



Employment Court of New Zealand

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Robertson v Envirowaste Services Limited [2010] NZEmpC 146; (2010) 8 NZELR 173 (2 November 2010)

Last Updated: 22 October 2011

IN THE EMPLOYMENT COURT AUCKLAND

[\[2010\] NZEMPC 146](#)

ARC 49/09

IN THE MATTER OF de novo challenge to a determination of the

Employment Relations Authority

BETWEEN NEIL WILLIAM ROBERTSON Plaintiff

AND ENVIROWASTE SERVICES LIMITED Defendant

Hearing: 28 June 2010

(Heard at Hamilton)

Appearances: David Hayes, counsel for plaintiff

Ray Parmenter, counsel for defendant

Judgment: 2 November 2010

JUDGMENT OF JUDGE B S TRAVIS

[1] The plaintiff, Neil Robertson, has challenged a determination of the Employment Relations Authority which found that he was justifiably dismissed from his employment with the defendant.

Factual findings

[2] Mr Robertson commenced employment with Supa-Bins in Otorohanga in about March 2008. On or about 1 July 2008 the defendant EnviroWaste Services Ltd (EnviroWaste) took over Supa-Bins and Sarah Hearfield (nee Comber) was appointed the branch manager. Mr Robertson received an individual employment agreement, which he claims to have signed some weeks later and an employee

induction handbook which provided the guidelines under which he was expected to

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operate. Mr Robertson complained of his pay sheet being altered without his consent and that his pay was late on at least one occasion. He also claims that he was told by Mrs Hearfield to take three minutes to warm up his truck when the standard time was ten minutes and that he was falsely accused of claiming an extra hour's time when his claim was supported by the global positioning system (GPS) records of his truck's movements. On this occasion he claims he was supported by Joe Marks, the dispatcher.

[3] On 29 August 2008 Mrs Hearfield gave Mr Robertson a letter requiring him to attend a disciplinary hearing the following Monday morning, regarding the unloading of a digger from the trailer of a truck he had been driving. He claimed that he did not unload the digger and that this was done by Brian Hogarth who was not disciplined about the incident. On 31 August Mr Robertson wrote out a six page explanation of what had taken place on 27 August when his truck was damaged during the unloading manoeuvre.

[4] The disciplinary meeting was rescheduled until 4 September 2008 to enable Mr Robertson to have a support person present. He claims that the meeting was a farce because Mrs Hearfield did not believe anything he had to say and just told him to buck up his ideas. He claims he does not recall receiving a letter containing a final written warning.

[5] Mrs Hearfield's evidence was that she handed a copy of her letter of 5

September to Mr Robertson, personally, in an envelope marked "private and confidential". The letter states that the unloading of the digger was an unsafe act and it was the driver's responsibility to ensure that no potential harm occurred. The letter acknowledges that he had agreed to take a medical examination in relation to his fitness to work, because he had experienced a number of personal issues and had been on medication since August 2007. The letter concluded:

I have very carefully considered the discussion we have had today and decided to give you a final written warning. This is your absolute last chance. I need to see an immediate and on-going improvement in your performance. This means, working diligently, meeting all of the obligations in your employment agreement and that you follow

EnviroWaste policies and procedures (particularly, with regard to health and safety).

[6] I prefer Mrs Hearfield's evidence that this letter was given to Mr Robertson and that it accurately covers what was discussed at the disciplinary meeting. Mr Robertson's brief of evidence said that he did not recall receiving that letter but in cross-examination he claimed that this was not the letter that he was given. I consider that Mr Robertson was mistaken in his recollection.

[7] On 3 October 2008 the performance review of Mr Robertson was carried out and his manager recorded "have seen improvement in attitude last two weeks. This is to become standard".

[8] Mr Robertson's evidence was that he thought he was no longer under a cloud from being told to buck up his ideas, and that things were almost looking up.

[9] On that same day, 3 October, Mr Robertson made a delivery of a 30m² Huka Bin to a timber merchant and building supplies firm, T. Braithwaite Timbers Ltd (Braithwaites), at Taumarunui. He had done this delivery at least six times before. His evidence was that the job was not part of his normal work, which included refuse collection and cartage, because the bins belonged to Supa Shavings, which was owned by the previous owner of Supa Bins. That person did not have a truck available that day and Mr Robertson was asked to do the job. The previous day he had taken a bin away from Braithwaites and had dumped the shavings on a farm and then brought the bin back. On that occasion he met Gary Stewart, the general manager of Braithwaites, and asked him to send someone with him to show him the farm. Mr Stewart had told him to "get stuffed", which Mr Robertson considered quite rude.

