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Makiha v Northern Tree Harvesters Ltd AA 31/06 (Auckland) [2006] NZERA 645 (10 February 2006)

Last Updated: 24 November 2021

Determination Number: AA 31/06 File Number: AEA 741/05

Under the [Employment Relations Act 2000](#)

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND OFFICE

BETWEEN Denny Makiha (Applicant)

AND Northern Tree Harvesters Limited (Respondent)

REPRESENTATIVES Bryce Quarrie, Counsel for Applicant

Murray Broadbelt, Advocate for Respondent

MEMBER OF AUTHORITY Marija Urlich

INVESTIGATION MEETING 3 November 2005

DATE OF DETERMINATION 10 February 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Northern Tree Harvesters Limited (“NTH”) operates a log haulage business out of Mitimiti, Hokianga. Denny Makiha was employed as a driver/utility person by NTH from September 2003 until his dismissal on 15 December 2004. Mr Makiha’s terms of employment were contained in a written employment agreement. Attached to this document was a job description which includes the following requirement:

“OVERALL RESPONSIBILITIES:

...

Responsible for the day to day regular maintenance of any truck, plant or equipment that is operated, including but not limited to:

Daily checks prior to starting of plant including oil & water checks, tyres and lighting.

...”

[2] This employment relationship problem concerns NTH’s allegation and conclusion that Mr Makiha failed to maintain the required oil check on the truck he drove and that this failure resulted in serious damage to the engine of that truck.

[3] Mr Makiha is adamant that he conscientiously carried out the required checks and says NTH failed to properly consider all possible explanations for the damage sustained to the truck's engine. For these reasons he says his dismissal was unjustified and seeks remedies consequent to his dismissal; reimbursement of wages totalling \$5775.00 and compensation for hurt and humiliation. For completeness, I record that at the investigation meeting Mr Makiha withdrew a personal grievance for alleged unjustified actions during NTH's investigation of this allegation.

[4] NTH says it carried out a fair and reasonable investigation into the allegation against Mr Makiha and that the decision to dismiss him was reasonable in the circumstances.

[5] To determine this employment relationship problem the Authority must consider:

- (i) whether it was fair and reasonable for NTH to conclude Mr Makiha had failed to maintain his truck checks;
- (ii) whether it was fair and reasonable for NTH to conclude Mr Makiha's alleged failure to maintain the truck checks resulted in damage to the truck's engine; and

(ii) whether the decision to dismiss Mr Makiha was fair and reasonable in all the circumstances.

(i) Did NTH have a reasonable basis to conclude Mr Makiha had failed to maintain oil checks?

[6] There is no dispute that Mr Makiha was required, under the terms of his employment agreement, to carry out daily checks of the truck. These checks included a requirement to refill the truck's oil if necessary. The oil was provided by NTH. NTH also provided a system for recording oil use to be completed by the drivers. Mr Makiha's evidence was that he carried out the checks every morning. Magdalene Makiha told me she regularly observed her husband under the bonnet of his truck in the mornings when she brought him out a thermos. She said he was carrying out his checks.

[5] On 12 November 2004 Mr Makiha reported that the truck's engine was missing. Mr Makiha was directed to park up the truck in the yard. Anne Swaannenbeck, NTH's administrator, checked the oil three times and each time found a smattering of oil at the end of the dipstick. At Mr Martin's request Ms Swaannenbeck wrote a report dated 6 December 2005 which was provided to Mr Makiha to comment on during the course of the investigation.

[6] Leo Lloyd, NTH's contract mechanic, examined the truck's engine on the evening of 12 November 2004. He said the dipstick showed no oil and the oil sump drained 12 litres from a 40 litres tank. Mr Lloyd found tailings in the drained oil. He said he knew serious damage had been done to the truck and that it would probably require a complete overhaul. Mr Lloyd took the engine sump off and found the number 4 crankpin had run a bearing and that the other crankpins were damaged. Mr Lloyd reported to Mike Martin, NTH's manager, that there was a slow leak in the oil tank but no evidence of splashing, that this indicated the oil levels had not been maintained over a period of time and that there was insufficient oil in the engine to enable the truck to operate without causing serious damage to the engine. Mr Lloyd confirmed this advice to Mr Martin in a written report, which was provided to Mr Makiha during the investigation.

