

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 351
5450231

BETWEEN

REX MARTIN COMINS
Applicant

A N D

BR & SL PORTER LIMITED
Respondent

Member of Authority: James Crichton

Representatives: Phillip Comins, Advocate for the Applicant
Mark Beech and Jeremy Sparrow, Counsel for the
Respondent

Investigation Meeting: 26 August 2014 at Tauranga

Date of Determination: 28 August 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Comins) alleges that he was unjustifiably dismissed from his employment by the respondent (Porters) while Porters resists that claim, and counter claim for alleged over paid wages.

[2] Mr Comins was employed by Porters as a driver and had worked for Porters in that capacity since 2008. By common consent, the relationship was casual in nature until March 2011 when Mr Comins became a permanent employee. That permanent engagement was confirmed by the execution of a written employment agreement recognising his permanent status.

[3] On 2 October 2013, Mr Comins was involved in a serious truck accident near Cambridge while driving one of Porters' vehicles. Mr Comins was not to blame but because the accident involved two trucks, an investigation by the Commercial Vehicle Investigation Unit (CVIU) was undertaken.

[4] Amongst other things, CVIU obtained copies of both drivers' logbooks and obtained various other information in respect of the vehicles involved and the drivers of them.

[5] As a consequence of the CVIU inquiries into the accident in question, the CVIU advised Mr Bruce Porter, the Manager Director of Porters, that there were certain logbook irregularities in respect of Mr Comins' practice.

[6] Mr Porter referred the matter to his general manager, Mr Carroll.

[7] Subsequently, Porters' despatch team advised Mr Carroll that it appeared that Mr Comins had falsified his logbook for Christmas Day 2013.

[8] Mr Carroll summoned Mr Comins to a meeting which took place on 31 December 2013. Mr Comins was not told he could bring a support person to that meeting.

[9] There is some dispute about how long the meeting took and what its content consisted of, but it is common ground that in that meeting, Mr Comins, under pressure from Mr Carroll, made admissions that he had in fact falsified his logbook for Christmas Day 2013. There was some discussion between the two men about the prospect of other irregularities in respect of Mr Comins' logbook practice, but in the result no attempt was made to finalise those other issues.

[10] Mr Carroll took the view that the admission made by Mr Comins went to trust and confidence and he dismissed Mr Comins summarily at that meeting.

[11] Mr Comins subsequently raised a personal grievance and after an unsuccessful mediation, the matter proceeded to the Authority for determination.

Issues

[12] There are two matters that the Authority must address. The first is the question whether Mr Comins was unjustifiably dismissed or not and the second is whether the counterclaim filed by Porters has been made out.

[13] Accordingly, I propose to address the following questions:

- (a) Was Mr Comins unjustifiably dismissed; and

(b) Is the counterclaim made out?

Was Mr Comins unjustifiably dismissed?

[14] I am satisfied on the evidence that Mr Comins was not unjustifiably dismissed from his employment. I agree with Mr Comins that the procedure adopted by Porters was far from perfect, but I have not been persuaded that it resulted in any unfairness to Mr Comins. Given the admission made by Mr Comins about the falsification of his logbook for Christmas Day 2013, it is difficult to see how an employer in Porters' position could not have lost significant trust and confidence in Mr Comins.

[15] Moreover, I must consider the resources available to Porters in dealing with matters of this kind, such as the availability of in-house human resources specialists and the like and in that regard, I think the approach undertaken by Porters, a small to medium sized employer, while far from perfect was good enough to ground a fair dismissal.

[16] Fundamental to this case is the obligation resting on both employer and employee to abide by the requirements of the relevant provisions of the Land Transport Act 1998 (the 1998 Act) relating to the operation of commercial vehicles on New Zealand roads.

[17] While it is apparent that employers have obligations in respect of the 1998 Act, the primary or initiating obligation under the 1998 Act rests with the driver of the vehicle. It is apparent from Mr Comins' evidence that he had a somewhat flexible view of his obligations in respect of the maintenance of his logbook and the obligations that rested on him in respect of that logbook.

[18] Mr Comins maintained in his evidence that other drivers employed by Porters had similar views and behaved similarly but Porters denied that and there is no evidence before me to support Mr Comins' contention.

[19] Moreover, Mr Comins was a driver with 13½ years of experience in the trucking business and yet his testimony proceeded on the footing that he had little or no idea of the statutory obligations resting on him as a consequence of the relevant provisions of the 1998 Act.

[20] This was so notwithstanding the clear evidence before me that the individual employment agreement between Mr Comins and Porters, the code of conduct applicable to the employment relationship, and the job description identifying the duties of the position all evidenced the reiteration of the statutory obligations resting on a professional driver in terms of the 1998 Act.

