

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 99
5568403

BETWEEN PHILLIP FRATER
 Applicant

A N D TRUCK STOPS (NZ) LIMITED
 Respondent

Member of Authority: Peter van Keulen

Representatives: Angela Sharma, Counsel for Applicant
 Elizabeth Coats, Counsel for Respondent

Investigation Meeting: 9 and 10 March 2017

Submissions Received: 10 March 2017, from the Applicant and Respondent

Date of Determination: 20 June 2017

DETERMINATION OF THE AUTHORITY

- A. I decline the applicant's claim for a personal grievance; Truck Stops (NZ) Limited's dismissal of Mr Frater was justified.**
- B. Mr Frater is not entitled to a bonus as claimed.**
- C. Truck Stops (NZ) Limited did not breach the duty of good faith and I will not impose a penalty.**
- D. Costs are reserved.**

Employment relationship problem

[1] Truck Stops (NZ) Limited (Truck Stops) dismissed Phillip Frater for breaching its cash sales and rework policies, the breaches being the third occurrence of Mr Frater breaching these policies.

[2] Mr Frater says the dismissal process was procedurally defective because Truck Stops failed to investigate the allegations properly and it was biased toward Mr Frater evidenced by the manner in which the process was conducted and the manner in which the previous warnings had been determined. He also says Truck Stops action of commencing the disciplinary process shortly after Mr Frater returned from leave and shortly following an acute illness for his father, lacked good faith.

[3] Mr Frater says the decision to dismiss him was not substantively justified because:

- a. Truck Stops had not implemented the policies it relied on.
- b. Truck Stops could not rely on the two earlier warnings to determine that any further breaches amounted to serious misconduct. A further breach of either policy (if they had been implemented) did not evidence a repudiation by Mr Frater that would justify a loss of trust and confidence in him.
- c. Truck Stops' decision to dismiss was inconsistent with Mr Frater's performance in meeting all of his key accountability requirements. Truck Stops failed to weigh the alleged misconduct against Mr Frater's performance and the performance of the branch as a whole.

[4] Mr Frater also claims that I should impose a penalty against Truck Stops for breaching the statutory obligation to act in good faith pursuant to s 4A of the Employment Relations Act 2000 (the Act).

[5] In its statement in reply, Truck Stops says that the dismissal of Mr Frater was substantively justified and was the outcome of a fair and thorough process. It also says it complied with its statutory duty of good faith.

[6] This determination, reserved at the conclusion of a two day Investigation Meeting, has been issued ten days outside the statutory period of three months after receiving the last submissions from one of the parties. I record that when I advised the Chief of the Authority that this would likely occur he decided, as he was permitted by s174C(4) of the Act to do, that exceptional circumstances existed for providing the written determination of the Authority's findings later than the latest date specified in s174C(3)(b) of the Act.

Background

[7] Truck Stops provides parts and servicing for trucks and buses.

[8] Truck Stops employed Mr Frater from 31 July 2006 until the termination of his employment on 25 February 2015. Mr Frater was employed at the Nelson branch of Truck Stops (the Nelson Branch).

[9] During his employment Mr Frater had worked in the parts department at the Nelson Branch but he transferred to the service department in 2013 when became the Service Manager.

[10] When Mr Frater started as the Service Manager, there was no Branch Manager at the Nelson Branch just a corresponding Parts Manager in the parts department. In 2013, Mr Frater and the Parts Manager reported to the Regional Manager.

[11] In March 2014, Truck Stops created a new role of Branch Manager for the Nelson Branch. Marty Richards who was the Parts Manager became the Branch Manager and Mr Frater reported to Mr Richards.

[12] In July 2014, Mr Frater was issued with a verbal warning for breaching Truck Stops' cash sales policy.

[13] In August 2014, Mr Frater acted inappropriately in handling a "rework matter". Truck Stops subsequently carried out a disciplinary process with Mr Frater and issued him a written warning on 2 September 2014.

[14] In February 2015, Truck Stops became aware of information that caused it to be concerned that Mr Frater had again, not followed Truck Stops' cash sales and rework policies.

[15] Mr Richards became aware of the three possible breaches in early 2015. I note that initially the disciplinary process concerned these three possible breaches of the cash sales policy and the rework policy, but during the course of the process, Truck Stops decided that Mr Frater had not breached the cash sales policy in relation to one incident, known as the Louisville job. For this reason I will not outline any of the facts relating to the Louisville job.

