IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2016] NZERA Auckland 391
5618195

BETWEEN	PAUL COX Applicant
AND	CAMPBELLS CARRYING COMPANY 2014 LIMITED Respondent

Member of Authority:	Nicola Craig
Representatives:	John Schlooz, Counsel for Applicant Scott Campbell, Director of Respondent
Investigation Meeting:	9 September 2016
Determination:	29 November 2016

DETERMINATION OF THE AUTHORITY

A. Paul Cox was unjustifiably dismissed by Campbells Carrying Company 2014 Limited (Campbells Carrying). Within 30 days of the date of this determination Campbells Carrying is to pay Mr Cox:

(i) $3,802.50 gross as lost wages; and

(ii) $2,250.00 as compensation for humiliation, loss of dignity and injury to feelings.

B. Campbells Carrying is ordered to pay a penalty of $1,500.00 to the Authority, for transfer to the Crown account, within 30 days of the date of this determination, regarding a breach of s 63A of the Employment Relations Act 2000.

C. No penalty is awarded regarding good faith.

D. A timetable is set for memoranda on costs, in the event that the parties are not able to resolve the matter themselves.

Employment relationship problem

[1] Campbells Carrying Company 2014 Limited (Campbells Carrying or the company) is a small freight business owned by Scott Campbell (Mr Campbell). Paul Cox (Mr Cox) worked for Campbells Carrying, and its predecessor company, as a truck driver since 2013. From mid 2014 Mr Cox worked 17 hours a week for Campbells Carrying.

[2] Mr Cox had previously worked as a driver for a trucking company owned by Mr Campbell's father, Murray Campbell (Mr Campbell Snr) and had been family friends with the Campbell family, particularly Mr Campbell Snr, for some years.

[3] Mr Cox says that he was unfairly summarily dismissed on 3 March 2016 following allegations that on 29 February he parked a company truck into an overhanging tree causing damage to the truck. Campbells Carrying says that it acted as a fair and reasonable employer could have done due to Mr Cox's negligent parking but agrees that it did not follow a proper procedure.

[4] An investigation meeting was held on 9 September 2016 where I heard evidence from Mr Cox, Mr Campbell and Mr Campbell Snr. A letter from another person was originally to be the subject of evidence given over the telephone, but Mr Campbell agreed to the removal of the letter, and so I set that aside.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from the parties but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Issues

[6] The issues for investigation and determination are:

i. Was Mr Cox unjustifiably dismissed by Campbells Carrying, and if so, what remedies (if any) should he receive?

ii. Was Campbells Carrying in breach of its obligations regarding providing a written employment agreement, and if so, should a penalty be awarded?

iii. Was Campbells Carrying in breach of the duty of good faith, and if so, should a penalty be awarded?

Events regarding dismissal

[7] In the late morning of 29 February 2016 Mr Cox had to park the Campbells Carrying truck in a spot adjacent to where he normally parked it. The normal spot, outside Mr Campbell's house where the company was based, was occupied. This was a truck which had just been bought by the company, although Mr Cox had driven trucks of this size before. After parking Mr Cox finished work and did not see Mr Campbell.

[8] At 7.06 pm Mr Campbell texted Mr Cox as follows:

> Paul I've just moved the truck off tree, not happy. There is a big dent down side and scratches on door. Have tomorrow off while I sort out what I'm going to do.

[9] As Mr Campbell has an early start in the mornings, driving for the company, he turns his phone off around 8pm. Mr Cox tried to ring Mr Campbell that evening and ended up leaving a message for Mr Campbell to ring him.

[10] Mr Cox had Tuesday off as he had been told to do. Mr Campbell tried to phone Mr Cox twice that day but got no answer. Mr Cox did not normally work on Wednesdays.

[11] On Wednesday 2 March Mr Campbell phoned Mr Cox. Mr Campbell said that he was not happy with what had happened and that Mr Cox should consider

retirement. Mr Cox asked why, and Mr Campbell replied that Mr Cox had had two or three accidents in his trucks. Mr Cox said that he was not ready to retire yet and he would talk to Mr Campbell the next day at work.

[12] On 3 March Mr Cox went to Mr Campbell's house to collect the truck for work at the normal time of 4.30am. There was no truck there.

[13] Mr Cox phoned Mr Campbell to ask what was going on. Mr Campbell said that he did not want Mr Cox here anymore and he was fired. The reason given was negligence. Mr Cox replied that Mr Campbell could not do that as it was an accident. Mr Campbell said he could do it and offered Mr Cox a month's wages.

