

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2014] NZERA Wellington 64
5407701

BETWEEN JOHN ROBINSON
 Applicant

AND EMMERSON TRANSPORT
 LIMITED
 Respondent

Member of Authority: Trish MacKinnon

Representatives: John McDowell, Counsel for the Applicant
 Bill Calver, Counsel for the Respondent

Investigation Meeting: 13 March 2014 at Napier

Determination: 13 June 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Robinson was employed as a truck driver by Emmerson Transport Limited for more than nine years until his dismissal in September 2012 for falsification of organisation records including time and transport records. He says the decision to dismiss him was not one a reasonable employer could have taken in all the circumstances. He also claims the reason for his dismissal was different from the allegations put to him by his employer and his dismissal was, therefore, unjustified.

[2] Emmerson Transport Limited (ETL) rejects that view. It asserts Mr Robinson was dismissed after a fair and appropriate investigation and disciplinary procedure. The employer says Mr Robinson deliberately falsified his time records and disobeyed instructions. He had been unable to supply an acceptable explanation for his actions which were sufficiently serious to warrant dismissal.

Issue

[3] The main issue for determination is whether ETL was justified in dismissing Mr Robinson. This will necessarily entail consideration of whether the reason relied on by ETL for dismissing Mr Robinson was put to him in sufficient detail that he could address it before the decision to dismiss was made.

Legal test

[4] Whether or not a dismissal is justifiable is to be determined on an objective basis by applying the test in s.103A of the Employment Relations Act 2000 (the Act). The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred.

[5] The Act requires me to consider, in relation to Mr Robinson's dismissal, the following factors along with any others that I consider appropriate:

- (a) Whether ETL investigated the allegations against Mr Robinson sufficiently, taking into account the resources available to it; and
- (b) Whether it raised its concerns with Mr Robinson before dismissing him; and
- (c) Whether it gave Mr Robinson a reasonable opportunity to respond to its concerns before dismissing him; and
- (d) Whether it genuinely considered Mr Robinson's explanation in relation to the allegations against him before proceeding with the dismissal.

[6] The Act precludes me from finding Mr Robinson's dismissal to be unjustifiable solely because of defects in the employer's process if those defects were minor, and if they did not result in Mr Robinson being treated unfairly.

Relevant facts

[7] ETL is a freight company based in Hastings. It employs approximately ninety driving staff. The drivers are required by law to maintain an accurate logbook recording their driving hours and are subject to limits on the number of hours they can drive in a day and in a week.

[8] The driving hour restrictions include drivers having to take a rest break after five and a half hours' driving. The time they finish work must be within fourteen hours of their start time. They must then have a ten hour break before commencing work again. Drivers and their employers can face significant penalties if inaccurate information is entered into their logbooks¹. ETL uses a combined "*Driving Hours Log Book & Timesheet*" recording system (the logbook).

[9] Over the course of his employment, Mr Robinson carried out many different driving duties for ETL. One of these was a regular round trip from the Hastings headquarters to Te Kuiti to collect by-products from the meat works. This round trip, or "run", was the focus of ETL's investigation in August and September 2012. When the company checked Mr Robinson's logbooks against the GPS recordings for 29 and 30 July 2012 and 12 and 13 August 2012, it found discrepancies. There were mismatches between his recorded hours of work and his truck's location and activity.

[10] Kerry Hughes, ETL's Central and South Area Manager, held an informal meeting with Mr Robinson on 16 August 2012 to discuss those discrepancies. Mr Robinson's explanations did not satisfy Mr Hughes. He and the Managing Director, Ian Emmerson discussed the issue and agreed that it required further investigation.

[11] Mr Hughes wrote to Mr Robinson on 16 August 2012 inviting him to a meeting on 20 August to discuss issues relating to his logbook and hours recorded as worked. The letter informed Mr Robinson that, depending on its outcome, the meeting could result in disciplinary action being taken against him. He was advised that Mr Hughes and Mr Emmerson would attend the meeting, and was encouraged to bring a representative or support person with him.

