

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 183/09
5279294

BETWEEN

JAMIE MUNRO
Applicant

AND

TENIX ALLIANCE NEW
ZEALAND LIMITED
Respondent

Member of Authority: P R Stapp

Representatives: Jills Angus Burney for Applicant
Susan-Jane Davies for Respondent

Investigation Meeting: 30 October 2009 at Wanganui

Further information and
written submissions: 11 November 2009

Determination: 23 November 2009

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Jamie Munro's employment relationship problem involves a motor vehicle accident, a complaint Tenix received from a local farmer, an accident report and his attendance at investigation and disciplinary meetings. These were relied upon by Mr Alastair Borthwick branch manager, in making a decision to dismiss Mr Munro from his employment. Mr Munro has denied causing the accident and has denied not driving to the conditions at the time of the accident.

[2] Mr Munro wants his job back, but Tenix says it is impracticable to reinstatement him because there has been a loss of trust and confidence in Mr Munro due to his involvement in the accident, and because of a prior warning given to him a

few days before the accident involving an incident of “horseplay”. He had been fooling around and was partly responsible for damage caused to another company vehicle. Further, Tenix says it is in the middle of a restructuring and there would be no position for Mr Munro because of job losses, including what had been his job. Also Tenix says other employees have come forward confidentially with stories about Mr Munro’s driving.

Issues

[3] This is a matter requiring consideration of the following matters:

(1) Whether or not the decision maker came to an honestly held belief based on genuine grounds that Mr Munro had been driving too fast for the conditions.

(2) What would a fair and reasonable employer have done in all the circumstances at the time of the dismissal pursuant to section 103A of the Employment Relations Act 2000? This requires an objective assessment of the parties’ evidence available at the time, and for me to assess whether Tenix acted fairly. The employer’s decision is underpinned by a serious allegation relating to serious misconduct, and therefore the evidence the employer considered at the time must be as compelling as the allegation is grave.

(3) If there is a personal grievance is it impracticable to reinstate Mr Munroe?

(4) If there is a personal grievance, is there any contributory fault under section 124 of the Employment Relations Act 2000?

The facts

[4] Mr Munro commenced his employment with Tenix Alliance New Zealand Limited on 30 June 2003 as a trainee line mechanic in an apprenticeship, and upon graduating he became a line mechanic for the company. Previously he had served in the Royal New Zealand Air Force. His employment is covered under a Tenix and the Engineering Printing Manufacturing Union (EPMU) 2008-2010 collective

employment agreement (the CEC). He was paid an average \$1,525.49 per week and worked on call on a roster arrangement. He was a union delegate and on the health and safety team.

[5] On 12 August 2009 Mr Munro was involved in an accident in his work vehicle on Watershed Road near Wanganui. Watershed Road is a dry narrow gravel road with blind corners. He had been dealing with a call out on a nearby farm property. A local farmer, Mr Lindsay Johnstone, and his farm hand, say they witnessed from Rangitatau Road, Mr Munro's driving while they were fencing. They did not witness the accident.

[6] Mr Munro's and another driver's vehicles collided on one of the narrow blind corners, and Mr Munro says that the other driver made an admission that she had been going too fast. Mr Munro assisted the other driver down the road home and he left to return to Wanganui. On the way home he reported the accident to his team leader, and was informed by his team leader that there had been a complaint made by Mr Johnstone about a Tenix employee's driving on the road. The team leader went to the scene, and took some photos of the accident site with Mr Munro. The team leader then went to speak to the other driver, her mother and the local farmer. He obtained written statements from the other driver and her mother. Mr Munro completed a written vehicle accident report and recorded that the other driver had said "*sorry, I was going too fast*".

[7] Another employee from out of town was called in to investigate the matter. The investigator provided an accident report that included that there had been some interviews and that consideration had been given to statements made by the other driver, the driver's mother, Mr Johnstone, Tenix's receptionist and Mr Munro. The accident report was provided to the EPMU and Mr Munro a day before an investigation and disciplinary meeting, which was arranged for Mr Borthwick to consider Mr Munro's behaviour.

[8] That report also included the comment that the other driver "*...does not recall making any other statement*". The other driver's written statement did not refer to any comments being made about admitting to going too fast.