[16] On his return from leave in early 2015, Mr Richards became aware that a bus owned by a customer (the Bus) had been released to the customer when there was still an outstanding account to be paid. This was a potential breach of the cash sales policy.

[17] Mr Richards investigated this by speaking to relevant staff and looking at the invoicing and related job records. This investigation revealed:

- a. The customer had brought the Bus back to the Nelson Branch in December 2014 to review work that had been done on the exhaust brake in July 2014.
- b. In the course of reviewing the July exhaust brake repairs in December 2014, Mr Frater instructed the apprentice at the Nelson Branch to replace the vacuum hoses for the exhaust brake and a battery cable. Mr Frater wrote off most of the apprentice's time for fitting the parts. The time written off was three hours and forty-five minutes leaving only fifteen minutes of time, which was not charged to the customer. Only the parts were invoiced to the customer.
- c. Mr Frater then subsequently replaced the air filter on the Bus. Mr Frater instructed the parts department to invoice the customer for the part (the air filter) but the customer was not charged for Mr Frater's time.
- d. The air filter was replaced on 29 December 2014 and the bus remained at the Nelson Branch until 10 January 2015.
- e. On 10 January 2015 the customer called Mr Frater who was not at work. He asked if he could collect the Bus and Mr Frater told him he could. Mr Frater then called Dave Neilson the Nelson Branch foreman and told him the customer was going to collect the Bus.
- f. When the customer collected the Bus on 10 January 2015, he had not paid the invoice for the air filter.

[18] Mr Richards considered Mr Frater's actions in connection with the work done replacing the hoses and the cable to be a potential breach of the rework policy. This

was because Mr Frater had not completed the rework form which would enable management to track the faulty workmanship and allocate the time spent on the rework appropriately. Mr Richards considered Mr Frater's actions of releasing the Bus without ensuring the outstanding invoice was paid to be a potential breach of the cash sales policy.

[19] Mr Richards discussed this with Mr De Sanary, the Regional Manager. They decided to commence a disciplinary process.

[20] On 19 February 2015, Mr Frater was given a letter setting out the allegations amounting to potential breaches of the rework policy and the cash sales policy. The letter invited Mr Frater to attend a disciplinary meeting. The letter also advised Mr Frater of his right to bring a support person or a representative and advised him that dismissal was a potential outcome of the process.

[21] On 25 February 2015, Mr Frater attended the disciplinary meeting. Mr Richards and Mr De Sanary attended on behalf of Truck Stops.

[22] Mr Frater did not have a support person or a representative with him. Mr De Sanary offered to adjourn the meeting so that Mr Frater could attend with a support person or representative but Mr Frater wanted to continue.

[23] Mr Frater's response to allegations included:

- a. He accepted that he did not fill out a rework form in connection with the hoses and cable work as the policy would require because he did not think it was a rework at the time. He did not open an account for the apprentice's time because he wrote it down to fifteen minutes and decided it was not worth charging for fifteen minutes work.
- b. He accepted that the Bus was released with an outstanding invoice but thought this was the responsibility of the parts team not him. In fact, it transpired that the parts team had not invoiced the air filter until 8 January 2015. Mr Frater admitted he forgot about checking if the invoice for the air filter had been paid when he authorised the release of the Bus.

[24] Mr Richards and Mr De Sanary took some time to consider Mr Frater's responses. This included clarifying matters with HR and returning to discuss their preliminary thoughts with Mr Farter.

[25] At the end of the disciplinary meeting, after three breaks to consider the responses received, Truck Stops decided that Mr Frater had breached the policies and this amounted to serious misconduct, as Mr Frater had been given two previous warnings for breaching these policies. Truck Stops had lost trust and confidence in Mr Frater and it dismissed Mr Frater with immediate effect on 25 February 2015.

The issues for unjustified dismissal

[26] For an unjustified dismissal claim there are two issues to consider:

- (a) Did the employer follow a fair disciplinary process in coming to the conclusion to dismiss; and
- (b) Was the decision to dismiss substantively justified?

