

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Michael John Coleman (Applicant)  
**AND** Rotorua Forest Haulage Limited (Respondent)  
**REPRESENTATIVES** Fraser Wood for applicant.  
Simon Lance for respondent.  
**MEMBER OF AUTHORITY** Ken Raureti  
**INVESTIGATION MEETING** 1 November 2006  
22 December 2006  
**DATE OF DETERMINATION** 18 January 2007

DETERMINATION OF THE AUTHORITY

**Employment relationship problem.**

[1] Mr Coleman was employed as a truck driver by Rotorua Forest Haulage Limited (RFH). On the 28<sup>th</sup> April 2006 he was suspended from his employment on full pay and required to attend a disciplinary meeting on 3 May 2006. He attended the disciplinary meeting and was dismissed the following day on 4 May for refusing to obey lawful instructions in relation to carrying the truck trailer when returning empty to Rotorua, and for the taking of an unauthorised day away from work. RFH categorised those incidents as serious breaches. It indicated that whilst in its view those actions in themselves are sufficient to justify dismissal, Mr Coleman's refusal at the disciplinary meeting to acknowledge that they were serious breaches demonstrated a marked lack of understanding of his obligations as an employee, and in those circumstances terminated his employment immediately. Mr Coleman says his dismissal was unjustified on substantive and procedural grounds.

[2] RFH says it met its obligations as a good employer toward Mr Coleman. The company says Mr Coleman was dismissed for refusing to acknowledge that he was obliged to follow its lawful and reasonable instructions, and refusing to follow RFH's protocols and policies in relation to leave.

**Background.**

[3] Mr Coleman has been employed as a truck driver on and off since he was 18 years old which is when he first worked for RFH. He left when he was 20 and did not have much to do with RFH until 2004 when he started doing some part-time driving for the company carting sawdust to Katikati on Saturdays. At that time, Mr Coleman was also working full-time as a truck driver for Firth.

[4] In 2005 Mr Coleman left Firth and started full-time with RFH on the 4th April as he says RFH's offer of employment was too good to refuse. RFH had just secured a new contract with

Tachikawa to cart timber from Rotorua to Mount Maunganui. Mr Coleman was employed primarily to do that run.

### **Verbal agreement.**

[5] The core elements of his employment were agreed verbally, but were not confirmed in writing. Mr Coleman has childcare obligations which required him to be home before his partner started work at 4.30pm. This placed obvious limitations on the hours he could work, however they agreed that while the full optimal use of the truck was four loads per day, given his circumstances, he would only have to do three loads of timber per day, Monday – Friday and would work Saturdays if needed.

[6] To offset the lost revenue of not doing four loads per day, they agreed that on his return trips he would put the trailer up on the back of the truck instead of towing it back, the savings being made in the road user charges for the trailer. Two other key aspects of their verbal terms of employment were that he would not be required to tarp his loads (a time saving factor), and he would be paid \$16.00 per hour.

[7] There was one aspect of their verbal arrangements that they differed on; Mr Coleman says that they agreed that he would get a pay rise after six months, whereas Mr Tony Sargison, RFH's Operations Manager said the agreement was that they would review his wages with no guarantee of a pay rise.

[8] The six month pay review period is significant in that Mr Sargison's evidence was that Mr Coleman put the trailer up regularly for the first six months of his employment, and coincidentally it was only after the perceived pay rise was not granted at or around that period that Mr Coleman stopped putting the trailer up as required.

[9] Mr Coleman acknowledges that it was a requirement of his job that he was to put the trailer up on to the back of the truck on the return runs. He said that during the early period of his employment (from April until about early August) he had problems with loading the trailer on to the truck, and consequently, he towed the trailer back from Mount Maunganui. He said that he told the engineers on at least four or five occasions about the problem he was experiencing, and he would leave it with them to fix it. He says that after several trips in and out of the workshop, and trying different things, loading of the trailer was made easier particularly with the addition of another lifting chain configuration.

