

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 100/09

BETWEEN PAIKEA WAAKA
 Applicant

AND STL LINEHAUL LIMITED
 AND ROBERT PEARSON
 Respondents

Member of Authority: P R Stapp

Representatives: Mike Andrews for Applicant
 Robert Pearson for Respondents

Investigation Meeting: 25 June 2009 at Palmerston North

Determination: 3 August 2009

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Waaka has claimed his dismissal was unjustified. He has claimed 3 months lost wages and \$15,000 compensation for humiliation, loss of dignity and injury to feelings, and costs. Mr Waaka has claimed penalties against Mr Robert Pearson, a company shareholder, personally, for aiding and abetting breaches, and penalties against STL for allegedly failing to comply with a direction made by the Authority, failing to attend mediation, failing to follow the dispute resolution processes and failing to produce records as requested.

[2] STL and Mr Pearson denied all the claims.

[3] Mr Waaka commenced his employment as a driver with STL in early May 2008. He was based in Palmerston North. He signed off an employment details document and an undertaking to read the health and safety manual, hand in his log

book pages and make a decision on Kiwi Saver. There was no employment agreement.

[4] In early June Mr Waaka had a trip to Kaikoura where a false deck jolly came off his flat deck trailer and damaged the machinery underneath it. He says he checked the load and chains as required, but STL says the check was obviously not made or there would not have been an accident. Mr Waaka was able to continue his trip after getting assistance from another driver and using a “hiab” to reload.

[5] On his return to Picton when he was south of Cheviot the gears broke and arrangements had to be made to transport the load to Picton and tow the truck to Christchurch for repairs. Mr Waaka received a speeding ticket when he was returning home to Palmerston North. He left the ticket in the vehicle he was using.

[6] Mr Waaka’s next job was to pick up a load at Hawera on 20 June 2008. However, he decided to help another driver on route to New Plymouth, and that driver was to drop him back to pick up his truck and load. On the same day there was a telephone discussion between Mr Waaka and Mr Chris Rua, the branch manager, about what he was doing. Mr Waaka says that Mr Rua was angry. Mr Rua telephoned Mr Waaka back later the same day and told him he was sorry but he had to “let him go”. Mr Waaka concluded that he had been dismissed.

[7] After this a mechanic found three whiskey bottles in Mr Waaka’s truck cab that was in Christchurch being repaired. Mr Waaka accepted that there were three whiskey bottles in his truck, but says that they had been given to him as personal gifts. Also, the speeding ticket Mr Waaka received was found in the other vehicle Mr Waaka used to get home after the Christchurch trip.

[8] Mr Waaka’s representative, Mr Andrews, sent a letter dated 4 July to STL requesting the reasons for Mr Waaka’s dismissal and requesting mediation to resolve the employment relationship problem. STL replied through Mr Pearson on 15 July in a letter that essentially outlined the series of events leading up to 20 June. These included the damage done to machinery caused by Mr Waaka not checking his truck and the false deck jolly coming off the flat deck trailer. STL concluded that Mr Waaka had been driving too fast as witnessed by another driver. The gears broke. Mr

Waaka received a speeding ticket in a company vehicle returning to his home at Palmerston North. STL did not take up the suggestion to go to mediation.

[9] Mr Pearson concluded that Mr Waaka did not have the experience required to do the job because he had not checked his load and the coupling, he did not check the oil level and was driving too fast. Mr Pearson also concluded that finding the whiskey bottles and speeding ticket he had no other option but to dismiss Mr Waaka.

Issues

[10] What was the reason for the dismissal? Would a fair and reasonable employer in all the circumstances have dismissed Mr Waaka?

Determination

[11] STL's defence for not having an employment agreement was that Mr Waaka was on a 3 month trial. First, I find that the employee details document signed by Mr Waaka falls short of meeting the statutory requirements as to what is required in an employment agreement. Second, I find that there is no defence for not providing an employment agreement just because there was a trial or probationary period. There was no intended employment agreement provided to Mr Waaka. There was no penalty sought on that breach.

[12] There was no investigation conducted by Mr Pearson in regard to Mr Waaka and what he was doing in New Plymouth. The decision was made to dismiss Mr Waaka. Mr Pearson accepted responsibility for that decision, although the decision was communicated through Mr Rua.

[13] Mr Waaka had no opportunity to comment and reply to any allegations before Mr Rua told him that he was sorry but he had to let him go. A fair and reasonable employer would therefore not have been able to make any findings, despite the information that would have been available to the employer and which could have been used by the employer to base allegations on. Mr Waaka said that he did check the couplings and the load. He denied that he had been drinking and the three whisky

bottles were gifts. Mr Waaka had some explanations that a fair and reasonable employer would have assessed and possibly checked before making a decision.

[14] Mr Pearson said that finding the bottles caused him to prohibit any alcohol, including beer, being kept in the vehicle fridges by all drivers, and to re-enforce the company's policies. Mr Waaka accepted that he received the speeding ticket. He says now that he wished he had not left the ticket in the vehicle to be found. He said that he helped out a mate on 20 June and says that what he had to do was not clear. There is no indication of what Mr Rua reported to Mr Pearson on that matter.

