

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

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| BETWEEN | Michael Tandy (Applicant) |
| AND | Murray Hubert (Respondent) |
| REPRESENTATIVES | John Peebles for Applicant No appearance for Respondent |
| MEMBER OF AUTHORITY | Vicki Campbell |
| INVESTIGATION MEETING | 6 December 2006 |
| DATE OF DETERMINATION | 19 December 2006 |

DETERMINATION OF THE AUTHORITY

[1] No statement in reply has been received from the respondent. I am satisfied the respondent received the statement of problem. The track and trace records show that the statement of problem was delivered to Mr Hubert's address and signed for by "Hubert" on 18 August 2006.

[2] On 24 October 2006 a copy of the notice of investigation meeting was couriered to the respondent. The track and trace details relating to that courier package show that "D Hubert" signed for the document at 8.21am on 28 October 2006. I am satisfied the respondent has been served notice of the investigation meeting.

[3] The investigation meeting commenced at 10.00am on 6 December 2006. The respondent did not make an appearance at that time. The notice setting down the investigation meeting sets out the consequences of non-attendance. I adjourned the meeting briefly at 10.01am to allow the respondent the opportunity to appear. During the adjournment I looked up Mr Hubert's telephone number in the white pages and passed the number on Mrs Eileen Jackson-Hope, Employment Relations Authority Support Officer. At about 10.15am Mrs Jackson-Hope advised me that she had attempted to make contact with Mr Hubert but to no avail. Mrs Jackson-Hope left a message for Mr Hubert explaining that the investigation meeting was about to get under way, and provided the address for attendance. The respondent did not appear at the investigation meeting.

[4] I reconvened the investigation meeting at about 10.30am and considered the matter in terms of Clause 12 of Schedule 2 of the Act which empowers the Authority to proceed to act fully in a matter if a party fails to attend or be represented without good cause.

[5] I did not consider that the respondent had shown "good cause" for its failure to attend the investigation meeting. Accordingly, I proceeded to act as fully in the matter as if the respondent had attended.

Employment Relationship Problem

[6] Mr Tandy claims he has been unjustifiably dismissed from his employment by Murray Hubert for allegedly failing to pick up and transport milk from Palmerston North.

[7] I am required to scrutinise Mr Hubert's actions in accordance with the statutory test of justification set out at section 103A of the Employment Relations Act. The section states:

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[1] The relevant question is how a fair and reasonable employer would have acted in all the circumstances of the case. These circumstances include not just the employer's reaction to the misconduct, but also the circumstances under which the misconduct occurred and the circumstances of both the employee and employer.

[2] The Authority reviews Mr Hubert's actions to ascertain whether it carried out a full and fair investigation that disclosed conduct which a fair and reasonable employer would regard as misconduct. The statutory test obliges the Authority to then separate out the employer's actions for evaluation against the specified objective standard of what a fair and reasonable employer would have done in the circumstances.

Events leading to the dismissal

[8] Mr Tandy was employed as a driver of a refrigerated vehicle from April 2005 until his dismissal on 5 August 2006. He worked on a fortnightly shift system whereby on the first week he commenced at or about midnight or 1.00am. He drove the truck, which would be full of empty milk crates, or small goods from Mainland, from Hamilton to Palmerston North, where the contents of the truck would be unloaded at the Translink cool stores. Mr Tandy would then proceed to Mainland in Palmerston North and pick up and load the truck with milk product. He would bring that load back to Hamilton where he would hand the truck over, at about 3.00pm, to a new driver who would drive the load to Auckland.

[9] If the days he worked during the first week of the fortnightly shift system fell on a Saturday or Sunday then on the way back to Hamilton from Palmerston North, he would drop

his load at various places, including Waiouru, Taupo, Rotorua and sometimes Tokoroa. He would then drive back to Rotorua where the new driver would be waiting for him and he would drive a company car back to Hamilton. The new driver would then take the vehicle to Whakatane and Tauranga, delivering milk at each town.

[10] In the second week of the fortnightly shift system, Mr Tandy commenced at or about 3.00pm and drove the truck from Hamilton to Auckland; he would deliver the milk product (previously picked up from Palmerston North) to Mainland and then return to Auckland.