### **Analysis of truck & trailer RUCs.**

[10] It is apparent from analysing an RFH spreadsheet print-out of the daily running sheets for the truck (Reg# CPK868) and the trailer (Reg# E978U) that during April 05 the trailer was towed back rather than piggybacked 18 times out of 23 day trips being 79%, in May 05 it was towed back 17 times out of 25 day trips being 68%, in June 05 it was towed back 21 times out of 22 day trips being 96%, and in July 05 it was towed back 19 times out of 24 day trips being 79%. During the first 4 months, Mr Coleman towed the trailer back rather than carrying it for approximately 80% of the time.

[11] In August 05 (which is when Mr Coleman says the trailer was altered making loading easier) there is an almost reversal of the first 4 month trend. In August 05 he towed the trailer back 6 times out of 25 day trips being 24%, in Sept 05 twice out of 23 being 8%, in Oct 05 three times out of 22 being 14%, in Nov 05 eight times out of 21 being 38%, and in Dec 05 eight times out of 21, being 38%. For the 5 months from August to December 05, Mr Coleman towed the trailer back rather than carry it for approximately 24% of the time.

[12] The data for 2006 shows that in Jan 06, he towed the trailer back once out of ten day trips being 10%, Feb 06, six times out of 18 day trips being 33%, and then in March and April another reversal occurred almost reflective of the first 4 months. In March, he towed the trailer back 19 times out of 24 day trips being 79%, and April shows 15 times out of 18 day trips being 84%.

**Letter of 24 March 2006.**

[12] It is apparent that in the days preceding the 24<sup>th</sup> March, Mr Sargison discussed with Mr Coleman his concerns regarding Coleman towing the trailer rather than carrying it. Mr Coleman had raised concerns about the loading of the trailer with Mr Sargison, however he says he wasn't aware that Mr Sargison was unhappy with him for not putting the trailer up until around the 21<sup>st</sup> or 22<sup>nd</sup> March.

[13] Mr Sargison says Coleman's concerns were raised with one of their engineers who checked the truck and the lifting procedure. He says that it was his understanding that the engineer had checked with Coleman who responded that the gear was operating satisfactorily, however he continued to drive with the trailer down. Mr Sargison says he advised Mr Coleman driving with the trailer down was unacceptable.

[14] On the 24<sup>th</sup>, Mr Sargison approached Mr Coleman in the yard and gave him a letter which said.

*Good morning Mike*

**RE: CARRYING OF TRAILER**

*This is to confirm our discussion of the other day. When you are returning empty to Rotorua you are to carry your trailer on the back of your truck.*

*Regards*

*Tony Sargison*  
TRANSPORT MANAGER

[15] He said that he also gave Mr Coleman a verbal warning that this practice was unacceptable. He says that Mr Coleman screwed the letter up and threw it on the ground merely stating he wanted a pay rise.

[16] Mr Coleman says that when he read the letter he said to Tony, *This is bullshit, you know I am having problems with it*, and he screwed the letter up and threw it in the ground out of pure frustration.

**Sick day Monday 24 April.**

[17] On Sunday 23 April, Mr Coleman says he knew he was coming down with something and he wouldn't be able to work his Monday shift. He says he tried to contact RFH's dispatch but couldn't get through so he called his shift mate and asked him to cover his shift. He agreed to and did Mr Coleman's run that day.

[18] Mr Sargison says that there are correct procedures for advising of absences, and they are required to be followed. He says that the RFH dispatch is on deck 24 hours a day through phones that are redirected to mobile phones, and it was his understanding that there were no messages or phone calls to anybody from Mr Coleman. Mr Sargison said that the arrangement Mr Coleman made with the other driver meant RFH could not meet its other obligation with an export order and that in turn put the whole contract in jeopardy.