[12] Mr Robinson attended the meeting of 20 August alone and, while the parties have some disagreement over the content of the discussion, it is evident ETL was not satisfied with Mr Robinson's explanations. This led to Mr Hughes inviting Mr Robinson to attend another meeting at which further investigations into his timesheets were to be discussed. The invitation was conveyed by letter dated 27 August 2012.

[13] The letter noted the company's concern that the incidents and anomalies relating to Mr Robinson's timesheets were a violation of company guidelines and

¹Land Transport Act 1998

protocols and possibly constituted serious misconduct. Mr Robinson was once again advised that dismissal was a possible outcome depending on the result of the investigation. He was strongly urged to bring a witness or representative to the meeting.

[14] The meeting was held on Friday 7 September 2012 and Mr Robinson again attended alone. After hearing from Mr Robinson, Mr Emmerson and Mr Hughes took a short adjournment during which they agreed his conduct was unacceptable and he could no longer be trusted. They determined he should be dismissed and conveyed that decision orally to Mr Robinson. Written confirmation followed on 10 September 2012 and informed Mr Robinson that his employment had been terminated for serious misconduct: “(1) *Falsification of organisation records, including time, transport records.*”

Employment Agreement

[15] Mr Robinson was employed on an individual employment agreement in effect from January 2007. Clause 26 of that agreement provided for dismissal for serious misconduct in a number of specified situations. The list, which was intended as a guide and was not exhaustive, included:

Falsification of time sheets, attendance records, or other special payment records or any other actions which could result in a payment to which an employee is not entitled.

[16] The employment agreement provided that serious misconduct could give rise to summary dismissal.

Evidence and Discussion

[17] Mr Robinson’s evidence was that he had filled in his log books in the same way for the entire 9 years of his employment with ETL. He said that at all times he followed the instructions of the dispatcher, Charles Johnson. With Mr Johnson’s consent, he had established the habit of collecting the truck from ETL’s yard in his own time and going to his home for a cup of coffee before starting his run. He said Mr Johnson did not ever give him a specific time to leave for Te Kuiti but would tell him the approximate time he should arrive there, telling him to leave when he was ready.

[18] Mr Johnson denied this. His evidence was that he had never consented to Mr Robinson going home to have a cup of coffee after he had started his run. Nor did he agree to Mr Robinson picking up the truck early or leaving when he was ready. Mr Johnson said it was his responsibility as dispatcher to give drivers clear instructions about their tasks for the day and their starting times. He had instructed Mr Robinson to start work at 3.00 p.m. when he was doing the Te Kuiti run.

[19] That allowed sufficient time for driving there and back and for loading the truck. There could be up to 15 minutes leeway either side of 3 p.m. if there was good reason, but the normal start time for the run was 3.00 p.m. Mr Johnson was in daily telephone contact with a manager at the Te Kuiti plant and knew the time frame the plant required for by-product to be uplifted. Occasionally there would be a problem at the Te Kuiti plant that would result in a driver being delayed there, but that was infrequent.

[20] Mr Robinson said that when he met with Mr Hughes on 16 August 2012, Mr Hughes asked him about the differences between his GPS records and his logbook entries. Mr Robinson says he told Mr Hughes about his arrangement with the dispatcher. Mr Hughes also asked why Mr Robinson spent so much time waiting at Te Kuiti. Again, Mr Robinson said that he always left for Te Kuiti with the knowledge of Mr Johnson.

[21] Under questioning in the investigation meeting Mr Robinson denied falsifying records. When asked about specific discrepancies between hours recorded in his log book and hours recorded by his truck's GPS, he appeared reluctant to answer. When he did, he acknowledged the differences, but maintained he did not falsify his log book.

[22] In the course of the investigation meeting Mr Robinson acknowledged that he was required to record his start time in his log book "*when I walked in the gate*". That acknowledgement was inconsistent with his practice as evidenced by the answers he gave regarding particular instances. When asked, for example, why he had not recorded his 45 minute coffee break at his home on 29 July 2012 as a rest break, Mr Robinson said he had started work earlier than he recorded in his log book and had spent over an hour of his own time loading his truck. In his view recording an incorrect starting time was not falsifying his log book.