[11] If the days he worked during the second week of the fortnightly shift system fell on a Saturday or Sunday he would drive pick the truck up in Rotorua and drive it to Tokoroa and back to Rotorua and sometimes onto Taupo. While he was making milk deliveries on this run he would pick up empty milk crates and deliver them back to Palmerston North, before returning to Hamilton.

[12] Mr Tandy worked six days on and two days off over the fortnightly shift system. There were three drivers working the system. While two were working, one would be taking his days off. He would work through the system on week one, have his two days off and then commence on week two.

[13] Mr Tandy told me that during the first week of the fortnightly shift system he would work a maximum of 14 hours a day and during the second week he would work somewhere between six and eight hours per day. He said that during his employment there were no issues raised in relation to his performance.

[14] Friday, 4 August 2006 was the second of Mr Tandy's two days off, having completed week two of the fortnightly shift system. He was due commence work again on Saturday, 5 August 2006 at about midnight to 1.00am. On Friday, 4 August 2006, he attended a cashflow machine in Dinsdale, Hamilton, where he saw a colleague who told him that the truck he was to drive the following morning was not running over the weekend and asked him if he would work that day, being the Friday, and do the Auckland run at 3.00pm.

[15] Mr Tandy rang Mr Hubert straight away and spoke to him on the telephone. Mr Hubert told him that if he could work that day, he could take the two weekend days off (being 5 and 6 August 2006).

[16] Mr Hubert advised Mr Tandy that the truck was not running over the weekend because it was being serviced. He said Mr Tandy could start back on the first week of the fortnightly shift system the following Monday morning. Mr Tandy took the opportunity, went to work and did the job. He said he started at about 3.00pm and was finished about 7.30pm that evening. He said it was a straightforward run because there was nothing to pick up since the truck was not

going on to Palmerston North. He simply had to drive to Auckland, delivery the milk to Mainland and then drive the empty truck back to Hamilton ready for its servicing.

[17] Following his return to Hamilton, Mr Tandy attended a party where he enjoyed himself until 5am the following day. He said about 7.30am that morning, Saturday, 5 August 2006, Mr Hubert rang him and asked him to go in to work and wash the truck.

[18] Mr Tandy says he told Mr Hubert in no uncertain terms that he would not be coming in to wash the truck on his day off. He told me that Mr Hubert did not say anything when he told him that he would not be washing the truck and did not hear from Mr Hubert again until the next day, Sunday, 6 August 2006.

[19] Under normal circumstances when a truck needed to be washed Mr Hubert would leave a cheque for \$45 in the console of the truck and the truck would be washed in the driveway shared by Mainland, in Auckland. Mr Hubert normally told the drivers that the cheque was in the truck and asked them specifically to take the truck through the wash. Mr Tandy told me he didn't wash the truck himself, rather the \$45.00 was to pay others to the truck. I am satisfied it is not usual for the drivers to be required to physically wash the trucks and the request from Mr Hubert asking Mr Tandy to attend work on his day off to wash the truck was out of the ordinary.

[20] On Sunday, 6 August 2006 Mr Tandy says Mr Hubert rang him. Mr Tandy has caller identification on his cell phone; saw that it was Mr Hubert's number and chose not answer the call. Mr Hubert, having rung the number and not received a response, left a message. In his message Mr Hubert told Mr Tandy that he had left milk in Palmerston North about two weekends before 5 August 2006 and he was therefore giving him [Mr Tandy] two weeks' notice of the termination of his employment.

[21] Mr Tandy told me that during the following two weeks, he worked out his notice period, and was required to train his replacement, which commenced work on Monday, 7 August 2006.

[22] Mr Tandy maintained at the investigation meeting that he had not done anything wrong. He denies leaving any milk behind. He says that on the day the incident occurred that Mr Hubert had referred to, there was only a small amount of milk to pick up because the company had given the milk to another truck company to transport.

[23] In scrutinising Mr Hubert's actions and how he acted I have used as a useful starting point the requirements set out in *NZ Food Processing IUOW v Unilever NZ Ltd* [1990] 1 NZILR. This case sets out the minimum requirements of procedural fairness to be applied by an employer in an investigation into misconduct:

- notice to the employee of the specific allegation of misconduct and of the likely consequence if the allegation is established;

- a real as opposed to a nominal opportunity for the employee to attempt to refute the allegation or explain or mitigate his or her conduct; and
- an unbiased consideration of the employee's explanation, free from predetermination and uninfluenced by irrelevant considerations.