**Suspension.**

[19] On Thursday 27 April when Mr Coleman had returned to the yard from his shift, Mr Sargison approached him while he was in his truck and they were having a general conversation. Mr Sargison gave him a letter and told Mr Coleman to read it as he was suspended. The letter of suspension said:

Good morning Mike

- 1) *Further to our letter dated 24 March 2006 in regards to carrying your trailer when returning to Rotorua.*

*Your reaction to receiving the letter is totally unacceptable. Screwing the letter up and saying that you don't have to do it is just not acceptable.*

*You are still continuing to tow your trailer when returning to Rotorua empty.*

- 2) *On Monday 24 April 2006, you decided to take the day off and you organised your own relief driver (being the night shift driver). Due to this we missed our deliveries due that night which has put our contract in jeopardy.*

*Both of the incidents are now considered as serious misconduct.*

*Effective from today you are suspended.*

[20] The letter concluded with advising Mr Coleman that he must attend a meeting to discuss these incidents. He was advised to bring representation and to treat it with seriousness as his job may be in jeopardy.

### **Disciplinary meeting 3 May 2006.**

[21] During the meeting, they discussed the aspect of the trailer not being towed on the return trip to Rotorua. Mr Coleman says he told them that he had problems with putting the trailer onto the flat deck and that the trailer unit did not fit on the deck in a way that made carrying the trailer the most expeditious way to drive. During the discussions, Mr Coleman asked Mr Sargison when RFH was going to honour their agreement by reviewing his salary.

[22] In the discussions about Mr Coleman's absence on the 24<sup>th</sup>, the company was referring to it as an unauthorised absence whereas Mr Coleman was of the view that he acted responsibly by arranging cover and his absence was due to sickness, therefore being entitled to paid sick leave, not unauthorised absence.

[23] Both parties indicated that the meeting became heated, it deteriorated and became unproductive.

### **Letter of termination of employment, 4 May 2006.**

[24] The following day Mr Coleman received a letter advising him that his employment is being terminated effective immediately. The reasons for his dismissal were his *refusal to obey the lawful instructions of his employer in relation to the carrying of the trailer,.....followed by his response in screwing up the letter of warning, and.....you then continued to tow your trailer when returning empty.....At the meeting you continued to refuse to accept that you were obliged to follow the instructions of your employer.*

[25] A further reason related to *the taking of an unauthorised day away from work* and Mr Coleman's *unauthorised intervention* in arranging another driver to cover his shift, thereby jeopardising RFH's whole contract.

### **Legal Considerations**

[26] There are two predominant legal considerations for this matter. One of the considerations is in respect of Mr Coleman's suspension, and authorities for such situations are well canvassed in *Grey v Nelson Methodist Presbyterian Hospital* [1995] 1 ERNZ,672,694, and in *ASTE v Northland Polytechnic Council* [1992] 2 ERNZ 943, 961, see also *Birss v Secretary for Justice* [1984] 1 NZLR 513 (CA), especially the passages from the judgement of Richardson J at pp 517 and 521 cited in *ASTE*."

[27] The other legal consideration is that of s.103A of the Employment Relations Act 2000

**Test of justification**

*For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.*

[28] The Court has recently examined the test for justification (*Air New Zealand v Hudson* unreported AC 30/06). It was held there that the effect of s.103A is to separate out the employer's actions (including the decision to dismiss) for evaluation by the Authority or the Court against the specified objective standard of what a fair and reasonable employer would have done in the circumstances.

[29] At paragraph 144 the Court said in respect of the case before it:

*"The question is how would a fair and reasonable employer have acted in all the circumstances of this case. An employer does not have to prove that the incident which it characterised as serious misconduct happened. It must, however, show that it carried out a full and fair investigation which disclosed conduct which a fair and reasonable employer would regard as serious misconduct. The employer is not required to conduct a trial or even a judicial process but there are some fundamental requirements of natural justice which are appropriate and which, in this case, are reinforced by the company's policies. As part of a full and fair investigation, natural justice requires that an employee is given a proper opportunity to comment on the allegations made against her".*

[30] The Court noted that the objects of the Act including the obligation of good faith must inform any objective assessment of what a fair and reasonable employer would do in the circumstances.

