaded the Company to step back from your dismissal. This correspondence therefore serves as notice to you that you have been dismissed from your employment with Blackwell Motors Limited as from today, 26 April 2011.

Your final wages and holiday pay will be credited to your bank account on Wednesday 27 April.

The Company would appreciate the prompt return of the workshop clothing provided to you and any other Company property that may be in your possession.

No mention was made of the other allegations contained in the respondent's letter to

Mr Liu dated 12 April, which seemingly were dropped by the respondent.

[22] A personal grievance was raised on behalf of Mr Liu by his then representative by way of a letter dated 3 May 2011.

The issues

[23] The Authority must decide whether the respondent's actions, and how the respondent acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred (s.103A(2) of the Employment Relations Act 2000 (the Act)).

[24] When considering this question, the Authority must apply the test on an objective basis and consider the following:

(a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and

(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and

(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and

(d) whether the employer generally considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

[25] Two major considerations therefore are whether the decision to dismiss was procedurally fair, and whether it was substantively fair.

Was the decision to dismiss Mr Liu procedurally fair?

[26] Mr Liu's counsel asserts that the decision to dismiss Mr Liu was procedurally unfair because:

a. Copies of the job card and other contemporaneous information were not made available to Mr Liu and Ms Lim;

b. The company did not approach Mr Poulson to seek his view of whether Mr Liu had told him that the grease was black, indicting a potential fault with the bearing;

c. Mr Sy was not asked whether Mr Liu spun the wheel and did not provide any notes of the interview with him; and

d. The decision had already been taken when Mr Liu was invited to comment upon their findings in the letter dated 19 April.

Documentation not being made available

[27] There is a straight conflict of evidence between the parties as to whether the documentation was made available to Mr Liu and Ms Lim before Mr Liu's dismissal or not. On balance, I prefer the evidence of Ms Lim, as she explained that she needed to see the documentation to understand the technical aspects of what Mr Liu was telling her, as she did not understand how a wheel bearing worked and what work Mr Liu had carried out on the truck. She said that the first time that she had seen the job card was in Mr Goldstein's office after the dismissal. All in all, I found Ms Lim's evidence to be wholly credible.

[28] There is an obligation on an employer to make available to an employee facing dismissal all relevant information. (Section 4(1A) (c) of the Act). This is all the more so when Mr Liu spoke only a very basic level of English and Ms Lim needed to see the job card to understand fully the case against Mr Liu.

[29] I do not consider that this failure is a minor one, but consider that it caused unfairness to Mr Liu. If the job card had been provided, it would have served as an aide memoire for Mr Liu to enable him to explain more clearly what he did, and to have assisted Ms Lim to understand the issues. It would also have provided the respondent with the opportunity to explore whether Mr Liu had treated the truck as having passed or failed the pre COF inspection. Mr Liu was clear that it had not passed because of the problems with the king pins. That alone would have caused the truck to have failed its COF inspection.

[30] Even if I am wrong in my assessment of whose evidence is most credible, by the respondent's own evidence it did not supply a copy of the job card until the meeting on 19 April. However, the respondent's witnesses also accepted that, by this date, it had already decided that the allegations were proven. The letter of 19 Apr il was to give Mr Liu an opportunity to comment whether he should be dismissed or not. Therefore, the best case the respondent has is that the information was given after the decision had been reached that the case had been proven against Mr Liu. This is in breach of the requirement under s. 4(1A)(c) of the Act.

[31] This finding alone, therefore, makes the dismissal unjustifiable, as no fair and reasonable employer could have failed to have provided a copy of the job card to Mr Liu prior to deciding that the case was proven.

Mr Poulson not being approached

[32] The second straight conflict of evidence is whether the respondent approached Mr Poulson to ask him what Mr Liu had told him about the truck. This is relevant because Mr Liu says he told Mr Poulson that the truck had failed because of the king pins being *no go*, and because he had told Mr Poulson that the grease around the wheel bearing in question was very black, requiring it to be changed. Mr Poulson had released the vehicle to the owner despite these problems.

[33] Mr Grenfell says that he did not speak to Mr Poulson, but that Mr Mills did. On balance I believe that the respondent did not speak to Mr Poulson, despite the assertions of their witnesses. This is simply because there is no mention of speaking to Mr Poulson in any of their correspondence, nor in the statements of evidence of either Mr Mills or Mr Grenfell. The correspondence and statements refer to the company speaking to Mr Sy, so one would expect there to be reference to them speaking to Mr Poulson as well. Certainly, no outcome of such a conversation was conveyed to Mr Liu and Ms Lim.