[9] The meeting was held on 20 August 2009 involving Mr Munro, Colin Webster union organiser, Wayne Ruscoe the lead organiser, Mr Borthwick, and Bronwyn Long Human Resources manager.

[10] At the meeting Mr Munro and his representatives said that there was not enough evidence for the employer to decide that he was driving too fast and Mr Ruscoe suggested a defensive driving course should be considered. Mr Munro was informed that dismissal was being considered and he was asked if he had anything to say.

[11] Mr Munro was dismissed for serious misconduct under Tenix's code of conduct. Mr Borthwick says that after he received the investigator's accident report he arranged payment to the family of the other driver for the damage to her vehicle.

Discussion

[12] There is no dispute that Mr Munro was involved in the vehicle accident on Watershed Road while he was at work. The accident occurred at a blind corner. The road was dry and is a narrow gravel country road. He disputed that he was speeding and driving too fast for the conditions. He says the other driver admitted that she was driving too fast, and Tenix says that she denied that.

[13] Mr Johnstone made a complaint, first by telephone to Tenix, and secondly after being contacted he followed it up with two email statements. Only one email statement has been provided.

[14] An accident report was commissioned by Tenix, involving an out of town employee of the company. Written statements were attached to the final report. There were no statements from the farm hand (the second witness to Mr Munro's driving) and Mr Munro's team leader, and they were not included in the report process, except that the team leader did have some discussions with the other driver and her mother and Mr Johnstone after the accident and took a photo of the accident site with Mr Munro present. The content of the investigator's discussions with the other driver and her mother and Mr Johnstone have not been disclosed, except that the team leader appears to have been the source for their statements being provided. Mr

Munro claims that Mr Johnstone could not and did not see what happened. Mr Borthwick says he relied on the information available at the time and it was open to dismiss Mr Munro because his actions amounted to serious misconduct.

[15] There were no independent witnesses to the accident, but there had been the complaint from Mr Johnstone that in his opinion Mr Munro (as the identified driver) was driving too fast for the conditions before the accident. Mr Johnstone made a complaint because he had a genuine concern for public safety on the road.

[16] Mr Borthwick says he reached his own decision that he was considering dismissing Mr Munro. Mr Borthwick says he relied on: (1) the investigator's report, (2) that there were two witnesses, (3) that there was an accident, and (4) his conclusions from his investigation meeting held on 20 August 2009 that Mr Munro was driving recklessly and threatened public safety. He informed Mr Munro that he was considering dismissing him, and asked for anything that Mr Munro had to say. He dismissed Mr Munro and confirmed it in writing on 21 August 2009.

[17] The circumstances relevant to considering Mr Munro's personal grievance are that:

- There were no eye witnesses to the accident.
- Mr Munro consistently denied that he caused the accident.
- There was no independent evidence available to support that the other driver denied saying that she was driving too fast. Ms Long and Mr Borthwick said that the other driver had denied saying this, but could not provide any evidence to support their contention.
- There are no findings on how credibility was determined, except for assertions that the other people involved were more credible than the applicant. It is hard to understand how Mr Borthwick and Ms Long reached their opinion that on the balance of probabilities Mr Munro was not credible by relying on the meeting of 20 August. Clearly at that meeting Mr Munro and his representatives were contesting the allegations and grounds Mr Borthwick outlined that would impact on Mr Munro's employment. Mr Munro had consistently denied that he caused the accident. He maintained that the other driver admitted going too fast.

