

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 222/10
5135322

BETWEEN DARYL FALCON
 Applicant

A N D AIR NEW ZEALAND
 LIMITED
 Respondent

Member of Authority: Philip Cheyne

Representatives: Fay Birch, Representative for Applicant
 Kevin Thompson, Counsel for Respondent

Investigation Meeting: 3 December 2010 at Christchurch

Determination: 6 December 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Daryl Falcon says that he has a personal grievance following his dismissal for serious misconduct on 11 April 2008 after an accident while he was driving a cart on the ramp at Christchurch airport. His claim is for reinstatement and compensation. In its amended statement in reply Air New Zealand says that it justifiably dismissed Mr Falcon following a full and fair investigation which led it to conclude that Mr Falcon was guilty of serious misconduct in the way he drove the cart. It also seeks as damages from Mr Falcon the costs of repairing the cart.

[2] After the statement of problem (30 October 2008) and first statement in reply (20 November 2008) were lodged the parties agreed to mediation. Despite mediation the matter was not resolved.

The Authority's investigation process

[3] The material provided to the Authority caused me to think that this appeared to be a weak grievance claim. I decided that Mr Falcon should provide his and any other supporting statements of evidence for the Authority to review before deciding who needed to give evidence for Air New Zealand. During a phone conference on 31 March 2009 it was agreed that Mr Falcon would do this by no later than 18 May 2009. The agreement was formalised into a notice of directions.

[4] 18 May 2009 came and went without Mr Falcon complying with this direction.

[5] By email on 12 June 2009 Mr Falcon's default was brought to the attention of his representative. That prompted a call to the Authority on 20 July 2009 with the explanation that Mr Falcon had been unwell but was to see the representative that day. The representative requested until 7 August 2009 to lodge and serve statements of evidence. My agreement to that request was confirmed by email on 20 July 2009.

[6] 7 August 2009 came and went without Mr Falcon complying with this direction.

[7] On 30 April 2010 I asked the support officer to arrange a further phone conference to try and progress the matter. As usual there was an attempt to get an agreed date. Ms Birch eventually responded and there was a conference on 24 June 2010. The following extract from the notice of directions following the conference captures some of the discussion:

[2] Ms Birch confirmed that the applicant wishes to progress this matter and is now in a position to do so. Mr Thompson raised the matter of the applicant's failure to comply with the previous timetable. However, it remains incumbent on the Authority to investigate matters.

[3] It was agreed:

(a) ...

(b) ...

(c) Within 1 month of day's date (ie by no later than Wednesday 23 July 2010) the applicant will lodge and serve statements of evidence and all relevant material, including video(s) and surveys.

[8] On 21 July 2010 the Authority received an email from a Department of Labour information officer who had apparently received a phone call from Ms Birch to the effect that a barrister would advocate for Mr Falcon at the Authority and would be making a request for an extension of time for the statements of evidence. The email also says *Fay Birch will send in a letter tomorrow ...*

[9] *Tomorrow* and 23 July 2010 came and went without anything further happening. The support officer's follow up call to the barrister produced the response *I was approached by Fay in relation to this file. A follow up meeting was missed by client. I do not yet have instructions.*

[10] I decided to schedule an investigation meeting for 3 December 2010. The notice of meeting was accompanied by further directions including:

[3] *If Mr Falcon does attend, I will give him an opportunity to explain his default this far and either dismiss the matter or make arrangements for further investigation.*

[11] Mr Falcon attended with Ms Birch today. His explanations for the default are that Ms Birch was sick, his marriage fell apart, he was involved in a custody battle, there were difficulties getting in touch with witnesses, he made unsuccessful attempts to instruct another representative and the effect of the earthquake on Ms Birch's access to her office. Mr Falcon said that he has appointments with two possible representatives next week on Monday and will advise the Authority on Tuesday as to his representative.

