

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Shankaran Nair (Applicant)
AND The Farmers Trading Company Limited (Respondent)
REPRESENTATIVES Amy Wright, Counsel for Applicant
Mike Gould, Counsel for Respondent
MEMBER OF AUTHORITY R A Monaghan
INVESTIGATION MEETING 9 September 2003
**SUPPLEMENTARY
EVIDENCE RECEIVED** 3, 6, and 7 October 2003
DATE OF DETERMINATION 20 October 2003

DETERMINATION OF THE AUTHORITY

Employment relationship problem

Shankaran Nair says he was unjustifiably dismissed by his former employer The Farmers' Trading Company Limited ("Farmers"). The dismissal followed his failure to advise Farmers' of the suspension of his motor vehicle driver's licence, and driving both a company vehicle and a rental vehicle during the suspension. Farmers' says the dismissal was justified because Mr Nair's actions were in breach of company policy, and resulted in a breakdown of trust and confidence between the parties.

Mr Nair seeks reinstatement.

Mr Nair also seeks payments he says are owed to him in respect of the employer's contribution to a company superannuation scheme which was wound up in 1996.

Background

Mr Nair began his employment with Farmers' in October 1993. At the time Farmers' operated a staff superannuation scheme, which Mr Nair joined in March 1995. Farmers' made contributions to the scheme on behalf of Mr Nair at the rate of 4% of his remuneration.

The scheme was wound up on 1 April 1996. Pursuant to a choice offered at the time, Mr Nair opted to have the company's former superannuation contribution incorporated into his salary. He also opted to have the benefits accumulated in the Farmers' Superannuation Plan transferred to a staff retirement plan. No employer contributions were made to the staff retirement plan.

On the winding up of the superannuation scheme employer contributions were to be paid to employees as a component of salary. Thus, since Farmers' had contributed to the superannuation scheme in the sum of 4%, by letter dated 22 March 1996 Mr Nair was advised:

“From 1 April 1996 your new pay rate will be \$15.76817/hr. This incorporates the company's contribution of 4.00% previously paid on your behalf to FSS.”

By letter dated 21 November 1997 Mr Nair was offered a position as support services manager at the company's St Luke's store at the salary set out in the letter. The letter made no mention of superannuation. Mr Nair says he is owed \$6,505.24, being the amount of the company's superannuation contribution calculated at 4% of his salary from 21 November 1997 to the date of termination of his employment.

A letter to Mr Nair dated 2 July 2001 confirmed his appointment to a position as 'DSM' in the Albany store. The letter began as follows:

“We are pleased to confirm the terms of your employment with the Company. The Farmers Personal Employment Contract Store Operations (copy enclosed) will apply. Any previous contracts and benefits are cancelled and replaced with those specified below. The following special items apply.

This letter shall prevail where there is any inconsistency between this letter and the Individual Employment Contract (Store operations).”

There was no mention of superannuation in the letter, and the terms were to be effective from 25 June 2001.

On or about 21 September 2001 Mr Nair was appointed to the position of store auditor. Store auditors' duties included conducting audits of the Farmers' stores as well as of various supermarkets owned by Progressive Enterprises Limited (“Progressive”). Progressive and Farmers are both subsidiaries of Foodland Associated Limited. The essence of the auditor's position was that the auditor was required to make assessments and judgments on compliance by staff with company policies and processes as well as relevant legislation.

The audit process was very thorough. Auditors followed a detailed worksheet. The draft example provided at the investigation meeting indicated audits addressed stock control, price integrity, sales controls and procedures, cash controls, general security (including of premises, electronic information and retail), health and safety, payroll (including sampling staff files to ensure up to date job descriptions and employment contracts were on file), accounts, legislative compliance (primarily addressing land transport, building, health and safety and smoke-free legislation), fixed assets and additional information. Lists of associated tasks were set out under each of these headings. There was also a column headed 'evidence necessary for judgement', which referred the auditor to the relevant manual and added notes and questions to be followed up as part of the audit.

Thus by its nature the position required a person capable of enjoying a high degree of trust, of being thorough and methodical, understanding the need for and uses of documentation, understanding the need for and purpose of ensuring compliance, and able to grasp the breadth of the areas in which compliance might be expected.