[34] Mr Grenfell said in evidence that the fact that there was black grease on the wheel bearing should have alerted Mr Liu to a potential problem with the bearing. However, Mr Liu said that Mr Poulson had told him not to change the grease until the king pins came in. If Mr Liu had changed the grease before then, he would have had to have dismantled the bearings and would have found any faults. Mr Liu cannot be blamed for not changing the grease before the vehicle was released to the owner when he had been instructed to do so later. Nor can he be blamed for the vehicle being released by Mr Poulson to the owner as I am satisfied that Mr Liu was unable to prevent this happening.

[35] The respondent says that the failure to spin the wheels was the primary cause of the failure to spot the wheel bearing fault and so it could be argued that knowledge of Mr Liu spotting the black grease would have added nothing to their conclusion that Mr Liu had committed serious misconduct. However, for the reason that I expand upon below, I believe that it was not reasonable for the respondent to have relied

solely on the wheel spinning test, and their belief that Mr Liu had failed to conduct it, in their decision to dismiss him.

[36] This failure to speak to Mr Poulson is a flaw in the process which potentially leads to an unjustifiable dismissal. Section 103A(3)(a) requires the employer to sufficiently investigate the allegations against the employee before dismissing him. For the reasons stated above, what Mr Liu told Mr Poulson was relevant information, and the company should have sought to have verified it.

Discrepancies in the accounts of what Mr Sy was asked and the failure to provide notes of the interview

[37] Counsel for Mr Liu points out that the letter from Mr Grenfell to Mr Liu dated

19 April states that Mr Sy was asked whether he (Mr Sy) had visibly checked the movement under the vehicle or spun the wheel to check for smooth operation. However, the statements of evidence of Messrs Grenfell and Mills state that they had asked Mr Sy if he had seen Mr Liu spin the wheel. Whilst this is certainly a discrepancy, I am not certain that it necessarily indicates a serious error in the process. It would have been a strange thing for Messrs Grenfell and Mills to have asked Mr Sy whether he had spun the wheel without also having asked if he had seen Mr Liu do so, when it was quite clear that Mr Liu had been saying all along that he (Mr Liu) had spun the wheel. Therefore, I attribute this discrepancy to the letter being poorly (or not comprehensively) expressed rather than to an error in the process causing unfairness.

[38] The failure to provide a note of the interview with Mr Sy was not best practice. (It was also not best practice for the respondent not to have kept a note of their meetings with Mr Liu). However, the company did report in the letter of

19 April what Mr Sy had said, so a failure to provide a separate note of the interview is not a significant flaw.

Decision already made by 19 April

[39] The letter of 19 April makes clear that the company had already decided that the allegation against Mr Liu was proven. (Namely, that Mr

Liu had *failed to notice that the right front wheel bearing was on the verge of failure before returning the vehicle to the customer*). The letter also stated that his action was considered by the company to constitute serious misconduct. The letter stated that the company was

contemplating summarily dismissing Mr Liu but asked him to submit any reasons why the company should step back from that course of action, including any mitigating factors and any circumstances that might otherwise dissuade the company from terminating his employment.

[40] I believe that, if the company had spoken to Mr Poulson, and given all the paperwork requested by Ms Lim to her beforehand, then this approach set out in the

19 April letter would not have been premature, as the company would, by then, ha ve conducted a sufficiently thorough investigation and would have given Mr Liu an opportunity to have responded to the respondent's concerns. It would, one would expect, have also genuinely considered his explanation. However, as the respondent had not completed its s. 103A obligations, then this letter was premature. It therefore does constitute a flaw, as the decision that serious misconduct had been committed should not have been made until the proper steps had been completed.

Conclusion

[41] I believe that there were some significant flaws in the way that the disciplinary process was conducted which did prejudice Mr Liu. These flaws were not the actions that a fair and reasonable employer could have made in all the circumstances. Therefore, they render the dismissal unjustifiable.

Was the decision to dismiss substantively fair?

[42] There are two issues that need to be explored in deciding this question.

a. First, was it reasonable for the respondent to have concluded that

Mr Liu was negligent on the evidence of the bearing having failed; and

b. If the answer to the first question can be answered in the affirmative, was the decision to dismiss one that a fair and reasonable employer could have taken in all the circumstances.

