

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 137/08  
5096847

BETWEEN

FRANK FARNAN  
Applicant

AND

BLACKTOP  
CONSTRUCTION LIMITED  
Respondent

Member of Authority: R A Monaghan  
Representatives: F Farnan, in person  
J Phipps, Advocate for Respondent  
Investigation Meeting: 28 February 2008  
Submissions received: 7 March 2008 from Respondent  
Determination: 11 April 2008

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**DETERMINATION OF THE AUTHORITY**

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## **Employment relationship problem**

[1] Blacktop Construction Limited (“BCL”) employed Frank Farnan as a mechanic/serviceperson commencing 23 May 2005. It dismissed him following repeated failures to follow reasonable instructions.

[2] Mr Farnan says the dismissal was unjustified and has raised a personal grievance.

## **The employment relationship**

### **1. General background**

[3] In his position as mechanic/service person, Mr Farnan was required to attend to BCL’s internal vehicle repair and service needs, as well as to emergency

breakdowns. Ben Everett, a director of the company as well as its resource manager, recruited him for that purpose, but as the employment relationship proceeded Mr Everett became increasingly concerned that Mr Farnan was causing more problems than he was fixing. In particular Mr Farnan was undertaking or ordering repairs which were not necessary or which he was not in a position to authorise. In doing so he was also exercising initiative and judgment in ways that were cutting across BCL's procedures and lines of authority.

[4] Mr Everett sought to correct the problem by raising informally the company's requirement that Mr Farnan follow instructions, before convening a more formal meeting in July 2006 to discuss his concerns. To that end he prepared a lengthy list of duties, together with procedures Mr Farnan was to follow in carrying them out. By agreement at the meeting Mr Farnan's duties were amended to focus on maintenance, and Mr Everett expressly instructed Mr Farnan not to carry out any mechanical repairs unless instructed to do so by Mr Everett or one of the supervisors. Mr Everett further instructed Mr Farnan not to involve himself in a number of other matters unless he was directed to do so by Mr Everett or one of the supervisors. If Mr Farnan had any concerns he was to bring them to the attention of Mr Everett or one of the supervisors. All of this was reduced to writing.

[5] In September 2006 Messrs Farnan and Everett had a discussion about payment for overtime, and again reduced their arrangement to writing. Even that document repeated Mr Everett's requirement that Mr Farnan undertake duties in accordance with the list of duties. Mr Everett said in evidence that he also reminded Mr Farnan to phone for instructions if necessary.

[6] Mr Farnan believes the termination of his employment evolved from that discussion, because he believes Mr Everett thought he was being paid too much.

## 2. First warning

[7] On 14 March 2007 Mr Everett instructed Mr Farnan to take some spare parts to a service repair agent, Turnco Engineering. Mr Farnan did so, only to find that the vehicle for which the parts were intended was not there. He went to another agent (where the vehicle had been taken in error), left the parts and instructed that agent to

complete the repair. The incident was minor in itself, but BCL had a service arrangement with Turnco Engineering. Mr Farnan was not authorised to have the repair completed by the second agent, and his action was inconsistent with BCL's arrangement with Turnco.

[8] A meeting was held on 15 March to discuss the matter. Mr Farnan acknowledged he had made a mistake, and when asked why he had not contacted Mr Everett about whether or not the vehicle should be repaired at the other agent's he indicated he did not wish to question Mr Everett.

[9] The meeting then turned to a discussion about the application of the arrangement regarding overtime, but I do not accept that any associated disagreement or concern caused Mr Everett to 'contrive' Mr Farnan's dismissal.

[10] Mr Everett told Mr Farnan he would receive a verbal warning for not following instructions. Further, Mr Everett urged Mr Farnan to contact him if he thought 'something was not right'. The warning was confirmed in writing, together with advice that the warning would stay on Mr Farnan's file for 6 months. The letter said further similar behaviour within that period may result in a final written warning, or dismissal.

### 3. Final written warning

[11] In July 2007 Mr Farnan instructed an auto electrician to undertake a repair, even though he knew he was not authorised to issue the instruction. Further, he did not report the fault in question.

[12] A meeting to discuss the matter was held on 8 July. On Mr Everett's instruction Sarah Jones, the health and safety training manager, conducted the meeting. Mr Farnan told Ms Jones he had attempted to contact the two supervisors for authorisation, but neither was available. He asserted that he was not allowed to call Mr Everett. However by then, as part of the attempt to correct Mr Farnan's inappropriate exercises of initiative, Mr Farnan had been told several times that he should contact Mr Everett if there was a problem and the matter was referred to in his earlier warning.

[13] Mr Farnan told Ms Jones he decided to call the electrician to make the repair as he did not wish to hold up other work which was ready to proceed.