**Discussions and Findings**

[31] There was no signed written employment between the parties; however, both parties agree that a key requirement of Mr Coleman's employment was that when he was returning empty to Rotorua, he was to carry the trailer on the back of the truck. Mr Coleman did experience difficulties with the loading of the trailer, but those problems were ironed out in the workshop with the trailer being able to be loaded safely although it may have taken a little longer than Mr Coleman may have liked. The problems were ironed out in late July (Mr Coleman's evidence) and are reflected in the RUC analysis particularly for the August 05 – December 05 period.

[32] I find it is likely that Mr Coleman sought a pay rise in early 2006 which was declined by RFH. This impacted on Mr Coleman's work, and it was a contributing factor to the reversal of the frequency of him towing the trailer back empty. The RUC analysis shows a reversal of the frequency of carrying the trailer back empty for the March/April 2006 period.

[33] Mr Coleman says he stopped carrying the trailer because of the problems he was experiencing with loading the trailer. I accept that loading of the trailer may not have been as quick and easy, or ideal as Mr Coleman may have preferred, however, it is my view that it was not as problematic as Mr Coleman described in his evidence. I draw that conclusion after arranging a site visit to RFH's yard where I observed Mr Coleman load and unload the trailer a couple of times. RFH then arranged for a forklift loading demonstration. During the demonstrations, Mr Coleman was explaining to me some of the difficulties he experienced, although he acknowledged during the demonstrations that the loading of the trailer wasn't too bad. Albeit that it was some seven months since he last loaded that trailer, Mr Coleman indicated that it was the same trailer he towed, and there did not appear to be any modifications to it. In other words, it was in pretty much the same condition for loading that it was when he was dismissed.

[34] Over the whole period of Mr Coleman's employment, the ratio of him towing the trailer back empty to carrying it on the truck was a 52/48 % split, almost 50/50. RFH did not satisfy me with any evidence that Mr Coleman was warned about not carrying the trailer back. The 24 March letter followed a discussion Mr Sargison had with Mr Coleman about towing the trailer, however it falls short of being able to be considered as a warning or a written warning. The letter does not reference to a warning, or being a warning, and importantly, it does not identify or clearly point out the consequences of not carrying the trailer.

[35] Mr Coleman had a right to clearly understand that the consequences of not carrying the trailer back may be termination of his employment. RFH had an obligation to ensure he knew and clearly understood what the consequences may be.

[36] Mr Coleman's absence on Monday 24 April was explained to RFH. Mr Coleman said he was sick and he arranged for another driver to cover for him. RFH have characterised it as *taking an unauthorised day*. Mr Coleman may not have followed the company's procedure in respect of the process of notifying absences, (although I was not satisfied on the evidence that a clear and well understood process is in place), but if he was sick, RFH had other avenues open to it to determine the genuineness or otherwise of the absence. To categorise it as *unauthorised* without further enquiry was premature but had serious consequences for Mr Coleman.

[37] After the 24 April absence, Mr Sargison suspended Mr Coleman by handing a letter to him in the yard when he returned from his run. A starting point for any suspension is whether there is a contractual ability to enable an employer to suspend an employee, and if there is a contractual ability, the general principle applying to the action of suspension carried out by an employer will usually require an employer acting fairly to consult with an employee about a proposed suspension before deciding whether and when to take that step. RFH had no contractual right to suspend Mr Coleman. In my view there was no immediate need to suspend, as there were no health and safety risks or other urgency. RFH was relying on Mr Coleman's reaction of screwing up the letter of 24 March, the fact that he was towing the trailer when returning to Rotorua and his absence on Monday 24 April. The manner in which the suspension was carried out could have been managed better.

[38] RFH had every right to make enquiries of Mr Coleman surrounding his absence and the fact that he was towing the trailer back empty. Dependent on the circumstances, RFH could have lawfully required Mr Coleman to carry the trailer back empty every time. That was their original agreement, it was not unreasonable, and it was also a general policy that RFH promotes to all drivers that they carry their trailer back if the situation allows.