- There were two witnesses to Mr Munro's driving, but there was no information gathered from the second witness, i.e. the farm hand. Mr Borthwick had to rely on what Mr Johnstone had informed the company.
- Mr Munro and Mr Johnstone had different opinions about Mr Munro's driving.
- There was no evaluation of the witness statements attached to the report for any detailed credibility findings. Mr Munro denied ever seeing the statements until the report was presented a day or two before Mr Borthwick's meeting with him. The differences that emerged between Mr Munro and the people involved would require a fair and reasonable employer enquiring more fully before reaching any conclusions than just relying on the report.
- The report, without any analysis, states that there was a factor of "intentional" behaviour that was an issue. There was no clarification about what this meant and how that conclusion was reached.
- It is unclear whether the purpose of the report was to establish any findings of causation and liability on the accident (which was absent) or to provide findings on Mr Munro's behaviour (which it purports to do).
- Mr Borthwick says he relied on the investigator's report, which he is entitled to do, but unfortunately the inconsistencies and discrepancies, which do not appear to have been followed up, means his decision appears to have been influenced by improper considerations and irrelevant issues based on that report.
- The other incident relied upon by Mr Borthwick was a verbal warning involving an entirely different matter. While the employer has drawn a conclusion from it, a fair and reasonable employer would not have because it involved a different matter, there was no repeat behaviour of the same nature, Mr Munro was remorseful over that matter and it was very much at the lower end of the scale for misconduct where the employer concluded that it had to issue a verbal warning.
- The specific details and actual allegations were not put to Mr Munro other than for him to ascertain for himself from the report that he was given at the same time. This conclusion is supported by the meeting

notes where only two questions were actually put to Mr Munro, including whether or not he agreed with the report.

- Mr Munro was present with his team leader when a photo was taken at the site of the accident. There was no independent evidence about the findings and conclusions drawn from the team leader's photographs. Both parties have drawn different conclusions from the photos. For example there are different opinions about the tyre marks identified in that evidence and no expert evaluation of it has been made. Tenix's investigator did not give any evidence as an expert. Mr Borthwick's opinion was formed without a site visit and he did not interview anyone other than Mr Munro.
- Mr Munro reported the accident and he filled out the required forms for Tenix honestly and genuinely. He provided his statement. He did all this in the belief that the company would investigate the accident. He did not know that the Tenix investigator would be considering a recommendation and course of action that concluded that his employment would be affected. Properly Mr Borthwick took these up in a separate process before making any decision and gave Mr Munro the opportunity to comment on his decision that he was considering dismissal.
- Mr Johnstone says he provided two emails, but only one has been produced. None of the witnesses knew that there were two emails and none of them had seen the other one. The evidence before me was that Mr Johnstone was asked to provide more detail in the second email. Mr Johnstone had never met Mr Munro before. Mr Johnstone acknowledged that he knows Mr Munro's team leader, and that he is a member of the 4 x 4 club so knows safe driving from reckless driving. Mr Munro acknowledged when answering questions from me that it was only Mr Johnstone's opinion that he was driving too fast or speeding for the conditions.
- Mr Borthwick decided to consider dismissing Mr Munro, but did not say what his findings were, and how he came to them, other than on the balance of probabilities he decided on credibility.
- Finally there is the uncertainty about Tenix accepting liability for the accident when it towed and paid out for the damage to the second

vehicle. Critically Mr Borthwick says he accepted the company was at fault after he received the accident report. But he had no precise details as to whether or not this occurred before he made his decision to dismiss Mr Munro or afterwards.

- There were no complaints made to the Police.

Findings

[18] Mr Munro has a personal grievance because a fair and reasonable employer would not have come to an honestly held belief that Mr Munro's driving was reckless and or negligent because of the above circumstances, and including relying on the accident report produced that would have required more enquiries being made.

[19] This is a matter that involves a very serious allegation relating to negligence and safety involving Mr Munro's driving, and therefore, Tenix has the responsibility to produce compelling evidence as the allegation is grave. Although there was an accident there was no proof to the required standard that the accident was caused by Mr Munro's driving. There was a conflict between him and Mr Johnstone on the nature of his driving, and where there was another witness it appears that there was no attempt to get any further information from that witness. Also Mr Munro claims that the other driver admitted going too fast. Ms Long and Mr Borthwick told me that the other driver denied going too fast but neither of them could point to any evidence where she had denied that claim. Indeed neither of them met with her. Her statement in the accident report did not cover it. There is no explanation from the investigator or the team leader about what the other driver said and if she denied admitting to Mr Munro that she was going too fast. This is a serious defect. Tenix has not met the required standard therefore to claim that Mr Munro was driving recklessly despite Mr Johnstone's opinion. This can only lead to the conclusion that a fair and reasonable employer would not have decided to dismiss Mr Munro. In addition there is the evidence that he had worked for 7 years with Tenix, having completed an apprenticeship, except for the oral warning he had an unblemished record, and he drives in excess of 30,000 km a year.

