

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 405/07
5090783

BETWEEN WAYNE BARNES
 Applicant

AND APEX TRANSPORT LIMITED
 Respondent

Member of Authority: R A Monaghan

Representatives: Agnes McKay, Advocate for Applicant
 No appearance for Respondent

Investigation Meeting: 12 December 2007

Determination: 19 December 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Wayne Barnes says he was unjustifiably dismissed from his employment as a driver with Apex Transport Limited (“Apex”). He also seeks wages not paid in respect of his final weeks of employment, and holiday pay.

Failure by party to attend or be represented

[2] Apex did not appear and was not represented at the investigation meeting scheduled for 12 December 2007.

[3] Counsel had been instructed, was served with the statement of problem, filed a statement in reply, and was served with a notice of investigation meeting and a timetable for the filing of statements of evidence. The Authority made enquiries when the timetable for filing statements of evidence was not met, at which point counsel withdrew.

[4] Paul Norwood, Apex' sole director, advised the Authority on 5 December 2007 that he was seeking another representative and would also be seeking an adjournment. Later that day he formally requested an adjournment. The Authority attempted to make further enquiries of Mr Norwood but he did not return its calls. Advice that the adjournment was declined was sent to Mr Norwood on the afternoon of 7 December. The Authority heard nothing more from him.

[5] As at the scheduled commencement time for the 12 December investigation meeting, no representative of Apex was present. The Authority attempted again to contact Mr Norwood. He did not return its call.

[6] Apex has not shown good cause for its failure to appear or be represented. I therefore proceed under cl 12, Schedule 2 of the Employment Relations Act 2000 to hear and determine the matter as if Apex had attended or been represented.

Background to the dismissal

[7] Mr Barnes lives in Hamilton, but at the material time was carrying out a delivery run commencing at 11 pm in Auckland then making various stops en route to and within Hamilton, Rotorua, and back to Hamilton.

[8] He commenced such a run at 11 pm on Monday 19 February 2007. At about 9.40 am on Tuesday morning, 20 February, his truck broke down. He was en route to Rotorua, and was some 25 minutes west of Rotorua, when the breakdown occurred.

[9] The truck was not roadworthy again until 2.14 pm. Mr Barnes, and his partner who was accompanying him, waited near the truck for most of that time. Because of the implications for Mr Barnes' driving hours and duty time, the Apex dispatcher offered to put Mr Barnes and his partner up in a motel in Rotorua. Mr Barnes declined, primarily because for personal reasons he and his partner wished to return to Hamilton. Accordingly Mr Barnes completed his run and returned to his home in Hamilton just after 6.50 pm.

[10] Mr Barnes travelled to Auckland to begin his next shift at 11 pm that same night. The shift was uneventful and Mr Barnes completed it at 10.15 am on the morning of Wednesday 21 February.

[11] Mr Barnes worked again on a shift beginning in Auckland at 11 pm on the night of Wednesday 21 February. At 7.30 am the next morning, Thursday 22 February, he suffered a lapse in concentration and the trailer on his truck tipped over. He took a day's stress leave on Friday 23 February

[12] There was no further contact with Apex until, on Wednesday 28 February, Mr Barnes was asked to attend a meeting in Auckland the next day, Thursday 1 March. He did so.

[13] Present at the meeting were Mr Barnes' manager, Neville, and the despatcher. There was a discussion about insurance forms Mr Barnes was to complete in respect of the accident, before Neville commented that there was no reason to sack Mr Barnes but in the light of recent incidents including the accident it might be better if Mr Barnes resigned. Mr Barnes was shocked and angry, said 'whatever' and left.

[14] Later Mr Barnes decided he did not wish to resign. However there was no further contact between Apex and Mr Barnes until on or about 7 March 2007, when Neville telephoned Mr Barnes to ask for the return of the company uniform. Mr Barnes advised that he was not resigning, and there followed a disagreement about whether or not Mr Barnes had resigned. Eventually Neville said 'all right, you are sacked'.

