

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 326/07
5051582

BETWEEN BRENDON JAMES
 MACDONALD
 Applicant

AND BRAKE & TRANSMISSION
 NEW ZEALAND LIMITED
 Respondent

Member of Authority: Marija Urlich

Representatives: Anthony Jackson, for Applicant
 Justine O’Connell, for Respondent

Investigation Meeting: 19 July 2007

Further information and 1 August, 14 August, 17 September, 10 October 2007
submissions received: from Applicant
 26 July, 10 August, 7, 18 September, 10 October 2007
 from Respondent

Determination: 17 October 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Brendon MacDonald was employed by Brake & Transmission New Zealand Limited (“BNT”) from September 2004 until his dismissal for “*misuse/irresponsible use of the company motor vehicle*” on 13 March 2006. Mr MacDonald was first employed by BNT as a customer service representative and from December 2004 until his dismissal as a sales representative, covering territory from Whangarei north.

[2] Mr MacDonald enjoyed his work and his employer considered him a valuable employee. However, throughout his employment BNT received a number of complaints about his driving of his company vehicle. These complaints came from

members of the public, customers and the police and gave rise to concern about Mr MacDonald's driving which were drawn to his attention both informally and formally.

[3] On 2 March 2006 BNT received a complaint which ultimately led to Mr MacDonald's dismissal. The complaint was made by an employee of a customer who said that Mr MacDonald had "tailgated" his vehicle through the main street of Kaikohe. Over the course of a number of days and several meetings the complaint was put to Mr MacDonald, he provided a written response, his response was considered and he was advised of his dismissal. On 28 March 2006 BNT wrote to Mr MacDonald recording the disciplinary process followed, the reasons for his dismissal, that Mr MacDonald had been paid a month's wages in lieu of notice and that he had received all monies owing to him.

[4] Mr MacDonald says his dismissal was procedurally and substantively unfair. He says that throughout his employment he drove carefully and lawfully and that the complaints received by BNT were baseless. Mr MacDonald says the Kaikohe complaint was malicious, that BNT did not conduct a fair investigation and that the conclusions it reached, including that to dismiss, were not reasonable or fair in all the circumstances. In addition he says his manager, Terry Rowland, did not like him, he ignored or minimised the work place stress he raised with him and predetermined his dismissal. He seeks remedies to compensate the consequences of his dismissal.

[5] BNT says Mr MacDonald's conduct amounted to serious misconduct, the investigation process was fair and the decision to terminate Mr MacDonald's employment was one which was open to a fair and reasonable employment in all the circumstances.

[6] Mr MacDonald's terms of employment were set out in a written employment agreement and imported policy document entitled "Code of Conduct" which provides:

Code of Conduct

Vehicles

...

Unauthorised or irresponsible use of a Company vehicle, or a vehicle owned by a customer is not permitted.

...

For serious breaches of these rules an employee will be liable to dismissal without notice.

[7] The code of conduct also sets out a comprehensive disciplinary procedure.

Documents

[8] At the investigation meeting BNT's key witness, Terry Rowland, advised that he had notes of his informal and disciplinary meetings with Mr MacDonald. These notes have been provided to the Authority and Mr MacDonald subsequent to the investigation meeting, their inclusion in the record of evidence has been the subject of submissions and Mr MacDonald has had an opportunity to make submissions as to the substantive issues raised by them.

Was BNT's reliance on the warnings fair and reasonable?

[9] In reaching the decision to dismiss BNT relied on counselling and a final written warning issued to Mr MacDonald about this issue. Mr MacDonald says it was unfair for BNT to rely on these warnings because they were not fairly issued.

[10] On 2 April 2005 Terry Rowland, BNT's Whangarei manager wrote to Mr MacDonald

Dear Brendan

You are now responsible for a BRAND NEW company car.

Subaru Impreza 2.0 GX 2005 Reg No. CPL273

This vehicle must be at all times, keep (sic) in a clean and tidy condition in accordance with company policy.