[14] Mr Cox phoned Mr Campbell on 4 March and left a message, with Mr Campbell calling back the next day. Mr Cox said that he was not happy with the procedure which had been followed and that he was not accepting the offer of a month's wages.

[15] Mr Campbell said that he had never had to fire anyone before. Mr Cox replied that that was not his problem, that Mr Campbell was the employer and should know all the rules and regulations. Mr Cox then said that he had parked the truck and was unaware of any damage to it and that Mr Campbell may have done the damage himself when he moved the truck. Mr Cox asked for something in writing about the dismissal and said that he was consulting an employment lawyer.

[16] On 10 March Mr Cox found that Campbells Carrying had paid his final pay and holiday pay into his bank account.

[17] On around 17 March Mr Cox received a letter from the company dated 10 March which confirmed that his termination was:

> …as a result of continued damage to company property, careless driving, and as a result of your attitude towards such incidents.

[18] The employment agreement provides for two weeks' notice[1] but also provides for the possibility of summary dismissal for serious misconduct.[2] One of the examples of serious misconduct listed is:

> (d) Damage as a result of negligence to company or client's vehicles, building or property.

[1] Clause 20.1
[2] Clause 20.2

Unjustified dismissal

[19] I find that Mr Cox was summarily dismissed by Campbells Carrying during the telephone call of 3 March, although there was subsequent discussion about what, if any, payment was to be made.

[20] Did Campbells Carrying act as a fair and reasonable employer could have done? As part of this test for justification under s 103A of the Act, I must consider whether there was sufficient investigation of the allegations, whether concerns were raised with Mr Cox before dismissing him and whether he was given a reasonable chance to respond. [3]

[21] In terms of the substantive justification for the dismissal, during the 3 March call Mr Campbell said that the dismissal was for negligence and mentioned earlier accidents. The company's letter of 10 March, which was in the nature of a statement of reasons for dismissal under s 120 of the Act, refers to continued damage to company property, careless driving, and Mr Cox's attitude towards such incidents.

[22] At the investigation meeting Mr Campbell said this was not an accident. When questioned, he did not appear to consider that Mr Cox had deliberately driven the truck into the tree branches, so much as thinking it was more in the nature of reckless driving. Mr Campbell considered this situation to be distinguishable from Mr Cox's other driving incidents which Mr Campbell did accept were accidental.

[23] Mr Campbell also expressed concern at the investigation meeting that Mr Cox knew that he had had an accident but then did not report it to Mr Campbell. This does not seem to be captured in the company's letter setting out the reasons for dismissal.

[24] It was not evident that Mr Campbell had put his concerns to Mr Cox regarding the latter's alleged reckless driving or failure to report the accident to him.

[25] The company referred to Mr Cox's driving history of previous accidents and resulting insurance claims. These mainly occurred when Mr Cox was employed by Mr Campbell Snr's company, although at the time of the accidents Mr Cox was driving a truck which was owned by Mr Campbell but leased to his father's company.

[3] S 103(3)(a), (b) and (c) of the Act

In any event, Campbells Carrying agreed that these were accidents and did not result in any disciplinary action against Mr Cox.

[26] There may have been a prospect that the company could have substantively justified a dismissal on the basis of Mr Cox's conduct and the serious misconduct provision in the employment agreement. However, this is a situation where the absence of a full and fair investigation does not make it possible for the company to show that the decision to dismiss was one that a fair and reasonable employer could have taken.[4]

[27] Having initially started wisely by giving himself some time after his initial outrage that his new truck was damaged, Mr Campbell then failed to take other necessary steps to deal with the issue. What he did not do was to tell Mr Cox in more than minimal detail what his concerns were, and to give Mr Cox a proper chance to respond.

[28] There was a minimal process, effectively involving one text and one telephone discussion, before Mr Cox was told over the phone on 3 March that he was fired. Both phone calls lasted about 2 to 4 minutes. Mr Campbell acknowledged that during at least one of the calls he was probably driving a truck, while talking hands free.

[29] Campbells Carrying did not put all of its concerns to Mr Cox, and thus he did not have a proper opportunity to respond. Particularly when considerations such as Mr Cox's attitude seem to have been taken into account, it was unreasonable not to have arranged a meeting to discuss the concerns and Mr Cox's responses.

[30] In addition Mr Cox was not advised at any stage that there was a disciplinary process happening or that his employment was in jeopardy. It was also not suggested that he could seek support or representation.