[21] Amongst other things, I am satisfied on the evidence I heard that Mr Comins was inducted into his driving role at Porters with an introductory programme which emphasised the importance of complying with the statutory obligations pertaining to the maintenance of logbooks. Furthermore Porters told me (and I accept) that its despatchers regularly emphasised to drivers their obligations in relation to the maintenance of the logbooks.

[22] At least in part as a consequence of the claims made by Mr Comins in this proceeding, Porters has initiated regular toolbox meetings with drivers to emphasise their obligations under the law and pursuant to contract.

[23] As if all of this is not sufficient to emphasise the point, each driver's logbook commences with an explanatory note in plain language which identifies the obligations of the driver and the penalties for non-compliance.

[24] I am satisfied then that there is a wealth of material before me to evidence the point that Mr Comins knew or ought to have known what his obligations were in respect of the maintenance of an accurate logbook. He was an experienced commercial truck driver. He had worked for a number of different entities in 13½ years in the industry including as an owner/driver. He had received induction and regular supervisory reinforcement identifying his statutory obligations. His logbook, consistent with all other drivers' logbooks, had a plain language explanation at the beginning about what the obligations of a driver were. The evidence that other drivers at Porters had a similarly "*flexible*" view of logbook matters was simply not borne out; indeed, there was no evidence at all before the Authority that any other driver at Porters was in any doubt about what was required of them.

[25] Mr Comins was dismissed for falsifying his logbook on Christmas Day 2013. He acknowledged when confronted that he had done that. In dismissing him for that offence, the employer relied on clause 10.4 of the operative individual employment agreement. The thrust of that provision is that Porters could dismiss for breaches of

the code of behaviour which code included a provision requiring employees to “*properly and accurately ... maintain ... logbooks ...*”.

[26] While as I noted earlier in this determination there is some dispute about exactly what happened at the 31 December 2013 meeting between the principal protagonists, it is common ground that one of the things that did happen at that meeting was that Mr Carroll for Porters put to Mr Comins the allegation that he had falsified his logbook for Christmas Day 2013 and Mr Comins eventually conceded that that was precisely what he had done. In my considered view, that exchange comprises a virtuous circle which supports the substantive decision to dismiss Mr Comins for serious misconduct.

[27] As Porters was at pains to point out in its evidence to me, not only does falsifying a logbook constitute a breach of the driver’s statutory obligation in terms of the 1998 Act but it also potentially constitutes the fraudulent misrepresentation of the driver’s entitlement to payment for the hours allegedly worked as well as putting a variety of the employer’s interests at risk. In that latter connection, Porters referred to its obligations under the 1998 Act, which amongst other things required it to ensure that its drivers complied with the law, the effect on its business if the authorities were to lose confidence in the business because of the failure of an employee to fulfil their obligations, and the possible impact on its insurance position.

[28] Mr Comins argued that, contrary to Porters’ allegations, he was not actually paid money that he was not entitled to and therefore it could not be said that he was guilty of dishonestly claiming wages he was not entitled to. Certainly it is accepted as a fact that, because of his admission on 31 December 2013 that he had falsified his logbook, Porters was able to amend the pay run so as to record the correct pay for Mr Comins for the day in question. The effect of this amendment was to ensure that Mr Comins was not overpaid. But that does not alter the fact that he fraudulently claimed moneys that he was not entitled to and that claim was the basis of the dismissal.

[29] Mr Comins also alleges, as well as claiming there was no substantive justification to dismissal, that there were procedural irregularities in the dismissal which rendered the decision to dismiss unsafe. I have already indicated my general view that the process adopted by Porters was not perfect but that I am satisfied that the procedural irregularities had no impact on the outcome.

[30] I have been referred to a decision of my colleague, Member Doyle in *Mitchell v. Quality Bakers South*, ERA Christchurch CA135/03, 16 December 2003, where at para.[25] of the determination, the Authority had this to say:

There are situations where the absence of any real opportunity to be represented may not have had an impact on the outcome of the investigation process.

[31] I am satisfied this was such a case. The principal complaint made on Mr Comins' behalf about the procedure was the failure of Porters to encourage him to get a support person or representative at the disciplinary meeting. There can be no doubt that the better view is that an employer conducting a disciplinary inquiry ought to propose, suggest or encourage an employee affected to obtain advice or at the very least obtain a support person for any discussion that the employer proposed to have in relation to the matters of concern. Here, I am simply not persuaded that the absence of such a support person would have had any effect on the outcome.

[32] There was no power imbalance between the parties. Mr Carroll for Porters gave evidence to me, which I accept, that he had always had a good working relationship with Mr Comins. The two men were of an age and both struck me as practical and down-to-earth in their approach.