[23] When asked about a two hour discrepancy between the finish time he recorded on one occasion and the GPS records of his arrival back at the ETL yard, Mr Robinson said it had taken him two hours to clean his truck. He then accepted that he had arrived back at the yard considerably later than he had recorded in his log, and had completed the cleaning in a much shorter time. That accorded with Mr Johnson and Mr Emmerson's evidence that the facilities available for cleaning vehicles at the ETL yard allowed a full clean of truck and trailer to be completed half an hour at most.

[24] I am satisfied from the evidence before me, including the log book entries and GPS records for the period from 28 to 30 July and 12 and 13 August 2012, as well as Mr Robinson's own acknowledgements when giving evidence, that he recorded incorrect information in his logs with regard to a starting time; some rest breaks; and a finishing time. These included Mr Robinson failing to record rest breaks on 28 and 29 July; incorrectly noting his starting time on 29 July and incorrectly recording his finishing time on 30 July. The inaccuracies were deliberate and constituted falsification.

[25] I am also satisfied that Mr Robinson was fully apprised of his employer's concerns over his log book. In the meetings with Mr Hughes and Mr Emmerson in August and September 2012 he was informed that they were concerned he was not recording accurate times and that this could result in his being remunerated for time he did not work.

[26] In his written evidence, Mr Robinson said there were "*numerous occasions*" when log book offences occurred with the knowledge of the employer. He said ETL condoned the falsification of log books, for example when he exceeded his driving hours due to the truck's breakdown and had to drive the truck back after it had been repaired. The actual hours would not be recorded in the log book but would be noted in a "*black book*" kept by Mr Hughes for the purpose of recording excess hours worked by drivers. Under questioning, Mr Robinson said this happened only "*a couple of times*" during his employment with ETL.

[27] Barry Hinks, a witness appearing by way of summons, also referred to a "*black diary*" kept by Mr Hughes. This was in written evidence prepared for him which, he confirmed, reflected his views. Mr Hinks was a reluctant witness who acknowledged orally he had never seen the black diary, but had heard of its existence

from other drivers. He had worked for ETL for over six years and had resigned in 2013 when the company refused him a pay rise.

[28] There were inconsistencies in Mr Hinks' evidence in relation to the black diary and other practices he referred to in written evidence, but acknowledged orally he knew of only by hearsay. I found his evidence to be unreliable and have not taken it into account in determining this matter.

[29] Mr Hughes denied there was, or ever had been, such a book, and Mr Emmerson was also unaware of it. Mr Emmerson said there was a protocol covering breakdown situations where a driver was forced to wait for his truck to be repaired. The protocol allowed drivers to be paid in excess of the 70 hour per week maximum where the breakdown time was recorded in the "*off duty*" part of the log book.

[30] Mr Emmerson spoke of the reticence of some drivers to comply strictly with statutory log book requirements. ETL was aware this had been a problem, but the company had been effecting a culture change amongst its drivers in recent years and this was an ongoing process. He acknowledged that taking a firm stance with Mr Robinson was part of that process, but denied he had terminated Mr Robinson's employment as a lesson to other drivers.

[31] Mr Hughes said no other driver had been dismissed for log book falsification. He said that, although some other drivers had made errors with their log books, no driver had ever had such serious discrepancies between their log books and their GPS records. He had become aware some drivers were unhappy with the hours Mr Robinson was claiming and this had sparked his inquiry into his log books.

[32] Mr Hughes said he had had occasion before August 2012 to talk with Mr Robinson about his log books, the most recent time being approximately six months earlier. He had subsequently noticed an improvement and the matter had not been taken further.