[10] When he made the first delivery of a bin to Braithwaites he was instructed to place it at the end of a concrete pad in front of the shavings bin hopper as the Huka bin would not fit under the hopper. The procedure was to reverse the truck up to the edge of the concrete and then lower the bin. Once it was lowered he would get out of the truck to disconnect the bin and then go back into the truck to raise the hoist. He delivered both green and blue bins to Braithwaites on occasions. One was for treated timber shavings waste and the other was for untreated shavings. When he returned with a blue bin at about lunchtime on 3 October, there were no staff around and he said that he put the bin in the usual spot at the end of the concrete pad and drove off. He claimed he would have not have put the bin under the hopper as he did not know whether natural or treated sawdust would come out of the chute.

[11] The following day he claimed he was told that although he had come to work an hour earlier he would not be paid for that. Mrs Hearfield complained that it had taken him one and half hours to wash his truck.

[12] Mr Stewart gave evidence that on 3 October, at about 1pm, the machinist called him over to the end of the conveyor and pointed out some damage. There were blue bin paint marks on the superstructure. Mr Stewart concluded the EnviroWaste driver must have tried to back the bin under the hopper conveyor and had seriously damaged it, because the bin was too high to fit under the hopper. Mr Stewart enquired of his staff if anyone had reported the accident but nothing had been said about it. The following day Mr Stewart sent a facsimile message to Mrs Hearfield claiming that the driver's actions had smashed the superstructure supporting the conveyor belt and caused extensive damage which had not been reported to Braithwaites and was not noticed until sometime after the driver had left the premises.

[13] Mrs Hearfield checked and found that the driver had not reported the incident to her. She checked the logbook sheets, the daily work sheets and the daily GPS records and found that the driver in question must have been Mr Robertson. She went to the Braithwaites site and spoke with Mr Stewart. He showed her the damage and said words to the effect that the only way it could have been caused was by her driver's efforts in trying to put the bin under the hopper. Mrs Hearfield took pictures with her cell phone and examined the site. It was her evidence that she thought Mr Stewart was being honest with her and that she had no reason to disbelieve him.

[14] On 9 October Mr Robertson received a letter, dated the previous day, requiring him to attend a meeting concerning an

incident on Friday 3 October about which a written complaint had been received from Braithwaites. The complaint was

that instead of returning the bin to the end of the concrete, as directed, he had tried to place it under the conveyor and had caused extensive damage, totalling approximately \$1,200. It was alleged that he had not reported the incident to Braithwaites, or to EnviroWaste. He was advised of his entitlement to bring a support person or representative to the meeting and was warned that it was an extremely serious issue against a background of similar issues and a failure to have improved his overall attitude. It was stated that, given the seriousness of each of the issues, they amounted to serious misconduct and could result in his summary dismissal.

[15] The disciplinary meeting was delayed because Mr Robertson sought a postponement. Mr Robertson had taken sick leave and was receiving counselling for stress. On his own evidence he said he had suffered a nervous breakdown on 17

October as a result of the stress and his doctor gave him seven days off work. He claims to have been forced by Mrs Hearfield to take four days more off work using his holiday pay.

[16] The disciplinary hearing was held on 28 October. Mr Robertson claimed that the meeting started at 4pm, lasted about 30 minutes and went badly. He claimed that Mrs Hearfield started by saying three strikes and he was out. He claimed to have raised the point that another driver had demolished a fence a few weeks earlier and that nothing had happened to him. It is common ground that Mr Robertson denied hitting the hopper. He presented photographs he had taken on his phone to show there was no damage. These showed a scuff mark on the plywood. Mr Robertson claimed that if he had hit the hopper he would have broken the panel he hit and not the rear panel on the other side. Mr Robertson claimed there was no blue paint showing on the photos but Mrs Hearfield pointed to a knot in the timber and she claimed the photos she had taken the day before had been lost from her phone.

