

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 110
3080695

BETWEEN JASON PARKINSON
 Applicant

AND NIGEL AND MEGAN MCFALL
 T/A WAIMAK PATROLS &
 SECURITY SERVICES
 Respondents

Member of Authority: David G Beck

Representatives: Michael McDonald, advocate for the Applicant
 Anna Oberndorfer, advocate for the Respondents

Investigation Meeting: 5 February 2021

Submissions Received: 5 and 26 February from the Applicant
 5 February from the Respondent

Date of Determination: 19 March 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Jason Parkinson was employed by Nigel and Megan McFall as a mobile security guard based in Kaiapoi from 21 December 2018 until his dismissal on 6 June 2019.

[2] Mr Parkinson raised a personal grievance through his advocate in a letter of 1 July 2019, alleging that he had been unjustifiably dismissed by the McFalls who are a partnership operating Wamaik Patrols & Security Services. Mr Parkinson was the McFalls only full-time employee. The main contention of the grievance was an allegation that Nigel McFall had unreasonably withdrawn an earlier assurance that he would support Mr Parkinson in an

application for a limited driving licence for work purposes after he was disqualified from driving for three months and unable to undertake his assigned role. The matter was filed in the Authority on 8 December 2019 and Mr Parkinson is seeking lost wages, compensation and costs.

[3] The McFalls filed a statement in reply claiming that the employment ended due to Mr Parkinson's actions in failing to secure Nigel McFall's support for his limited licence that was essential to his ongoing employment akin to a 'frustration of contract' contention.

The Authority's investigation

[4] Pursuant to s 174E of the Employment Relations Act 2000 ("the Act"), I make findings of fact and law and outline conclusions to resolve the disputed issues and make orders but I do not record all evidence. I have likewise, carefully considered the submissions received from both parties and refer to them where appropriate and relevant. Mr Parkinson raised a claim that he had been unjustifiably disadvantaged and dismissed but the former claim was not distinguished fact wise from the events that led to his dismissal, so I will deal with this as an unjustified dismissal claim. I heard evidence at the investigation meeting from Jason Parkinson (via a video link), Nigel McFall and Megan McFall.

Issues

The issues to be decided are:

- (a) Was Mr Parkinson unjustifiably dismissed?
- (b) If Mr Parkinson was unjustifiably dismissed, did he engage in conduct that would disentitle with to any remedies - if not, and remedies are appropriate what should they be and how is the issue of contributory conduct to be assessed.
- (c) An assessment of the level of costs if any to be awarded to the successful party.

What caused the employment relationship problem?

[5] The McFalls first engaged Mr Parkinson in December 2018. Nigel McFall recalls he received a CV from Mr Parkinson in response to a Trade Me advert he had placed. Mr McFall recalls being impressed by his CV and experience in the security industry and so he informally interviewed Mr Parkinson at a local café. He recalled Mr Parkinson indicating he was looking for a position of about a year as he was hoping to apply for a position as a corrections officer. He recalled Mr Parkinson saying he had to wait to apply for a Corrections' Department position as he did not have a clean driving licence. Mr McFall did not inquire further into the extent of Mr Parkinson's driving history.

[6] Mr McFall explained that at the time of Mr Parkinson's engagement, he was working as a full-time corrections officer and needed someone to help run his small business that monitored security alarms at both domestic and commercial premises in North Canterbury. Megan McFall did not undertake a full time role in the business and one of their sons occasionally undertook part-time hours.

[7] An individual employment agreement and comprehensive set of company policies, including a "safe driving policy", was provided and signed by Mr Parkinson on 1 January 2019. The latter document had a relevant extract pertaining to this dispute that read:

– every driver whilst carrying out work functions will:

- Ensure they hold a current driver licence for the class of vehicle they are driving and this licence is carried when driving a company vehicle.
- Immediately notify the Manager, if their driver licence has been suspended or cancelled. Or has had limitations placed upon it.
- Comply with traffic legislation when driving.
- Drive within the legal speed limits, including to the conditions.
- Report infringements to a manager at the earliest opportunity.

[8] Mr Parkinson worked a four-nights-on and four-nights-off roster pattern with varying starting/finishing times.