[33] Mr Comins, when pressed by Mr Carroll during the meeting, made an admission which, as I have already indicated effectively closed down Porters' need to conduct further inquiries. No amount of advocacy or support could change that fundamental reality. Even if an able advocate had been able to prevent Mr Comins from making the admission which concluded Porters' inquiry, I am satisfied on the evidence before me that there was still a wealth of material which would have justified Porters' conclusion that Mr Comins did not properly maintain his logbook in accordance with the law.

[34] Despite the fact that submissions for Mr Comins rested more or less exclusively on the failure of Porters to encourage Mr Comins to get a support person for the disciplinary meeting, there are other deficits in the process which need to be commented on. Mr Comins also alleged in passing that Mr Carroll had closed his mind to the issue, was not interested in what Mr Comins had to say, and in particular had made a decision to dismiss before the parties had actually met.

[35] Mr Carroll denies this and I prefer his evidence to Mr Comins'. I prefer it at least in part because Mr Carroll's recollection of the events is more consistent with what we know about the meeting. First, by common consent, the meeting was far more than perfunctory; the meeting on 31 December 2013 took at least three quarters of an hour which does not suggest the employer was going through the motions.

[36] Moreover, I prefer Mr Carroll's evidence that he had to encourage Mr Comins to make the admission he made (that he had falsified his logbook on Christmas Day) which again suggests that Mr Carroll was looking for answers rather than having a closed mind on the subject.

[37] Mr Carroll's evidence is that Mr Comins initially denied falsifying the logbook but then when pressed by Mr Carroll, admitted that he did it and also explained why he did it which was that he was cross about missing out on lucrative Christmas Day work which he believed had been allocated to other staff when it should have been allocated to him. Those admissions, made to Mr Carroll, were absolutely consistent with Mr Comins' evidence to me about what happened and so I am satisfied I can rely on them.

[38] I conclude then that the meeting was a genuine opportunity for the parties to engage about the concerns the employer had and that the allegation that Mr Carroll had already decided to dismiss prior to the meeting is simply not made out.

[39] The next issue I come to is the apparent failure of Mr Carroll to retire to reflect on what he heard (the admission) and his move to immediately indicate that summary dismissal was the appropriate outcome. While again the better view is that an employer should not move directly to confirming a final disposition of a disciplinary matter before giving the affected employee another opportunity to comment, especially on penalty, that process did not happen here.

[40] Certainly, employers should be cautious about adopting a truncated process of the sort used here, but again I am satisfied that even if there had been an opportunity for Mr Comins to comment on penalty, the outcome would have been the same and while the whole process was dealt with in a truncated fashion, given Mr Comins' admission of serious wrongdoing, it is difficult to see what else could be gained in terms of fairness by an adjournment.

[41] In the same general connection, it is apparent that there is no need for any further inquiry to be made by the employer because there has been a straightforward admission which comprehensively responds to the employer's concerns.

[42] Mr Comins protests that the letter that he obtained from the employer post-dismissal recording the reason for the dismissal does not elegantly reflect the actual basis of the dismissal. I agree that the letter in question is not written by a lawyer but written by a practical hands-on manager and as Porters' able counsel properly conceded, could perhaps have been better phrased.

[43] I am satisfied though that the letter is clear enough and that both parties knew that the decision to dismiss was based exclusively on the falsification of the logbook for Christmas Day 2013. That said, there were some indications at the disciplinary meeting that there may have been other days on which the employer considered that Mr Comins had falsified his logbook and as a consequence sought and obtained payment for work that he had not performed. That of course is the subject of Porters' counterclaim.

[44] I am satisfied those other allegations formed no part of the decision to dismiss, were never formed up in a way that was explicit enough to justify or require a response and therefore need not be considered further in relation to the allegation of unjustified dismissal.

[45] Accordingly, I have concluded that a good and fair employer could conclude that Mr Comins was guilty of serious misconduct when he admitted that he had falsified his logbook for Christmas Day 2013 and that in consequence the only possible way in which the matter could be responded to was by way of summary dismissal.

[46] In reaching that conclusion, I emphasise that all the law requires me to do is to identify that the decision which Porters made in this particular case is one of the decisions that a good and fair employer could make in the particular circumstances of this case, not the only one. It is conceivable that, based on the factual matrix, another good and fair employer in the same position could have concluded that dismissal was too harsh a penalty and that some other form of disciplinary sanction could have applied.

[47] But all the law requires is that I satisfy myself that the decision this employer made was one of the decisions available to it and I am satisfied that was the case here. It seems to me inevitable that any employer in the situation that Porters was in would have had its trust and confidence in Mr Comins seriously displaced by his behaviour, and behaviour which was admitted, and in those circumstances, I am satisfied that the decision to dismiss can stand.