[31] It was most unfortunate that Mr Cox had to arrive at work at 4.30 am on 3 March only to discover that no truck was present for him to drive, and then to have to phone Mr Campbell to find out what was going on, only to be told that he was fired.

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[4] *Singh v Sherildee Holdings Ltd t/a New World Opotiki*, Employment Court, Auckland, AC 53/05, 22.09.05, Couch J, at [89]

[32] In conclusion a fair and reasonable employer would have made it clear to Mr Cox what the concerns were, more specifically than just referring to the accident. It would have given Mr Cox the opportunity to meet to present his response to the concerns. It would have told him the outcome in a proper way. These things did not happen. Mr Campbell rightly accepted at the investigation meeting that in hindsight he should have put his points forward to Mr Cox.

[33] Under s 103A(5) of the Act I must not determine a dismissal to be unjustifiable solely because of defects in the process followed which were minor and did not result in the employee being treated unfairly. Campbells Carrying properly accepted that it had not followed a proper process. The defects resulted in a lack of proper discussion about Mr Campbell's concerns, a chance for Mr Cox to explain and for Mr Campbell to consider those responses. These were not minor matters.

[34] I find that Mr Cox was unjustifiably dismissed.

Remedies for unjustified dismissal

Lost Wages

[35] Mr Cox originally claimed three months' lost wages but now claims his whole loss, of around six months' wages. He has not taken up other employment since leaving Campbells Carrying and has not earned any wages, even from casual work, in that period.

[36] Under s 128 (2) of the Act where the employee has lost remuneration as the result of a personal grievance, I must order payment of the lesser of the lost remuneration or three months' ordinary time remuneration. Subject to my findings on contribution below, Mr Cox must be awarded three months' or 13 weeks' lost wages. He was paid a weekly gross wage of $390.00. For 13 weeks that amounts to $5070.00 gross lost wages.

[37] I have a discretion under s 128(3) of the Act to order a sum of compensation for lost remuneration greater than the three month period and have considered whether to award Mr Cox lost wages for the additional months. Mr Campbell and his father gave evidence that Mr Cox, who is in his mid-60's, had discussed retiring

sometime soon, although he had not given any formal notice of that. Mr Cox did not accept that he had any particular plan about when to retire. Given some uncertainty regarding Mr Cox's continued employment, I do not award any further lost remuneration.

[38] I now consider the issue of mitigation of loss. Mr Cox says that he registered with employment agencies. When questioned by the Authority he said that he had registered with two agencies which he was unable to name, and thought that was at the end of April or early May.

[39] When questioned Mr Cox said that he also tried to find work through word of mouth, and had looked in the local newspaper where there were very few jobs. There was nothing to suggest that he had gone wider in terms of other media or had looked on internet job sites. On Mr Cox's behalf it was suggested that his age was an impediment to finding work. He also wanted part time work whereas a lot of the driving jobs were advertised as full time.

[40] I am influenced in my findings on mitigation by the Employment Court's statement in *Xtreme Dining Ltd (t/a Think Steel) v Dewar* [5]:

> But when considering all the evidence, this issue of fact must be assessed on the basis that the employee is the victim of a wrong.[6] The Authority or Court must not be too stringent in its expectations of a dismissed employee. Further, what has to be proved – by the employer – is that the employee acted unreasonably; the employee does not have to show that what he did was reasonable.[7]

[41] Although it is finely balanced, I am not satisfied that Campbells Carrying has established that Mr Cox acted unreasonably in not mitigating his loss. Mr Cox's age, as well as his desire to continue with only part time work, may well have made it difficult for him to find other employment.

Compensation under s 123(1)(c)(i) of the Act

[42] Mr Cox claims $8,000 for humiliation, loss of dignity and injury to feelings.

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[5] [2016] NZEmpC 136
[6] *Banco de Portugal v Waterloo and Sons Ltd* [1932] AC 452 (HL) at 506
[7] Supra at [103]

[43] Mr Cox gave limited evidence of the effects of the dismissal on him. He says that the loss of income has restricted his (and his wife's) ability to be involved in social outings with friends.

[44] Two grounds were originally specified as the significant causes of Mr Cox's distress. The first was the suggestion that Mr Campbell had told people at the local Returned Services Association (RSA) about Mr Cox's dismissal. However, Mr Cox subsequently discovered that it was Mr Campbell Snr who had told someone at the RSA that Mr Cox was no longer working for Campbells Carrying. Mr Cox accepted that Mr Campbell should not be held accountable for his father's behaviour.

