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Walters v Tulloch Transport Limited CA167/10 (Christchurch) [2010] NZERA 712 (27 August 2010)

Last Updated: 10 November 2010

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

CA 167/10 5166999

BETWEEN

CAREY WALTERS Applicant

A N D

TULLOCH TRANSPORT
LIMITED
Respondents

Member of Authority: Representatives:

Investigation Meeting: Submissions:

Philip Cheyne

Joseph O'Neil, Counsel for Applicant Linda Penno, Representative for Respondent

28 July 2010 at Dunedin

30 July 2010 from the Applicant

5 August 2010 from the Respondent

Determination:

27 August 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Carey Walters worked as a driver for Tulloch Transport Limited (Tullochs) for about 3 years until he was dismissed on 21 April 2009 for serious misconduct. The dismissal followed a complaint from a motorist about Mr Walters' driving on 26 March. After an investigation that included meeting with Mr Walters, Peter Sutherland for Tullochs decided that he had lost trust and confidence in Mr Walters as an employee so he dismissed him.

[2] Mr Walters says that he committed no act of serious misconduct as defined by the employment agreement. He says that he drove safely on 26 March when he passed the motorist, that the yellow line on his side of the road that he crossed over was not in accordance with the relevant traffic regulations, that Mr Sutherland predetermined the dismissal and that he was treated differently from other employees.

[3] To resolve this problem I will set out more fully what it was that happened on 26 March near Clandeboye corner on State Highway 1 that resulted in the motorist's complaint, before canvassing what Tullochs did in response to that complaint.

Several other matters about Mr Walters' driving featured in Mr Sutherland's decision to dismiss him so I will explain their relevance. I must assess what Tullochs did and how it acted against the standard of the actions of a fair and reasonable employer in all the circumstances to determine whether the decision to dismiss Mr Walters was justified. There are some factual disputes to resolve along the way so I will first say something about the reliability of the main witnesses.

Some comment about the main witnesses

[4] There is a claim for lost remuneration. In his statement of evidence which he confirmed as true after swearing an oath to tell the truth, the whole truth, and nothing but the truth Mr Walters said that he was unemployed for 281 days following the dismissal except for some casual work, the details of which he described. That evidence is untrue. In fact Mr Walters also worked on a cash basis as a driver at least a dozen times (as far as he eventually admitted when pressed) during this period. When asked by Tullochs' representative he at first admitted driving on a particular occasion and said he was not working for wages. When pressed he owned up to receiving cash and driving on about a dozen occasions. Mr Walters' failure to mention this work in his statement of evidence was deliberate although I cannot say whether it was to maximise his claim against Tullochs or because he was concerned about the cash nature of the payment. Either way, his lie means that he cannot be regarded as a reliable witness when it comes to assessing conflicts between his evidence and that of other witnesses.

[5] Mr Sutherland impressed as a witness who took care to give balanced and accurate evidence. Warren Newbury, the motorist who complained about Mr Walters' driving, also impressed as a careful witness as to what he observed. The same can be said of Raymond Harris.

[6] Only a few matters fall to be determined based on Mr Walters' credibility as a witness.

The employment and some earlier issues

[7] Mr Walters was employed as a driver. For some years he drove a truck and trailer unit carting packaged milk between Dunedin and Christchurch.

[8] There was an individual employment agreement which included an *Employee Handbook*. There was also an *Operators Handbook*. Mr Walters was familiar with these documents. The last mentioned document makes a point of explaining that to drive safely within the speed limit drivers need to keep in mind that 90Km/h is the maximum speed in normal conditions on the open road and that trucks being less stable than cars need to go at least 10Km/h slower than any corner speed advisory sign. Similar messages are displayed on the inside window of the truck that Mr Walters drove.

[9] The employment agreement says that the *primary obligations and duties* include *abiding by all rules, regulations, policies, and/or procedures of the employer as may be advised ...* The *Operators Handbook* refers to the need to *remember that the Company's name is a mobile advertisement and the courteous driving habits will promote a favourable impression just as aggressive driving will cause an unfavourable impression of the Company*. It says *Conduct that threatens person's health, .or endangers plant, property or product in unacceptable*. There are provisions about misconduct, serious misconduct and disciplinary processes that I will mention later.

[10] Tullochs does regular driver assessments. Mr Walters' last two assessments were on 8 December 2008 and 2 March 2009 when he was assessed as competent. There is an evidential dispute about the last assessment, more of which shortly.