[48] In considering the process adopted by Porters, I have already made clear that it was not a perfect process but I am satisfied that given the size of the employer and the relative power balance between the principal protagonists, the defects in the process were minor and did not result in unfairness: s.103A(5) Employment Relations Act 2000 (the Act) applied.

[49] Looked at in the round, I am satisfied that the employer sufficiently investigated the allegations against Mr Comins, gave Mr Comins a proper opportunity to be heard, provided an appropriate environment in which Mr Comins could respond and then considered that response before making the decision to dismiss.

[50] It follows from the foregoing analysis that Mr Comins' claim of unjustified dismissal must fail.

What about the counterclaim?

[51] Porters filed a counterclaim with the Statement in Reply which sought repayment of wages allegedly overpaid to Mr Comins during the employment, prior to the Christmas Day event which resulted in his dismissal. The amount claimed is \$2,446.01 and the Authority has been provided with the working papers which justify that amount.

[52] I indicated to the parties during the investigation meeting that I preferred to deal with the issue of liability in relation to the alleged unjustified dismissal first and that I was likely to direct the parties to engage with each other to discuss the counterclaim if I was satisfied in principle that there may be some moneys owed by Mr Comins to Porters. The view I expressed at the investigation meeting remains my view.

[53] One of the challenges for me in identifying whether moneys have been overpaid or not is the number of base records of hours worked. It was apparent on the

evidence that the principal source was the logbook itself but of course Porters says that Mr Comins falsified the logbook on Christmas Day 2013 (an allegation I have accepted and which grounds the dismissal), but it also alleges that he did this regularly in relation to other days as well. If that allegation can be made out, then in principle that may support the counterclaim.

[54] But it is common ground that, as well as the logbook, there are other documents which record hours worked. The explanatory note at the commencement of the driver's logbook makes clear that drivers are to be paid for hours that they are employed, not just hours that they are driving. Because of that, there seemed to have been a variety of devices for recording what I might call additional time. In particular, from time to time Mr Comins would file a timesheet additional to the logbook which would justify additional payments and there was another document held by the despatchers for the same purpose. Mr Carroll's evidence was that at no time had he ever quarrelled with a driver who sought additional payment in this way. Put another way, those payments sought by drivers additional to the logbook were always paid.

[55] In Mr Comins' case, there was also another potential source of recording of hours worked. Mr Comins maintained a diary which he said recorded those additional hours. But the employer did not know about that diary and had never seen it and I ruled at the commencement of the investigation meeting that it was not going to be admitted into evidence because it could only represent, at best, Mr Comins' view about what he was entitled to by way of additional payment for hours allegedly worked.

[56] Given that I am satisfied that the parties need to engage with each other in respect of the alleged overpayment framed as the counterclaim, it may be that Mr Comins' diary can be of some assistance in identifying if in fact there has been overpayment or not. It will, of course, be a matter for Porters as to whether it accepts any of the material from Mr Comins' diary; given it did not know of its existence and had not mandated its use as a record-keeping tool, it will need to make its own decisions about whether the material recorded therein has any force or effect.

[57] I am satisfied that the proper course of action in relation to the counterclaim is to direct the parties to engage with each other to see if they can resolve that matter by agreement. Failing agreement, I would want to talk to the parties' representatives

again with a view to determining how that outstanding matter can be disposed of by the Authority.

Determination

[58] I am satisfied that Mr Comins does not have a personal grievance. His dismissal in my judgment was a dismissal that a fair and reasonable employer could have made in the circumstances of the case where he had admitted to falsifying his logbook for Christmas Day 2013. It follows that Mr Comins' case fails in its entirety.

[59] Porters has filed a counterclaim alleging that it overpaid Mr Comins. The calculations justifying that apparent conclusion were undertaken after the dismissal of Mr Comins for misconduct in falsifying his logbook. I direct that the parties' representatives are to engage with each other with a view to seeing if the matter of the counterclaim can be resolved by agreement. If the matter is not able to be resolved by agreement, counsel for Porters is to advise the Authority and I will convene a further telephone conference to determine the disposition of the counterclaim.

Costs

[60] Costs are reserved in respect of the disposition of the personal grievance claim. The parties are urged to engage with each other in the context of the discussions I have directed on the counterclaim to see if the costs issue can be resolved by agreement as well.

[61] Failing that, counsel for Porters, the successful party, is to file and serve a memorandum seeking the Authority to fix costs, and Mr Comins will then have 14 days from his receipt of that memorandum to file a memorandum in response.

[62] The Authority will then fix costs on the papers.

James Crichton
Member of the Employment Relations Authority