Justification for the dismissal

[15] Material information in the statement in reply was contained in one typewritten page. It indicated that Apex did not dispute the fact of dismissal, but said dismissal was justified on the basis of clause 20 of the parties' written (but unsigned) employment agreement. Clause 20 read in part:

“20.1 We may terminate your employment without notice in the event of serious misconduct, which includes but is not limited to:

a. ..

...

f. Damage to the company or client’s vehicles, building or property as a result of negligence.

..”

[16] The company’s vehicle was damaged, and the statement in reply asserted the cost of repairing the damage was in the vicinity of \$22,000.

[17] There was no evidence that Apex investigated the circumstances of the accident, and in particular Mr Barnes’ explanation that the accident occurred because he was tired. Given the events of the preceding few days, it is not surprising that he was tired.

[18] Dismissals can rarely be justified when they are imposed without any investigation or discussion with the dismissed employee about the conduct leading to the dismissal. From the statement in reply it would appear that Mr Barnes was dismissed summarily and arbitrarily on the basis of no more than the fact that he had caused damage to the company’s vehicle. There was no investigation into any negligence of which Mr Barnes may have been guilty, nor any consideration of Mr Barnes’ culpability and the appropriateness of dismissal in the light of that information.

[19] In those circumstances I find that an employer acting fairly and reasonably would not have decided to dismiss. The dismissal was unjustified and Mr Barnes has a personal grievance.

Remedies for unjustified dismissal

[20] Mr Barnes seeks:

- (a) reimbursement of the remuneration lost between 10 March 2007 and the date when he commenced new employment, 19 August 2007, calculated at an average of \$752.60 (nett) per week x 23 weeks, less an amount earned from casual work (\$2,334.99 nett); and

(b) compensation for injury to feelings.

[21] In May 2007 Mr Barnes pleaded guilty to a charge of careless driving arising out of the accident. Ms McKay obtained the written decision of the community magistrate in the matter.¹ The decision referred to the summary of facts and to Mr Barnes' view that his employer had been insistent he drive that day, before commenting on the accident as follows:

"I have addressed the aggravating factors. The factor that your vehicle and trailer veered to the left, crossing the fog line and the trailer slid over the centre line into the opposite lane and it came to rest on the opposite side of the road with the trailer lying on its side. You said at the time that you thought the crash happened because of lack of concentration on your part.

The mitigating factors ... [guilty plea]

Your driving on this occasion was not that of a careful and prudent driver in the circumstances and with a truck and trailer like that you should not have lost concentration. However you know all that already."

[22] Mr Barnes sought to argue in the Authority, in effect, that the accident was caused by fatigue for which he was not responsible. He said further that he worked the hours he did for economic reasons.

[23] This argument does not acknowledge certain things. First, Mr Barnes has statutory obligations in respect of his own health and safety². I do not accept that he took the steps he could have to address the risk of fatigue, particularly in the period commencing on the morning of 20 February. Secondly, I do not accept on his evidence that his failure to do so can be attributed wholly to Apex.

[24] Further to both of those points I did not find persuasive the reason Mr Barnes gave for declining the offer of accommodation in Rotorua after the breakdown on 20 February. Had the offer been accepted, Mr Barnes would have had a better

¹ New Zealand Police v Barnes, 14 May 2007, CRI 2007-019-1952. There is an outstanding application for rehearing on the matter of sentence.

² Under the Health and Safety in Employment Act 1992 and the Transport Act 1962 (as applicable at the relevant time)

opportunity for adequate time off duty before starting his next duty that night. Similarly the decision to work on the night of 20-21 February, despite the inadequate period off duty, was Mr Barnes'. He did not request time off, whether paid or unpaid, when he should have. I do, however, accept that he was prevailed upon to work on the night of 21-22 February.