[11] Raymond Harris was Tullochs' group training officer. Part of his job involved liaison with the Police CVIU (Commercial Vehicle Investigation Unit) including Senior Sergeant Warren Newbury. He sometimes received reports of incident involving Tullochs' drivers from CVIU and also from the public. In that context Mr Harris met with Mr Walters on Friday 27 February 2009 to discuss complaints from the public about Mr Walters' driving. One complaint was to the effect that Mr Walters sped through a flooded section of road and caused distress to another road user and the other complaint was that Mr Walters raced another truck along a Dunedin road and drove through a red light. The result of the meeting with Mr Walters about these matters was a decision to assess his driving. He was also given a memo dated 2 March 2009 that reads in part:

As we stated at the meeting, when driving a heavy motor vehicle for a company you are a moving billboard, this means that any action taken by that vehicle (good or bad) will reflect back on the company.

As we only have the drivers word and your response to this to go by we will not be taking any further action re this.

We would expect that given the current situation that we do not receive any further complaints regarding your driving.

As a follow up you will be having a driving assessment.

[12] The memo explains why Mr Walters had a driving assessment out of sequence on 2 March 2009. The assessment was done by Mr Harris who is very experienced in such things. In his evidence Mr Walters says that during the assessment he drove as normal, travelling at 95 km/h frequently and not slowing to 10 km/h under the recommended speed for corners. In response Mr Harris says that if Mr Walters had driven in this manner during the assessment on 2 March he would have noticed it, recorded it and spoken to Mr Walters about it. Such is the very purpose of an assessment so it is probable that an

assessor would do these things, especially when driving issues had led to an assessment out of sequence. That is one reason to prefer the evidence of Mr Harris as I do and the other reason has already been set out above. Accordingly I reject the evidence of Mr Walters just mentioned and prefer Mr Harris' evidence supported by the assessment form.

[13] On 24 March 2009 Mr Walters received a traffic infringement notice for exceeding the speed limit. He was travelling at 99 km/h when the speed limit was 90 km/h. While Mr Walters accepts the accuracy of the radar reading, his evidence is to the effect that the vehicle must have been faulty. It is fitted with a speed limiter that should have prevented it accelerating beyond 95 km/h on a level surface. I will return to this point shortly.

Events on 26 March

[14] At around dusk Mr Walters was driving south on State Highway 1. He caught up with another vehicle and passed it leading at the Clandeboye corner. Heading south leading into the bend there is a left-hand turning bay for vehicles turning east and another road joins from the west. There are yellow lines marked on either side of the centre line of the main road. It is common ground that, at the time, the yellow line for the south bound lane was a solid line about 21 metres long. In passing the other vehicle, Mr Walters was on the other side of the road adjacent to this yellow line. He completed the passing manoeuvre without incident and continued on his way.

[15] By chance, in the passed vehicle was Senior Sergeant Newbury of the CIVU who was a passenger in a four wheel drive vehicle being driven by his daughter, a learner driver. The senior sergeant recognised the truck as belonging to Tullochs. He was sufficiently concerned by the driving to immediately ring Mr Harris to complain. Mr Harris found out who was driving and rang to speak to Mr Walters. When Mr Walters was asked about his speed and passing on the wrong side of the road he told Mr Harris:

Yep, I couldn't stop and the driver slammed on their brakes and the car was all over the road so I did pass on the wrong side of the road crossing the yellow lines.

[16] Mr Harris told Mr Walters who was in the car and said that there would be repercussions.

[17] Mr Harris also spoke to Mr Sutherland who asked him to get the Senior Sergeant to put his complaint in writing. That was done a few days later by email. It reads in part:

We were travelling south on State Highway 1 in the passing lanes a couple of kilometres north of the Clandeboye turn off. As I was instructing my daughter I was aware of the other vehicles and noticed a Tulloch truck and trailer approaching from behind us. What made me take more notice was the fact that we were travelling between 90 and 95 kilometres per hour along the length of the passing lanes and the truck and trailer was gaining on us fairly quickly. It was sufficient that I remarked on its speed to my wife and mother-in-law who were seated in the rear of the vehicle.