[9] Mr McFall described Mr Parkinson as being capable in his work but he recalled some significant concerns arose – the first being around late January 2019 whilst going over health and safety requirements when Mr Parkinson indicated that he was one speeding ticket away from incurring a driving ban. Mr McFall says he at the time was shocked, then sought and got an assurance that Mr Parkinson would not speed whilst driving at work.

[10] Mr McFall also recalled a second incident that Megan McFall corroborated and Mr Parkinson did not contest of him and Mr Parkinson having a heated discussion about how much time he had spent attending a job, Mr Parkinson throwing a set of keys at him and remonstrating with him using abusive language. Mr Parkinson conceded that he ‘lost it’ but says the following day they shook hands and he thought no more of it. Mr McFall insisted that Mr Parkinson could at times appear volatile when under stress and he had cause to reduce his workload.

[11] Mr Parkinson incurred a speeding ticket on 25 January 2019 whilst at work for travelling at 73 km/h in a 50 km/h zone. Mr Parkinson said he did not disclose this speeding ticket as he felt it would not amount to him losing his licence.

[12] Mr Parkinson received a further speeding ticket on 17 February 2019 whilst at work for travelling at 83 km/h again in a 50 km/h zone in a suburban Rangiora street at 6:12 pm. He produced the infringement notice but no correspondence confirming when he received such.

[13] There is a difference in the parties’ accounts as to whether Mr Parkinson promptly reported this further speeding offence to his employer as it became apparent that he was concerned about a potential driving ban. In his written brief, Mr Parkinson said he called Mr McFall on 22 May after having found out the day before that he would potentially lose his licence when he contacted the “fines office”. Mr McFall confirmed in his written and oral evidence that this was the first time he had been apprised of the speeding ticket situation and Mr Parkinson disclosed he was going to lose his licence. In oral evidence Mr Parkinson claimed he told Mr McFall once he received the infringement notice.

[14] Mr Parkinson’s next move was anticipatory as he contacted an advocate on 22 May after claiming Mr McFall had indicated he would support an application for a limited licence and he took steps to prepare the paperwork for an application to get a limited licence for work purposes. The application documentation included a draft affidavit in support from his

employer to be sworn by Mr McFall. Mr McFall acknowledged he initially supported the application but claimed that he was annoyed about the timing of when he was advised of the ban.

[15] It was not until 30 May that the Police unsuccessfully attempted to serve a suspension notice on Mr Parkinson and he says that he advised Mr McFall of the situation and he provided him with the affidavit for him to have sworn. Mr Parkinson did not however, share a copy of his application for a limited licence that contained significant contextual background information that I find in good faith Mr Parkinson should have shared with his employer.

[16] A text exchange evidences that Mr McFall committed to having the affidavit signed the next day. Mr McFall prevaricated up until 6 June and then an exchange of texts occurred on that day as follows starting with Mr Parkinson (P) and then Mr McFall (M):

P Do you think you will get it done today as its been a week since they were drawn up which cost me \$600 and as I mentioned it is going to take me at least 2 weeks from when I submit them or even longer before i get a hearing with the judge.

M It's almost impossible to get anyone to sign them. Can you phone a JP in kaiapoi pegasus or Rangiora and get an appointment for me. Can do anytime today or before 11 am next 5 days.

P Did you not find one yesterday this is starting to become like my security licence

M I'm working 20 hour days and doing my best

P And ive done everythng I can from my end to be able to carry on working for you and all you have to do is find a JP to sign a form but like my security licence seems impossible for you to organise

Don't take this the wrong way but im getting pretty fucked off with being treated like I don't matter

M Fine I won't support it then. You put yourself in this situation not me. I'm doing two jobs because YOU lost your licence. Don't play the victim I asked you to find me a JP to get them signed and you text me that. Get a grip

P Playing the victim are your serious? Telling me to get a grip? lol

We shall see who needs to get a grip since i lost my licence working for you illegally which you were fully aware of

JP Neil price

(contact details followed)

M I'm not supporting it. I'll get the paperwork sorted from my end for termination and get back to you.

Ring me after 5pm to discuss or meet somewhere tomorrow.