Was it reasonable to have concluded that Mr Liu was negligent?

[43] To answer this question, it is necessary to consider whether the failed wheel bearing could have passed the wheel spinning test (which all parties agreed was the fundamental way of checking the wheel bearing of a truck) and then failed shortly afterwards. If the answer to this question could be answered in the affirmative, the

next question is whether the respondent should reasonably have considered this as an explanation for the bearing failing rather than attributing it to Mr Liu's negligence.

[44] Evidence was heard from Mr Hartshorne, a very experienced A-grade qualified diesel engineer working in the heavy truck/bus field. I found his evidence very helpful in assisting me to understand the technical aspects of the matter before the Authority. His evidence was that the wheel of a Mack truck is large and heavy and that the spinning of the wheel, which has to be done by hand, may not necessarily indicate a fault, as it is difficult to get the wheel to spin fast enough and because the grease around the wheel bearings could dampen down the effect.

[45] In addition, Mr Liu had adjusted the wheel bearing by tightening it, which also may have prevented the detection of a fault. (Mr Hartshorne explained that it was necessary to do the wheel spinning test after having tightened the wheel bearing as, if one does it when the wheel bearing is loose, a noise may be emitted that masks the noise caused by a fault.) Mr Hartshorne also gave evidence that it does happen on occasion that a vehicle can pass a certificate of fitness or warrant of fitness inspection and then fail very soon afterwards, for no apparent reason. He said that he had known of wheels coming off caravans shortly after having passed a warrant of fitness test.

[46] Mr Hartshorne also said that the presence of black grease around the failed wheel bearing, which Mr Liu had told him he had noted, indicates that it is at the end of its life and that it would need to be replaced. In order to replace it, it is necessary to take the wheel bearing apart and, having done that, any faults in the wheel bearing would have been evident.

[47] Mr Mills denied that it was hard to detect wheel bearing faults when spinning the wheel of a Mack truck, and emphasised that this was a standard test that everyone in the industry relies on.

[48] I believe that Mr Liu did spin the wheel and carried out the proper test. Mr Liu cannot account for why the bearing failed within three days of him doing so, but his simple but entirely consistent account of what he did to test the bearings persuades me that he is telling the truth. However, that does not necessarily mean that the respondent was unreasonable to have concluded otherwise. It had believed that the truck had driven 600 kilometres before the bearing had failed. In fact, on closer examination of the paperwork, it is more likely that the truck had only travelled 33

kilometres. Was it reasonable for the respondent to have concluded that Mr Liu had not spun the wheel?

[49] It is my belief that the respondent was not unreasonable to have concluded that the fault would have been present when Mr Liu had worked on the truck. Whilst there is a chance that the bearing had a latent fault that could not have been detected, it is much more likely, given the extent of the damage described by the respondent's witnesses, that the fault was present.

[50] However, I do not believe that the respondent was reasonable in concluding that Mr Liu was simply lying when he said he had spun the wheel. I reach this conclusion for the following reasons. First, spinning the wheel is a fundamental part of the job (likened by Mr Hartshorne to opening a shut door to exit a room, it being so second nature to an experienced mechanic) and that alone should have told a reasonable employer that Mr Liu was more likely than not to have spun the wheel.

[51] Second, Mr Liu had worked for the company for many years, without any warnings. He had never received a performance assessment according to Mr Mills. He was described by Mr Mills as another *valued member of the Blackwells team*. Despite this, it seems that the fact of the wheel bearing failure *ipso facto* led the respondent to conclude that Mr Liu could not have spun the wheels. That is, the failure led inexorably to the conclusion that Mr Liu had not carried out the test. The respondent did not contemplate any other possible explanation for the failure and I believe, having heard the respondent's evidence, that there was nothing that Mr Liu could have said that would have persuaded it not to have dismissed him.

[52] Thirdly, it seems from the evidence presented by Mr Hartshorne, that the only sure way of detecting a failed bearing is by a visual examination. By its very nature, the wheel spinning test is an indirect way of detecting a problem (using vibration and noise). It strikes me that it might be likened to a doctor listening to someone's heart through a stethoscope, and inferring disease from what he or she hears. Therefore, it seems to me that the wheel spinning test it is not a fool proof, 100% sure way of detecting a flawed bearing, despite Mr Liu appearing to say it was in evidence.