[27] More specifically for this case, based on the facts and ss 4(1A) and 103A of the Act, the matters I must consider are:

- (a) Did Truck Stops investigate the allegations of misconduct sufficiently;
- (b) Did Truck Stops outline the allegations, explain the possible implications of a finding of misconduct and give all the information it had that was relevant to the allegation of misconduct to Mr Frater for him to consider and respond;
- (c) Did Truck Stops give Mr Frater a reasonable opportunity to respond to the information and the allegations of misconduct before it made its decision on whether the behaviour amounted to misconduct and that this justified dismissal;
- (d) Did Truck Stops consider the explanation given by Mr Frater before it made its decision that the conduct amounted to misconduct and justified dismissal;

- (e) Was Truck Stops required to give Mr Frater an opportunity to respond to the decision to dismiss him and if it was, was this an adequate opportunity; and
- (f) If there were any failings by Truck Stops in the steps outlined above, does that render the disciplinary process unfair?

[28] The issue I must consider on the question of substantive justification is was dismissal a decision a fair and reasonable employer could have come to in the circumstances.

Did Truck Stops conduct a fair disciplinary process?

Did Truck Stops investigate the alleged misconduct and the relevant circumstances properly?

[29] I accept that Mr Richards' investigation was sufficient. Mr Richards spoke to relevant employees and consulted the relevant job records to establish what had occurred for both allegations.

Did Truck Stops provide the relevant information and explain the allegations and consequences to Mr Frater?

[30] Truck Stops did provide the relevant information to Mr Frater in the letter of 19 February 2015. It also set out Mr Frater's rights to bring a support person and a representative. And, the letter was clear that dismissal was a possible outcome of the pending process.

[31] However, there was one aspect that was problematic. In connection with the potential breach of the rework policy, the letter referred to not following the rework policy in connection with replacing the air filter.

[32] This is problematic because the replacement of the air filter was not a rework job. It did not relate to the prior work, being the exhaust brake nor did it involve chargeable time, as Mr Frater's time as Service Manager was not accounted for as chargeable to customers. It was in fact the replacement of the hoses and cables that Truck Stops considered to be a rework job because it related to the previous exhaust brake work and had chargeable time attached to it.

[33] This difference is compounded by the fact that the work was done in two separate parts. The hoses and cable were replaced at the start of December and the air filter was replaced at the end of December.

[34] So, whilst the information was provided and the allegation explained it may have been confused and not entirely clear to Mr Frater.

Did Truck Stops give Mr Frater an appropriate opportunity to respond to the allegation and any information provided?

[35] Truck Stops allowed Mr Frater sufficient time to address the allegations including sufficient time before the meeting and during it.

Did Truck Stops consider Mr Frater's response properly before it made its decision?

[36] Truck Stops did consider Mr Frater's explanations. The time taken was short but this was not an overly complicated matter and the explanations were simple.

Did Truck Stops give Mr Frater an appropriate opportunity to respond to the decision to dismiss him and if so, did it consider this?

[37] Mr Frater was aware that dismissal was a possibility at the outset of the process. He was informed during the meeting that this was being contemplated and given time to consider his response to that. Mr Frater was then able to make submissions on sanction, which Mr Richards and Mr De Sanary considered before reaching their conclusion.

If there were any procedural failings, was the disciplinary process unjust?

[38] The only issue I have with the process is the description of the rework issue as arising out of the air filter work and not the replacement of the hoses and cable, in the disciplinary letter of 19 February 2015.

[39] However, I do not accept that this renders the whole process to be unjust. It is clear to me that Mr Frater knew what the allegation was and he was able to respond to it. This is evidenced in the notes of the disciplinary meeting, which were made relatively contemporaneously and from Mr Frater's personal grievance letter dated 18 May 2015 where his solicitor sets out in detail the explanations he provided in the meeting.

[40] Both documents record Mr Frater responding and explaining why he did not complete a rework form in line with the policy – because he treated the replacement hose and cable work as not being a rework. There is no confusion about which aspect of the work on the Bus might be rework work and therefore what the actions by Mr Frater were, that Truck Stops was referencing as being a potential breach of the rework policy.

[41] Further, Mr Frater does not raise this aspect of the process as being problematic or unjust in either his personal grievance letter nor in his statement of problem. I take it from this that he had no issue with the information provided to him and the explanation of the allegations. If he did then I would expect the grievance to record that.