[17] I find Mr Robertson was not asked whether he knew he had damaged the hopper. He admits that the meeting became quite upsetting to him, he felt unfairly treated and he was accused of lying. That is consistent with Mrs Hearfield's evidence that Mr Robertson became more and more agitated and was yelling and was saying he did not do it and was leaving the meeting as they were not giving him a fair go.

[18] After the meeting Mrs Hearfield discussed the issue with John Tate, her manager from Hamilton, who had come to assist her and was present throughout the meeting. Mrs Hearfield said that she had concluded that Mr Robertson was the driver and had caused the damage. This was because she had spoken to Mr Stewart and he seemed to be telling her the truth and she asked why would a customer try to make up such a story for just over a thousand dollars worth of damage. They decided that Mr Robertson had not reported the incident, that he had been given a final warning only a few weeks before and was told it was his absolutely last chance. Mrs Hearfield says she concluded she could not trust him to be driving their trucks any longer. She claims that Mr Tate agreed with her and, because he was concerned about Mrs Hearfield's safety, Mr Tate went and told Mr Robertson that he had been dismissed with immediate effect and that they would deliver a formal letter to him the following day.

[19] Mrs Hearfield's evidence is that she wrote the dismissal letter that night and had it couriered to Mr Robertson the following day. That letter refers in some detail to what had been discussed at the 28 October meeting. It states Mrs Hearfield's conclusion that Mr Robertson was responsible for the damage, had not reported it, that he was incapable of following basic instructions, that this had caused potential harm and also actual damage. It stated his overall attitude had not improved, there were no mitigating factors, that he had chosen to ignore the defendant's rules and policies and had continued to flout the rules. She expressed concern that his behaviour would result in damage to property, plant or serious injury to himself or other members of the staff and concluded:

Continuously operating unsafely in relation to plant and property, and putting yourself and others at risk of injury is absolutely unacceptable; your pattern of behaviour is one of indifference to these basic rules and policies. You have been reminded of these rules at several tailgate meetings and on a one to one basis. In continuing to behave this way I consider I can no longer afford you the trust and confidence that is required in an employment relationship.

[20] I note that the letter does not state that Mr Robertson had been asked at the meeting whether he knew he had caused the damage and had intentionally failed to report it. That supports Mr Robertson's account and my finding that he was not so

asked. He was not cross-examined on this point and Mrs Hearfield did not give contrary evidence. This is a matter which will assume considerable importance because of what was described as the "No Blame" policy.

Discussion

[21] Mr Parmenter, counsel for EnviroWaste, submitted that in the end Mr Robertson was dismissed summarily because he did not adhere to company policies and procedures relating to health and safety reporting, did not follow instructions and for failing to comply with a final warning. The final warning in the 5 September letter was said to be his "absolute last chance".

[22] Mr Hayes, counsel for Mr Robertson, queried what the last chance warning was about and whether it was for similar

conduct and contended that the positive performance review of 3 October 2008 had negated the warning. He submitted that there was insufficient evidence that it was Mr Robertson's truck that had hit the hopper, particularly as there was no blue paint on it in the photographs taken by Mr Robertson.

[23] Mr Hayes relied on Mr Robertson's evidence that at the Authority investigation the defendant produced for the first time a computer printout of the GPS unit on the truck. Mr Robertson claimed that the unit was accurate down to about 1 or 2 metres. He claimed that the printout showed that his truck was at Braithwaites at 12.49, that it showed the truck had been stationary for some five minutes and that if he had knocked into the structure as claimed and then moved the truck forward to position the bin in the correct place, he claimed the printout would have recorded such movement. His evidence was that when the truck was moving the GPS recorded each change as a one minute unit. Mr Hayes submitted that this timeframe related to the returning of the bin and an earlier timeframe at around 12.20 to 12.35 pm related to the picking up of the bin from Braithwaites.

[24] I had some difficulty following that evidence because the earlier time does not appear to relate to the address of Braithwaites. I also note that this matter was

raised for the first time at the Authority and was therefore not a matter before

EnviroWaste at the time of the disciplinary enquiry.

