

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Ian William Monahan
AND Lister's Pioneer Services Limited
REPRESENTATIVES Brian Warren for Applicant
Cathy Bormans for Respondent
MEMBER OF AUTHORITY Y S Oldfield
INVESTIGATION MEETING 12 April 2007
DATE OF DETERMINATION 22 May 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] In January 2006 the respondent employed Mr Monahan to drive a truck out of its Kaiwaka depot. On 12 July 2006 Mr Monahan received an offence notice for failing to produce a log book. This was followed by a summons to appear in Court on 28 September. The summons was copied to the respondent about late August and on Mr Monahan's next trip to the Auckland office, company director Rex Lowe gave him notice that his employment would be terminated on 28 September.

[2] Mr Lowe explained his decision to dismiss by telling me that he understood that Mr Monahan did not intend to offer any defence to the charge and that it carried a one month mandatory loss of licence. October and November were traditionally busy times for the business and he could not manage without Mr Monahan for a month during that period. In addition he noted that the employment agreement provides as follows:

"9 b) Instant dismissal may be taken in respect of any of the following misdemeanours: -

....7) Operating a vehicle in excess of the limits of the Driving hours and Logbooks Regulations."

[3] It transpired that Mr Monahan did not lose his license. On 28 September he entered no plea and the matter was held over until 20 October. He let the respondent know that he would be able to work the next day (29 September) but was told that he was no longer employed by the company and another driver had been taken on in his place. On 20 October Mr Monahan pleaded guilty but offered an explanation for his conduct which the Court accepted. This was that when he was stopped by an officer of the police transport unit and asked to produce his logbook he informed the officer that he had lost the book the previous day and was awaiting its replacement by the office manager.

[4] Mr Monahan contacted the respondent with the news that he had been fined but had not lost his licence. Mr Lowe asked why he had not originally told him or the Kaiwaka supervisor (Mr Broughton) what he had told the court. Mr Monahan replied that he wanted to "keep it quiet." He asked to be reimbursed for the wages he had lost, and put back to work. Although

Mr Lowe found it strange that Mr Monahan had not told him or the supervisor what he had told the court, he did have work available and offered Mr Monahan the opportunity to start back with him in two weeks time. However he said that because he felt Mr Monahan's actions had caused the situation he would not reimburse Mr Monahan for the five weeks wages he would end up losing.

[5] Mr Monahan was not prepared to return on those terms and chose to pursue a personal grievance instead. He earned very little over the next few months and seeks reinstatement and reimbursement of his losses. The issues for determination are whether the dismissal was justified, and if it was not, whether Mr Monahan's conduct contributed to the situation in such a way that remedies should be reduced.

Was the dismissal justified?

[6] The respondent company says that the dismissal was justified for the following reasons. In mid July, when the notice of offence came to light, Mr Broughton asked Mr Monahan what had happened. He admitted that he had failed to produce his logbook and had been "ticketed." He offered no explanation for his conduct and put forward no mitigating factors. It was a clear breach of the logbook regulations (to which he would later plead guilty). It was a very serious matter and employers are regularly held liable for the actions of their employees in this area. It amounted to grounds for "instant dismissal" pursuant to clause 9 of the employment agreement.

[7] Respondent witnesses also told me that there was no good reason for Mr Monahan to be without a logbook as a plentiful stock was kept at the depot in a stack right beside the timesheets which the drivers collected every week. Mr Monahan told me he did not know where the logbooks were kept but I did not find this credible and prefer the evidence of Mr Broughton and Mr Lowe on this point.

[8] Although the employer did not conduct a lengthy and formal inquiry into the alleged misconduct I am satisfied that the process was sufficiently thorough to establish what had happened and provided Mr Monahan ample opportunity to explain his actions. I conclude that after Mr Broughton had finished his discussion with Mr Monahan in mid July, grounds for summary dismissal had been established.

[9] However, the difficulty with the respondent's attempted justification in this case is that it did not, in fact, dismiss him for failing to produce his logbook. A month elapsed between the misconduct being established and notice of dismissal. Mr Lowe made the decision to dismiss only once he became aware that Mr Monahan was to appear in court on 28 September and because he expected him to lose his licence on that day. As he told me, he could not afford to be without a driver at a busy time (the spring avocado harvest) and arranged things so that he had time to find a replacement driver by the time Mr Monahan went to court.

[10] For a truck driver to lose his licence may well justify dismissal however the mere possibility of a loss of licence cannot. Mr Lowe's decision to dismiss was premature. The dismissal was not justified.

Remedies and contributory conduct

[11] Mr Monahan's contribution to the situation that gave rise to his grievance is at a high level. The failure to produce a logbook was entirely his fault and is a very serious matter. In addition he omitted (inexplicably) to tell Mr Broughton or Mr Lowe what he later told the court. He also failed to mitigate his loss by taking up what I consider in all the circumstances to have been a very reasonable offer of re-employment.

[12] I conclude that in the absence of contribution Mr Monahan would be entitled to five weeks lost wages. I was provided with three months' timesheets for Mr Monahan from which I was able to establish that he worked an average of 50 hours per week. Since his hourly rate was \$13.50 his average weekly earnings were \$675.00 gross making his loss over five weeks

\$3,375.00 in total. He would also be entitled to a modest level of compensation for the uncertainty associated with the period up until he was offered his job back. I set that at \$1,000.00.

[13] However Mr Monahan's contribution is fixed at 50%. Remedies are reduced accordingly. **The respondent is ordered to pay the following amounts:**

- **\$1,687.50 gross lost earnings, and**
- **\$500.00 compensation for hurt and humiliation.**

Costs

[14] Mr Monahan was not professionally represented. He may however seek to recover his filing fee and disbursements. Should he wish to do so he has a period of 28 days in which to make application to the Authority for a contribution to his costs. Upon receipt of any such application the respondent will have a further 14 days in which to reply.

Y S Oldfield
Member of Employment Relations Authority