

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 13
5293403

BETWEEN LEE CHRISTIANSEN
 Applicant

AND CAROL RASING trading as
 CHICKENS 4 U
 Respondent

Member of Authority: Dzintra King

Representatives: Glenn Finnigan, Counsel for Applicant
 Parvez Akbar, Counsel for Respondent

Investigation Meeting: 2 December 2010 at Auckland

Submissions Received 20 December 2010 from Applicant
 16 December 2010 from Respondent

Determination: 14 January 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr Lee Christiansen, said he was unjustifiably dismissed by the respondent, Carol Rasing trading as Chickens 4 U. The applicant says there have also been breaches of an implied term of his employment agreement that the respondent would comply with all laws pertaining to the employee's employment, including its obligations under The Kiwi Saver Act 2006.

[2] He seeks lost wages, compensation pursuant to s 123 (1) (c) (i) of \$7,000, compensation for breach of the implied term and a penalty for breach of the employment agreement.

[3] The respondent says the applicant's dismissal was justified and that it has complied with all relevant legislation.

Mr Christiansen's employment

[4] Mr Christiansen was employed by Chickens 4 U as a Class 5 licensed driver commencing employment in February 2009. His employment involved carting live chickens from farms in the Franklin and Waikato areas and delivering them to chicken processing factories in the South Auckland area. The work involved not only driving between the farms and factory and between the farms and the respondent's depot in Paerata but also filling out paper work, stacking the modules used to transport the chickens onto the trucks, and hosing the trucks and modules down. He occasionally did the unloading of full modules and the loading of empty modules at the Alstra factory.

23 December 2009

[5] Mr Christiansen said that the lead-up to Christmas 2009 was a particularly busy period. On 23 December 2009 he had been feeling fatigued due to the long hours he had been working the days before without a proper break as well as the early morning starts involved with the job. He often started between 2am and 3am. When he complained to Mr Rasing about being tired, he said Mr Rasing accepted what he was saying and agreed he would not have to drive the last load the following day.

[6] This purported agreement precipitated the events that led to Mr Christiansen's dismissal.

[7] Mr Christiansen believed that he had an agreement with Mr Rasing about the work that he would be doing the following day, 24 December 2009. He said that there was no qualification to the agreement of his not having the last run, such as it being subject to the number of birds required to be delivered or anything of that kind. He told his wife that he would be able to be home early on Christmas Eve and she and the children would then be able to go out and do some Christmas shopping.

[8] Mr Christiansen said that as he had already exceeded 13 hours work/driving and so on 23 December there was no time for him to drive to refuel his truck. However, the log book shows he had an hour's break. Mr Christiansen said his log book entries falsely showed breaks. On the morning of 24 December he forgot to refuel at Pukekohe and had to go to Mercer to refuel.

[9] Mrs Rasing said that the extra workload to which Mr Christiansen referred was simply the fact that they were working at Mokau farm, Tahuna, an extra drive of one hour. That happened every eight weeks of each round of chicken growing so Mr Christiansen had already driven and worked that route five times previously since starting in February 2009, with no problems at all. Never once had Mr Christiansen at any stage said he could not cope with the job. He had never complained about being too tired to keep on doing this. Sometimes the bird numbers could be found to be wrong. Mr Christiansen only started at 2.30am on 24 December, the factory starting earlier due to it being Christmas Eve. All other start times were 3am.

24 December 2009

[10] Mr Christiansen had never exceeded 13 hours work and he could have filled up on 23 December as he went straight past diesel pumps at Maramarua on the way back to the factory. Because Mr Christiansen had to divert to Mercer to fuel up the truck, this put him at the back of the queue to be loaded. He should have been on the way to Alscoa at 4.45am, instead he was seen at 6am at just east of the Bombay junction on his way to Alscoa with his first load. If he had filled up even first thing in the morning he would have not been that late back to Motou for his next load. He put himself at the back of the queue and made everyone finish late. Mrs Rasing did ring to find out where he was because he had to return anyway and he would be the first truck available back to Motou, so it would be reasonable that the overflow of chickens would be put on to his truck. It was the last shed for that run on that farm and he had to take the hoist back to the depot as it would be uneconomical to get another truck to come down at short notice.

[11] On 24 December he started work at 2.45am driving from the Paerata depot to the Mokau farm at Tahuna to deliver the chickens to the Alstra chicken processing plant. Due to what Mr Rasing had told him the day before, he was only expecting to do one delivery. At about 9.45am he received a call from Mrs Rasing wanting to know where he was.