The 21 September 2001 letter of appointment said:

“You will be provided with a motor vehicle in accordance with the Company Motor Vehicle Policy. The current entitlement is to a 1.8L company motor vehicle.

Details of the Motor Vehicle Policy will be provided to you in due course.”

Mr Nair received a written employment agreement shortly afterwards. Farmers' work rules and disciplinary procedures were attached to the agreement. They read in part:

"The following behaviours are misconduct which will result in disciplinary action and in the event of serious or repeated breaches are likely to result in summary dismissal.

1. ...
8. Vehicles
To be authorised to drive a company motor vehicle a Team Member must have a current drivers' licence for the appropriate class of motor vehicle.
....
Unauthorised use or irresponsible use of a company vehicle will be deemed misconduct."

Relevant provisions of the motor vehicle policy ("the policy") were:

"3.9a The team member allocated or driving a company vehicle is held responsible for safeguarding the security and value of the company's asset, and for minimising insurance claims and unnecessary repair costs. ... The team member must hold a valid drivers license and advise the Fleet Manager and relevant Divisional Manager of any license endorsements. Any license restrictions must be adhered to at all times. The Line Manager is responsible for sighting the current license of team members who drive a company motor vehicle. Any cancellations, conditions or endorsements of driving licenses must be notified immediately to your Divisional Manager and Fleet Manager, Support Office."

Mr Nair denied receiving the policy. I am inclined to accept his denial because the evidence indicated human resources procedures could have fallen down when it came to ensuring he received a copy, but the unpersuasive nature of his evidence on the matters I am about to discuss cause me to consider it likely he was at least aware of its contents.

On 5 April 2003 Mr Nair's driver's licence was automatically suspended for a period of three months as a result of the accumulation of demerit points against the licence. Mr Nair says he did not know he was expected to report the suspension, which clause 3.9a of the policy required him to do. In addition, on the ground that family members were permitted to drive company vehicles, he arranged for his wife to drive for him. At the investigation meeting he agreed he knew it was illegal to drive while his licence was suspended. When asked why then, even if he was not aware of the company's policy, he did not inform it of the suspension of his licence, he said he did not consider it necessary because he had arranged for someone else (his wife) to drive for him.

During the early period of the suspension of Mr Nair's licence, Mrs Nair accompanied him where necessary, and did the driving. However between 3 and 5 June 2003 Mr Nair was obliged at short notice to conduct an audit at a store in the Wellington region. His wife was not able to accompany him, so he hired and drove a rental vehicle. Obviously he was driving unlawfully and he knew it. Nevertheless he did not advise Farmers' of the suspension of his license or of his inability to have his wife drive for him.

Then, because of illness, Mrs Nair was unable to drive for some two weeks during mid-late June 2003. Mr Nair sought a period of sick leave and annual leave, but did not receive the full amount he sought. He therefore drove the company vehicle himself during the period 16 June to 2 July 2003. When asked at the investigation meeting why, knowing he was driving unlawfully and that his arrangement to have someone else drive for him could not continue, he did not then inform the company of the suspension of his license, his only response was a very long silence.

On 21 June 2003 a police constable stopped Mr Nair for exceeding the speed limit. The constable asked Mr Nair to produce his driver's licence, but Mr Nair was unable to do so. Mr Nair gave the constable Farmers' business address in the meantime, on the ground that Farmers' was the

registered owner of the vehicle and Farmers' address was the appropriate one to give. The incident was not reported to Farmers' at the time and does not seem to have been immediately followed up.

The same police constable stopped Mr Nair again for exceeding the speed limit on 2 July 2003. This time the constable became aware that Mr Nair's licence was suspended and impounded the vehicle. Later the same day the constable formally advised Mark Hope, general manager human resources, of the impounding and the reasons for it, including details of the status of Mr Nair's licence.

It took the events of 2 July to prompt Mr Nair to advise Farmers' of the status of his licence. After the impounding of the vehicle Mr Nair notified his manager, the group internal audit manager HP Hong, that his license was suspended and the vehicle was impounded. I consider it obvious that he did so because he knew the company would inevitably find out about the impounding and suspension of his licence anyway. He also sought three days' annual leave to cover the remainder of the period of suspension of his licence. Mr Hope found out about Mr Nair's approach when he contacted Mr Hong early that afternoon to ascertain whether Mr Hong was aware of the situation.

