

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2011] NZERA Auckland 534  
5329182

BETWEEN	GEORGE MARU Applicant
AND	MCKAY ELECTRICAL & INSTRUMENTATION (WHANGAREI) LIMITED Respondent

Member of Authority:	K J Anderson
Representatives:	A Singh, Counsel for Applicant M Hammond, Counsel for Respondent
Investigation Meeting:	4 August 2011 at Hamilton
Submissions Received	11 August 2011 for Respondent 18 August 2011 for Applicant
Submissions in Reply:	24 August 2011 for Respondent
Determination:	16 December 2011

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The applicant, Mr Maru, says that he was unjustifiably dismissed, effective from 19 May 2010. Mr Maru asks the Authority to find that he has a personal grievance and award him the remedies of reimbursement of wages and compensation.

[2] Conversely, the respondent, McKay Electrical & Instrumentation (Whangarei) Limited (McKay Electrical), denies that Mr Maru was unjustifiably dismissed. McKay Electrical says that it followed a fair and reasonable process and that the decision to dismiss Mr Maru was substantively fair in the circumstances. McKay Electrical has a counter-claim against Mr Maru and requests an order from the

Authority that Mr Maru repay the sum of \$788.40; representing the wages that it is alleged that he was overpaid because he falsified his timesheets.

### **Background facts and evidence**

[3] Mr Maru had been employed as a Line Mechanic with McKay Electrical since 2006. His duties included the day-to-day maintenance of street lights. This involved driving a patrol to inspect whether the lights were working. The patrol of street lights typically takes two weeks of each month. Mr Maru was provided with a company vehicle with a GPS system installed. He was also provided with a laptop computer and he recorded any faults that he found into a database. The nature of Mr Maru's work meant that he had a degree of flexibility as to when he started and finished work and he was largely unsupervised.

[4] The vehicle that Mr Maru drove was fitted with a Minor Planet GPS system. The system is quite advanced and monitors the status and movements of the vehicle. For example: the system can provide data showing whether the vehicle motor is turned on or off, whether it is idling and whether the vehicle is moving or stationary, along with the speed the vehicle is travelling at and its location; at any time of any particular day. McKay Electrical can download current and historical information from its vehicles.

[5] Mr Maru was responsible for filling in his own timesheets and it is the expectation of McKay Electrical that employees are only to record the time that they are carrying out work for the company.

### **Concerns arising**

[6] The evidence of Mr Peter Lingley, the Manager of the Hamilton branch of McKay Electrical, is that in April 2010, Mr Maru's team leader, Mr Keith Hargood, informed him that he had some concerns that Mr Maru's timesheets did not reflect the time that Mr Maru was actually working. It seems that Mr Hargood had formed this belief some time in March 2010. Mr Lingley says that he concluded that the matter of Mr Maru's time keeping should be investigated and he consulted Ms Elizabeth Galbraith, the Human Resources Manager for the company.

[7] The evidence of Ms Galbraith is that she undertook an analysis of Mr Maru's timesheets, comparing them with the GPS records for his vehicle. The analysis carried

out by Ms Galbraith was for the period 16 March to 30 April 2010. Ms Galbraith concluded that the times recorded by Mr Maru, as compared with the GPS records from his vehicle, varied in his favour (in regard to being paid) from 20 minutes to 4 hours over the period that was analysed. Ms Galbraith gave several examples of the discrepancies that she discovered; thus:

- (a) On 16 March 2010, Mr Maru was on patrol. His timesheet claims 9 hours of work. The GPS report indicates Mr Maru left home at 2.25am and arrived back home at 6.36am. He later left home at 7.25am and arrived back home again at 11.06am. This amounts to just under 8 hours of work.
- (b) On 19 March 2010, Mr Maru was on patrol. His timesheet claims 9 hours plus half an hour overtime; whereas the GPS report indicates Mr Maru arrived at work at 2.48am and then arrived back home at 5.03am. He later left his home at 6.32am and returned home at 11.42am. This equates to 7½ hours of work.
- (c) On 23 March 2010, Mr Maru's timesheet claims 9 hours plus a half hour overtime. The GPS report indicates that he left home at 2.45am, returned home at 6.55am, left his home at 7.42am and then arrived back home at 11.54am. This equates to 8 hours and 20 minutes.
- (d) On 28 April 2010, Mr Maru's timesheet claims 9 hours. The GPS report for this day shows that he arrived at work at 5.57am and returned home at 2.06pm. This is a little over 8 hours of work. During this period, Mr Maru would have been expected to have taken an unpaid lunch break of half an hour.
- (e) On 30 April 2010, Mr Maru's timesheet claims 9 hours of work. The GPS report indicates that he arrived at work at 6.52am and arrived back home at 2.01pm. This is 7 hours of work. During this period Mr Maru would be expected to have taken an unpaid lunch break of half an hour.