[12] After doing the delivery to Alstra he expected his final task of the day would be to return to the farm to pick up the fork hoist for return to the Paerata depot. On arriving at Mokau farm as he was connecting the fork hoist trailer to his truck which was to be taken by him back to Paerata Mrs Rasing told him that he needed to do one more load.

[13] Mr Christiansen said that he accepted that he reacted badly and objected to this. He told Mrs Rasing that Mr Rasing had told him he was not getting the last run. He said he did not swear at Mrs Rasing, who claims that he was yelling and swearing at her. She directed him to drive his truck to the loading pad, which he did. Mr Rasing was there with Mr Fotu Peleti.

[14] On getting out of the cab he told Mr Rasing that he had not had a break in the last four days and that he had agreed that Mr Christiansen would not have the last load. Mr Rasing's response was to say *Bullshit, it's in your log book*. Mr Christiansen explained that drivers were not taking the breaks that were logged. He told Mr Rasing he would take the truck to Paerata and he could drive it from there. Mr Rasing said it was his job and he had to do it. There was a heated exchange. He said he reminded Mr Rasing that he had been promised an early finish.

[15] Mr Christiansen said that by that stage he was quite upset and matters were not helped by the fact that Mr Rasing was speaking to him aggressively and swearing. Mr Christiansen accepted that he did tell Mr Rasing that believed the Rasings were getting away with too much. He said that was a reference to hours he felt he had been made to work without breaks. He told him he would be taking him to the Employment Relations Authority. Mr Rasing said he could not do that because he was in bankruptcy and he would have to pursue his wife. Mr Christiansen then said well he would have to take Mrs Rasing to the Authority.

[16] Mr Fotu Peleti was also quite aggressive to Mr Christiansen and was backing Mr Rasing in insisting that Mr Christiansen deliver the load all the way to the Paerata factory.

[17] While he was securing the modules in his truck Mrs Rasing was on her mobile. He said he gathered that she had been arranging a relief driver to pick up the delivery from the Paerata depot to take it to the Karaka factory. Mrs Rasing approached him and said she had telephoned Jim, the relief driver, and told Mr Christiansen that Jim would pick the truck up at Paerata. She said *I hope you're happy with that*. Mr Christiansen's response was *Oh good*. At that point the truck was loaded so he strapped down the modules and drove off to the Paerata depot. Mrs Rasing did not tell him he was expected to do any further duties once he had delivered the truck back to the Paerata depot.

[18] He arrived there at approximately 12.20pm and handed over the truck to Jim and then went home.

[19] Mr Christiansen said that at no stage in his conversations with either Mr or Mrs Rasing was he told that his intended actions to deliver the birds only as far as Paerata would be treated as serious misconduct or would result in his being dismissed. He said he considered the matter had been resolved before he left the farm.

[20] Mr Christiansen accepted that he said he was not prepared to do what had been asked of him. He did not dispute that he refused to deliver the chickens to the factory three times before Mrs Rasing contacted the relief driver. However, he felt that the demand was unreasonable in light of the agreement over his work duties that had been made the day before and the complete lack of understanding on Mr Rasing's part and his unwillingness to have a reasonable discussion about what he was asking him to do to try and resolve a situation that, in Mr Christiansen's view, Mr Rasing had allowed to develop.

The respondent's version of the events of 24 December

[21] Mrs Rasing said Mr Christiansen connected up to his trailer and came out of the truck yelling at her *Fuck this, I'm not doing this any more. I'm going Christmas shopping*. She said this was rudely said before he was even told there was an overflow. She told him there was an overflow and said could he please take his truck round to the load out pad. He then did so. The verbal abuse continued. He was ranting and raving saying that he refused to deliver the chickens to the factory, he was going Christmas shopping. He gave a very aggressive response to her and refused three times to deliver the chickens to the processing plant at Karaka.

[22] Mrs Rasing did not understand why he could drive the load to Paerata and not the extra 14.4kms to Karaka plant. I asked Mr Christiansen about this during the hearing and did not get a satisfactory or coherent response.

[23] Mrs Rasing said that initially he was only yelling and swearing at her as her husband and the rest of the catching staff were round at the load out pad waiting with the fork hoist.

[24] Mr Christiansen then arrived at the load out pad yelling *Fuck this, I'm parking it up*. Mr Rasing was opening the shed doors when all the yelling and aggressive

behaviour by Mr Christiansen was taking place. Mr Christiansen never said anything about breaks, just that Mr Rasing had said the day before that he might not get a load. However, Mr Rasing told Mr Christiansen that the farm figures were wrong and tried to show him the figures, but to no avail. He just kept yelling and swearing *I'm parking it up* three times after being asked to take the birds to the factory.