[25] Mr Hayes submitted that even if it was to be found that there was sufficient evidence that it was Mr Robertson's truck that had damaged the hopper, which was denied, there was insufficient evidence that Mr Robertson knew that he had caused the damage. He relied on the "No Blame" policy when reporting incidents. This is contained in the employee induction handbook which requires that when an incident, which could be a near miss, near hit, accident, injury, property damage or the like, occurs, it must be reported no matter how minor. The failure to report such an incident is said to be a breach of the Health and Safety in Employment Act and a violation of the company rules and may result in disciplinary action. It then states:

Note that EnviroWaste maintains a "No Blame" policy to encourage incident reporting.

[26] Mr Robertson had maintained in his evidence that if he had known that he had caused the damage or even if he had known that he had hit the hopper, he would have had no incentive to conceal the matter because if he had reported it, the no blame policy would ensure that no disciplinary action was taken against him. Mr Hayes submitted that Mr Robertson therefore had no motive for not reporting the incident even if he was responsible for it. I have found that this was not an issue that was dealt with in the disciplinary enquiry nor referred to in the dismissal letter.

[27] Mr Parmenter submitted that Mr Robertson had to know that he had hit the hopper and that this was obvious. He relied on Mr Stewart's evidence that this would have caused a jolt to the truck driver. He submitted that Ms Hearfield, from her own experience, would have been able to conclude that Mr Robertson must have known whether he had hit the hopper and caused the damage. Further, he submitted that as the bin was found in the proper place on the concrete apron, it must have been moved after having come in contact with the hopper. If Mr Robertson had not known he had hit the hopper and had still thought he was some distance away from it, Mr Parmenter submitted that one might have expected the bin to have been found under the hopper, instead of where it was found. He therefore submitted it was not

unreasonable to infer that Mr Robertson knew he had hit the hopper, moved the bin away and had dropped it in the proper place.

[28] Applying the test in [s 103A](#) of the [Employment Relations Act 2000](#), I am satisfied that a fair and reasonable employer would have concluded that Mr Robertson's vehicle had caused the damage to Braithwaites' hopper. Mrs Hearfield conducted a prompt investigation of the scene of the incident and, from what she was told by Mr Stewart and her inspection of the damage, she was entitled to conclude that the bin on Mr Robertson's truck struck the hopper on one side and, because of the internal structure of the hopper, the damage was transmitted through to the other side. No other cause of the damage was apparent. The front end loader on the Braithwaites site could not reach where the damage was apparent. Mrs Hearfield was also entitled to conclude, as had Mr Stewart, that the blue paint they saw on the point of impact on the hopper had come from the blue bin carried on Mr Robertson's truck.

[29] However, although Mr Parmenter presented a reasonable scenario for Mrs Hearfield assuming that Mr Robertson must have known the bin on his truck had struck the hopper, none of that material was presented to Mr Robertson during the course of the enquiry. Because of the no blame policy, if Mr Robertson had reported the incident that could well have been the end of the matter. This was a critical issue for EnviroWaste to have enquired into and it had failed to do so. If Ms Hearfield, or Mr Tate, had concluded that Mr Robertson knew he had struck the hopper and had intentionally not reported the incident this would have amounted to a finding of serious misconduct which could have justified the summary dismissal. If this was their conclusion it is surprising that it was not included in the extensive reasons for the dismissal set out in the 28 October letter.

[30] Those reasons also create some difficulties for EnviroWaste. According to Mr Parmenter's submission, in the end Mr Robertson was dismissed because he did not "adhere to company policies and procedures with regard to health and safety reporting and following instructions" and for failing to comply with a final warning and because he was indifferent to basic rules and policies which could cause injury or damage. These submissions are taken from the 28 October letter. It is not entirely

clear what instructions Mr Robertson was alleged not to have followed but the inference from context in the letter is that the letter states that Mr Robertson knew where he was to place the bins and had not reported the incident. It may have been in these respects that he was not following instructions. He was said to have failed to carry out lawful instructions and had performed an unsafe act. It is in this respect that Mr Robertson's knowledge of whether he had caused the damage ought to have been investigated.

[31] It is also unclear to what Mrs Hearfield was referring when she stated that Mr Robertson had once again failed to follow basic instructions. The reference to this being a "further example" of Mr Robertson not following policies and rules and to similar issues having been discussed with him on formal occasions, might be taken to be a reference to the "absolute last chance" final warning on which Mr Parmenter relied, although this is not expressly stated in the letter. Mrs Hearfield's statement that Mr Robertson's overall attitude around those issues had not improved was also inconsistent with the positive performance review.