[53] Finally, no effort was made by the respondent to investigate what had caused the wheel bearing to fail. For example, the respondent had serviced the vehicle around six months before Mr Liu inspected it. It may have been that the beginnings

of a problem had been spotted then but a conclusion reached that it would last another six months. This was not investigated by the respondent however.

[54] As counsel for Mr Liu points out in his submissions, where a serious charge is the basis of the justification for a dismissal the evidence in support of it must be as convincing in its nature as the charge is grave. (*Honda NZ Ltd v NZ Shipwrights Union* [1991] 1 NZLR 392 (CA)). These doubts identified above cause me to conclude that the evidence against Mr Liu was not convincing enough.

[55] In conclusion, given all the circumstances, I do not believe that a fair and reasonable employer could have concluded that an extremely experienced and a valued member of the team with 15 years' work history, who had never received a warning, could have failed to have carried out such a fundamental test, when he had asserted strongly that he had, especially when the only potentially clear evidence to suggest that he had not was the damaged truck itself.

Was the dismissal reasonable?

[56] Given my conclusions above, I do not need to address this second question, as the conclusion that Mr Liu had not spun the wheel was not a reasonable one for the respondent to have reached. However, I will do so briefly.

[57] The respondent concluded that Mr Liu had committed serious misconduct and that it had lost trust and confidence in him. Even if it had been reasonable for the company to have concluded that Mr Liu had not spun the wheel, I am not satisfied that a fair and reasonable employer could have concluded in all the circumstances that dismissal was justified. This is for the following reason.

[58] The respondent accepts that it did not believe that Mr Liu had failed to carry out the test wilfully, and has characterised the failure as a*n oversight*. In essence, the employer states that it lost trust and confidence in Mr Liu for what apparently would have been his first material mistake in 15 years. There have been a number of employment cases over the years which deal with whether it is reasonable for an employer to dismiss an employee for a one off act of negligence. The underlying principle that may be derived from the case law can conveniently be summarised by citing a passage from Makatoa v Restaurant Brands (NZ) Ltd [1999] NZEmpC 172; [1999] 2 ERNZ 311 (EmpC) at 319, where Chief Judge Goddard stated:

The mere fact that consequences are very serious does not mean that the act which produced or contributed to those consequences necessarily amounts to serious misconduct. That kind of misconduct will generally involve deliberate action inimical to the employer's interests. It will not generally consist of mere inadvertence, oversight, or negligence however much that inadvertence, negligence, or oversight may seem an incomprehensible dereliction of duty.

[59] To be able reasonably to justify dismissal, the case will have to be exceptional. In W & H Newspapers Ltd v Oram [[2001] NZCA 142; 2001] 3 NZLR 29, [2000] 2 ERNZ 448 (CA) the Court of Appeal held that a single incident of carelessness, when sufficiently serious, can impair trust and confidence and justify dismissal. In that case, however, a journalist who had caused a photograph to be published of a social worker erroneously identified as a notorious criminal gang leader, had ample opportunity to check the right man had been photographed and to rectify his error, but did not do so, which he freely admitted. This was not the case with Mr Liu, who had protested that he had spun the wheel, who had been prevented from changing the grease which would have identified the wheel bearing fault and who had not been able to prevent the vehicle being released to the client before the remedial work which he had identified could be carried out.

[60] In my view, if Mr Liu had committed an oversight, as alleged, it was not reasonable for the employer to have concluded that it reached the high hurdle demanded by the case law to justify dismissal. The consequences of the wheel bearing failing were not great, although I accept that they could have been. However, no evidence was adduced about the circumstances of the failure, such as whether it had failed while on the road. Mr Mills stated that the customer had been lost following the incident, although I note that the customer gave the truck back to the respondent to repair the stub axle after the bearing had failed, and that the truck still failed its COF inspection at the VTNZ even after that work had been done by another mechanic. No evidence was adduced from the owner as to why it ceased using Blackwells.

[61] Mr Grenfell stated in his dismissal letter dated 26 April that the company took into account Mr Liu's length of service and mechanical experience, but that they served to reinforce the company's opinion that the fault should have been noticed. However, given that Mr Liu was a valued member of the team with 15 years' work history, who had never received a warning, and given that the detection of a fault is not an exact science, in all the circumstances I do not accept that a fair and reasonable

employer could have concluded that it was justified in treating the believed oversight as serious misconduct meriting summary dismissal.