At the Clandeboye turn off the vehicle pulled out and overtook us. At this stage my daughter had slowed to around 70 kilometres per hour due to the corner on State Highway 1. My concern is that this corner is marked with yellow no-passing lines through out and the truck and trailer was entirely on the incorrect side of the yellow lines throughout the corner.

Having observed this abysmal example of driving with excess speed and overtaking on yellow lines I immediately contacted you ...This driving was not of a standard I would expect of any professional driver and clearly his actions are those are the type that bring Tulloch's, Meadow Fresh and the transport industry as a whole into disrepute. .

Disciplinary Investigation

[18] Mr Sutherland wrote to Mr Walters on 3 April 2009, inviting him to a meeting to hear his explanation in response to the allegation of operating his vehicle in an unsafe manner. Mr Walters was given a copy of the email from the Senior Sergeant and told that the speeding infringement incurred on 24 March would be included in the investigation. He was advised that it was an allegation of serious misconduct which could result in dismissal and that he was entitled to support or representation at the meeting.

[19] This meeting was held on 6 April. Mr Walters decided to forego any support or representation so Mr Sutherland, Mr Harris and Mr Walters were the only attendees. There are notes of the meeting made by Mr Sutherland which I accept as substantially accurate. In brief, Mr Walters said that he came up to the corner, checked his mirrors, his speedo was reading 93 km/h, got into the corner, looked forward, saw the brake lights on the vehicle in front and took evasive action. He said he did not notice the yellow line. Mr Harris told him it was about 20 metres long on the south bound lane and the full length of the corner on the north bound lane rather than *yellow no passing lines through out* as stated by the Senior Sergeant. Mr Walters said that he could have pulled up rather than pass but felt that it would have caused the 6-high milk to topple over. He said that his speed was 93 km/h during the passing manoeuvre as he did not brake after seeing the vehicle's brake lights. Mr Walters also said that he had been travelling at a safe distance prior to the vehicle braking and that he could have pulled in to his own lane if a north bound vehicle had emerged. He stated that his was a safe passing manoeuvre despite the advisory limit of 85 km/p and the company requirement to drive at 10 km/h less that posted advisory limits. Mr Walters said

that he did not realise there was a yellow line where he was passing. Mr Walters also said that the speedo in the vehicle must read slow as it read 95 km/h when he got the ticket for travelling at 99 km/h. He never suggested that he had logged a defect note about the speedo or the speed limited.

[20] Following this meeting Mr Sutherland investigated further. He had the speedo checked and discovered that it actually read fast so that if the truck was travelling at 95 km/h the speedo would show 97-98 km/h. He had the speed limited checked and it was found to be working correctly. Following these investigations Mr Sutherland wrote to Mr Walters on 14 April 2009. He set out Mr Walters' explanation given at the earlier meeting and the results of his further investigations. Mr Sutherland described the driving behaviour as illegal and potentially unsafe and an example of serious misconduct. He referred to the 2 March memo as a *verbal warning*. Mr Walters was required to attend a further meeting and again advised about the risk of dismissal and his right to representation.

[21] There was a further meeting on 20 April when Mr Walters was represented. His version of events was unchanged. Mr Sutherland suggested that Mr Walters had been catching the vehicle for several kilometres and intended to pass it at the Clandeboye corner rather than being forced to do so by the vehicle braking. Mr Walters denied this. There was discussion about the incidents that led to the 2 March memo and the 24 March speeding infringement.

[22] Following the meeting Mr Sutherland concluded that he would dismiss Mr Walters for serious misconduct. He wrote a letter dated 21 April 2009 to Mr Walters setting out his conclusions and the reasons for the dismissal. To summarise, Mr Sutherland decided that Mr Walters deliberately intended to pass the vehicle at the corner because he did not reduce his speed as he closed on the vehicle and allowed the gap between the vehicles to shorten to a distance where it was doubtful that he could have safely stopped. He decided that Mr Walters deliberately made an unsafe and illegal passing manoeuvre by crossing the yellow line and incurred a complaint from a member of the public. Mr Sutherland rejected the explanations that the speedo was reading slow and that there was any problem with the speed limiter. He considered that the complainants that led to the 2 March memo were from credible witness as against Mr Walters' denial of poor driving behaviour. Finally Mr Sutherland concluded that, despite the 2 March memo, Mr Walters had failed to change his driving behaviour and continued to drive in a manner that was illegal, unsafe and inconsiderate to the extent that Mr Sutherland had lost trust and confidence in him. Mr Walters was dismissed with pay in lieu of notice.