[45] The other ground identified as significant was Mr Cox feeling too embarrassed to go back to see people at the market where he had had good working friendships through his driving work. He is concerned about what may have been said at the market about his termination, by someone from Campbells Carrying, although there was no evidence that anything was actually said.

[46] Subject to my findings on contribution, I would award Mr Cox $3000 under s 123(1)(c)(i) of the Act as compensation for humiliation, loss of dignity and injury to feelings.

Contribution

[47] I am required under s 124 of the Act to consider the extent to which the actions of Mr Cox have contributed to the situation that gave rise to the personal grievance. If those actions are to be taken into account they must be both causative of the outcome and blameworthy.[8]

[48] Campbells Carrying's position was that Mr Cox must have been aware of the truck scraping against the tree as it was parked. Mr Campbell says that he could hear scraping when he reversed the truck out from the tree. Photographs were produced of the scene, showing the truck body wedged into the tree's branches, along with pictures of resulting broken branches and damage to the truck. The damage included side and top scratches and scrapes, and two dents.

[8] *Harris v The Warehouse Ltd* [2014] NZEmpC 188 at [178]

[49] Mr Cox was parking in a residential area. He accepts that he could have parked safely elsewhere but parked where he did as it was the closest space to Mr Campbell's house. He did not offer an explanation as to why he had driven into the tree branches, other than saying it was an accident. Mr Cox denied having heard any "major crashes or bangs".

[50] Having seen the photographs, including of the body of the truck wedged into the tree branches, it is hard to believe that someone driving the truck into the tree in this manner could fail to be aware of contact having been made. Damage should have been checked for. Mr Cox did not do this or report the incident to anyone. He was aware of the reporting requirements, having undertaken them with previous incidents.

[51] I find Mr Cox's behaviour to be both causative of the outcome of the dismissal and to be blameworthy.

[52] In terms of deduction for contribution, in *Paykel Ltd v Morton*[9] Judge Colgan held that not every imperfection or peripheral fault by an employee should attract a deduction. Further, a reduction of 25% is described as one of particular significance.

[53] More recently, in *Xtreme Dining* the Full Court found that a contributory finding of fault of 50% is a significant one. [10]

[54] In the present case I deduct 25% from remedies for Mr Cox's contribution. I consider that Mr Cox's conduct was more than could be described as an imperfection, but less than would justify a substantial reduction.

[55] Having made that deduction, I therefore order Campbells Carrying to pay Mr Cox the following sums within 30 days of the date of this determination:

(a) $3,802.50 gross as lost wages; and

(b) $2,250.00 as compensation for humiliation, loss of dignity and injury to feelings.

[9] [1994]1 ERNZ 875
[10] Supra at [222]

Written employment agreement

[56] Mr Cox claims a penalty for the company's historical failure to provide him with a written employment agreement.

[57] Mr Campbell accepts that when Mr Cox moved to his company from his father's company, Mr Campbell was not aware of any obligation to provide employees with a written agreement and did not give Mr Cox one then. Mr Cox did not request a written agreement.

[58] It was only when Mr Campbell hired another employee in mid 2015 that he was told about the obligation to have a written agreement. Mr Cox was then given a written agreement in July 2015, which the parties signed on 27 July.

[59] Under s 63A of the Act an employer's obligations include providing a copy of the proposed agreement to the employee. The Authority may impose a penalty for non-compliance.[11]

[60] Sections 64 and 65 of the Act also concern written agreements but at the time of Mr Cox's employment with the company, penalties under those provisions were only claimable by a Labour Inspector.

[61] I find that Campbells Carrying breached its obligation under s 63A by failing to provide a copy of a proposed employment agreement to Mr Cox.

[62] Following the recent decision of the Full Bench of the Employment Court in *Borsboom (Labour Inspector) v Preet PVT Ltd & Warrington Discount Tobacco Ltd (Preet)* [12] I now go through the four step test outlined there to assess the appropriate penalty.

[63] Step one is to identity the nature and number of breaches. Here there is only one breach of one section of the Act with no breaches of other minimum standards statutes alleged. The breach pleaded concerns only one employee. The maximum penalty for a breach of this Act by a company is $20,000.[13]

[11] S 63A(3) of the Act
[12] [2016] NZEmpC 143
[13] S 135 (2)(b)

[64] Step two is to assess the severity of the breach, to establish a provisional starting point, including aggravating and mitigating factors. The provision of written employment agreements is important.