[7] On 13 November 2004 Mr Lloyd carried out a complete oil and filter change using an additive to try to get some more mileage out of the engine. Mr Lloyd said he knew NTH was not in a position to spend \$30,000 on an engine overhaul which, was the cost he estimated of the damage to the engine.

[8] Having heard from Ms Swaannenbeck and Mr Lloyd Mr Martin then looked at the oil records which showed oil had not been put in the truck in the six weeks prior to Mr Makiha reporting the mechanical difficulties.

[9] Mr Martin asked Mr Makiha to attend a meeting on 19 November. Mr Martin told Mr Makiha the information he had received to date. Mr Martin then advised Mr Makiha that the matter was serious, that the evidence indicated Mr Makiha had failed to maintain the oil checks, that he was responsible for doing so and that as a consequence of this failure significant damage had been

done to the engine. Mr Martin then advised Mr Makiha that the alleged conduct could amount to serious misconduct and if upheld could result in dismissal. Mr Martin advised a further meeting would be held and that Mr Makiha was entitled to have a representative present.

[10] Mr Makiha presented a report to Mr Martin setting out the events of 12 November. In the report Mr Makiha said he carried out an oil check that morning and that the oil level had been okay.

[11] On 1 December Mr Martin meet again with Mr Makiha to advise he would have to undertake alternate duties because his truck was parked up and there was no other truck available for him to drive. Mr Makiha was also invited to attend a formal disciplinary meeting on 3 December. This meeting and its purpose was confirmed in a letter to Mr Makiha dated 1 December. Mr Makiha continued on sick leave as from 16 November.

[12] On 3 December Mr Martin and Mr Makiha meet again. Mr Martin asked Mr Makiha if he had anything further to add to the information received to date. He said there was nothing further.

[13] On 6 December Mr Makiha meet with Mr Martin. He asked if he was suspended and was advised that he was not and that duties were available for him to perform. Mr Makiha said he wanted time off to seek legal advice. Mr Martin agreed to this request.

[14] On 8 December the parties meet again. Mr Makiha was accompanied by his barrister, Mr Quarrie, who raised a number of issues on his behalf including:

- (i) on 17 November the rocker cover gasket was found to have been replaced upside down and this could have been the case for some weeks and would explain a slow oil leak;
- (ii) if there had been a slow leak of oil over this period then the grease monkey should have noticed and topped up the oil because it was part of the grease monkey's job;
- (iii) Mr Lloyd would have performed a "sneaky check" on the truck oil level during the seven week period leading up to the engine failure and discovered if the oil had been low; and
- (iv) Mr Lloyd's opinion should be given little weight because, as the contract mechanic, it is in his interest for someone else to be responsible for the damage to the engine.

[15] Mr Quarrie wrote to Mr Martin the following day to confirm these points.

[16] Mr Martin wrote to Mr Makiha on 15 December that the decision had been made to dismiss him and the reasons:

"Dear Denny

We write to inform you that your employment is terminated effective immediately for serious misconduct. The serious misconduct was your failure to maintain the correct oil level in truck number 16 resulting in extensive damage to that vehicle's engine. This amounts to negligence. We have considered your written and verbal responses and the written response from your lawyer. We are of the view that you were negligent and that this constitutes serious misconduct.

We regret having to make this decision but consider that your negligence has irreparably damaged the relationship of trust and confidence between employer and employee. Although this is dismissal for serious misconduct, we are dismissing you on two weeks' notice. We enclose your final pay slip. This will be direct

credited to your bank account overnight tonight. Yours faithfully

Mike Martin Manager"

[17] Mr Makiha says no reasonable basis existed upon which NTH could fairly conclude he had negligently failed to maintain the correct oil level in the truck.