Justification

[23] Justification for the dismissal must be assessed objectively 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 of the dismissal.

[24] On 6 May 2009, after the dismissal, Mr Walters' solicitor wrote to Mr Sutherland raising a personal grievance. An element of the grievance is that the Senior Sergeant wrongly asserted that there were yellow no passing lines throughout the corner when it was only 21 metres in length, that the road markings were not compliant with relevant standards and rules and that enforcement of the no passing rule was unlikely. These matters were also raised at the Authority's investigation meeting where it was conceded by the Senior Sergeant that a prosecution or traffic infringement notice would have been unlikely. The evidence is also that the road markings have been changed more recently.

[25] These issues about the yellow line were raised after the dismissal rather than as part of Mr Walters' explanation at either disciplinary meeting. That is Mr Sutherland's evidence which I accept. It is also apparent from reading the 6 May 2009 personal grievance letter with its attachments that include print date information. Presumably Mr Walters did not dispute the legitimacy of the markings before the dismissal because his explanation was that he had not noticed them while driving. Mr Walters' other possible explanation at the time was that he noticed the yellow line on the south bound lane but crossed it while passing anyway. It is hard to see how that would have given Tulloch any greater reason to trust Mr Walters' to drive safely in the future. In any event, the true relevance of the non complying yellow line is that Mr Walters was probably not liable to a criminal standard for a traffic infringement rather than not responsible for *abysmal . driving with excess speed and overtaking on yellow lines*, as expressed by the complainant.

[26] Mr Sutherland rejected Mr Walters' explanation that he had to take evasive action because of the braking by the vehicle in front. Rather, Mr Sutherland concluded that Mr Walters intended to catch up with and pass that vehicle. He did not reduce his speed to match that vehicle and closed the gap between the vehicles to a distance where it was doubtful he could have stopped in the clear distance of road in front of him. Those conclusions are all obvious inferences and are the conclusions that any fair and reasonable employer would have reached at the time for the same reasons given by Mr Sutherland. That led to Mr Sutherland's conclusion that Mr Walters deliberately made an unsafe and illegal passing manoeuvre by crossing the double yellow line. That too is a conclusion that any fair and reasonable employer would have reached in the circumstances at the time. No-one could think that passing at excessive speed on a yellow line was not illegal and unsafe.

[27] Mr Sutherland further concluded that Mr Walters failed to change his driving behaviour following the 2 March 2009 memo and continued to drive in a manner that was illegal, unsafe and inconsiderate. That conclusion was based on the speeding infringement notice received by Mr Walters on 24 March 2009 and the conclusions about the driving at Clandeboye

corner two days later. As noted Mr Sutherland had checked the speedo so he knew that it reported a speed slightly faster than the real speed. Accordingly Mr Sutherland did not accept Mr Walters' explanation that the speedo was reading less than 99 km/h when he was stopped and ticketed for that speed, a conclusion that any fair and reasonable employer would have reached in the circumstances at the time. What faced Mr Sutherland then was an employee who on 2 March had received a memo cautioning him about driving in a manner that resulted in complaints from the public, but about three weeks later received a speeding infringement notice, then 2 days later was again speeding and passing unsafely on a yellow line. In light of that, Mr Sutherland's conclusion that Mr Walters had not changed his driving behaviour was the conclusion that any fair and reasonable employer would have reached.

[28] There is a complaint that Mr Sutherland closed his mind to the explanations given by Mr Walters and effectively pre-determined the decision to dismiss. I do not accept that view. I prefer Mr Sutherland's evidence that he considered Mr Walters' explanations. He just did not accept them for the reasons he gave at the time. There was nothing unfair or unreasonable in any of that.