[25] Mrs Rasing said she did not hear Mr Christiansen tell Mr Rasing to drive the truck back to Paerata. Mr Christiansen told her to drive it back. However, he knew she was a Class 1 driver and could not drive a Class 5 vehicle. Mr Rasing advised Mr Christiansen that he had to take the load to the Karaka factory and that it was his job to do so. He had done so for the past ten months.

[26] Mr Christiansen became aggressive and was out of control. Mr Rasing told him to listen to himself and to get some control. Mrs Rasing said that Mr Christiansen never mentioned any promise that Mr Rasing had made the day before, only that Mr Rasing had told him he might not get a load. There was nothing said by Mr Christiansen that he simply had had enough. His behaviour was straight out unwarranted verbal abuse.

[27] In terms of the exchange with Mr Rasing, Mrs Rasing said Mr Christiansen threatened Mr Rasing by saying *I'll get you*. Mr Rasing asked *What do you mean?* Mr Christiansen replied *You'll see*. Mr Rasing told him that he was in liquidation. Mr Christiansen replied *Bullshit, you're making mega bucks and paying kids' wages*. Mr Rasing said that Mrs Rasing was his employer and he then replied *Well I'll get her then*. There was no mention of the Employment Relations Authority nor was there any mention of breaks at all.

[28] Mrs Rasing said she rang Jim the relief driver to drive the chickens from Paerata to Karaka as Mr Christiansen had refused more than three times to take the chickens to Karaka and they could not be left parked up at Paerata as it would become an animal welfare and SPCA issue. That was why a relief driver had to be called in to rescue the chickens. Mr Christiansen had no intention of taking the chickens to Karaka, his only interest was Christmas shopping.

Arrangements for a meeting

[29] Mr Christiansen maintained that Mr Rasing's aggressive attitude continued with his effort to arrange a disciplinary meeting.

[30] On 29 December Mr Rasing approached him to propose a meeting. Mr Christiansen did not want a meeting at that stage. Mr Rasing told him he wanted a meeting to sort out what happened the other day. He was not told the meeting was disciplinary or that he might be dismissed, but he did say he did not want to attend the meeting without representation.

[31] Mr Rasing was persistent and again asked to have the meeting. Mr Christiansen said that by that stage he was concerned at being hounded to attend the meeting and wanted the request made in writing and he told Mr Rasing this.

[32] On 31 December 2009 Mr Christiansen received a letter asking him to attend the disciplinary meeting later that day. He asked for the meeting to be deferred to 5 January. He asked Theo Tahu, another driver, to come along to the meeting with him.

[33] On 29 December Mr and Mrs Rasing approached Mr Christiansen at the back of the Karaka factory and asked him to come to a meeting about what happened on Christmas eve. Mr Christiansen said *no* twice. Mr Rasing then told Mr Christiansen *it doesn't have to get to this*. Mr Christiansen then said put it in writing and I may reply. They could not have a reasonable discussion because of his aggressive attitude.

[34] Mr and Mrs Rasing thought that maybe the situation could be sorted out with a reasonable discussion, but to no avail. She gave Mr Christiansen a letter to attend a disciplinary meeting and he asked if he could change the date. He was told he could and he could have whoever wanted as a witness. He had the chance to arrange the meeting, time and date to whatever he saw fit.

[35] Notification of the disciplinary meeting given to Mr Christiansen says:

Following our investigation into your alleged misconduct, you are required to attend a disciplinary meeting to discuss the matter further. This meeting will be held on 31 December at 2.00pm at Karaka Plant Prayer Room. Please advise of your availability and/or suggest a time that would be more suitable. The area of concern is refusal to perform assigned work and/or walking off the job. This misconduct is of a serious nature and could result in your dismissal. You are welcome to have a representative or support person present at this meeting and are encouraged to do so. The person may be a work colleague, a relative, your lawyer or a friend. At the meeting we will discuss your alleged conduct and you will be given every opportunity to present your side of the story. You have the right to bring witnesses to the meeting and should advise the company of any staff you wish to be available.

Disciplinary Meeting

[36] The meeting was attended by Mr Christiansen, Mr Tahu, Mr and Mrs Rasing and Mr O'Connor who was a Plant Manager at Van der Brinks. The Rasings asked him to chair the meeting as he had experience in running disciplinary meetings. The decision to dismiss Mr Christiansen was made by Mr and Mrs Rasing.