By letter to Mr Nair dated 2 July 2003 Mr Hope referred to the suspension of Mr Nair's licence, the impounding of the vehicle, and relevant provisions in the work rules and motor vehicle policy. He went on to say: "The company alleges that your failure to advise it that your drivers licence was suspended in April 2003 and your subsequent use of the company vehicle notwithstanding that you did not hold a current driver's licence, amount to serious misconduct." It suggested a meeting date of 4 July 2003 to discuss the matter, offered the opportunity to bring a support person, and warned of the possibility of dismissal.

The meeting went ahead on 11 July 2003. By then Mr Nair had instructed his solicitors, so that counsel attended the meeting. A member of the Farmers' human resources department had provided counsel with statements from Mr Hong and the fleet manager as well as employment documents. The only material fact in dispute was whether Mr Nair had received a copy of the motor vehicle policy, and counsel very fairly and sensibly acknowledged that her approach at the 11 July meeting was to present what I described loosely as a plea in mitigation. She conveyed Mr Nair's apologies and said he realised he had made a serious error of judgment but was willing to make amends. She also explained Mr Nair's efforts to arrange for his wife to do his driving.

The meeting was adjourned while Mr Hope conducted further investigations I understood to be aimed at identifying the detail of how much driving Mr Nair had done during the period of suspension of his licence.

There was a further meeting with Mr Nair and counsel on 21 July 2003, during which Mr Hope put some questions about fuel consumption. Mr Hope then took a brief adjournment to consider all of the responses he had received to date. He took into account Mr Nair's long and unblemished record with the company, before concluding that Mr Nair's actions were such a serious breach of the trust required between the parties that summary dismissal was appropriate. He advised Mr Nair accordingly, and Mr Nair's employment ended the same day.

Farmers' paid Mr Nair one month's salary on termination, in recognition of his years of service with the company.

Determination – unjustified dismissal

It was common ground that the relevant legal tests include whether the decision to dismiss was one which a reasonable and fair employer would have taken in the circumstances (**BP Oil NZ Limited v Northern Distribution Union** [1992] 3 ERNZ 483 (CA)). In addition the employer must show

that a full and fair investigation disclosed conduct capable of being regarded as serious misconduct (**W & H Newspapers Limited v Oram** [2001] 2 NZLR 29; [2000] 2 ERNZ 448 (CA)). A third leading authority prevents me from substituting my judgment for that of the employer in relation to the penalty the employer imposed (**Northern Distribution Union v BP Oil** [1992] 3 ERNZ 483 (CA)).

There was no dispute that the conduct complained of occurred, rather counsel for Mr Nair submitted that it was not at a level of seriousness that could justify an employer, acting reasonably, deciding to impose a summary dismissal. In that respect the principal factor in Mr Nair's favour was his previous record of service.

Counsel's submissions also addressed whether Mr Nair was aware of the motor vehicle policy. However even if I accept he was unaware of it, Mr Nair is really saying that although he drove unlawfully both a company-owned and a company-rented vehicle while his driver's licence was suspended and without informing his employer of the fact of suspension, his conduct is mitigated by his lack of awareness that he should have informed his employer.

I agree with the company and find such an explanation unacceptable from a person in Mr Nair's position. He knew the suspension of his licence meant he could not drive lawfully, and hence he would be unable to convey himself to premises where he was required to carry out his duties. It must be obvious to the meanest intelligence (and Mr Nair is considerably more intelligent than that) that for practical reasons, if for no other, it would be necessary to inform the employer of such a significant impediment to the carrying out of work duties. Any strength in Mr Nair's argument that he thought arranging for his wife to drive for him was an adequate way of addressing the matter is negated by his continuing failure to inform the employer of the suspension of his licence once his wife was no longer able to do the driving.