P Then my next phone call is to internal affairs

[17] There then followed texts about Mr Parkinson's final pay and return of property and a concluding text from Mr Parkinson: "This can be done the nice way or not the nice way and this is all because you couldn't get a form signed"

[18] In the event, Mr Parkinson was not required to surrender his licence until he was served a notice of disqualification on 10 June 2019 suspending him from holding a driving licence for three months.

[19] When asked to explain why he had not signed the affidavit, Mr McFall indicated that in the interim, he had viewed Mr Parkinson's vehicle GPS records and noticed several incidents of recent excessive speeding and he decided he could not support the limited licence application. Mr McFall admitted he did not put these concerns to Mr Parkinson, claiming that he feared his negative reaction and a confrontation. Instead, Mr McFall confirmed in a letter of 6 June 2019 that "As you no longer hold a valid driver's licence, we have no option but to terminate your employment contract". Mr McFall sought no legal advice on this decision.

[20] When put to him at the investigation meeting that he had not adhered to his assurance he would moderate his speed, Mr Parkinson was unrepentant and conceded he had continued to flout speed limits.

[21] In summary, I find that Mr McFall summarily dismissed Mr Parkinson for a reason he failed to disclose at the time. I however, find that in context the reason given for dismissal was not wholly unconnected to Mr McFall's unexpressed concerns. In assessing where the overall fairness lies, I need to consider that the McFalls operated a very small business and could not redeploy Mr Parkinson onto any other duties and that Mr McFall could not continue covering his position for an extended period as he was at the time working elsewhere.

Was the dismissal justified?

[22] Section 103A of the Act requires the Authority to assess on an objective basis, whether an employer's actions were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. A dismissal must be effected in a procedurally fair manner with good faith obligations applying as set out in s 4 of the Act.

[23] Section 103A details factors that the Authority must objectively measure an employer's actions against before concluding whether the employer, in context, acted in a fair and reasonable manner, these summarised are:

- a) Whether given the resources available to the employer, did they sufficiently investigate the allegations made against the employee; and
- b) did the employer raised the issues of concern with the employee prior to deciding to dismiss; and
- c) was the employee afforded a reasonable opportunity to respond to identified concerns; and
- d) did the employer genuinely consider any explanation provided by the employee before deciding to dismiss; and
- e) any other factor the Authority regards appropriate.

Applying factors identified by the Act

[24] I find on the facts, that the McFalls gave insufficient attention to the above factors set out in (a) to (d) but it is appropriate to consider the reasons why the McFalls felt unable to confront Mr Parkinson and that they are a small employer who took no advice on their actions.

[25] The McFalls in summary: did not initially identify specific concerns or put them to Mr Parkinson for consideration, they conducted no disciplinary meeting and did not disclose the result of the limited investigation of Mr Parkinson's vehicle GPS records. As a result, Mr Parkinson had no real opportunity to get advice or indeed to provide an explanation of any mitigating factors prior to Nigel McFall issuing the decision to summarily dismiss him.

[26] At best (applying s 103A(e)), one could say that the issue was clear cut in the sense that Mr Parkinson by his own actions had lost his driver's licence and he provided no explanation of any contextual factors as to why his driving record was so poor and although not put to him, Mr Parkinson continued to speed when common-sense would have dictated that he desist from doing so.

[27] I find that the McFalls were in specific breach of ss 4(1A)(c)(i) and (ii) of the Act that requires that an employer must provide an employee information where they are "proposing to make a decision that will, or is likely to have an adverse effect on the continuation of employment" and more pertinently "an opportunity to comment on the information to their employer before the decision is made".¹ This good faith provision reinforces ss 103A (3)(b) and (c) of the Act that codifies basic procedural fairness considerations that I must apply, including:

whether, the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and whether the employer gave the employee *a reasonable opportunity* to respond to the employer's concerns before dismissing or taking action against the employee.²

[28] Further, moving immediately to a summary dismissal decision leads to a reasonable conclusion that the matter had already been pre-determined and it also breached the McFalls obligations under s 103A of the Act to consider other contextual matters such as Mr Parkinson's health and other potentially mitigating factors. To their credit, the McFalls openly conceded that they had failed to provide Mr Parkinson with any semblance of procedural fairness.