[42] Mr Frater also suggests the timing of the disciplinary process was a breach of good faith as he had just returned to work after leave and his Father had just been through an acute illness. Whilst I understand that the timing may not have been ideal for Mr Frater it is not a breach of the duty of good faith by Truck Stops to commence the process when it did. In fact, had it not commenced the process at the earliest opportunity it would likely have been criticised for allowing Mr Frater to continue to work without any steps being taken.

Is Truck Stops' decision to dismiss substantively justified?

[43] The test for substantive justification is whether the decision Truck Stops reached was one that a fair and reasonable employer could have reached in all the circumstances. I accept that it is.

[44] Turning specifically to Mr Frater's complaints about substantive justification:

- (a) I do not accept that Truck Stops had not implemented the rework policy or the cash sales policy correctly. Both policies were in effect and valid. Mr Frater was aware of the policies and the expectations on him. I think Mr Frater may have had some mistaken belief that he had discretion to act outside the policies in order to preserve goodwill with customers. This possibly arises out of his previous position and the different reporting lines but the two warnings he received in the previous six months must have made it clear to him that this was not the case and the policies needed to be adhered to.

- (b) Truck Stops could rely on the two earlier warnings to determine that any further breaches amounted to serious misconduct. As part of this claim, Mr Frater raised grievances about the previous warnings but I determined that those grievances were not raised within the required period¹. On this basis then, I see no reason why Truck Stops could not rely on the prior warnings for breaching the same policies and no reason why it could not decide that the third and fourth breaches of policy amounted to misconduct justifying dismissal².
- (c) Truck Stops' decision to dismiss may have been inconsistent with Mr Frater's performance in meeting all of his key accountability requirements but this does not render it unjustified. I do not see how an employee who meets all of his expectations could be said to be immune from dismissal for breaching policies. In any event, I am satisfied that Truck Stops weighed the alleged misconduct against Mr Frater's performance and the performance of the Nelson Branch when considering the appropriate sanction.
- (d) Finally, I am not persuaded that Truck Stops was biased in any way toward Mr Frater.

Conclusion on unjustified dismissal

[45] In summary, Mr Frater knew of the policies and expectations on him because of the two previous warnings. Truck Stops carried out a fair disciplinary process in connection with two further potential breaches of those policies. Mr Frater was able to answer the allegations of subsequent policy breaches and Truck Stops considered these explanations. Truck Stops decided Mr Frater had breached the policies and considering the two previous warnings, it decided it had lost trust and confidence in Mr Frater. In the circumstances, Truck Stops decided that dismissal was the appropriate response. I find that these actions are what a fair and reasonable employer could have done in all of the circumstances of this case.

[46] Mr Frater was not unjustifiably dismissed.

¹ *Frater v Truck Stops(NZ) Limited* [2017] NZERA Christchurch 22

² See *O'Connor v Ports of Auckland Limited* [2011] NZEmpC 165, *New Zealand Shop Employees and Related Trades IOUW v McKays's Food Centre Limited* [1983] ACJ 441 and *White v Chief Executive of Department of Corrections* (AA243/09, 21 July 2009)

Bonus

[47] Mr Frater's claim for a bonus is premised on remedies being awarded for unjustified dismissal under s 123(1)(c)(ii) of the Act. As there is no unjustified dismissal, he is not entitled to remedies.

[48] However, Mr Frater's statement of problem also references the provisions in his employment agreement that confer on him the right to participate in Truck Stops' bonus scheme, suggesting he might have a contractual right to a bonus. The Truck Stops bonus scheme rules require an employee to be employed at the time that a bonus is payable. The justified dismissal of Mr Frater means he was not employed at the time the bonus was payable and therefore he has no contractual claim to a bonus.

Penalty for breach of the duty of good faith

[49] Truck Stops has not breached the duty of good faith so I will not award a penalty as claimed.

Determination

[50] Truck Stops (NZ) Limited's dismissal of Mr Frater was justified.

[51] Mr Frater is not entitled to a bonus as claimed.

[52] Truck Stops (NZ) Limited did not breach the duty of good faith and I will not impose a penalty.

Costs

[53] Costs are reserved. The parties should seek to agree how they will deal with the legal costs incurred in taking part in these proceedings. If they cannot agree, any party seeking a contribution to its legal costs may lodge and serve a memorandum within 28 days of the date of this determination. Any party opposing that application may then lodge and serve a memorandum in reply within a further 14 days.