

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 53/10
5273771

BETWEEN PETER McCUTCHEON
 Applicant

AND WESTLAND CO-OPERATIVE
 DAIRY COMPANY LIMITED
 Respondent

Member of Authority: Philip Cheyne

Representatives: Andrew McKenzie, Counsel for Applicant
 Garry Pollak, Counsel for Respondent

Investigation Meeting: 16 February 2010 at Hokitika

Determination: 9 March 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Peter McCutcheon worked for Westland Co-Operative Dairy Company Limited (WMP) from June 2008 until May 2009 when, following a disciplinary investigation, WMP dismissed him for serious misconduct. Mr McCutcheon says that he was unjustifiably dismissed and he seeks reinstatement and compensation. WMP says it justifiably dismissed Mr McCutcheon for serious misconduct after determining that Mr McCutcheon caused a serious accident by driving too fast.

[2] There are few factual disputes. For the most part, the grievance concerns what Mr McCutcheon says is an over-reaction to his accident. To resolve the problem, I will set out more fully the sequence of events, including WMP's disciplinary investigation before applying the law relating to justification for a dismissal.

Terms of employment

[3] Mr McCutcheon worked as a driver. He belonged to the Union and was bound by the terms of a collective employment agreement. The agreement provides for termination of employment on two weeks' notice but permits summary termination for good cause. Mr McCutcheon was also bound by another document signed by him called *Common Terms and Conditions of Employment*. One of the employee duties in that document is not to do anything whereby the goodwill and reputation of the company may be prejudicially affected. It says that disciplinary matters will be considered in accordance with company policies and procedures and that, as a general principle, the company is entitled to trust that employees will do what is required of them competently and act reasonably in their employment.

[4] The requirements of a milk tanker driver are set out in a position description. The main purpose of the job is to transport liquid dairy products from suppliers to the processing plant efficiently and safely. A key task and responsibility is to demonstrate careful driving habits. Qualifications and experience as a driver of heavy vehicles is a requirement. There is also a company handbook. It includes details about the company's disciplinary rules. There is a definition of serious misconduct which includes acts of negligence which seriously affect quality of product or service, health or safety of people or damage to company property or the environment. There are also examples of misconduct including *failing to observe safety rules* and *irresponsible behaviour*. Under the handbook serious misconduct can result in summary dismissal whilst misconduct might result in a warning first.

Mr McCutcheon's accident

[5] On 14 April 2009, Mr McCutcheon drove from Hokitika to Karamea and return collecting milk. At about 12.15pm on the return journey, travelling south but just north of Rapahoe, Mr McCutcheon's truck and trailer overturned. A power pole was hit and powerlines came down interrupting power to various customers. The truck and trailer unit came to rest blocking most of the State highway and a substantial amount of milk was spilt. The truck and trailer unit were substantially damaged. No other vehicles were involved.

[6] Mr McCutcheon was unharmed. He called his supervisor who in turn called WMP's transport manager (Doug Cochrane). Mr Cochrane took steps to organise

salvage equipment and then drove to Rapahoe. Meantime, the Police arrived at the accident scene. Mr McCutcheon spoke briefly with the constable and after a time was taken to the Police station for a breath/alcohol test and to provide a statement. The breath/alcohol test was negative. Once finished at the Police station, Mr McCutcheon travelled to WMP's depot. He was advised to go home for the day and come in the next morning to speak to Mr Cochrane.

[7] I should say a little about the site of the accident. Travelling south towards Rapahoe there is a left hand bend followed immediately by a right hand bend. Both are clearly signposted with 45kph advisory signs. The stretch of road is subject to a 70kph speed restriction. On the day of the accident, road conditions were fine.

Investigations

[8] Next morning, there was a brief meeting between Mr McCutcheon and Mr Cochrane, also attended by Julie Bell (an HR adviser). Mr Cochrane told Mr McCutcheon that he was taking him off trucks until the Police report was received, hopefully within a day or two. He said he was pleased Mr McCutcheon was not hurt and he stressed the seriousness of the accident for the company. Mr McCutcheon was told there would be a formal meeting once the Police report was available and was asked if there was anything he wanted WMP to know in advance. Mr McCutcheon said that he was not going fast, he had come round the corner and the sloshing of the milk in the trailer must have caused the trailer to hit the kerb, that he was doing about 60kph at the time and that the posted 45kph was advisory only.

[9] Following this meeting, Mr Cochrane wrote a memo outlining what had happened, concluding with:

Indications into why this accident happened are suggesting that Peter was travelling to fast on this section of highway. We are presently gathering information from various people to try and understand why this accident happened so we can start the disciplinary process. If we can prove driver gross negligence with this matter I would suggest that we would be seriously considering termination of Peter's employment in this instance.

[10] On 16 April, as requested, Police sent by fax to WMP a copy of the attending constable's report with a note that more work was required on the file. The constable's report includes notes made of Mr McCutcheon's comments at the time as follows:

I was returning to Westland Milk Products yard in Hokitika. I had been to Karamea and was on my way back.

As I approached the township of Rapahoe I changed down 2 gears before entering the township. I rounded the corner and somehow or another the truck and trailer unit rolled over. I guess I may have been travelling at around 60kms at the time of the crash.