[14] Ms Jones told Mr Farnan he would receive a written warning for failing to follow instructions. A final written warning was issued in a letter dated 9 July 2007. The warning was to be in force for 6 months, and provided that further failure to follow instructions may result in dismissal.

### 3. Incident leading to dismissal

[15] On 22 July 2007 Mr Everett instructed Mr Farnan to collect a set of front and rear axle assemblies, and return and store them on an old truck chassis in BCL's yard. When Mr Farnan arrived at the yard with the assemblies, he found another axle assembly had been stored on the chassis. There was no room for his assemblies. He assumed the other assembly had been put there on Mr Everett's instructions, which was not the case. He and the employee responsible for the second assembly decided to store Mr Farnan's assemblies somewhere else. The place they chose was not suitable.

[16] Mr Everett was concerned when he saw the placement of Mr Farnan's assemblies, and because Mr Farnan had not contacted him to advise the original instruction could not be followed. He spoke to the other employee, who was cautioned. He also convened a disciplinary meeting with Mr Farnan. The meeting went ahead on 23 July 2007.

### 4. The decision to dismiss

[17] During the disciplinary meeting Mr Farnan gave his account of his actions, including his assumption that the other employee had been acting under instruction. He accepted he did not confirm this with the other employee. He also accepted that he should have contacted Mr Everett, but said that it was not for him to question orders. Finally he accepted that he made mistakes, but said he was not deliberately disobedient.

[18] Mr Everett took a break to consider his decision. On his return he advised that - with reference to the previous warnings, Mr Farnan's failure to contact him over the difficulty with the placement of the axle assemblies, and the failure to follow instructions in that respect - he did not believe that Mr Farnan would change. Mr Farnan's employment would have to end. At the same time Mr Everett said he respected Mr Farnan and considered him a man of honour, so offered Mr Farnan the opportunity to continue working for a 'couple of months' until he found another job.

[19] Mr Farnan chose to leave immediately.

[20] The dismissal was confirmed in a letter dated 26 July 2007

### **Justification for the dismissal**

[21] Mr Farnan says his dismissal was unjustified because:

- (a) it was contrived following the discussions concerning overtime and because Mr Farnan earned too much;
- (b) the incident giving rise to it was trivial;
- (c) the other employee was given only a caution;
- (d) Mr Farnan did not receive copies of the minutes of the disciplinary meetings preceding the warnings; and
- (e) a replacement employee had been engaged before Mr Farnan's dismissal.

[22] I do not accept the dismissal was contrived. It was imposed for genuine reasons, being those Mr Everett cited.

[23] I might accept that, individually, the incidents which led eventually to Mr Farnan's dismissal were trivial, but they were symptoms of a more significant underlying problem. That was Mr Farnan's tendency to do things his way, and Mr Everett's lack of success in correcting the problem. The two men had discussed the need to follow instructions, and the further need to contact Mr Everett in case of doubt. However Mr Farnan continued to: exceed the boundaries that had been expressly conveyed to him; make his own decisions particularly in response to

unexpected events or when standard instructions could not be followed; and to discount or ignore the need to contact Mr Everett in such circumstances.

[24] Accordingly I do not consider it accurate to say Mr Farnan was dismissed because of a trivial incident. He was dismissed, following informal discussion and formal warnings, because the cumulative effect of his failures to follow instructions meant his employer no longer had trust and confidence that he would carry out his work in accordance with its procedures and objectives.

[25] As for the caution given to the other employee involved in the axle incident, any apparent disparity in treatment is adequately explained in that the employee was not breaching an instruction given to him and was unaware of the instruction given to Mr Farnan.

[26] To the extent Mr Farnan says the dismissal is unjustified on the basis of an allegation that minutes from the meetings of 15 March and 8 July 2007 were not provided, I consider it unlikely Mr Farnan did not receive those minutes at the time. I consider it more likely that he was so dismissive of them that he did not retain them and now does not recall them. In any event copies were provided at the disciplinary meeting of 23 July, and when the documents were put to him at the investigation meeting he did not dispute the accuracy of their contents. I do not consider anything in that amounts to a procedural shortcoming, let alone that it vitiates the justification for the dismissal.

[27] Finally, Mr Farnan asserted that a replacement employee had been engaged prior to his dismissal. That was not the case. Mr Farnan was misinformed.

[28] For these reasons I conclude that the decision to dismiss was one a fair and reasonable employer would have made. The dismissal was justified.

### **Costs**

[29] Costs are reserved.

[30] If either party seeks a determination of costs from the Authority there shall be 28 days from the date of this determination in which to file and serve a written statement of position on the matter. If the other party wishes to respond there shall be a further 7 days from the date of receipt of the statement of position in which to file and serve a written response.

R A Monaghan

Member of the Employment Relations Authority