[29] There is a complaint that Mr Sutherland effectively reopened the issues covered by the 2 March memo when that memo specifically stated *we will not be taking any further action re this*. The second point based on the memo is that Mr Sutherland treated it as a disciplinary warning when it was not. In the dismissal letter Mr Sutherland states *you were given a verbal warning on 2 March* and *You were warned on 2 March ...* Turning first to the second point, it is correct that Mr Sutherland misconstrued the nature of the communication with Mr Walters on 2 March. It expressly was not a warning as provided for in the disciplinary code. However, Mr Sutherland's error was immaterial. He dealt with Mr Walters' post 2 March conduct as alleged serious misconduct rather than a repetition of less serious misconduct that escalated to the next category because of an earlier warning. It has long been the law that slight or immaterial deviations from standards of procedural fairness should not result in consequences out of proportion with the seriousness of the departure: see *NZ (with exceptions) Food Processors etc IUOW v Unilever New Zealand Ltd* [1990] 1 NZILR 35. As a result I find that Mr Sutherland's mistake does not affect justification for the dismissal. Returning to the first point, I do not accept that Mr Sutherland reopened the issues that had been dealt with by the 2 March memo. He simply took account of recent events in forming a view about the gravity of Mr Walters' subsequent behaviour. Mr Sutherland was entitled to do so. Indeed, the memo specifically set out Tulloch's expectation that there would not be any further complaints about Mr Walters' driving. As events transpired there was a further complaint about his driving.

[30] There is a complaint that Mr Sutherland did not fully investigate the allegations because he did not interview the Senior Sergeant. That is directed particularly at the assertion in the email about *yellow lines throughout the corner*. It is now common ground that this was incorrect but it was also clear at the first disciplinary meeting that the south bound yellow line was only about 20 metres long and did not go *throughout the corner*. Accordingly there is no merit in the complaint at this point. Another point is that the Senior Sergeant did not allege that the passing was unsafe. That is not expressly said in the email but it is certainly implied. In any event, the point is that the allegation of unsafe driving was clearly put by Mr Sutherland and Mr Walters had ample opportunity to respond to the allegation.

[31] There is evidence to the effect that the speed limiter and speedo in the truck suffered from an intermittent fault. Service records show that components related to the speed limiter were adjusted on 13 March 2009. As noted, Mr Sutherland checked the speed limiter and the speedo when Mr Walters raised those issues at the first disciplinary meeting but established that the speed limiter was working correctly and the speedo difference counted against rather than in favour of Mr Walters. Neither point can now undermine Tulloch's justification for the dismissal.

[32] There is an argument about inconsistent treatment and disparity. The first point is that because Mr Walters was not given a warning in respect of the 2 March complaints Tulloch's condoned him receiving complaints from the public about his driving. Tulloch's had to then warn him that future such conduct would not be condoned. I am referred to *Otumarama Private Hospital Ltd v Bell* [1995] NZEmpC 329; [1995] 2 ERNZ 491. In that case there was a house rule against sleeping at work but in practice there was considerable tolerance of such behaviour. The Employment Court stated that where there has been an element of permission in the past there should be a clear statement about its withdrawal or modification prior to any disciplinary action. Here, there is no evidence of tolerance of driving behaviour such as that displayed by Mr Walters and he was clearly as a result of the 2 March memo about any future tolerance in any event. There is evidence that Tulloch's did not dismiss another driver who had been speeding and was convicted of careless driving. I accept Mr Sutherland's evidence that the situation differed because of Mr Walters' refusal to accept there was any fault in his driving. Accordingly I do not accept that there is any merit in the complaints about inconsistent treatment and disparity.

[33] The final point to consider is whether Mr Walters' conduct is properly classified under the employment agreement as misconduct, rendering him liable to a warning rather than serious misconduct. The point arises because the employment agreement lists as serious misconduct *Being convicted of a ... driving offence of a serious nature eg "careless use", "dangerous driving" etc* and *Breach of the Employer's code of conduct* while examples of simple misconduct are *Incurring a complaint from a member of the public* and *Breach of the Employer's code of conduct*. The submission is that (at worst) Mr Walters' driving resulted in a complaint, breached the stipulation in the code about speed and resulted in him receiving an infringement notice, but did not even result in a charge let alone a conviction on any serious driving offence. However, the point does not

directly address the way that Mr Sutherland saw the matter. Mr Walters was dismissed because of his illegal, unsafe and inconsiderate driving leading Mr Sutherland to lose trust and confidence that he could be relied on to perform his duties to the company's standards in the future. On balance I find that any fair and reasonable employer would have reached the same conclusion. It follows that Mr Walters' was justifiably dismissed.

Summary

[34] Mr Walters was justifiably dismissed.

[35] Costs are reserved. Any claim for costs must be made within 28 days by lodging and serving a memorandum. The other party may then lodge and serve a reply within a further 14 days.

Philip Cheyne
Member of the Employment Relations Authority

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