[8] Ms Galbraith prepared a table summarising her findings and this has been provided to the Authority. While Mr Maru disputes the conclusions arrived at by McKay Electrical, in regard to whether he was working or not, there does not appear

to be any dispute about the general content of the records. Ms Galbraith says that it also appeared that Mr Maru had used his company vehicle for personal use without permission. The further evidence of Ms Galbraith is that after she had analysed Mr Maru's vehicle GPS movements, as compared with his timesheets; she also analysed the GPS movements of other staff and compared them with their time recording. Ms Galbraith says that she wanted to check whether there was a culture within McKay Electrical of falsifying timesheets, but she found that Mr Maru was the only person with such marked discrepancies.

[9] The further evidence of Ms Galbraith is that having carried out the analysis of Mr Maru's GPS movements and his time records, it was decided that the company needed to investigate two particular matters fully and this required a meeting with Mr Maru to hear his explanation.

[10] Via a letter from Mr Lingley dated 17 May 2010, Mr Maru was invited to a disciplinary meeting. The letter notified him that he was required to attend the meeting with Mr Lingley and Mr Hargood at the Hamilton office on Wednesday 19 May 2010. Mr Maru was also informed that Ms Galbraith would be present at the meeting, via a telephone conference call. The letter goes on to inform Mr Maru that:

At this meeting we will discuss the allegations that you appear to have:

1. Falsified your timesheet.
2. Used a company vehicle for non work related activities without prior approval.<sup>1</sup>

A selection of your timesheets and related vehicle GPS records are provided here for your reference. I am obliged to advise you that if these allegations are proven to be correct there is a potential for disciplinary action to be taken, up to and including immediate termination of employment. You are entitled and encouraged to bring to the meeting with you a support person/representative of your choice. I am giving this letter to you now so that you are aware what the meeting will be about and to give you ample opportunity to consider your response. During the meeting you will have every opportunity to comment on and discuss this matter with Keith, Elizabeth and myself. If you have any queries regarding this matter please do not hesitate to contact me

[11] Mr Maru met with Mr Lingley and Mr Hargood on 19 May 2010. He was accompanied by a support person. Ms Galbraith was involved in the meeting via a

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<sup>1</sup> It subsequently transpired that McKay Electrical decided not to pursue this matter as there was insufficient evidence.

telephone link and took notes which have been produced to the Authority. The evidence of Ms Galbraith is that the meeting lasted a little over 2 hours. The relevant timesheets and GPS records were discussed and Mr Maru was asked for an explanation pertaining to the discrepancies between the two records, as had been revealed by the investigation conducted by Ms Galbraith.

[12] Mr Maru gave several reasons for the discrepancies between his timesheets and the GPS records. These included:

- (a) The time it took to set up or synchronise his laptop computer each morning. Mr Maru said it took between half an hour and an hour for this to happen.
- (b) Mr Maru did an assessment of the weather and if conditions such as rain or fog needed to clear, so that he could go out to conduct his patrols.
- (c) Carrying out vehicle maintenance, such as washing the vehicle and clearing out any debris that he may have picked up during his patrols.
- (d) Catching up on paperwork.
- (e) Dropping his wife off at home when she accompanied him on a patrol, before going back to the work depot.

[13] In his written statement of evidence for the Authority, Mr Maru also referred to time being spent phoning his work colleague [Mr P<sup>2</sup>] to obtain his whereabouts. This is not mentioned in the notes of the meeting or in the evidence of Mr Lingley or Ms Galbraith; nonetheless, there is general overall consistency in the evidence regarding the explanations given by Mr Maru.