[18] NTH reached the conclusion that Mr Makiha had failed to maintain the correct oil level in the truck based on the following:

- (i) as the driver of the truck Mr Makiha was responsible for checking and maintaining the correct oil level in the truck on a daily basis;
- (ii) the oil records showed oil had not been put in the truck for the last six weeks;
- (iii) Ms Swaanenbeck reported the truck had a "smattering" of oil on the end of the dip stick on 12 November;
- (iv) Mr Lloyd inspected the truck on 12 November and reported it had insufficient oil to operate safely; and
- (v) Mr Lloyd reported there was no evidence the truck could have lost 28 litres of oil in one day ie, only evidence of a slow oil leak.

[19] Mr Quarrie has submitted that Mr Lloyd's mind was closed to any explanation for the lack of oil and consequent damage to the engine other than Mr Makiha's failure to maintain the oil levels in the truck. Mr Martin was the decision-maker and it is his decision-making process which is under scrutiny. I am satisfied on the evidence received that the alternative explanations raised on Mr Makiha's behalf as to the cause of the insufficient oil level and consequent damage to the engine were fairly considered by Mr Martin:

- (i) Mr Martin concluded that the mistaken replacement of the rocker cover gasket following the test drive was not the cause of the insufficient oil level identified on 12 November or the damage. On that occasion the driver reported spraying oil from the misplaced gasket. There was no evidence of an excessive oil leak on 12 November;
- (ii) the grease-monkey's job did not include checking and maintaining the oil levels;
- (iii) Mr Lloyd had not performed any sneaky checks of the oil levels during the period in question.

[20] Mr Quarry has submitted that Mr Lloyd could not give an objective opinion on the cause of the engine damage because he was contracted to NTH to maintain the truck engines. I do not accept Mr Lloyd could not provide an objective opinion as to the cause of the engine damage because there is no evidence that Mr Lloyd was responsible for regular oil checks or that any area of maintenance under Mr Lloyd's responsibility caused the damage to the truck engine. Given the circumstances of NTH and the fair consideration of the explanations provided by Mr Makiha, it was reasonable for Mr Martin to rely on the opinion of the contract mechanic and not seek a further opinion.

(iii) Was the decision to dismiss fair and reasonable in all the circumstances?

[21] Mr Quarry submits that Mr Makiha should have had an opportunity to address the decision-maker, the Board, and that he was unfairly denied that opportunity. Mr Martin told Mr Makiha at an early stage of the investigation that he would discuss the issues with the Board and another member of the Board, Patricia Waiomio, was present at all the disciplinary meetings. At the investigation meeting Mr Makiha said he understood Mr Martin was the decision-maker.

[22] Notwithstanding, it is fundamental to a fair process that an employee facing an allegation of serious misconduct should have a fair opportunity to address the decision-maker. Was Mr Makiha afforded an opportunity to address the decision-maker? Mr Martin conducted the investigation into the allegation, reached a conclusion based on that investigation and put a recommendation to the Board for a vote. I accept Mr Martin's evidence that he put the recommendation to the Board to seek their support for a difficult decision. This is not the same as relinquishing his decision-making role to the Board.

Conclusion

[23] I am satisfied that Mr Makiha was treated fairly during the investigation process and that Mr Martin carried out inquiries to a reasonable degree. These inquiries established to a reasonable extent in all the circumstances that the responsibility to check and maintain the oil in the truck was Mr Makiha's, that the oil levels had not been maintained and serious damage had been sustained to the truck as a consequence. I am satisfied that Mr Martin fairly weighed the decision to dismiss Mr Makiha and considered factors such as Mr Makiha's prior record of good service and standing in the community. For these reasons I find the decision to dismiss Mr Makiha was one that would have been made by a reasonable employer.

Costs

[24] The issue of costs is reserved. The parties are invited to try to resolve this issue themselves. If they are unable to do so the parties may request the Authority determine this matter by filing memoranda as to costs.

Marija Urlich

Member of Employment Relations Authority