[32] Although I have accepted Mrs Hearfield's evidence that the final written warning was given to Mr Robertson, I accept Mr Hayes submission that the positive performance review on 3 October should have been taken into account. Instead, as the dismissal letter evidences, Mr Robertson is accused of continuing to flout the rules. If that were so, it ought to have been dealt with in the performance review, but instead a positive response was recorded. I am not satisfied that a pattern of behaviour of indifference to those rules was something that Mrs Hearfield was entitled to conclude existed, nor that Mr Robertson's overall attitude had not improved.

[33] There were no further disciplinary matters raised by EnviroWaste prior to the investigation of the incident at Braithwaites. If there were problems with Mr Robertson's flouting of the rules or his attitude, these needed to have been put to him, his response properly dealt with and the conclusions advised to him in the period leading up to or during the final disciplinary interview. From Mr Robertson's evidence it appeared that the employment relationship he had previously enjoyed under the previous owner of the business had deteriorated under Mrs Hearfield's

management. That may be as a result of Mr Robertson's attitude or flouting of rules, but if so, those allegations were never expressly put to him and investigated.

[34] For these reasons I conclude that EnviroWaste has failed to discharge the burden of showing that its actions were what a fair and reasonable employer would have done in all the circumstances at the time of the summary dismissal. The challenge must be allowed and I find that Mr Robertson was unjustifiably dismissed.

Remedies

[35] Mr Robertson was summarily dismissed on 28 October 2008 and, on his evidence, was out of work until 28 November when he obtained another driving job. His pay had been \$16.50 per hour plus a \$15.00 daily bonus. Counsel, in closing submissions, appeared to agree that Mr Robertson worked an eight hour day which means that he earned a total of \$147 each day. They also appeared to agree that was

\$755 per week, instead of \$735 and that the period of loss started on 9 October. That is contrary to the evidence that Mr Robertson was paid until 28 October, the day he was dismissed. I calculate that he lost four weeks pay totalling \$2940 gross.

[36] Although the statement of claim also sought compensation pursuant to [s 123\(1\)\(c\)\(i\)](#) of the Act, no figure was given. In his final submissions Mr Hayes sought \$10,000 under this head. In support of the claim for humiliation, loss of dignity and injury to feelings Mr Robertson said the investigation meeting was quite upsetting to him and that he felt that he was unfairly treated. He also said that he did not believe he should have been sacked and that this whole experience had left him feeling disappointed, hurt, embarrassed and angry.

[37] There was also evidence from Mr Robertson that he had suffered a nervous breakdown as a result of stress caused by EnviroWaste and a medical certificate, dated 17 October 2008, relating to stress, was produced. This indicates there was a prior medical history which may have made Mr Robertson more susceptible to workplace stress. Had this material been explored in more detail and more closely linked to his grievance it may have justified a substantially greater award. I consider an award of \$8,000 under this head would be adequate on the present evidence.

[38] The issue of whether there was contributory conduct on the part of Mr Robertson which would justify a reduction in the remedies to be awarded was not addressed at the hearing. It is however, the obligation of the Court under [s 124](#) of the Act to consider the extent to which the actions of the employee contributed towards the situation which gave rise to the personal grievance and, if those actions so require, reduce the remedies accordingly.

[39] I consider there was blameworthy conduct on the part of Mr Robertson because I accept the evidence advanced on behalf of the defendant that Mr Robertson ought to have known that his truck had struck the hopper and yet he failed to report the incident. Had this been argued it might have amounted to totally disqualifying conduct which would have prevented the award of any remedies. Because it was not addressed I do not have the benefit of submissions on the issue. As a matter of equity and good conscience I consider in all the circumstances that the remedies I would otherwise have awarded should be reduced by 50 percent.

[40] I therefore order EnviroWaste to pay to Mr Robertson the following:

- a) \$1,470 gross for lost remuneration after deducting 50 percent;
- b) \$4,000 for distress, humiliation and injury to feelings after the deduction of 50 percent.

Costs

[41] Costs are reserved. If the parties cannot agree then a memorandum as to costs should be filed and served within 30 days from the date of this judgment, with a further 30 days to respond.

B S Travis

Judge

Judgment signed at 3.45pm on 2 November 2010