[14] The evidence of Mr Lingley is that upon hearing Mr Maru's explanations, some questions were put to him to obtain further clarity. Mr Lingley gives some examples:

- (a) If Mr Maru was having trouble with his computer, why did he not contact the company to ask about repairs or getting a new computer?

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<sup>2</sup> Given that this person is not substantially involved in the matters before the Authority, his identity is not published in order to protect his privacy.

The company had no record of receiving any request from Mr Maru about the functioning of his computer.

- (b) The period of monitoring of his timesheets and comparing them with the GPS records was done during the summertime. Only in extreme weather circumstances would line mechanics not work. It was highly unlikely that Mr Maru was unable to work due to weather conditions.
- (c) It is not necessary to wash a company car every day. Why did Mr Maru think this was necessary?

[15] The further evidence of Mr Lingley is that after hearing Mr Maru's explanations the meeting was adjourned. During the adjournment Ms Galbraith and Mr Lingley discussed Mr Maru's explanations and considered both his employment agreement and the company rules, which expressly state that falsification of timesheets equates to wilful misconduct. A conclusion was reached that given that falsification of timesheets was expressly prohibited in the company rules and went to the core of the relationship of trust and confidence, it was decided that it was appropriate to summarily dismiss Mr Maru.

[16] When the meeting was reconvened, Mr Lingley advised Mr Maru that he and Ms Galbraith had considered his explanations and weighed up the evidence before them. Mr Lingley told Mr Maru that they had concluded that it was more likely than not that Mr Maru had falsified his timesheets and that this conduct goes to the centre of the relationship of trust and confidence. Therefore, it was felt that the appropriate sanction was to terminate Mr Maru's employment immediately.

[17] The further evidence of Mr Lingley is that in order to avoid any embarrassment for Mr Maru in front of his colleagues, he was asked whether he would like to remain at work for the rest of the day and then just leave at the normal time. However, Mr Maru decided he would prefer to leave immediately.

[18] The termination of Mr Maru's employment was confirmed to him via a letter dated 24 May 2010:

I wish to confirm our discussions on Wednesday 19 May. This meeting took place at the Hamilton branch office with Peter Lingley, Keith Hargood, myself (via conference phone) and your support person, [Mr P]. We had a lengthy discussion of the allegations that there were significant and repeated discrepancies in your timesheet

entries when compared to the GPS records. You had previously been provided with copies of both sets of records which we went through in detail. The decision was reached to terminate your employment due to the seriousness and extent of these discrepancies. These discrepancies amount to a significant amount of money. We reserve the right to recover this money at any time in the future. Your final pay has been prepared and will be paid by direct transfer on Wednesday 26 May. You will receive a direct credit of \$4,473.91 the breakdown of which will be seen on your payslip. If you have any questions about this letter or require further explanation on any point, please don't hesitate to contact me.

Elizabeth Galbraith  
Manager, Human Resources

### **Analysis and conclusions**

[19] Section 103A of the Employment Relations Act 2000 (the Act) provides the test to be applied to a dismissal. In determining whether a dismissal or an action was justifiable, the Authority is required to consider on an objective basis, whether the employer's actions and how the employer acted, were what a fair and reasonable employer would<sup>3</sup> have done in all the circumstances at the time the dismissal or action occurred.

[20] As was held by the Employment Court in *Air New Zealand v Hudson* [2006] ERNZ 425:

However, the s.103A requirement for the Authority and the Court to stand back and determine the matter on an objective basis by evaluating the employer's actions does not give an unbridled licence to substitute their views for that of an employer. Their role is instead to ask if the action of the employer amounted to what a fair and reasonable employer would have done and evaluate the employer's actions by that objective standard. It may mean that the Court [Authority] reaches a different conclusion from that of the employer but, provided this is done appropriately, that is objectively and with regard to all the circumstances at the time the dismissal occurred, a conclusion different from that of the employer may be a proper outcome.