[20] It is my conclusion that Mr Munro's dismissal was unjustified and he has a personal grievance.

Remedies

[21] The first matter for me to consider is whether Mr Munro has contributed to the situation giving rise to his personal grievance. Undoubtedly his driving is a causative link to his dismissal. There was an accident, whoever was to blame. There was a complaint about Mr Munro's driving from a farmer who did not know Mr Munro. That farmer's opinion about Mr Munro's driving is linked to Mr Munro's union official's suggestion that a defensive driving arrangement be put in place for Mr Munro. Whatever speed Mr Munro was driving at was causative of dust on the dry and gravel road. There is no argument that Mr Munro was driving in excess of the 100km speed limit, but there is a difference of opinion on whether or not Mr Munro was driving to the conditions. This has to be affected by there being no witnesses to the accident, the unresolved issue of whether or not the other driver admitted going too fast and that there has been some discrepancy in Mr Johnstone's evidence about Mr Munro cutting a left hand corner. Mr Munro co-operated with the company's enquiry into the accident. Therefore, I conclude that no contributory fault has been established to the necessary standard of proof.

[22] Mr Munro has asked to be reinstated. In the meantime he has obtained a fixed term arrangement with another employer to work until Christmas. Tenix says that pending consultations on redundancies may impact on Mr Munro's position if he was reinstated. Also it claimed that other employees, who wish to remain anonymous, have come forward with stories about Mr Munro's driving. Tenix has asked me to consider these two matters and not reinstate Mr Munro. First the matter of the consultations on redundancies is on-going. There are a number of positions affected and there is nothing to suggest that consultations on redundancy make it impracticable to reinstate Mr Munro. Good management should be able to deal with this and it is a risk that Mr Munro may face consultation for redundancy should he be reinstated. Secondly, the evidence given about the unnamed employees is most unsatisfactory. Significantly, neither Ms Long nor Mr Borthwick could give any facts about what these employees are complaining about. Their evidence lacks any substance to be given any weight. There were no details of incidents, with times and dates being relied upon. Ms Long and Mr Borthwick were adamant in saying that the employees

concerned had asked them to keep their names confidential. Whatever the matters these employees are now raising, Mr Munro says they never brought the matters to his attention previously. He says he has no knowledge of what they are referring to. I accept Mr Borthwick says he is disappointed with the employees raising such matters after the event. I have to say I am concerned that this type of evidence has been referred to in this way. It is my decision that Tenix will have to reinstate Mr Munro.

[23] Mr Munro is seeking all his lost wages. He has claimed losses from the date of his dismissal until the Authority's investigation meeting. He mitigated his loss. He obtained alternative work to tie him over until his employment relationship problem was sorted out. His estimated loss amounts to \$10,086.71. This is based on approximately ten weeks loss of wages at \$1,008.67 per week. The exact sum is left to the parties to work out and leave is granted to the parties to return to the Authority if needed. I award Mr Munro \$10,086.71 subject to any agreed variation on the exact amount being calculated by the parties.

[24] Mr Munro is seeking \$12,000 compensation. This is a case where Mr Munro and his parents have established that Mr Munro has been hurt, humiliated and has lost dignity and had injury to his feelings. It is my assessment that having regard to equity and good conscience considering the remedies overall that his compensation should be fixed at \$8,000 under s 123 (1) (c) (i) of the Act. I have relied on his personal reaction to being dismissed, the embarrassment he suffered with his parents over having to tell them about being dismissed and his parent's account of the impact of the dismissal on Mr Munro.

Summary

[25] Tenix Alliance New Zealand Limited is required:

- To reinstate Mr Munro to his previous position or a position not less advantageous as soon as practicable.
- To pay Mr Munro \$10,086.71 lost wages subject to any variation on the correct calculation being agreed or any further orders of the Authority on the amount.
- To pay \$8,000 compensation under s 123 (1) (c) (i) of the Act for humiliation, loss of dignity and injury to feelings.

[26] Costs are reserved as requested.

P R Stapp
Member of the Employment Relations Authority