

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 367
3040871

BETWEEN AMBI SREEDHARAN
Applicant

A N D TRUCKING RELIEF
LIMITED
Respondent

Member of Authority: T G Tetitaha

Representatives: A Sreedharan in person
D Cantwell, Director for Respondent

Investigation Meeting: 22 November 2018 at Auckland

Submissions Received: 22 November 2018 from Applicant
22 November 2018 from Respondent

Record of Oral
Determination: 23 November 2018

ORAL DETERMINATION OF THE AUTHORITY

A. Ambi Sreedharan was unjustifiably dismissed by Trucking Relief Limited.

B. Trucking Relief Limited is ordered to pay Ambi Sreedharan the following:

- a. Lost remuneration equivalent to one month's wages less PAYE. That sum is then to be reduced further by 50% due to the contributing conduct;**
- b. Compensation of \$3,500. This sum is inclusive of the 50% reduction; and**
- c. The above payments are to occur within 28 days of the date of this determination.**

C. Because both parties are self-represented they are to meet their own costs of the hearing today.

Employment relationship problem

[1] Ambi Sreedharan was employed as a truck driver and administrator. He alleges he was unjustifiably disadvantaged because he was never provided with any administration duties or training. He was also dismissed by Trucking Relief Limited (TRL) on 6 April 2018 for refusing to complete a truck driving route for a client on 5 April 2018. Mr Sreedharan alleges this was an unjustified dismissal.

Relevant Facts

[2] TRL is a truck driver/labour hire company. It principally employs truck drivers for supply to the LPG gas industry. One client required a backup administrator for scheduling. At the time TRL understood the administrative work was a small amount limited to scheduling. TRL employed Mr Sreedharan to fulfil the truck driving and administrative duties for that client.

[3] Mr Sreedharan was employed on or about 13 June 2016 and signed an employment agreement. His role described therein was for “truck driver and administrator to work on assignments for third parties (clients)”.

[4] Initially he was employed on a casual basis but then was made permanent after approximately six months. At the time he held a Class One truck drivers licence. He was later offered training towards achieving a Class Two licence. He was also provided with flexibility in his working hours. He was allowed to finish by 3:30 or 4:00 p.m. to collect his children from school. He was allowed up to two days off to study in 2018.

Disadvantage

[5] Over the course of his employment his duties primarily involved driving trucks with little or no administration work. I understand from his evidence that the client’s previous depot supervisor gave him limited training in scheduling. The majority of the scheduling skills, Mr Sreedharan tells me, he taught himself given he was a qualified lawyer as well.

[6] By March 2018 he began raising issues with TRL regarding training on administration duties. I cannot see from the evidence when he raised the issue about having been given no administration work. I accept the evidence of Darren Cantwell, director of TRL, that there was some admin work albeit very small. It is accepted no further training than what the client had provided was given. This was superseded by the dismissal.

Events leading to dismissal

[7] Performance issues began arising in 2018. These related to his timesheets and speeding. The client organised a meeting with Mr Sreedharan to discuss those issues. Mr Sreedharan was also seeking a meeting to discuss his hours of work related to the timesheets. There had been some discussion about the actual number of hours he was working verses the amount claimed. He believed the numbers of hours he was working were insufficient to meet his financial needs. He believed he had been given permission by a previous depot supervisor to record additional hours even though they were not worked. The lack of income had begun affecting his mental health and wellbeing and he alleged he was becoming somewhat depressed by the situation. He had not reported to work one day as a consequence.

[8] The meeting with the client occurred on 5 April 2018. TRL was not present. Mr Sreedharan and the client discussed his timesheets and the speeding issue. He believed that they were resolved. No other performance issues were discussed to his knowledge.

[9] The client then asked Mr Sreedharan to finish his truck run that day. He refused. He told me this was because he believed he could not finish the run in time to collect his child from childcare at 5.30 pm due to attending the meeting at 8.30 am. The client told him to go home and then referred the matter to TRL.

[10] There is a dispute whether TRL's sales manager spoke with Mr Sreedharan about his behaviour after the meeting with the client or not. TRL alleges that Mr Sreedharan called the sales manager by phone, they discussed his refusal to work and he was asked to give a reason why he wouldn't work, but he could not. He was then told by the same sales manager that if there was no reason he may be dismissed. Mr Sreedharan tells me this conversation never happened.

[11] The next day TRL sent a letter to Mr Sreedharan dated 6 April 2018 advising that he had committed serious misconduct by refusing to complete the truck delivery run and his employment was summarily terminated.