[21] The meaning of s.103A was again clarified by a full bench of the Employment Court in *Air New Zealand Limited v V* [2009] ERNZ 185:

The meaning of the text of s.103A is clear on its face and in the light of its common law antecedent. It sets out a test of justification where a personal grievance has been alleged. In cases of dismissal, it

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<sup>3</sup> Because the dismissal of Mr Maru occurred prior to 1 April 2011, the new provisions of the Employment Relations Amendment Act 2010 are not applicable.

requires the Authority or the Court to objectively review all the actions of the employer up to and including the decision to dismiss.

[22] As established in *Air New Zealand v. V*, in determining whether or not the actions of the company were those of a fair and reasonable employer in the circumstances, the Authority is required to objectively review [“... all of the actions of the employer up to and including the decision to dismiss.”

[23] The circumstances applying to Mr Maru were:

- (a) McKay Electrical formed a belief that Mr Maru’s timesheets did not accurately record the actual hours that he had worked.
- (b) The company conducted an investigation and compared Mr Maru’s timesheets with the GPS records of his daily vehicle movements for the period 16 March 2010 to 30 April 2010, a total of 34 working days. An analysis of that period of time showed that Mr Maru had claimed, and been paid for, 30 hours of work that the company concluded he had not carried out.
- (c) Mr Maru was provided with the timesheets and GPS records and asked for an explanation at a disciplinary meeting held on 19 May 2010. The company considered Mr Maru’s explanations but did not accept them. The company concluded that Mr Maru had falsified his timesheets and that this was “wilful misconduct” under clause 16.0 of the employment agreement.

**Was McKay Electrical entitled to conclude that the actions of Mr Maru constituted serious misconduct?**

[24] Clause 16.0 of the employment agreement between the parties provides a variety of circumstances whereby the sanction of summary dismissal may apply. Relevant to the circumstances of Mr Maru is:

- (e) Falsification or being party to falsification of any company or client document or record. This includes time/wage/accident/expense/leave records etc.

[25] The grounds for a belief that serious misconduct by an employee has occurred must depend on the facts of each case. The employer must have either clear evidence

upon which any reasonable employer could safely rely, or have carried out reasonable inquiries which left the employer, on the balance of probabilities, with grounds for believing that the employee was at fault<sup>4</sup>.

[26] It has been submitted for Mr Maru that the sample taken of his timesheets and the associated vehicle GPS records from 16 March to 30 April 2010, was not an accurate sample. It is submitted that McKay Electrical should have reviewed the relevant records for the entire time that Mr Maru had been employed by the company.

[27] But that argument is inconsistent with the findings in *Hardie v Round*<sup>5</sup>, a case that the Authority was referred to by counsel for the applicant. This case involved the alleged falsification of timesheets, albeit the circumstances were somewhat different to those involving Mr Maru. The Court held that as a matter of fairness, the employer [“...was obliged to make known his concerns and the grounds for them within a reasonable time of their occurrence” and that the results of an investigation [“...must be commensurate with an ability for the employee to recall the relevant events and to challenge the employer’s account of them.”

[28] It follows that I conclude that there was nothing unfair or unreasonable about the period of time that McKay Electrical elected to investigate pertaining to Mr Maru’s timesheets and GPS records.

[29] I conclude that a full and fair investigation conducted by McKay Electrical, disclosed conduct on the part of Mr Maru that was capable of being regarded as serious misconduct falling squarely within clause 16.0(e) of his employment agreement, in that there were reasonable grounds for McKay Electrical to believe that Mr Maru had falsified his time records on various occasions.

**Was the dismissal of Mr Maru an action that a fair and reasonable employer would have taken in all the circumstances?**

[30] As has been submitted for Mr Maru, it is well recognised that where a serious allegation is the basis of a dismissal, the evidence to support that allegation must be as convincing in nature as the seriousness of the charge. It was submitted for Mr Maru that McKay Electrical did not have evidence that was “sufficiently convincing” to

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<sup>4</sup> *Airline Stewards and Hostesses of New Zealand IUOW v. Air New Zealand Ltd* ERNZ, Sel Cas pre-1991, 985, [1990] 3 NZILR 584 at 993

<sup>5</sup> (2008) 8 NZELC 317

support the allegation of falsification of time records (or dishonesty) made against Mr Maru.

[31] The Authority has been referred to an earlier determination *Robinson v. Rentokil Initial Ltd*<sup>6</sup> where it was stated that:

There was no basis to use GPS alone to determine whether he was working or not. While it might provide an accurate measure of when the van was started and moving, that was not a measure of whether he was working.