[37] Mr Rasing made notes at the disciplinary meeting. Mr O'Connor read the allegations. Mr Rasing read a statement about what had happened on 24 December. Mr Christiansen was given the chance to reply. Mr Christiansen said the yelling and swearing had been directed at Mr Rasing. Mr Rasing said he had not been there. Mr Christiansen said he was. Mr Rasing replied he was not. Mr Christiansen was then asked had anyone else ever refused to do a load. Mr Rasing said *No, never*. Mr Rasing asked Mr Christiansen why he had parked up the load. Mr Christiansen replied he had to go Christmas shopping. Mr Rasing asked Mr Christiansen what happened when there was an overflow. Mr Rasing repeated the question and Mr Christiansen finally admitted that first finished takes the overflow.

[38] Mr Christiansen said that during the meeting he made the point that at the time of the incident Mr Rasing had told him he would not have to do the final run. Mr Christiansen said he wanted to raise his view that double standards were being applied. He thought there had been a disparity in the approach that the respondent was taking with him in comparison to the company's approach over other issues. He pointed out that another employee had tested positive for excess breath alcohol while driving one of the respondent's vans. He also understood that no inquiry had been made regarding that incident. However, Mr O'Connor cut him off saying he could not bring that up as it had nothing to do with the incident. There were other matters Mr Christiansen wanted to raise that he believed were relevant to what he considered to be the harshness of his facing dismissal for what he had done. One was that drugs had been found in somebody's truck and his understanding was that no formal disciplinary action had been taken on that occasion.

[39] The respondent says the meeting lasted more than half an hour. Mr Christiansen said it was 10 or 15 minutes.

[40] At the meeting Mr Christiansen was told that the numbers were wrong and that is why he had the last load. Mr Rasing asked him what happened if there was an

overflow. Mr Christiansen eventually replied that the first truck finished does the overflow. So as he was the first finished in the process for the chickens had already been without water and feed for 4 to 5 hours it was a requirement of animal welfare and MAF regulations in order for the chickens' crops to be emptied. But that day Mr Christiansen was an hour late getting back, turning around from Maramarua to go and get fuel instead of filling up the day before so the chickens had already been delayed in getting picked up.

[41] Mr Rasing twice asked Mr Christiansen whether there was anything else he wished to add to his defence. Mr Christiansen said there was not. Mr O'Connor and Mr Tahu were sent outside and brought back into the meeting later. Mr Christiansen was told that in light of his aggressive behaviour, his swearing, refusal to deliver his load to the factory, abandoning the chickens and walking off the job, that his employment was terminated.

[42] Mr Rasing said that Mr Christiansen, during the altercation on 24 December, never mentioned any promise that he had supposedly made the day before, only that Mr Rasing had told him he might not get a load. Mr Rasing said they had to make alternative arrangements after Mr Christiansen refused three times to take the load to the Karaka factory.

[43] The letter of termination given to Mr Christiansen states:

Today you attended a disciplinary meeting regarding your refusal to attend assigned work and/or walking off the job.

Karaka Plant Pray room at 1.00pm.

Attended by yourself, Theo Tahu as your representative, Ray Rasing, Carol Rasing.

Roy O'Connor chaired the meeting.

The conclusion to the meeting resulted in termination of your employment immediately. The reason for the termination of your employment is your refusal to perform assigned work and walking off the job.

Final payment of wages and any due holiday pay will be paid to your account within 48 hours of this notice.

[44] I am satisfied that there were no relevant issues of disparity and while I accept that Mr Christiansen was cut short in raising those issues at the disciplinary meeting,

the outcome would not have been any different as during the hearing the respondent provided me with satisfactory explanations for the alleged disparities.

[45] There is no dispute that Mr Christiansen refused to comply with the respondent's instructions to take live chickens to the Paerata plant and that this instruction was given three times.

[46] The justification was based on the desire to go Christmas shopping and that he had been promised by Mr Rasing that he would not get the last load.

[47] Mr Rasing's evidence was that no such promise had been given and it would not be practicable given the nature of the promise.

[48] I accept that Mr Rasing did not give any express undertaking that Mr Christiansen would not get the last load. This is for the reasons that Mr Rasing gave me during the hearing. Furthermore, the reason for Mr Christiansen having to do the last load was due to his own failure to fuel up earlier and having to then subsequently attend to that and be placed at the back of the queue. Mr Christiansen was well aware of how that operated.

