

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Elton James Wirihana
AND Alaway Cartage Limited
REPRESENTATIVES Barry Hayes for Applicant
Gareth Lewis for Respondent
MEMBER OF AUTHORITY Yvonne Oldfield
INVESTIGATION MEETING 31 January 2007
DATE OF DETERMINATION 14 March 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This problem has arisen as a result of an accident involving one of the respondent's trucks. Mr Wirihana was employed to take this truck on a regular run (usually at night) delivering meat to the North Shore. At first Mr Wirihana told the company that he was driving the truck when the accident happened but it soon came to light that he had actually been in the passenger seat. Another employee had been at the wheel, and that person did not have a full driver's license let alone a truck license. This meant that the company would not be able to access full insurance cover for the accident. Mr Wirihana told me that he came under pressure from the company to continue to say that he was driving when the accident occurred. He agreed but after talking it over with his father, and realising that dangerous driving charges were being considered by the police, he changed his mind.

[2] At the time of the accident the respondent's Managing Director, Mr Ball, was overseas on holiday. In his absence, the preliminary inquiry was conducted by Operations Manager Willie Mete who concluded that Mr Wirihana "*was not driving the truck as he should have been and had allowed an unlicensed driver to be in control of the vehicle.*" Mr Mete told Mr Wirihana that as a result he would be stood down until Mr Ball returned in three weeks' time. Mr Wirihana responded that he could not manage without an income for this long and would rather resign immediately to pursue other work. Mr Mete accepted this resignation and told Mr Wirihana that he would arrange for his final pay, including holiday pay, to be made up.

[3] Meanwhile Mr Ball heard about what had happened. He relayed instructions to Mr Mete that Mr Wirihana's final pay be withheld until his return. Mr Ball told me that he did this because he understood that, pursuant to the employment agreement, the cost of the insurance excess for repairs to the damaged vehicles was payable by Mr Wirihana. The employment agreement provides at clause [18] as follows:

"(b) The following are offences which constitute serious misconduct and may give rise to summary dismissal:

...

(x) Damage as a result of negligence or deliberate act on the part of the employee, to vehicles, buildings, property of the company or its customers.

The cost of loss or damage to the extent of the insurance excess may be recovered from the employee where it can be shown that such loss or damage arose out of the employee's negligence or wilful act."

[4] Mr Wirihana's evidence was that if he had been paid on time, he would not have pursued the employment relationship problem, but when he still had not been paid on 31 August he decided to lodge the matter with the Authority. On 31 October, he received payment of the outstanding wages and holiday pay. Counsel for the respondent advised that this payment was made on the basis that it was:

"ex gratia, as under the terms of the employment agreement between the parties Alaway was entitled to deduct \$500.00 for an insurance excess paid by Alaway."

Issues for determination

[5] Although the issues relating to wages and holiday pay have been resolved Mr Wirihana wishes to have the following issues investigated:

- i. Mr Wirihana claims that the imposition of the three week unpaid suspension was unfair and forced him to resign, thus giving rise to a constructive dismissal grievance, or at least a disadvantage grievance;
- ii. Mr Wirihana also says that he was disadvantaged by the alleged pressure to lie about the accident (in that it caused him added anxiety and concern.) He does not make a separate claim in relation to this but says that his final claim for compensation for the dismissal grievance (\$15,000.00) includes compensation for the distress caused by this pressure. During my meeting with the parties I pointed out to them that there was no evidence to link the decision to resign with the alleged pressure to lie about the accident. After giving Counsel the opportunity to be heard on how best to deal with this aspect of the claim I advised that I would deal with it as a separate disadvantage grievance;
- iii. Mr Wirihana claims two weeks pay in lieu of notice (\$1,530.00) in accordance with the notice provisions of his employment agreement. He also claims three weeks wages in reimbursement of lost earnings. However during the course of the investigation he gave evidence that he got casual work very soon after his employment ended, and then after two months of that, found permanent work at a rate of pay comparable to what he would have earned at *Alaway*. His claim is therefore for the shortfall between his earnings at *Alaway* and what he earned in the two months on casual work. In addition he seeks compensation pursuant to s.123. If Mr Wirihana does establish one or more personal grievances the final issue for determination will be whether any remedies to which he is entitled should be reduced for contributory conduct.

Was Mr Wirihana constructively dismissed?

[6] The respondent company is in the business of refrigerated cartage, specifically in delivering meat throughout the Auckland area. Apart from the directors and a few administrative staff, the rest of the employees are drivers, who usually work their runs and do their deliveries alone. One run, however, was more difficult than most, and the driver on that run was assisted by an "offsider" who would help him unload the meat from the truck.

[7] On 17 July the respondent employed George Tahere to work as the driver's assistant on this run. George Tahere was the young cousin of the driver concerned, Daniel Tahere. George Tahere did not have a full licence to drive a car let alone a truck however during his first week of employment he was observed by Mr Wirihana moving a truck about 10 metres in a customer's car park. This he did with Daniel Tahere's permission.

[8] Around the same time that George Tahere started work a new driver had also been taken on. He had been assigned to work with Mr Wirihana to learn the ropes. Mr Wirihana found him a poor worker who frequently dropped the meat when helping unload it. Before starting his shift on the evening of Thursday 27 July, Mr Wirihana asked Daniel Tahere (as a favour to him) to take the new driver out with him instead. In turn Mr Wirihana would take George Tahere on his run.

[9] There was no operational reason for this proposal and Daniel Tahere had some misgivings about it. His cousin and Mr Wirihana were in the same general age group and as he told me, he was concerned that they might get up to mischief. His evidence was that he stressed to Mr Wirihana that George Tahere was not to drive, and only gave his agreement on assurances that this would not happen. Mr Wirihana disputes this and claims to have had no knowledge that George Tahere lacked a licence. I find Daniel Tahere more credible on this point. This conclusion was supported by the fact that in a subsequent statement to the police Mr Wirihana stated that Mr Tahere:

"had been employed as an offsider for the truck drivers not as a driver. I don't think he has a truck licence."

[10] No-one mentioned the swap to the supervisor, Willie Mete.

[11] No sooner were they out on the run than Mr Wirihana did offer Mr Tahere the chance to drive. Mr Tahere took a corner too fast and clipped a parked vehicle, shunting it into another parked car. He did not even notice that he had done so, but Mr Wirihana did. At their next stop (which was the abattoir about 500m down the road) they inspected the truck and found a gouge down its side. They returned to the accident site and drove slowly past but no one was present so they continued with their run.

[12] When they got back to the yard that night Mr Wirihana and George Tahere discussed what had happened with Daniel Tahere. Daniel Tahere was very concerned to protect his cousin, for whom he felt responsible. Mr Wirihana agreed that he would take responsibility for what had happened. He wrote a note to Mr Mete which read: *"stopped at McD's Greenlane 4 a feed 10.30pm came back 2 truck and it had been side swiped."*

[13] Mr Mete arrived at work early on Friday, saw the note and checked the truck for damage. Later that morning a manager at the abattoir told him that he had received a complaint that, just the night before, one of the respondent's trucks had hit a parked car on the road near the abattoir. The witness had reported that the truck carried on then later came back but did not stop.

[14] Unsurprisingly, Mr Mete inferred a connection with the damage to Mr Wirihana's truck. Friday was Mr Wirihana's day off and he was not due back at work until Saturday morning. Mr Mete tried to get him during the course of Friday but had no success. Meanwhile, back at the yard George Tahere had spoken up and said that he had been driving the truck at the time of the accident.

[15] Mr Mete called Mr Wirihana again on Saturday and told him he wanted to speak to him before he came in to work. Mr Wirihana agreed and the two men met and spoke outside Mr Wirihana's house. Mr Mete asked if George Tahere had been driving and what the note had been about. Mr Wirihana confirmed that George was driving and that the note had been an attempt to take the blame for him.

[16] Mr Mete denies that he brought up the suggestion that Mr Wirihana continue with this story. However, he says that Mr Wirihana expressed a willingness to do so and he responded *"if you do, we'll look after you."* Mr Wirihana took this to mean that if he said he was the driver involved in the accident, he would keep his job. I consider this a reasonable interpretation to place on Mr Mete's words.

[17] Mr Wirihana proceeded to work the Saturday. During the course of his shift Mr Mete and Office Manager Wayne Thomas informed him that they wanted to meet with him on the

Monday morning to discuss what had happened. Meanwhile Mr Wirihana was having serious doubts about what he had undertaken to do. He talked it over with his father, Mr James Wirihana senior, who counselled strongly against making any false statements.

[18] Mr Wirihana arrived at the Monday meeting accompanied by his father. His doubts were compounded when he was told that he was required to report to the Otahuhu Police in regard to the accident. He told Mr Mete and Mr Thomas that he was not prepared to say he was driving the truck. He and his father proceeded to the Police station, where he made a statement and was advised that no charges were likely to be laid against him. Then they returned to finish meeting with Mr Mete and Mr Thomas.

[19] Mr Wirihana did not dispute that he had allowed Mr Tahere to drive his truck, that there had been an accident, and that they did not stop at the scene. Mr Mete and Mr Thomas informed Mr Wirihana that he would be stood down for three weeks until Mr Ball returned. As we have already seen, Mr Wirihana senior responded that his son could not survive without income for three weeks, and in reliance on getting his outstanding wages and holiday pay (which would have come to over \$1,000.00) the applicant opted to resign.

[20] Mr Ball heard what had happened shortly after this in a telephone conversation with his son, who was keeping in contact with Mr Mete during his parents' holiday. He relayed instructions to Mr Mete and Mr Thomas to "*stop any further proceedings*" until he got back and that he would deal with it personally when he did. He also instructed them to hold back Mr Wirihana's final pay. He told them just to tell Mr Wirihana that he would deal with it when he got back. As it was, by the time Mr Mete and Mr Thomas got these instructions, Mr Wirihana had already resigned. He waited for his pay in vain. When Mr Wirihana senior queried this with Mr Mete and Mr Thomas on his son's behalf, they advised they could do nothing until Mr Ball returned.

[21] When he did, in mid August, he made an attempt to get Mr Wirihana, without success, on an out of date telephone number. There was no further contact between the parties until this matter was lodged. He finally got paid in October 2006.

[22] Mr Wirihana says that for a time after his employment ended he felt too distressed by what had happened to look for permanent work. However on 7 August he registered for casual work with Allied Workforce Ltd and over the next two months he earned a total of \$2,151.12. After this he found permanent work at a comparable rate of pay to that which he had received at *Alaway*.

Determination

[23] Counsel for the respondent has argued that Mr Mete's decision to stand Mr Wirihana down came at the conclusion of an investigation which was short but, given the undisputed facts which had emerged, full, fair and complete. He says that the suspension was not pending completion of a process, but a disciplinary measure in itself. He says that Mr Wirihana admitted serious misconduct which would have justified summary dismissal and in these circumstances it was open to the employer to elect to apply a lesser penalty of suspension. Mr Lewis concedes however that the evidence indicates that it remained possible that Mr Wirihana might be dismissed when Mr Ball returned.

[24] I reject this submission. The evidence leaves no room for doubt that Mr Mete was suspending Mr Wirihana simply so that the matter could be dealt with by Mr Ball when he returned. This approach was, as it turned out, fully endorsed by Mr Ball when he heard what had happened. However I am not satisfied that it was justifiable. It was not reasonable for Mr Wirihana to be left hanging for three weeks, without wages and without knowing what his fate would be. He was entitled to a fair and complete process and a timely answer as to what would happen to his employment. I am satisfied that the unpaid suspension was a serious breach of the employment agreement, which made it untenable for him to remain employed by the respondent. On that basis, I conclude that he was constructively dismissed.

[25] I conclude further that a dismissal at that point could not have been justified. Although some critical facts had been established (Mr Wirihana had allowed Mr Tahere to drive his truck, there had been an accident, and they did not stop at the scene) it was not expressly put to Mr Wirihana that these amounted to serious misconduct or that it might justify dismissal. He could not respond properly to what was not properly put to him, and as a consequence, the employer cannot say with confidence that it had all the relevant information on which to make a decision whether or not to dismiss.

[26] I am not satisfied that the employer's actions in this case were what a fair and reasonable employer would have done in all the circumstances. The applicant has established that he was dismissed unjustifiably.

Was the applicant disadvantaged by pressure to lie about the accident?

[27] I accept that the suggestion that Mr Wirihana lie first came not from Mr Mete but from Mr Daniel Tahere however Mr Mete did indicate clearly that he sanctioned this approach. His doing so clearly amounted to an unjustified action. I also am satisfied that it disadvantaged Mr Wirihana by clouding the issues relating to the disciplinary process and by causing him additional stress in the final days of his employment.

Remedies

[28] Mr Wirihana has satisfied me that he has made out two personal grievances and is entitled to remedies for each grievance.

[29] In relation to the dismissal grievance Mr Wirihana's first claim is for pay in lieu of notice of \$1,530.00. He is entitled to this in full as it is a contractual entitlement. His claims for lost earnings and compensation are a different matter however. I am satisfied that in permitting an unauthorised driver to take the wheel of a vehicle in his care he has contributed to the situation giving rise to the unjustified dismissal grievance. Remedies must be reduced on account of this contributory conduct in terms of s. 124 of the Employment Relations Act 2000. I conclude that in all the circumstances, they should be reduced by 50%. Mr Wirihana's evidence is that he earned \$2,151.12 gross from his casual work over an eight week period. At *Alawaya* his wages for this time would normally have been \$6,120.00 gross. He has therefore lost earnings of \$3,968.88 gross. With a reduction of 50% for his contribution, this leaves an award to him of \$1,984.44 gross.

[30] I accept that Mr Wirihana was hurt and humiliated as a result of the loss of his job. However I consider some of that humiliation arose out of a knowledge of his own foolishness in contributing to the situation and a sense that he had let his parents down. I conclude that an award of \$6,000.00 would be appropriate to compensate for the distress arising out of the dismissal. Given the contributory conduct this award is also reduced by 50% to \$3,000.00.

[31] Finally I consider an award of \$500.00 will remedy the hurt and humiliation associated with the disadvantage grievance. There is no reduction for contributory conduct in relation to this award since Mr Wirihana is not in any way responsible for Mr Mete's conduct in relation to this issue.

Summary of Orders

[32] The respondent is ordered to pay to Mr Wirihana the following:

- i. \$1,530.00 gross pay in lieu of notice;
- ii. \$1,984.44 gross lost earnings;
- iii. \$3,000.00 compensation for hurt and humiliation associated with the unjustified dismissal;

- iv. \$500.00 compensation for hurt and humiliation associated with the unjustified disadvantage.

Costs

[33] I leave it to the parties to discuss this issue at this stage however should the Authority be required to determine it submissions should be lodged no later than 28 days from the date of this determination.

Yvonne Oldfield
Member of Employment Relations Authority