The circumstances in the *Robinson* case were somewhat different to those of Mr Maru, as Mr Robinson admitted that he had falsified his timesheet entries. Nonetheless, McKay Electrical acknowledges the general proposition that the GPS records alone do not establish whether an employee is working or not, and says that it does not expect the timesheets to have the “exact” start time as a GPS recording. McKay Electrical also acknowledges that there will be “some minor administration tasks” that an employee may perform before they start the vehicle and that this consideration was taken into account in regard to Mr Maru. And, McKay Electrical says that it did not rely on Mr Maru’s GPS records alone to determine whether he had been working during the periods relating to the discrepancies that were identified.

[32] McKay Electrical says that it also:

- (a) Reviewed the timesheets and GPS movements of other McKay Electrical employees and found that Mr Maru was the only person with such marked discrepancies.
- (b) The company found no evidence or record that Mr Maru’s computer did in fact take some time to synchronise as he had claimed.
- (c) The company reviewed the weather for the monitoring period and found that there were no severe storm events that would have stopped Mr Maru from performing his work.

[33] McKay Electrical says that it considered Mr Maru’s responses carefully but they were found to be implausible and on the evidence at hand, the company came to the conclusion that it was more likely than not that Mr Maru had falsified his timesheets.

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<sup>6</sup> AA179/10 (unreported) 20 April 2010

## Determination

[34] In determining the question of whether the dismissal of Mr Maru was justifiable, the Authority is cognisant of the established (and often quoted) finding by the Court of Appeal in *Northern Distribution Union v. BP Oil New Zealand Ltd*<sup>7</sup>:

For a discussion of the kind of conduct that will justify summary dismissal it is unnecessary to look any further than this Court's judgment in *BP Oil New Zealand Ltd v. Northern Distribution Union* [1989] 3 NZLR 580. Definition is not possible for it is always a matter of degree. Usually what is needed is conduct that deeply impairs or is destructive of that basic confidence and trust that is an essential of the employment relationship. In the context of a personal grievance claim under the Labour Relations [Employment Relations] Act questions of procedural and substantive fairness are also relevant. In the end the question is essentially whether the decision was one that a reasonable and fair employer would have taken in the circumstances. [Underling added]

[35] In summary, having weighed the overall evidence and the respective arguments of both parties, I find that a fair and reasonable employer faced with the evidence regarding Mr Maru's timesheets and GPS records, and taking into account his implausible explanations for the discrepancies identified, would have concluded that his conduct deeply impaired or was destructive of the basic trust and confidence that is essential to the employment relationship.

[36] This is particularly so given that Mr Maru was in a role where he was unsupervised and hence his employer relied upon him to carry out his duties and submit honest records relating to the times that he was physically working and/or productive on behalf of the company.

[37] I find that the dismissal of Mr Maru was what a fair and reasonable employer would have done in the circumstances and that the dismissal was justified. The claims of Mr Maru are dismissed.

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<sup>7</sup> [1992] 3 ERNZ 483 at 487

**The counter-claim from McKay Electrical**

[38] McKay Electrical says that Mr Maru claimed and was paid for 30 hours recorded on his timesheet that he did not actually work. The evidence of Ms Galbraith is that Mr Maru was paid \$26.28 per hour (including a tools and clothing allowance). Therefore, McKay Electrical requires Mr Maru to repay the sum of \$788.40 (\$26.28 x 30 hours). On the evidence before the Authority, which has not been contested in regard to the amounts involved, I find that the claim is proven and that McKay Electrical is entitled to the sum claimed.

[39] Mr George Maru is ordered to pay to McKay Electrical & Instrumentation (Whangarei) Limited the sum of \$788.40.

**Costs**

[40] Costs are reserved. The parties are invited to resolve the matter of costs if they can, taking into account the daily tariff approach of the Authority and that the investigation meeting was completed within half of a day. In the event a resolution cannot be reached, the respondent has 28 days from the date of this determination to file and serve submissions with the Authority. The applicant has a further 14 days to file and serve submissions.

**K J Anderson**  
**Member of the Employment Relations Authority**