[49] Whilst Mr Christiansen subsequently tried to rely on fatigue to explain his behaviour, it was not a matter that was raised at the disciplinary meeting, nor was there any evidence to support that contention. Evidence is clear that he had taken breaks. The evidence that he purportedly worked continuous periods and falsified his log book did nothing to assist in that regard.

[50] He was invited to attend the meeting, made aware of the purpose of the meeting, his right to a representative and possible consequences. The notification of the meeting provided to him contradicted his evidence that he was not aware of what the meeting was for or that he could be dismissed. He was provided with an opportunity to respond to the allegations that included clear reference to his refusal to perform the assigned work and his behaviour on that day.

Kiwi Saver Act 2006

[51] The Authority does not have jurisdiction to deal with alleged Kiwi Saver defaults.

Was the dismissal justified?

[52] The instruction given to Mr Christiansen to take the last load to the factory was lawful and reasonable.

[53] Mr Christiansen's refusal to take the chickens to the factory constituted wilful and deliberate disobedience. This was not a situation like the one that arose in *Sky Network Television v Duncan* [1998] 1 ERNZ 354, where there was a dispute regarding whether or not the employer could legitimately vary Mr Duncan's work hours. There was no bona fide dispute as to the parties' legal rights.

[54] Wilful misconduct is intentional misconduct. In *Sky Network Television* at p359 Travis J stated that wilful misconduct denoted the absence of a bona fide belief in a right to reject the instructions as being unreasonable or unlawful or otherwise not binding.

[55] In *NZ (with exceptions) Food Processing etc IUOW v Unilever NZ Ltd* (1990) ERNZ Sel Cas 582 Goddard CJ stated at p592 that wilful disobedience contrasted with acts which were the result of the exercise of reason as opposed to mere whim.

[56] Travis J noted at p361 of *Sky Network Television* that the test was an objective one and a strongly held belief that had no bona fide or objective basis would not provide grounds for refusal to obey a lawful and reasonable instruction.

[57] In *Samuels v Transportation Auckland Corporation Ltd* [1995] 1 ERNZ 462 the Court held at p477 that there was nothing unfair or unreasonable in asking the applicant to perform duties he had previously performed.

[58] A failure to obey a lawful and reasonable instruction will not justify dismissal automatically in every case. The test is whether the conduct of the worker justified dismissal.

[59] I have found that the instruction was lawful and reasonable and that the disobedience was wilful. The final issue is whether the conduct justified dismissal.

[60] The action must impair the basic trust in the employment relationship

[61] I have no doubt that Mr Christiansen knew he was obliged to obey the instruction.

[62] The employer was entitled to give the instruction. Mr Christiansen was not entitled to refuse to obey it.

[63] I do not accept the submission that there was not an actual refusal to perform the task required. The instruction was to take the chickens to the factory not to Paerata Depot and leave them there.

[64] The employer was placed in an untenable situation by Mr Christiansen's refusal to take the chickens to the factory. Clearly the birds could not be left at Paerata. The fact that Mrs Rasing made an alternative arrangement so that the chickens would be delivered to the factory was something forced on her by Mr Christiansen's refusal. He cannot now say that his employer's response to his abnegation of his duties means there was no abnegation.

[65] Mr Finnigan submitted that as Mr Christiansen dropped the load at Paerata with his employer's knowledge and agreement it could not be said that he had walked off the job. That submission fails to take account of the fact that it was Mr Christiansen's actions in refusing to take the birds to the factory that led to his leaving them at Paerata. There was no agreement that this was an appropriate thing to do.

[66] Considering Mr Christiansen's conduct, there can be no doubt that it justified the employer in terminating his employment. Not only was he in the situation he was in because of his failure to refuel at an appropriate time, but he demonstrated an intention to ignore not only his employer's clear and legitimate instruction but also to disregard animal welfare considerations. Added to that was his abusive behaviour towards Mr and Mrs Rasing. His behaviour deeply impaired the trust essential to an employment relationship.

[67] I have referred to Mr Christiansen's abusive behaviour. The issue of verbal abuse was raised and addressed during the disciplinary interview.

[68] The dismissal was justified. Mr Christiansen does not have a personal grievance.

Costs

[69] Costs were reserved.

[70] If the parties cannot reach agreement on the issue of costs, the respondent should file a memorandum within 28 days of the date of this determination. The applicant is then to file a memorandum in reply within 14 days of receipt of the respondent's memorandum.

Dzintra King
Member of the Employment Relations Authority