[15] There was no investigation conducted into the damage of the machinery at Kaikoura. Mr Pearson conceded during the Authority's investigation that the broken gearbox was a mechanical failure. The three whiskey bottles in Mr Waaka's truck cab and the speeding ticket were found after the dismissal.

[16] In all the above circumstances a fair and reasonable employer would not have dismissed Mr Waaka before conducting a proper and fair investigation.

[17] Mr Waaka has a personal grievance for unjustified dismissal.

Aiding and abetting and penalties for breaches

[18] Mr Waaka has claimed that Mr Pearson aided and abetted in breaches of good faith by the company, he failed to comply with a direction of the Authority, including not producing records and not following the employment resolution process, and that he failed to attend mediation.

[19] I am satisfied that the employment relationship problem is really about the personal grievance raised by Mr Waaka. The application for penalties was made in an amended statement of problem. I accept an applicant would be entitled to pursue such claims, but in this instance the employment relationship problem has more to do with the claim for unjustified dismissal than penalty actions. For the above reasons I am not disposed to ordering any penalties, but would recommend to STL and Mr Pearson that they get some sound employment relations advice about employment agreements,

wages and time and holiday records and policies that will assist in aiming to achieve best practice in their employment relationships.

[20] Mr Pearson could have done more to assist to resolve this problem before the Authority's investigation meeting. Indeed STL and Mr Pearson had the duty and responsibility to attend mediation and failing to do so, even after a direction from the Authority, is a breach of good faith. I have decided not to impose a penalty because through this employment relationship problem it has the opportunity to fix its practices, including providing employment agreements.

[21] STL produced a document that purported to be a wage and time record at the Authority's investigation meeting, albeit this document was produced after the deadline set by me in earlier directions. I suspect Mr Pearson hoped that the matter would go away, but as he now knows that has not happened. Fortunately for him he did have a document relating to Mr Waaka's wages and produced it during the investigation meeting. The failure to produce it earlier has not had any major impact on the investigation.

[22] Mr Pearson explained that Mr Waaka had been paid his holiday pay and a day worked in lieu. That amount and the final payment do not appear to be inconsistent with Mr Waaka's pay history document. In the absence of any challenge being made to that information during the investigation meeting I do not intend to take the matter further.

Remedies

[23] Mr Waaka is entitled to lost wages. He was paid \$1,070 per week. He says he had two days temporary work and earned approximately \$270 for that work. He says he tried to find work but could not find any alternative employment. It is my decision to assess the lost wages on the basis of three months lost wages under s 123 (1) (b) and s 128 (2) of the Employment Relations Act. Mr Waaka has a personal grievance and has lost remuneration as a result of that grievance. I find that Mr Waaka did not contribute to the failure of the procedure followed by the employer that made Mr Waaka's dismissal wholly unjustified. In regard to the allegations about Mr Waaka's conduct and behaviour I find that they have not been established to the requisite

standard of proof given that at least one of the problems with his truck was a mechanical problem and there was no evidence to support Mr Waaka drink driving and his claim the three bottles of whiskey were gifts was not contradicted. Thus, I find that these matters did not contribute to any blameworthy behaviour giving rise to the personal grievance. His decision to go and help his mate without approval was not a wise decision. His decision to do that caused Messrs Rua and Pearson some difficulty not knowing what Mr Waka was doing instead of his own job. For this I have made a reduction in Mr Waaka's lost earnings because his action of omitting to keep his employer informed contributed to the situation giving rise to the personal grievance. I find that he did look for some work, but his evidence was very light on mitigating his loss that would restrict any loss of wages to the entitlement to three months wages under the Act, but I have reduced this to 8 weeks. This amounts to \$8,560.

[24] I now turn to the claim for \$15,000 compensation. There was a paucity of evidence of the impact of the dismissal on Mr Waaka. I accept that there was some impact on his feelings but the evidence was not sufficient to establish the level of the claim. I assess Mr Waaka's claim at \$4,500 compensation for hurt feelings in regard to him telling me he was upset by being told of his dismissal over the telephone and that there was no discussion about any findings and how the decision was reached. He further says he felt that the matter had been made worse by Mr Pearson suggesting that he was drinking and driving. However I have deducted a third for contribution for omitting to keep his employer informed of what he was doing in New Plymouth instead of doing his own job. I award him \$3,000.

Costs

[25] STL has put Mr Waaka to the unnecessary costs of the Authority's investigation, and especially where STL did not go to mediation and try and save costs. Costs follow the event and are to reimburse any party put to any unnecessary costs. Costs are not awarded against a party as a penalty. Costs follow the event and in this employment relationship problem Mr Waaka has been successful. It is proper that he should receive a contribution towards his costs. He was represented and his representative assisted in the preparation of statements of evidence. I assess the contribution as \$2,000 in the range of the tariff approach used in the Authority.

Conclusion

[26] STL Linehaul Limited is to pay Paikea Waaka the following:

- (1) \$8,560 lost wages.
- (2) \$3,000 compensation for hurt feelings under s 123 (c) (i) of the Act.
- (3) \$2,000 contribution to costs plus the \$70 filing fee pursuant to clause 15 of Schedule 2 of the Employment Relations Act 2000.

P R Stapp
Member of the Employment Relations Authority