Was Mr Sreedharan unjustifiably disadvantaged by TRL's refusal and/or failure to provide administration duties during the term of his employment?

[12] Although there has been evidence of complaints about the lack of training for administration duties I do not accept there was none offered by the client. He was trained to do the scheduling, albeit briefly by a previous employee of this client but that was sufficient for him to undertake the scheduling duties as expected.

[13] TRL is primarily a truck driving labour hire company. It does not generally hire labour for administration work. Although that is what I understand Mr Sreedharan wanted primarily to do, that is not what he was contracted to do.

[14] TRL wanted a full-time truck driver with a backup scheduler. Mr Sreedharan wanted to be a full-time administrator with occasional truck driving. The issue here is one of communication between the parties about their expectations. They both have a duty to be responsive and communicative with each other. Mr Sreedharan should have been aware by 2018 that there was little administration work attached to his role. He told me during the hearing that he would still have been there if the termination had not occurred. This indicates to me he was not disadvantaged by the lack of communication or the small amount of administration. Therefore I dismiss the application for an unjustified disadvantage in the circumstances.

Was Mr Sreedharan unjustifiably dismissed?

[15] The second issue is: was Mr Sreedharan unjustifiably dismissed on or about 6 April 2018. It is accepted that Mr Sreedharan was directed to complete his delivery run but refused to do so. This could have been *prima facie* serious misconduct. However, an employer is still required to follow the process set out in s.103A of the Employment Relations Act 2000 before dismissal occurs.

[16] Section 103A requires an employer to investigate then raise its concerns with the employee, give the employee an opportunity to be heard and genuinely consider the responses before dismissal occurred.

[17] Part of being given an opportunity to be heard is giving an employee the opportunity to seek support and/or legal advice. Even if the telephone call as alleged by TRL had occurred they were expecting Mr Sreedharan to provide an explanation on the spot. When he failed to do so he was terminated. The concerns and opportunity to be heard were condensed into one telephone call before dismissal occurred. This is insufficient to meet the test of what a fair and reasonable employer could do in these circumstances.

[18] If Mr Sreedharan is correct, the termination occurred by way of a letter without any prior warning that his refusal to do his duties could lead to dismissal. He was entitled to be put on notice that there was this concern and that this was the likely outcome. He was entitled also to have an opportunity to seek legal advice or support before the dismissal occurred. That would not have cost TRL anything other than time. Resolution of this issue needed 'cooler heads' - both parties needed time to consider and provide reasonable responses. The dismissal summarily prevented any of this necessary and legal process from occurring.

[19] Therefore, I find that Ambi Sreedharan was unjustifiably dismissed by Trucking Relief Limited.

Remedies

[20] Because Mr Sreedharan has a proven personal grievance of unjustified dismissal he is entitled to recover lost remuneration of wages and compensation.

Lost remuneration

[21] Lost remuneration is confined to one month because Mr Sreedharan found another job relatively quickly within that timeframe. I am not persuaded there have been any further losses after he found his new employment.

Compensation

[22] I accept he suffered distress. He was assisted by his wife to recover sufficiently and find a new job. There were no long lasting effects shown or medical assistance required.

[23] Similar cases in the Authority have resulted in awards of between \$5,600 to \$7,000 compensation. This case would justify an award of \$7,000.

[24] Remedies are always subject to potential reduction for contributing conduct. Contributing conduct is where an employee has acted in a way that is both causative of the dismissal and blameworthy.

[25] There is no doubt in my mind Mr Sreedharan's refusal to undertake his truck driving duties on 5 April 2018 was causative of the dismissal. And as I have noted above it was a form of serious misconduct and is therefore blameworthy. There seems from evidence today little reason as to why he did not complete his duties at least in part until he needed to pick up or collect his children.

[26] This requires a reduction in remedies. The amount of reduction I have determined that is appropriate is 50%. The following orders are made:

[27] Trucking Relief Limited is ordered to pay Ambi Sreedharan the following:

- (a) Lost remuneration equivalent to one month's wages less PAYE. That sum is then to be reduced further by 50% due to the contributing conduct;
- (b) Compensation of \$3,500. This sum is inclusive of the 50% reduction; and
- (c) The above payments are to occur within 28 days of the date of this determination.

[28] Because both parties are self-represented they are to meet their own costs of the hearing today.

T G Tetitaha
Member of the Employment Relations Authority