[29] I however, would not go as far to say that dismissal was not substantively a decision open to a fair and reasonable employer in all the circumstances. I do find though that a fair and reasonable employer could have approached this more fairly and paused to consider wider factors or alternatives before making the decision, but the assumption that serious misconduct was at issue is reasonably evident.

[30] Mr McFall did not assist his cause by a follow up letter setting out the reason for dismissal that was not fulsome.

¹ Section 4(1A)(c) Employment Relations Act 2000.

² Section 103A(3) Employment Relations Act 2000.

[31] As a result, it is not apparent from the haste undertaken that the McFalls were able to explore the motivation behind the misconduct and what, if any, mitigating factors were present.

[32] Whilst not excusing Mr Parkinson's evident serious misconduct and lack of full and timely disclosure to his employer, he was entitled to be treated fairly in terms of s 103A and good faith obligations set out in the Act.

[33] Further, I find that the defects in process were not minor as envisaged in s 103A(5)³ of the Act and they did result in Mr Parkinson being treated unfairly. I cannot absolve the McFalls from a very poorly conducted process as Mr McFall, a then serving corrections officer, would likely have a rudimentary grasp of the requirements of natural justice.

[34] This was a summary or instant dismissal and guidance on how "[B]ehaviour that deeply impairs or is destructive of confidence and trust" is to be assessed was summarised recently by Judge Holden in the Employment Court decision *Emmanuel v Waikato District Health Board*⁴.

[58] When considering whether an employee's conduct amounts to serious misconduct, justifying summary dismissal, the Court must stand back and consider the factual findings and evaluate whether a fair and reasonable employer could characterise that conduct as deeply impairing or destructive of, the basic confidence or trust essential to the employment relationship, justifying dismissal. What must be evaluated are the nature of the obligations imposed on the employee by the employment contract, the nature of the breach that has occurred, and the circumstances of the breach.

[59] This evaluation requires a two-step approach. The first step is to consider whether the conduct is capable of amounting to serious misconduct; if it is, then the second step is to consider whether dismissal is warranted in all the circumstances.

³ The Authority or the court must not determine a dismissal or an action to be unjustifiable under this act solely because of defects in the process followed by the employer if the defects were – (a) minor; and (b) did not result in the employee being treated unfairly.

⁴ *Emmanuel v Waikato District Health Board* [2019] NZEmpC81 at [58]-[62].

[60] It is essential to the maintenance of the necessary trust and confidence in the employment relationship that employees are honest and open with their employers. It will be a serious breach of an employee's obligations to his or her employer to mislead the employer in response to specific inquiries based on the employer's concerns. The duty of good faith also includes that parties to an employment relationship must not, whether directly or indirectly, do anything to mislead or deceive each other; or that is likely to mislead or deceive each other. Where an employee provides misleading information to his or her employer on a matter that the employee knows is important to the employer that usually will deeply impair or be destructive of the basic confidence or trust that is an essential of the employment relationship. It will almost inevitably amount to serious misconduct.

[61] When the Court then considers whether summary dismissal is warranted in the circumstances, it does not stand in the shoes of the employer. Rather it considers whether the decision to dismiss was one a fair and reasonable employer could have reached in all the circumstances at the time the decision was made. The employment history and an assessment of the employee's future reliability and trustworthiness may be relevant in this context.

[62] If the employer reasonably finds serious misconduct, and believes it can no longer trust the employee, it will be open to the employer to determine that dismissal is appropriate.

[35] Essentially the above guidance on approaching a summarily dismissed without notice involves applying the same justification test in s103A of the Act but the seriousness of the conduct has to be so destructive of the employers trust in the employee or substantial in its level of seriousness that no notice is warranted before dismissing – thus the sanction of summary dismissal is reserved for the most serious cases of misconduct.

Finding on the summary dismissal

[36] I find in the overall circumstances that the summary dismissal of Mr Parkinson was substantively justified on the grounds that he engaged in serious misconduct without any mitigating circumstances but the significant procedural deficiencies I have found render the dismissal unjustified.