Your current driving style, the way you drive the Hyundai Lantra, will not be accepted.

If you do not treat the new vehicle with respect and continue to drive like a mad man I will change it with, and give the new Subaru to Israel and you can have his Lantra, with the same conditions.

In accordance with any verbal agreement, you may use the Subaru for limited private use. Any travel outside of the Whangarei area I need to be informed about, and you must get my approval to do so.

If you decide to ignore any of the above then it will be treated, as GROSS MISCONDUCT and disciplinary action will be taken.

[11] Mr MacDonald countersigned the letter acknowledging he had received it.

[12] Mr Rowland's concerns about Mr MacDonald's driving could not have been drawn to his (Mr MacDonald's) attention in any plainer language. To his credit Mr MacDonald does not say that he did not understand what Mr Rowland's concerns were. What Mr MacDonald says is that he does not accept that he drove the company vehicle unsafely and BNT's conclusion that that is the case are unfair.

[13] On 22 August 2005 Mr Rowland wrote to Mr MacDonald, the relevant section of which is as follows:

...
IF I RECEIVE ANY MORE COMPLAINTS ON YOUR DRIVING HABITS FROM CUSTOMERS OR PUBLIC I WILL BE TAKING UNDER ADVICE FROM BNT'S OPERATIONS MANAGER, MURRAY FRANKS, DISCIPLINARY ACTION WHICH COULD RESULT IN YOUR DISMISSAL FROM BNT.
...

[14] As before Mr MacDonald countersigned Mr Rowland's letter. Again the letter was very clear; Mr MacDonald had to drive the company vehicle carefully or there would be disciplinary consequences.

[15] I accept that these were not formal disciplinary warnings but were attempts to draw BNT's concerns to Mr MacDonald's attention and warn him that disciplinary consequences may result if the conduct continued.

[16] On 27 September 2005 Mr Rowland received a letter from a Constable of the Whangarei Police expressing serious concerns about Mr MacDonald's driving as observed on 16 September 2005. The letter details the observed driving, describes it as "appalling" and explains Mr MacDonald was not pulled over because the sirens on the unmarked police car the Constable was driving were not working at the time.

[17] The witnesses agree that on 27 September 2005 Mr Rowland asked Mr MacDonald to attend a meeting about his driving and advised him to bring a support person. The meeting was held on 29 September 2005. Mr MacDonald attended with a support person.

[18] In his witness statement Mr MacDonald averred that at the meeting he was issued with a written warning and not given an opportunity to provide a response to the police complaint. I do not accept that that was the case. In his oral evidence Mr

MacDonald said he was given notice of the meeting and advised to bring a support person, that he attended the meeting with a support person, that the police complaint was discussed and he refuted in strong terms that there was anything wrong with his driving. He also said there was a discussion about a letter he had written to Mr Rowland raising concerns about stress and workload and the return of the Subaru Impreza was agreed at the meeting. Mr Rowland said he understood that Mr MacDonald wanted the Subaru Impreza back and that this would address his concerns. Mr MacDonald said that the return of the Subaru Impreza addressed some of his concerns.

[19] Mr Rowland advised Mr MacDonald that he was issued with a final warning. I am satisfied that this warning was issued after Mr MacDonald was given a fair opportunity to provide an explanation refuting the concerns expressed in the police letter.

[20] The meeting was followed by a written warning issued to Mr MacDonald on
14 October 2005:

FINAL WARNING

This is to confirm the final warning given to you on the 29th September 2005.

Specifically the issue discussed was:

- *Your misuse of the company vehicle. There have been several complaints about your driving of the company vehicle, including a complaint from the police (copy given to you)*
- *The [n]ature of misuse of the company vehicle had been discussed with you previously on two occasions (being April 2nd, August 22nd 2005) and you were advised that any further complaints could result in disciplinary action/possible termination, after these discussions we received a further complaint from the police which has prompted this action.*

Having considered all matters including your explanation the company considers your misuse of the company motor vehicle serious enough to issue you with a final written warning.