[33] The decision to dismiss Mr Robinson was made by Mr Emmerson in consultation with Mr Hughes. Mr Emmerson said that in the several years Mr Robinson had worked for ETL, the company had tried to help him to up-skill and improve his performance. He said a consistent theme was Mr Robinson's poor record keeping. He had had warnings in the past, although none were current at the time of his dismissal. Mr Emmerson said he did not take those issues into account

when he decided that dismissal was the appropriate disciplinary action. However, if Mr Robinson's history with the company had been unblemished, he would have taken that into account.

[34] Counsel for Mr Robinson submits there is no evidence of the employer addressing the issue of intent to falsify in its inquiry. Nor did it provide evidence of Mr Robinson receiving a monetary payment for the falsifying of records. I disregard the first part of that submission on the basis that Mr Robinson was an experienced driver who would have been well aware of the significance of the accurate recording of times in his log books. Mr Robinson acknowledged the discrepancies between his log book and GPS records, and did not justify them as errors. He simply asserted that he did not regard it as falsifying his log book to state a time he knew to be incorrect as the start time.

[35] With regard to counsel's submission of there being no evidence of monetary payment, I note that under the provision of the employment agreement cited by the employer in its letter of dismissal there did not need to be actual monetary payment resulting from the falsification. The possibility of such payment was sufficient. Mr Robinson accepted during the investigation meeting that his employer relied on his honesty in completing his log book accurately, and that not recording rest breaks (such as the coffee breaks when he took his truck home at the beginning of a run) resulted in his being paid for times he did not work.

[36] Mr McDowell also submits the procedure ETL followed was flawed because Mr Robinson was not told until he received his employer's witness statements that Mr Johnson denied having reached an agreement with him over when he could commence his Te Kuiti run.

[37] I reject that submission. Mr Robinson's own written evidence to the Authority was that Mr Emmerson and Mr Hughes had put to him that Mr Johnson had told him the time to leave (on his run). This occurred in the meeting of 20 August 2012. Mr Robinson was, therefore, well aware that Mr Johnson disagreed with his view that the dispatcher allowed him to leave when he wished.

[38] I also note that, while the issue of the dispatcher's instruction to Mr Robinson to commence his run at a specified time was disputed by Mr Robinson, he was not dismissed for disobeying an instruction. The letters from Mr Hughes to Mr Robinson

informing him of the meetings to inquire into his actions are both very clear that the focus was on his log books.

[39] The letter of termination is equally clear that Mr Robinson was dismissed for falsifying organisation records, including time, transport records. There was no evidence from Mr Robinson that he had been instructed to put erroneous start or finish times in his log book, or that he had been instructed not to record his rest breaks. Those were decisions taken by Mr Robinson alone.

[40] A related submission from Mr McDowell is that ETL's statement in reply added a new and further reason for Mr Robinson's dismissal to that previously given. This was the allegation that Mr Robinson had disobeyed instructions. I accept that submission. Although the issue of if, and when, Mr Robinson had been told to start his Te Kuiti run was raised during ETL's investigation, as I have noted above, the termination letter was very clear about the reason for dismissal. Having given one reason for dismissal, the employer cannot rely on further ground for dismissal after the event.

[41] The test of justification applies to the company's action in dismissing Mr Robinson for falsifying records. Any issue concerning the disobeying of instructions is relevant only as part of the surrounding circumstances at the time the decision to dismiss was made. Accordingly I have not taken the disputed issue of disobedience into account in arriving at my decision, other than as part of the background and as a matter to be considered in relation to credibility.

Conclusion

[42] I find that ETL followed a fair and reasonable procedure in carrying out its investigation. It made Mr Robinson fully aware of the matters of concern to it, allowed him sufficient time to respond to those concerns, and considered his responses before coming to the decision to dismiss.

[43] Even if falsification of time records were not regarded as serious misconduct in Mr Robinson's employment agreement, which it was, I would find his falsifying of his log book to be a serious breach of trust and confidence. Mr Robinson's actions exposed himself to the risk of sanctions, and also put his employer at risk of substantial fines and even the loss of its transport service licence under the provisions of the Land Transport Act.

Determination

[44] I find that Mr Robinson's dismissal was justifiable and accordingly dismiss his claim.

Costs

[45] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority