

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2019] NZERA 272
3031533

BETWEEN KELLY SMITHERS (NEE CAVANAGH)
Applicant

AND FRESH CONNECTION LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: Robert Morgan, Advocate for Applicant
Clive Knolles, Advocate for Respondent

Investigation Meeting: 8 February 2019 at Nelson

Submissions received: On the day

Determination: 6 May 2019

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

A Kelly Smithers was justifiably dismissed from her employment with Fresh Connection Limited.

B Costs are reserved.

Employment Relationship Problem

[1] Kelly Smithers nee Cavanagh was employed by Fresh Connection Limited from May 2016 at its Nelson premises. Fresh Connection Limited (Fresh Connection) is a duly incorporated company having its registered office in Auckland and supplying fresh and prepared produce to order.

[2] Initially Ms Smithers picked and packed fresh product for orders. She then moved to driving and making deliveries between Nelson and Blenheim from October 2016.

[3] Ms Smithers was dismissed on 27 April 2017. She says that her dismissal was unjustified and seeks reimbursement of lost wages, compensation and legal costs.

[4] Fresh Connection does not accept that Ms Smithers was unjustifiably dismissed. It says that Ms Smithers was dismissed for failing to follow the reasonable instruction of her manager that she not visit her sister during a break, and deliberately falsifying her timesheets and log book to cover up the fact that she did visit her sister for a longer time than her 30 minute break.

The issues

[5] The Authority needs to determine the following issues:

- (a) What are the material provisions of Ms Smithers' employment agreement with Fresh Connection?
- (b) What were the reasons for Ms Smithers' dismissal?
- (c) Was there a full and fair investigation into the allegations that formed the reasons for dismissal?
- (d) Could a fair and reasonable employer conclude serious misconduct from the events of 8 April 2017?

- (e) Was the decision to dismiss Ms Smithers on 27 April 2017 what a fair and reasonable employer could have done in all the circumstances?
- (f) If the dismissal was not justified then what remedies should be awarded and are there issues of mitigation and contribution?

What are the material provisions of Ms Smithers' employment agreement with Fresh Connection?

[6] Ms Smithers and Fresh Connection entered into an employment agreement that was signed on 28 May 2016.

[7] Clause 13.4 of the individual employment agreement provided in the event of serious misconduct the employer may dismiss the employee without notice. Serious misconduct was stated to include dishonesty and serious or repeated failure to follow a reasonable instruction.

What were the reasons for Ms Smithers' dismissal?

[8] I find that the reasons for dismissal were contained in the letter of 27 April 2017.

[9] They were that Ms Smithers had deliberately falsified company time and vehicle records in circumstances where she had not followed the reasonable direction of her manager when she had specifically been told not visit her sister.

Was there a full and fair investigation into the allegations that formed the reasons for dismissal?

Letter dated 10 April 2017

[10] The process commenced with a letter dated 10 April 2017 inviting Ms Smithers to a disciplinary meeting on 13 April 2017. The concern set out in that letter was that on Saturday 8 April Ms Smithers took the van on the Blenheim run, clocking in at 3:32am and clocking out at 12:14pm when she returned to Nelson. It was stated that taking into account delivery

times, transit times and break times, Fresh Connection could not reconcile why the run would have taken so long and why Ms Smithers clocked out so late.

[11] Ms Smithers was advised in the letter that she was entitled to attend the meeting with representation or with a support person, and that the company took the matter very seriously. It was concluded that if allegations were proven then that would constitute a breach of the employment agreement in clause 13.4 that referred to serious misconduct.

Meeting 13 April 2017

[12] Ms Smithers attended the 13 April 2017 meeting with her partner Terry as support person. Her manager, Jared O'Connell, attended together with the Managing Director of Fresh Connection, Clive Knolles.

[13] Following the meeting Ms Smithers was provided with some minutes taken by Mr O'Connell. Ms Smithers did not raise any issues about the minutes and I accept they form an accurate although not verbatim record of the meeting. Where there is difference in the notes and Ms Smithers' written evidence I find the more reliable record is the notes taken closer to the event in question.

[14] The notes record that Ms Smithers asked Mr O'Connell if she could help her sister out at a garage sale for "a couple of hours after her run" and he advised that she could not. Ms Smithers, as part of her explanation, said that Mr O'Connell did not say she could not go to her sister's for a break [at all]. Mr O'Connell is reflected in the notes as disagreeing with that. The minutes show that he said no to that request as well.

[15] It is stated in the notes that Ms Smithers advised she had been stressed in the previous two to three months. She admitted that she had incorrectly filled out her written hours for the day and in her log book and had not entered the full break time.

[16] The minutes recorded that she drove past her sister's house during her run and that she accepted she had had an unauthorised break [that exceeded the normal break time].

[17] Ms Smithers indicated that she accepted she should get a written warning at the meeting.

Letter 21 April 2017

[18] Ms Smithers was provided with a further letter on 21 April 2017 from Mr Knolles with the preliminary outcome of disciplinary meeting. The minutes from the 13 April meeting were attached to that letter.

[19] The letter set out the explanation given at the earlier meeting including the part of the explanation where Ms Smithers did not agree that Mr O'Connell directed her not to stop at her sister's house. There was a statement that Mr O'Connell during the meeting responded that was not correct and that he did direct Ms Smithers not to stop.

[20] A copy of the E Road report was attached to the letter confirming a stop at Ms Smithers' sister's address for one hour and 40 minutes and a copy of the vehicle log that did not accurately show that break time. The usual break time on the return journey would be 30 minutes.

[21] It was concluded, based on Ms Smithers' admission she had spent time at her sister's house and then falsified her vehicle log and timesheet, that she had been paid for time which she was not entitled to. A preliminary decision was set out that Ms Smithers had deliberately failed to follow the reasonable instruction of her employer and that she had falsified company time and vehicle records.

[22] It was stated that the issue of a direction not to stop at Ms Smithers sister's house was discussed with Mr O'Connell and it was concluded on the "balance of probabilities" that she had deliberately failed to follow his instruction.

[23] It was stated that these matters went to the trust and confidence that Fresh Connection needed to have in Ms Smithers. There was acknowledgement that Ms Smithers had admitted the allegation but it was concluded this was "too little and too late".

[24] A preliminary decision to terminate Ms Smithers' employment was advised with an opportunity to make further submissions and/or meet in person. Ms Smithers was reminded that she was entitled to bring a legal representative or support person with her to the meeting.

Email 24 April 2017

[25] Ms Smithers sent an email to Mr O'Connell about the outcome. She wrote that she had not been dishonest or set out to defraud the company or act with malice. She said that she was willing to accept that she had made a mistake in her log book/time sheet and be provided with a disciplinary notice because of a genuine error. She asked that a warning be considered and that any other action would be unjust and "a heavy handed way of dealing with the genuine mistake and go beyond what was required in these circumstances."

Final meeting 26 April 2018

[26] Ms Smithers attended this meeting with her partner and Mr O'Connell with Mr Knolles. Ms Smithers made similar submissions to that in her email. She stated that she had never done this previously and had only had one sick day. She said that she had always recorded extra break time on her timesheet in the past.

[27] At the end of the meeting Ms Smithers was advised that Mr O'Connell would speak with Mr Knolles and the other director in regard to a final decision.

Notice of termination

[28] On 27 April 2017, Mr O'Connell advised Ms Smithers that he wanted to have a discussion about the final outcome. Ms Smithers advised that she would rather wait for her partner to be there and Mr O'Connell went to his office. Ms Smithers then went into the office to hand in some paperwork and Mr O'Connell and Mr Knolles provided Ms Smithers with the disciplinary outcome letter.

Conclusion about procedural fairness

[29] Ms Smithers was not clearly advised of the allegations in the first letter in the process. She was however in the 21 April 2017 letter and had an opportunity to provide an explanation. There was some further investigation following the explanations about the nature of the instruction not to go to her sister's place and all relevant documentation was provided. Although it was suggested by Mr Morgan that there was no attention given to the substance I am not satisfied of that.

[30] I now turn to some other procedural issues.

Alleged bias

[31] Mr Morgan submits that a serious situation that involved Ms Smithers' previous manager may have clouded the process and decision making resulting in a more severe outcome for Ms Smithers. Mr Knolles said when questioned that he did not know about what the previous manager had been doing until after Ms Smithers' termination. I cannot be satisfied from the evidence of any causal link between what happened with the previous manager and a suggestion that the investigation/decision making was not approached with an open mind.

Not waiting until support person arrived to provide the letter of termination

[32] I accept that this caused some distress to Ms Smithers. I am not satisfied that it caused procedural unfairness. Mr Morgan submits that that Ms Smithers was denied any further opportunity to argue for an alternative outcome however at that stage the decision had been made and the action was the delivery of the letter of termination.

The opportunity to be heard by the decision maker

[33] Mr Knolles in his evidence referred to the decision to dismiss being made by him in consultation with the other director of the company although that other director was not present at the meetings. That evidence caused me to pause and consider further because the right to be heard by the decision maker or makers is one of the principles of natural justice on which procedural fairness is based.¹

[34] My questioning of Mr Knolles when considered in the round supported that his consultation with the other director was less about the other director being a joint decision maker and more focussed on reassurance about the decision he intended to make about termination. It is not uncommon for the Authority to hear evidence of discussion by the decision maker with others such as human resources advisers before the decision to dismiss is made. The Authority needs to assess the evidence carefully to distinguish between seeking advice and reassurance in a consultative way and decision making. Mr Knolles had authority to dismiss. I am not satisfied that Ms Smithers did not have an opportunity to be heard by the decision maker in the circumstances of this matter notwithstanding Mr Knolles consulted with the other Fresh Connection director before dismissing.

[35] I find assessed objectively the procedural factors in s 103A(3) were satisfied. The process was that which a fair and reasonable employer could have undertaken.

Could a fair and reasonable employer conclude serious misconduct from the events of 8 April 2017?

[36] Ms Smithers said that her previous manager knew and approved her having a break at her sister's house but there was no evidence that Mr O'Connell was aware of that.

[37] I find that it was open to a fair and reasonable employer to prefer Mr O'Connell's version of events that, on 8 April before she set out for her run he gave Ms Smithers a clear

¹ *Irvines Freightlines Limited v Cross* [1993] ERNZ 424 at pg 7

instruction not to go to her sister's house, and that that instruction was not limited to not helping out at the garage sale.

[38] Ms Smithers said that she should be able to take a break where she wanted. I accept that sounds reasonable. However the matter was not as straightforward as that. Mr O'Connell explained that the company did not want its employees taking breaks at places off route and he said that he made it clear to Ms Smithers that he did not want her to stop at her sister's. Ms Smithers' sister's home was off route, although only by about 120 metres. I find that rule lends weight to the reasonableness of the instruction given by Mr O'Connell even though there may have been a more relaxed approach from the previous manager.

[39] When Ms Smithers did then visit her sister she stayed there an hour over her break time. Her explanation for that was that she fell asleep and lost track of time. There was knowledge by Fresh Connection of a garage sale that day at her sister's. She did not tell Mr O'Connell when she got back to the yard the reason for the lateness in returning from her run. Mr O'Connell did not ask her why she was late. He said in his oral evidence that he was "fairly new to the role and wanted to consult with Mr Knolles."

[40] I find that a fair and reasonable employer could conclude the instruction was reasonable. Mr Knolles said that the instruction, if followed, removed the temptation to assist at the garage sale. I find that it was open to a fair and reasonable employer to conclude that the proximity between the instruction, the failure to follow it and the absence of an explanation on the day in question on return to the Nelson premises increased the seriousness of the misconduct.

[41] Ms Smithers accepted that both the log book entry and time sheet filled in after the visit to her sisters did not show the additional time spent there over the 30 minutes break of about one hour. Her explanation was that she was stressed and flustered about going over time and she made an error or a simple mistake rather than it being serious misconduct.

[42] Ms Smithers said in her explanation she had felt stressed at work for a period of time and refers to some incidents of bullying. She accepted that these concerns had not been raised earlier with her employer.

[43] Mr Knolles did however consider whether the entries were inadvertent. He did not consider it plausible that Ms Smithers forgot the time spent at her sister's and subsequently forgot to make the correct entries in the log book and on her time sheet. He considered that while one false record may have been a mistake there were two mistakes of the same nature. He concluded that supported deliberateness to falsify the records and cover up the visit to her sisters' against a direct instruction. The two entries Ms Smithers said in her oral evidence were made separately but within half an hour.

[44] I find objectively assessed that a fair and reasonable employer could conclude in all the circumstances a link between the failure to follow the instruction resulting in an extended break and the subsequent incorrect entries in both the log book and time sheet. Serious misconduct in the employment agreement includes dishonesty and a serious failure to follow a reasonable instruction.

[45] In conclusion, objectively assessed a fair and reasonable employer could have concluded that these actions viewed together amounted to serious misconduct that undermined the trust and confidence that Fresh Connection needed to have in Ms Smithers.

Was the decision to dismiss Ms Smithers on 27 April 2017 what a fair and reasonable employer could have done in all the circumstances?

[46] Ms Smithers accepted that she could have received a warning for her actions. Section 103A contemplates that, because the Authority is objectively considering what a fair and reasonable employer could have done, there may be more than one fair and reasonable justifiable outcome.²

² *Angus and McKean v Ports of Auckland Ltd* [2011] NZEmpC 160 at [35]

[47] While there was consideration of positive aspects of Ms Smithers' employment Fresh Connection concluded the actions on 8 April 2017 had impacted on the trust and confidence it needed to have in Ms Smithers as an employee. This was assessed in circumstances where Ms Smithers worked unsupervised for a significant part of her role.

[48] I find that in all the circumstances dismissal was within the range of reasonable responses available for Fresh Connection.

[49] A fair and reasonable employer could have dismissed Ms Smithers in all the circumstances and her dismissal was therefore justified.

Costs

[50] I reserve the issue of costs. Fresh Connection was represented by Mr Knolles but he had legal representation before the investigation meeting. In those circumstances I reserve leave for Mr Knolles until 20 May 2019 to lodge and serve submissions as to costs and Mr Morgan has until 4 June 2019 to lodge and serve submissions in reply.

Helen Doyle
Member of the Employment Relations Authority