[37] Whilst this concept may appear frankly odd to the McFalls, the concept of a dismissal being substantially justified but procedurally unfair and therefore overall being unjustified is well established having been identified by the Court of Appeal thirty-five years ago in *BW Bellis Ltd (t/a The Coachman Inn) v Canterbury Hotel etc IUOW* a judgment delivered by Woodhouse P, holding that a dismissal could be found to be a lawful exercise of an employer's right but "unjustifiable" by virtue of the way in which the matter was handled.

Conclusion

[38] Having made a finding of unjustified dismissal and finding breaches of good faith requirements on procedural grounds, Mr Parkinson is entitled to consideration of remedies.

Remedies

Lost wages

[39] Section 123(1)(b) of the Act provides for the reimbursement of the whole or any part of wages lost by Mr Parkinson should I find that he has established a personal grievance and s 128(2) mandates that this sum be the lesser of a sum equal to her lost remuneration or three months' ordinary time remuneration.

[40] Here I find a rare case were the loss of remuneration was not attributed wholly to the personal grievance as Mr Parkinson rendered himself incapable of performing his employment on an ongoing basis because of his driving disqualification. In this context, having discovered that Mr Parkinson had continued to speed whilst under the certain knowledge he was facing disqualification, I find it not unreasonable that Mr McFall withdrew his initial support for the limited licence application but paid Mr McFall's notice period and contributed \$600 to the costs incurred for Mr Parkinson having his limited licence application prepared (noting that the application did not proceed).

[41] Given the above and reflecting the circumstances of the dismissal, I consider overall justice is served by not awarding Mr Parkinson lost wages.

Compensation for hurt and Humiliation

[42] Mr Parkinson gave evidence of the impact of the summary dismissal and the uncertainty it created at a difficult time to find immediate alternative employment and the impact this had on his mental well-being and relationship with his partner.

[43] I am convinced that at the time, Mr Parkinson suffered humiliation, loss of dignity and injury to feelings due to his former employer failing to adequately explain the “full picture” and reasons for his dismissal.

[44] Taking into account the circumstances and awards made by the Authority and Court in similar situations and the manner by which the McFalls effected this dismissal, I consider Mr Parkinson’s evidence warrants a modest level of compensation that I set as the sum of \$5,000 under s 123(1)(c)(i) of the Act.

Contribution

[45] Section 124 of the Act states that I must consider the extent to what, if any, Mr Parkinson’s actions contributed to the situation that gave rise to his personal grievance and then assess whether any calculated remedy should be reduced. To assess whether the remedy should be reduced I have considered the relevant factors recently summarised by the Employment Court in *Maddigan v Director General of Conservation*⁵.

[46] Overall, I find Mr Parkinson by his reckless actions contributed to the situation giving rise to the personal grievance but I have balanced this up with my finding that the McFalls’ approach was significantly and procedurally deficient. Mr Parkinson cannot be blamed for the deficiencies in process that robbed him of the time for reflection and seeking of advice which may have led to alternatives to dismissal being explored.

[47] On balance, given the significant contribution to his downfall, I find a 20% reduction in Mr Parkinson’s remedy is warranted.

⁵ *Maddigan v Director General of Conservation* [2019] NZEmpC 190 at [71] – [76].

Summary

[48] **I have found that:**

- a. Jason Parkinson was unjustifiably dismissed by the manner in which his employment with Nigel and Megan McFall was terminated.**
- b. Nigel and Megan McFall failed to adhere to good faith obligations in effecting the dismissal.**
- c. In the circumstances Nigel and Megan McFall must pay Jason Parkinson the sum below:**

\$4,000 compensation pursuant to s 123(1)(c)(i) of the Act.

Costs

[49] Costs are at the discretion of the Authority and here Mr Parkinson was partially successful in his claims and has not succeeded in obtaining significant compensatory remedies in an investigation meeting that took a day. In the circumstances, I encourage the parties to come to an agreement on costs but if they are unable to do so a costs submission from Mr Parkinson should be lodged within 14 days of this decision and the McFalls will have a further 14 days to respond.

David G Beck

Member of the Employment Relations Authority