[12] For Air New Zealand it is submitted that Mr Falcon's inordinate and inexcusable delays and defaults are an abuse of the Authority's process. Counsel makes the point that Mr Falcon never even did anything to rectify his default in advance of today's investigation meeting; nor has there been any apology. I am referred to several cases including *646 Victoria (Hamilton) Ltd v Kathryn Anne Phillips* AC29/07, 23 May 2007. In that case the Employment Court struck out a challenge to an Authority determination because of the plaintiff's repeated failure to comply with the directions of the Court. I am asked to strike out Mr Falcon's proceedings.

[13] Although not quite for the reasons submitted by counsel I will bring this investigation to a conclusion now. The Authority is an investigative body that has the role of establishing the facts and making a determination according to the substantial

merits of a case: s.157(1). In carrying out its role the Authority must comply with the principles of natural justice, aim to promote good faith behaviour and generally further the objects of the Act: s.157(2). Normally, the Authority bases its determinations on evidence given on oath but that is not an absolute requirement. The Authority may follow whatever procedure it considers appropriate: s.160(1)(f). In particular, s.160(2) provides that the Authority may take into account such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not.

[14] Mr Falcon has had more than an adequate opportunity to provide the Authority with material and evidence to support his claim of unjustified dismissal. I am not prepared to allow any further opportunity because I can have no confidence that there will not be further non compliance with directions made by the Authority. In reaching that conclusion I am particularly influenced by Mr Falcon's claim that next week is the earliest that he could get an appointment with other potential representatives. The problem is not the limited availability of such representatives but Mr Falcon's delay in initiating any arrangement. It is extraordinary that Mr Falcon did not initiate something the very day Ms Birch on his behalf received the notice of meeting and notice of directions, more than a month ago. He should have understood his claim was in a parlous state and taken immediate step to remediate it. There is a limit to the time that the Authority will devote to matters such as this (to the detriment of other more interested claimants) and it has now been exceeded. There is also a limit to what the Authority will require from a respondent to defend its actions. That too has been exceeded. The default is all the worse for this being a reinstatement claim.

[15] On the material available to the Authority I conclude that Mr Falcon was justifiably dismissed. There was an accident when he was driving the cart. That resulted in minor injuries to himself and his passenger and damage to the cart. Air New Zealand investigated that incident by getting statements from witnesses including the passenger and Mr Falcon. The passenger said *Daryl was driving too fast and he was skidding in the wet*. Others supported the view that Mr Falcon was deliberately skidding the cart. A report was compiled and given to Mr Falcon. He was called to disciplinary meetings and given a chance to put his side of the incident. After listening to Mr Falcon's explanations the relevant manager decided that his driving was reckless, he was speeding and that this amounted to serious misconduct. Mr Falcon was given a further opportunity to say anything in mitigation, following

which he was advised of his dismissal. Later that was put in writing. The information before the Authority indicates that Air New Zealand complied with its disciplinary processes and treated Mr Falcon in a dignified manner. I find that Air New Zealand's actions and how it acted were those of a fair and reasonable employer in all the circumstances.

Counterclaim

[16] Counsel seeks an order that the respondent be at liberty to pursue its counterclaim against Mr Falcon within two months, while acknowledging that it is unlikely to be an economic prospect in light of the small sum involved. It is fair to say that the purpose of the counter-claim is to deter Mr Falcon from pursuing his grievance since there is an open offer to that effect.

[17] I think the better course is to bring everything to an end now and decline the counterclaim. It is essentially a common law claim for damages for breach of an implied term of the contract. That is not a matter that I would resolve without evidence on oath.

Summary

[18] Mr Falcon was justifiably dismissed.

[19] Air New Zealand seeks costs of \$3,000.00. That is the sort of sum that might have been ordered if there had been a day long investigation meeting so I think the award should be a more modest sum. I will fix costs as if there had been a half day investigation meeting. Mr Falcon must pay Air New Zealand costs of \$1,500.00.

[20] Air New Zealand's counter-claim does not succeed.

Good faith

[21] In my view Mr Falcon has obstructed rather than facilitated the Authority's investigation and has not acted in good faith towards Air New Zealand.

Philip Cheyne
Member of the Employment Relations Authority