[65] I am not able to identify any aggravating factors in this case. There are a number of mitigating factors. The situation is of relatively short duration. This company was only incorporated in late July 2014. Mr Cox had worked for some months for a predecessor company but there was little evidence regarding the circumstances of that or the change from one company to the other. The situation of Mr Cox not being offered a written agreement by this company continued for slightly less than a year.

[66] Mr Campbell had largely been a sole trader until October 2013. I am satisfied that the breach was inadvertent. Mr Campbell became aware of the requirements himself, rather than through any Labour Inspector action, and then acted to rectify the situation.

[67] There is no evidence of Mr Cox suffering any particular loss or harm, or being specifically disadvantaged by the absence of a written employment agreement. Well before the time of the dismissal, Mr Cox had been given and signed a written employment agreement.

[68] In *Preet* the Court found the Employment Relations Act breaches to be the least serious breaches (compared to the Minimum Wage Act and Holidays Act breaches) and provisionally allocated $10,000, being 50% of maximum penalty.

[69] However, in *Preet* the breaches of the Act related to wage and time records and the failure was part of an attempt to mislead or deceive employees and any one such as the Labour Inspector, who might have sought to check the records.[14] The absence of records makes the investigation of other minimum code breaches more difficult.

[70] By contrast here the breach was inadvertent and was not part of a larger plan to deprive employees of their entitlements. There is no indication of Mr Cox being a

[14] Supra at [165]

vulnerable employee or of the breach having any particular effect on him. Taking into account all of these factors I set the provisional penalty at $2000.

[71] Step three requires consideration of the means and ability to pay, which may result in a downwards adjustment. Here the business is a small one with only two other employees. I make a deduction of 20% for that factor, taking the total down to $1,600.

[72] Step four involves the proportionality or totality test; whether the provisional penalty after the first three steps is proportionate to the seriousness of the breach(es) and harm occasioned by it/them. In *Preet* penalties were required to be in proportion to the amount of money unlawfully withheld.[15] However, in this case there was no money unlawfully withheld.

[73] I have regard to the four objectives of penalty awards outlined in *Preet*. I consider that of the first two objectives, punishment of those who breach their obligations and general deterrence are relevant here. There does not appear to be a need for specific deterrence for this company, as it chose to promptly comply once it became aware of its obligation, without any state enforcement.

[74] In terms of the third objective there is no necessity to compensate the victim here as there is no evidence of any monetary or non-monetary loss, or uncertainty regarding entitlements due to the lack of a written agreement.

[75] Regarding the fourth objective there is no indication of potential unfair competition in these circumstances, as there was no particular benefit to the business or its director/shareholder from not having written employment agreements.

[76] Standing back and looking at all of the factors and considering whether a penalty of $1,600 would be right in all the circumstances, I find that a small reduction is needed, to $1,500.

[77] Mr Cox sought to have any penalty paid to himself under s 136 (2) of the Act. However, taking into account the lack of evidence of any particular harm or disadvantage to Mr Cox, I do not order any of the penalty to be paid to him.

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[15] Supra at [190]

[78] I order Campbells Carrying to pay a penalty of $1,500.00 to the Authority, for transfer to the Crown account, within 30 days of the date of this determination.

Good Faith

[79] Mr Cox claims that Campbells Carrying was in breach of its duty of good faith to him, based on the company:

(i) not being active and communicative in maintaining a productive employment relationship;

(ii) being uncommunicative and failing to respond adequately to his efforts to discuss and resolve the employment relationship problem; and

(iii) having no procedure and following no process in the termination of his employment.

[80] It was argued for Mr Cox that Campbells Carrying was unresponsive after Mr Cox was dismissed, before the letter of reasons for dismissal was received around 17 March. However, I have found that Mr Cox was already summarily dismissed at this time, and the duty of good faith was thus not applicable at that time. The letter was received within the 14 day time for response specified in s 120 (2) of the Act

[81] Mr Campbell accepted that he had not been very communicative, in relation to the accident. However, the third item listed above regarding process and procedure is dealt with under the unjustified dismissal grievance claim. I do not consider that there are remaining grounds for a breach of good faith claim.

Costs

[82] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Mr Cox shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Campbells Carrying shall have a further 14 days in which to file and serve a memorandum in reply. Any claim for costs must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[83] The parties could expect the Authority to determine costs, if asked to do so, on its usual 'daily tariff' basis unless particular circumstances or factors require an adjustment upwards or downwards. The daily tariff applicable at the time this case was filed was $3,500 per day.

Nicola Craig
Member of the Employment Relations Authority