[25] Overall while I am prepared to accept that fatigue accumulated as a result of those events, and caused the carelessness which Mr Barnes admitted, I do not accept that the circumstances excuse him entirely. There was a significant degree of contributory fault. I take into account, too, that Apex probably should not have permitted Mr Barnes to work on the night of 20-21 February and that it required him to work on the night of 21-22 February.

[26] I therefore reduce by two thirds the amount I would otherwise have awarded. Apex is ordered to reimburse Mr Barnes' lost remuneration in the equivalent of 7.7 weeks' wages less earnings from casual work. On the timesheets provided, Mr Barnes worked an average of 61 hours per week, excluding the final week. At a rate of pay of \$16 per hour, the total gross remuneration lost is $\$16 \times 61 \times 7.7 = \$7,482$. From that is to be deducted the gross equivalent of Mr Barnes' nett earnings of \$2,334.99. Mr Barnes is to provide the applicable gross figure.

[27] Mr Barnes was angry about his dismissal but there was relatively little further evidence of injury to his feelings. Taking into account the degree of Mr Barnes' contributory fault, I order Apex to compensate Mr Barnes for the injury in the sum of \$2,000.

The claim for wages and holiday pay

[28] Mr Barnes seeks:

- (a) the payment of wages not paid from 19 February 2007 – 7 March 2007, less an amount paid by direct credit to his bank account on 1 March 2007; and

(b) holiday pay on gross earnings from the commencement of employment to 19 August 2007.

[29] I infer from the facts available that the reason for Apex' failure to pay Mr Barnes from 19 February, save for the amount paid to him on 1 March, concerned Mr Barnes' failure to report for work from 22 February together with Apex' view of the outcome of the meeting of 1 March. The payslip corresponding to the 1 March payment indicates Mr Barnes was paid for the 43.5 hours he worked on 19, 20 and 21 February.

[30] Eight hours' pay is claimed, in effect, as sick pay for the time off on the night of 22-23 February. Mr Barnes said he took that time off by arrangement with the company. Accordingly Apex is ordered to pay him $8 \times \$16 = \128 for that day.

[31] Mr Barnes said further that the reason he did not report for work subsequently was that no work was offered or made available to him. He said the usual practice was that a representative of the company would telephone him in advance to advise of where he would be picking up his backload. Since he was not contacted, he concluded work was not being made available.

[32] Accordingly I find Apex was in breach of its obligation to provide Mr Barnes with work. It failed to do so in the week beginning 26 February and on 5, 6 and 7 March. It owes Mr Barnes $\$16 \times 61 \text{ hours} \times 1.6 \text{ weeks} = \$1,561.60$ (gross). Payment is ordered accordingly.

[33] Regarding holiday pay, a company-generated payslip for the period ended 1 April 2007 indicates the company calculated the sum of \$1,132.80 was owed. The nett amount that would have been paid into Mr Barnes' bank account was \$843.18.

[34] Mr Barnes says he did not receive the payment. He produced bank statements for the months of April and May 2007, and the payment does not appear.

[35] I therefore accept \$1,132.80 (gross) is owed to Mr Barnes as holiday pay and order accordingly.

Summary of orders

[36] Apex is ordered to pay to Mr Barnes in respect of his personal grievance:

- (a) \$7,482 less the gross equivalent of \$2,334.99 as reimbursement of remuneration lost as a result of the personal grievance; and
- (b) \$2,000 as compensation for injury to feelings resulting from the personal grievance.

[37] Apex is ordered to pay to Mr Barnes in respect of his claim for unpaid wages:

- (a) \$128 (gross) as one day's sick pay;
- (b) \$1,561 (gross) as unpaid wages; and
- (c) \$1,132.80 (gross) as holiday pay

Costs

[38] Costs are reserved.

[39] If either party seeks a determination of the matter they are to file and serve a memorandum setting out their position by the close of business on 8 February 2008. There shall be a further 7 days from the date of receipt of the relevant memorandum in which to file and serve a reply.

R A Monaghan

Member of the Employment Relations Authority