Moreover, I find that Mr Nair's behaviour amounted to irresponsible use of the company's motor vehicle in terms of cl 8 of the work rules. It is hard to describe deliberately driving motor vehicles belonging to someone else, with a suspended driver's licence, as anything other than irresponsible.

I consider it unfortunate that a person with Mr Nair's record of service should be summarily dismissed for misconduct, but he was dismissed as a result of a sustained and very serious 'error of judgement'. He was a senior person in a position of trust. Not only that, but the essence of his position was that he understand the importance to the company of compliance with legal obligations, and his job was to report to his superiors on other people's compliance with those obligations. His poor judgment in acting the way he did falls far short of meeting the standard that can reasonably be expected of someone in such a position. I conclude that Mr Nair's behaviour falls within the range of behaviour that is serious enough to justify summary dismissal, and that Farmers' came to that conclusion following a full and fair investigation.

I therefore dismiss Mr Nair's personal grievance alleging unjustified dismissal.

Determination – superannuation payment

The letter of 2 July 2001 appointing Mr Nair to the position of DSM in Albany expressly cancelled and replaced any earlier terms and conditions, and made no express provision regarding superannuation. For that reason, if Mr Nair had an entitlement to any additional payment in respect of superannuation up to the date on which those provisions took effect - namely 25 June 2001 - then the entitlement was extinguished by the express provisions of the letter. I therefore dismiss Mr Nair's claim in respect of the period commencing 25 June 2001.

Regarding the period from the commencement of the claim - namely 21 November 1997 - to 25 June 2001, neither party produced a full set of contractual documents applying to Mr Nair's various employed positions. I was shown letters recording various appointments as well as increases in salary, but the relevant documents were all silent on superannuation.

The only document Mr Nair was able to produce in support of his claim was a document headed 'store operations salary review August 2000'. It was not a document sent personally to him, rather it had a wide circulation. It announced the result of the company's August 2000 salary review and included the following: "3. Superannuation. These allowances will now sit outside the hourly rate for the purpose of calculating entitlement to a CAD [Competency Assessment and Development] increase. This will be effective from August 1 1999, and those people who would have got an increase but for their superannuation allowance will be backpaid the difference."

Mr Hope's explanation was that the document related only to team members in non-management positions in a store environment. Although it included the word 'salary' in its heading, the affected employees were paid on an hourly rate rather than a salary and their remuneration was assessed under the CAD system. That system was the company's performance and remuneration system for waged employees. As Mr Nair was a salaried, management employee during the period to which his claim relates, he was not affected by the change noted in respect of superannuation.

Overall the company's position is that its contribution of 4% was incorporated into Mr Nair's rate of pay from 1 April 1996. At that point his remuneration was higher than it would have been if it comprised wages or salary alone, and subsequent increases have been calculated from the higher base. In that way Mr Nair continued to receive the benefit of the 4% contribution.

Mr Nair's position is, in effect, that the 4% payment was always a separately identifiable payment in the nature of an allowance, and he should receive it in addition to the salary payments he has received. In addition to the August 2000 salary review document, which I accept did not apply to him, the principal item of evidence on which he relied was his observation that another employee who started employment after the superannuation plan was closed received the same or a comparable salary to his. To him, that meant he was not receiving the payment in respect of superannuation to which he was entitled.

However that kind of observation is not sufficient to do more than raise a question about why. It is not sufficient to prove entitlement to payment in the terms being sought. The evidence necessary to prove such entitlement must take the form of contractual and supporting documents, or oral evidence of the contractual arrangement. There has been no such evidence, and in particular there has been no evidence that the 4% payment was to continue to be calculated as if it were a separate allowance in addition to whatever salary Mr Nair was receiving at the relevant time. Accordingly I dismiss the claim for additional payment in respect of superannuation.

Costs

Costs are reserved. Counsel for the respondent has filed submissions as to costs, while counsel for the applicant has yet to be heard on the matter. Given the stance taken in the respondent's submissions I regard the matter of costs as something the parties should be able to resolve between themselves and invite them to do so. If they are unable to reach a resolution, the applicant shall have 14 days from the date of this determination in which to file and serve a memorandum on costs, and the respondent shall have a further 7 days in which to file and serve any reply.

R A Monaghan
Member, Employment Relations Authority