Any further instances of this behaviour may lead to further disciplinary action and your employment with Brake and Transmission being termination.

It is acknowledged that you were offered the right to representation.

Yours faithfully

...”

[21] It was open to a reasonable employer to reject Mr MacDonald's explanation that his driving was blameless and to accept the police complaint that Mr MacDonald's driving was not acceptable. Mr MacDonald was driving a company vehicle in a manner which drew negative attention to his driving. There was no evidence to suggest the police complaint was improperly motivated. The matter was serious and Mr MacDonald was on notice that complaints could result in disciplinary consequences. I find the final warning was justified. I find Mr MacDonald's stress issues formed part of the employer's considerations as to penalty; they were raised and discussed at the meeting and were addressed to a degree by the return of the Impreza.

The decision to dismiss – procedural fairness

[22] The test of justification for Mr MacDonald's dismissal is whether the investigation conducted by BNT, and the decision to dismiss, were what a fair and reasonable employer would have done in all the circumstances viewed at the time of the dismissal. Section 103A Employment Relations Act 2000 requires that decision must be made on an objective basis.

[23] On 5 March 2006 BNT received a complaint from an employee of a customer that Mr MacDonald had "tailgated" his vehicle through the main street of Kaikohe.

[24] On 6 March 2006 Mr Rowland advised Mr MacDonald that he had received a further complaint about his driving. Mr MacDonald asked if it was something to do with the employee of a customer with whom he had recently had a run in and Mr Rowland replied he needed to speak with his manager about the investigation procedure before he could give Mr MacDonald any more information. Mr Rowland told Mr MacDonald the matter was disciplinary and could result in his dismissal. Mr MacDonald said that he did not want to work if he was going to be given the "flick". Mr Rowland released him from his duties because he was upset and in no fit state to go out on the road.

[25] Mr MacDonald says this conversation is evidence that his dismissal was predetermined. I do not accept that is a fair representation of the conversation. What

Mr Rowland told Mr MacDonald was that as a consequence of his investigation into this complaint dismissal may be a disciplinary consequence. That was a fair and appropriate comment to make at the outset of a disciplinary investigation of this nature.

[26] The following day Mr MacDonald telephoned Mr Rowland and asked him if BNT would go to mediation. Mr MacDonald said he suggested mediation because he had read the Department of Labour website and mediation seemed “*this magical thing that would resolve all employment problems.*” Mr Rowland declined the request. He says he told Mr MacDonald that he was still investigating the complaint and that he should “*treat it as a positive*”. Mr MacDonald says Mr Rowland said that he “*did not do*” mediation. Mr Rowland denies that he made such a comment. Even if I accept Mr Rowland declined mediation it was not unreasonable given he was in the very early stages of conducting a disciplinary investigation.

[27] Mr MacDonald then telephoned Murray Franks, BNT’s Operations Manager, outlining his concerns and asking him to intervene in the disciplinary process. Mr Franks told Mr MacDonald the matter had not been predetermined, that Mr Rowland was investigating the complaint and referred him back to Mr Rowland. I have found Mr Rowland’s actions did not occasion any unfairness to Mr MacDonald. Mr Franks acted appropriately.

[28] Mr Rowland then met with Mr MacDonald and his partner, who was acting as his support person, and provided him with a copy of the complaint. The meeting did not last long and adjourned for Mr MacDonald to prepare his response.

[29] In the meantime Mr Rowland continued with his investigation of the complaint. He telephoned the complainant, asked him to outline what had happened and he confirmed the details of the written complaint. Mr Rowland then telephoned the complainant’s employer, a customer of BNT, and asked if he was aware of any problems between Mr MacDonald and the complainant. The customer said that the complainant was a character who “egged on” sales representatives, but he did not believe he had a particular issue with Mr MacDonald.

[30] Mr Rowland also spoke with co-workers in the customers work shop who could add nothing further.