[24] The Authority must have regard to the nature and degree of the alleged misbehaviour and its significance in relation to the position held by the employee and the business of the employer. What is required, if the response of dismissal is warranted, is that the misbehaviour must go to the heart or root of the contract between the employer and the employee or be such that it constitutes a serious breach of the employment agreement (*North Island Wholesale Groceries Ltd v Hewin* [1992] 2 NZILR 176).

[25] Mr Tandy was dismissed because he allegedly left milk behind in Palmerston North. He received no opportunity to provide any explanation and he was given no warning that dismissal was imminent. In the absence of any investigation, I do not consider the respondent was in a position to determine that misconduct, or serious misconduct had occurred. Further, there was a complete failure on the part of the respondent to adhere to any notion of procedural fairness.

[26] I concur with Mr Tandy's view that it is more likely than not that Mr Tandy's refusal to go back to work on his day off and wash the truck also contributed to Mr Hubert's decision to dismiss him. However, given Mr Hubert's failure to attend the investigation meeting to put his side of the story, this is only speculation.

Separating out Mr Hubert's actions against the statutory objective standard of what a fair and reasonable employer would have done in these circumstances, I find that Mr Hubert's actions were not what a fair and reasonable employer would have done. I conclude therefore that Mr Tandy was unjustifiably dismissed by Mr Hubert. Mr Tandy has a personal grievance as a result of Mr Hubert's actions and he is entitled to remedies in settlement of that grievance.

Remedies

Lost wages

[27] Mr Tandy claims reimbursement of lost wages from the date of dismissal, 5 August 2006, until he commenced new employment on 3 October 2006. Mr Tandy provided documented evidence of the steps he had taken to find alternative work. I am satisfied he has taken reasonable steps to mitigate his loss.

[28] It was Mr Tandy's uncontested evidence that he was paid \$750.00 gross per week irrespective of the number of days or hours he worked in the week. Mr Tandy received and worked a period of two weeks notice after 5 August 2006. I have calculated his final day of work (based on the six on two off shift system) as being 20 August 2006. He was out of work for a period of six weeks.

Mr Tandy is entitled to be reimbursed for six weeks lost wages in the sum of \$4,500 gross pursuant to section 123(1)(b) of the Employment Relations Act 2000. Mr Hubert is ordered to pay to Mr Tandy the sum of \$4,500 gross, within 28 days of the date of this determination.

Compensation

[29] Mr Tandy seeks compensation for hurt and humiliation caused as a consequence of his dismissal. Mr Tandy gave limited evidence in support of his claim. He told me he found being dismissed humiliating. Mr Tandy says he had no money and had to borrow money off his friends, not knowing if he would ever be able to pay it back.

Mr Hubert is ordered to pay to Mr Tandy the sum of \$2,500.00 as compensation pursuant to section 123(1)(c) of the Employment Relations Act 2000 within 28 days of the date of this determination.

Contributory conduct

[30] I am bound by section 124 of the Act to consider the extent to which Mr Tandy's actions contributed towards the situation that gave rise to his personal grievance, and if those actions so require, to reduce the remedies that would otherwise have been awarded accordingly.

[31] Real difficulties arise in cases where the process is flawed to the extent that it is not possible for the Authority to ascertain the degree of misconduct because this has been obscured by failures of process (see *Air New Zealand Ltd v Hudson*, unreported, 30 May 2006, AC30/06, Shaw J).

[32] Mr Hubert never carried out any proper investigation into the concerns he raised with Mr Tandy on 6 August 2006. Mr Tandy denies the allegations relating to leaving milk in Palmerston North. It is not possible to ascertain whether Mr Tandy's alleged misconduct was sufficiently serious to justify the dismissal or to constitute contributory conduct.

[33] For these reasons, I consider there is no basis for reducing the nature and extent of the remedies to be granted to Mr Tandy.

Costs

[34] Costs are reserved. Mr Peebles should try and contact Mr Hubert to discuss and resolve the question of costs if he can. If he cannot do so he is to file and serve submissions on the subject and the matter will be determined.

Vicki Campbell
Member of Employment Relations Authority