[39] The disciplinary meeting was heated, RFH had two issues it was investigating and seeking Mr Coleman's explanations for, and Mr Coleman was also seeking an explanation from RFH in relation to his request for a pay rise. The meeting deteriorated and became unproductive, with the final outcome the next day being Mr Coleman's dismissal.

[40] Mr Coleman was dismissed for refusing to obey lawful instructions in relation to carrying the truck trailer when returning empty to Rotorua, and for the taking of an unauthorised day away from work. It is my view that before RFH could fairly and reasonably have arrived at such a decision, it was incumbent on it to clearly and unequivocally put the lawful instruction to him and the consequences of his failure to carry it out. RFH was not clear and unequivocal in its instructions, it was aware of Mr Coleman's protests, and whilst Mr Coleman may have refused at the disciplinary meeting to accept that he was obliged to follow RFH's instructions, in the clearer light of day, a written instruction to that effect may have achieved the necessary sobering tonic.

### **Determination.**

[41] Standing back and objectively considering RFH's actions, Mr Coleman's suspension and his summary dismissal for refusing to obey lawful instructions in relation to carrying the truck

trailer when returning empty to Rotorua and his absence on 24 April is not what a fair and reasonable employer would have done in all the circumstances. **Mr Coleman was unjustifiably dismissed; he has a personal grievance and is entitled to remedies in settlement of that personal grievance.**

### **Remedies.**

[42] Having concluded that Mr Coleman was unjustifiably dismissed, it follows that consideration must be given to the remedies available to him under sections 123, and 128 of the Employment Relations Act 2000. I am bound by s.124 of the Act to consider the extent to which Mr Coleman's actions contributed towards the situation that gave rise to the personal grievance, and if those actions so require, to reduce the remedies accordingly.

[43] Mr Coleman understood and agreed to the condition of his employment regarding carrying the trailer. After the trailer had been altered (late July-early Aug) to such a standard where he could safely and reasonably load it, he was obliged to do just that. His actions, or rather inaction relating to not carrying the trailer being spasmodic and intermittent his demonstrated belligerence toward his employer is blameworthy conduct on his part which constitutes contributory fault requiring a reduction of the remedies available to him by 40%.

[44] Mr Coleman indicates that for the three month period following his dismissal, his total lost wages were \$5,488.00 gross, and for the next four month period, he lost a further \$4,268.55. His claim for lost wages is not as simple as the gross amounts reflect, as RFH offered Mr Coleman interim reinstatement to a driving job until his substantive matter could be investigated.

[45] Mr Coleman did not accept the offer of interim reinstatement primarily because it was not back into his original job, and the hours of work being offered did not fit in with his childcare commitments. Mr Coleman's hours of work and his childcare arrangements were very important to him, which is why they negotiated the special conditions of employment in the first place. If RFH's offer of interim reinstatement were substantially the same, particularly if it catered for his childcare responsibilities, that in my view would have disqualified him from any loss of wages remedy. However, RFH knew of his particular circumstances and therefore it was reasonably foreseeable that he would decline their offer.

[46] In the circumstances, this is not a case where the Authority should exercise its discretion under s.128 (3) and order an amount greater than the lost wages for the first three month period. Mr Coleman is entitled to \$3292.80 as lost wages under s.128 (2) of the Employment Relations Act 2000. **Rotorua Forest Haulage Limited is required to pay Mr Coleman that amount.**

[47] I am satisfied on the evidence that Mr Coleman has suffered some humiliation, loss of dignity and injury to feeling as a result of his personal grievance. **Rotorua Forest Haulage Limited is required to pay Mr Coleman \$2500.00 under s.123 (1) (i) of the Act.**

### **Costs.**

[48] Costs are reserved. The parties are requested to attempt to resolve that issue themselves. In the event that costs are not resolved, Mr Wood is invited to file submissions with the Authority and copy to Mr Lance within 28 days of the date of this determination. Mr Lance will have a further 14 days to respond and copy to the Authority and Mr Wood.

Ken Raureti  
Member of Employment Relations Authority