[31] The further information was referred to Mr MacDonald who provided a detailed written response to the complaint on 9 March 2006. Mr MacDonald denied that he had driven irresponsibly, raised his concern that the decision to dismiss him had been predetermined and asked Mr Rowland to consider his good service.

[32] On 13 March 2006 Mr MacDonald was advised of Mr Rowland's decision to dismiss him. This advice was followed up by a letter dated 28 March 2006.

[33] As set out above the final written warning issued to Mr MacDonald was fair and I find was fairly relied on at the time of the ultimate disciplinary investigation¹.

[34] The process followed gave Mr MacDonald a fair opportunity to put his side and to make submissions as to what Mr Rowland should consider in his deliberations. I find the process was procedurally fair.

The decision to dismiss - substantive justification

[35] BNT dismissed Mr MacDonald because it concluded that he had misused the company vehicle having been warned that a repeat of such conduct could result in his dismissal.

[36] Mr MacDonald wrote a detailed response to the complaint, which was in summary:

- (i) That the complainant had a long standing dislike for him and he (Mr MacDonald) had spoken with the complainant's employer on two occasions about his (the complainant's) rude attitude towards him (Mr MacDonald);
- (ii) that he had the complainant had had a disagreement about the Kaikohe incident a few days after it had occurred;

¹ The warning was not six months old, a reasonable life for such a disciplinary warning of that nature

- (iii) that the complainant told Mr MacDonald that if he had stopped the car he or his wife would have “*smacked his head in*”;
- (iv) that he told the complainant that his wife should not “*drive like a nana*”; and
- (v) there was nothing wrong with his (Mr MacDonald’s) driving on the evening of the incident, that the complainant’s car was travelling under the speed limit, he was travelling at the speed limit and kept to the two second rule.

[37] Mr Rowland spoke with:

- (i) the complainant;
- (ii) the complainant’s wife;
- (iii) the complainant’s employer; and
- (iv) two co-workers of the complainant, who Mr MacDonald thought may have overheard the exchange about the incident.

[38] The complainant and his wife confirmed the details of the complaint; they said the vehicle approached at speed, slowed down and followed them closely. The complainant’s employer said the complainant was a character who liked to give sales representatives a hard time, but that he did not believe there was any particular enmity towards Mr MacDonald. The co-workers did not hear anything. This information was put to Mr MacDonald.

[39] At the investigation meeting I put to Mr Rowland whether Mr MacDonald had been given sufficient support to help him to address BNT’s concerns about his driving. He said that he had driven with Mr MacDonald and pointed out issues about his driving, given him back the Impreza as a form of encouragement and had brought the numerous complaints to his attention. I am satisfied that Mr MacDonald was aware of and understood the issues that were drawn to his attention and was sufficiently supported to address the concerns.

[40] Mr MacDonald says his dismissal was unjustified because it was motivated by Mr Rowland’s personal dislike of him, that an element of this was racially motivated, that his dismissal was predetermined. The evidence establishes that Mr MacDonald

was a well liked and valued employee. He was treated reasonably and given a fair opportunity to address the concerns about his driving. I do not accept Mr MacDonald's concerns have any reasonable basis

[41] Mr MacDonald had received a final written warning about misusing the company vehicle. He was on notice that if the conduct was repeated he may be dismissed. A complaint of "tailgating" was received. Such conduct, if made out, would amount to misuse of a company vehicle. Mr MacDonald denied that he tailgated the vehicle. He said he was driving lawfully and the complainant's car was being driven like a nana, which Mr MacDonald explained meant the car was being driven under the speed limit. I am satisfied that Mr Rowland fairly investigated his concerns and weighed them against the information he received.

[42] I determine that a fair and reasonable employer would have dismissed Mr MacDonald for misuse of the company vehicle in full knowledge of the wrongfulness of this conduct and its consequences.

Costs

[43] Costs are reserved. I understand Mr MacDonald is legally aided. If there is any issue as to costs then the parties may apply for a timetable to be set.

Marija Urlich

Member of the Employment Relations Authority