Conclusion

[62] In conclusion, I find that the dismissal was both procedurally and substantively unfair, and so was unjustified. The personal grievance is

therefore proven.

Remedies

[63] Reinstatement was not sought by Mr Liu. Mr Liu does seek reimbursement of his lost wages. His evidence, which was unchallenged by the respondent in cross examination, was that, until 16 January 2012, when he started to work for his brother-in-law, he earned nothing after he was dismissed save around $600. I accept that he did try to find work after he was dismissed. I also accept that, in the period between his dismissal and 16 January 2012, his loss was the gross sum of $35,120.

[64] Section 128(3) of the Act provides that the Authority may, in its discretion, order an employer to pay to an employee by way of compensation for remuneration lost by that employee as a result of the personal grievance, a sum greater than that provided in subsection 128(2), namely the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.

[65] Bearing in mind the principles set out in *Telecom New Zealand Ltd v Nutter* [2004] 1 ERNZ 315, the discretionary nature of the remedy under s 128 is inconsistent with any principle requiring *full* compensation to be awarded. Amongst the factors to be considered features the consideration of whether other contingencies may have resulted in termination of the employee's employment, but for the unjustifiable dismissal.

[66] Mr Liu was not under any warnings prior to his dismissal and no evidence was given that his performance had been giving cause for concern, or that his position would have been disestablished. In addition, is the very powerful fact that he had already been employed by the respondent for 15 years without any warnings. Therefore, I think it reasonable to conclude that Mr Liu would have remained in employment, but for his dismissal, at least until 16 January 2012. Thirty eight weeks' gross loss of earnings is therefore a reasonable starting point in this particular case for

an award of compensation for lost remuneration under s 123, bringing s 128 (3) into the equation.

[67] Mr Liu asks that interest be awarded on the award of lost wages. The Authority has the power to award interest under clause 11 of the second schedule of the Act. That permits the Authority to order interest at the rate prescribed under the Judicature Act 1908, currently 5% per annum. Mr Liu's award of lost wages relates to the period ended on 16 January 2012. However, nearly nine months have elapsed between that date and the date of this determination, which cannot be attributed solely to the respondent. All in all, I do not consider it just to award interest on the reimbursing award.

[68] Turning to the question of compensation under section 123(1)(c)(i) of the Act, Mr Liu and his wife gave evidence, again unchallenged by the respondent, of the effect upon him of his dismissal. He asks for an award of $20,000. Although I accept that it would have been distressing for Mr Liu to have been dismissed after so many years' service, I believe that $20,000 exceeds what is reasonable in this case. I do, however, acknowledge the effect of the dismissal was more than moderate, and so believe that the sum of $10,000 is reasonable in the circumstances.

[69] S 124 of the Act requires me to consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and, if those actions so require, to reduce the remedies that would otherwise have been awarded accordingly.

[70] I have found that I believe Mr Liu when he states that he did spin the wheel. Given that:

a. I do not believe that the wheel spinning test is fool proof and 100%

reliable,

b. I accept, on balance, that Mr Liu did in fact conduct the test;

c. Mr Liu did also notice the presence of black grease, and advise

Mr Poulson about it;

d. Mr Liu did detect loose wheel bearings, and tightened them, as instructed by Mr Poulson (as part of the *small jobs* he did before the truck was taken away);

e. Mr Liu cannot be blamed for not having been given the chance to change the black grease (which would have led him to have detected the failed wheel bearing); and

f. Mr Liu cannot be blamed for the truck being given back to the customer before the work was completed on it,

I do not believe that Mr Liu contributed to the situation that gave rise to the personal grievance in any blameworthy way. Accordingly, I decline to reduce the amounts awarded.

Orders

[71] I order that the respondent pays the following sums to Mr Liu:

a. The gross sum of $35,120 under s 123(1)(b);

b. The sum of $10,000 under s 123(1)(c)(i).

Costs

[72] The parties should seek to agree how Mr Liu's legal costs are to be dealt with. In the absence of an agreement within 28 days of the date of this determination, Mr Goldstein is to serve and lodge a memorandum in respect of the contribution to costs sought from the respondent and Mr Kilpatrick shall have a further 14 days from receipt of that memorandum to serve and lodge a response.

David Appleton

Member of the Employment Relations Authority