[11] Mark Lockington is WMP's company secretary and it was eventually his decision to dismiss Mr McCutcheon. Mr Lockington, Mr Cochrane, Ms Bell and Mr McCutcheon met briefly on 17 April 2009. Mr Lockington gave Mr McCutcheon a letter of the same date advising that the company would conduct its own investigation into the accident and asking Mr McCutcheon to provide a written account of events and identify any witnesses. Mr McCutcheon was encouraged to seek advice from the Union. In response, Mr McCutcheon provided a statement dated 21 April. Mr McCutcheon's explanation was that the *sloshing effect* in the trailer caused it to slide from the gravel/seal verge which initiated the accident. Mr McCutcheon said that speed was not a factor as his maximum speed would have been 60kph, more than likely less as he was slowing for the corners and to enter the township. Mr McCutcheon said he thought that there was a witness and that Police would know that person's name. He also said that if speed had been a contributing factor, he probably would have rolled on the first, not the second, corner.

[12] The next meeting was on 27 April. Mr Lockington confirmed to Mr McCutcheon that there would be a disciplinary investigation since it appeared that speed was a factor. At that time, WMP expected that Police would provide further reports and that there would also be an LTA accident investigation. Mr Lockington said that WMP would await these reports before the disciplinary meeting.

[13] On 1 May Police wrote to Mr Cochrane to say that they would forward the vehicle inspection report from the LTA but were unable to provide any other reports. As a result, Mr Lockington wrote to Mr McCutcheon to update him of that development and advise of WMP's intention to press ahead with a disciplinary meeting as soon as it had the LTA report to hand.

[14] By 8 May, WMP had received the LTA report. No mechanical faults were identified with the truck or trailer. Mr Lockington wrote again to Mr McCutcheon to make arrangements for the disciplinary meeting. The letter clearly sets out that Mr McCutcheon risks dismissal for negligence being his excessive speed as the major

contributor to the accident which cost the company a considerable amount of money and created risk to the life of Mr McCutcheon and others. The letter also refers to a September 2008 discussion between Mr Cochrane and Mr McCutcheon about speeding and relevant documents were attached.

[15] The meeting eventually was held on 15 May. Before then, Mr McCutcheon told Mr Lockington that he was being prosecuted for careless use of a motor vehicle and he expected to receive the Police file that would have further relevant information. There were various exchanges between the Union and WMP about the meeting time and the availability of the Police file but it is not necessary to canvass those exchanges here. The point was reached that WMP was told that the Police file would be provided and the meeting was deferred to permit the attendance of the Union's Christchurch-based organiser. The evidence for Mr McCutcheon is that the Police report was copied and left in the transport office for Mr Cochrane to collect. However, the evidence of Mr Lockington and Mr Cochrane is that they never saw the Police file until September 2009. The copy apparently left in the transport office has never been located. There is no reason to doubt evidence of Mr Lockington and Mr Cochrane.

[16] Mr Lockington prepared briefing notes to guide him at the meeting. There are notes made by Ms Bell of the meeting itself which I accept as a substantially accurate account of the meeting. Mr Lockington explained the basis for WMP's concerns and referred to relevant policies, Mr McCutcheon's earlier statements in explanation, photographs of the road, the LTA report indicating no mechanical fault with the truck and trailer unit and the September 2008 discussion between Mr Cochrane and Mr McCutcheon about speeding. After a brief adjournment, Mr McCutcheon responded. He said it was an accident and not intentional; that he was not in a hurry; that he may have been exceeding 45kph but did not know what speed he was actually doing; and that the September 2008 discussion was irrelevant. There was some discussion back and forth on these points. In particular, doubt was cast on Mr McCutcheon's earlier admissions about his speed given the absence of any skid marks on the road.

[17] When Mr McCutcheon had nothing more to add, WMP took an adjournment. Ms Bell's notes record a 50 minute adjournment and I accept this as accurate. On Mr Lockington's return, he told Mr McCutcheon that he believed speed to be the

major cause of the accident, that Mr McCutcheon was responsible for the speed of the vehicle and its safe operation, that Mr McCutcheon was negligent and that it was extreme negligence because of the seriousness of the accident and the safety risks to Mr McCutcheon and others so that he considered that Mr McCutcheon should be dismissed. Mr Lockington said that the dismissal was immediate but that WMP would pay one month's pay in lieu of notice. Mr Cochrane asked one of the Union representatives to go with Mr McCutcheon and gave instructions for leaving work.

Justification

[18] Whether the dismissal was justified must be determined objectively by assessing whether WMP's actions and how it acted were what a fair and reasonable employer would have done in all the circumstances at the time.

[19] On its face, WMP conducted a full investigation and reached its decision to dismiss Mr McCutcheon in accordance with the relevant terms of the employment agreement for conduct which could be seen as serious misconduct. Similar cases confirming the point about the conduct are mentioned below. In the remainder of this determination, I will focus on Mr McCutcheon's challenges to the fairness of WMP's decision. Despite taking this approach, I remain mindful that it is WMP's obligation to prove justification for the decision to dismiss Mr McCutcheon.

[20] The first point made for Mr McCutcheon is that his negligence was at the lower end of the scale of carelessness and that WMP wrongly decided it was serious negligence because of the serious consequences. I am referred to dicta in *Makatoa v. Restaurant Brands* [1999] 2 ERNZ 311 and *Angel v. Fonterra Cooperative Group* [2006] ERNZ 1080 for an explanation of that dicta.

[21] In *Makatoa*, the Court said that serious misconduct generally will involve deliberate action inimical to the employer's interests and not generally negligence or oversight however much such may seem an incomprehensible dereliction of duty. In *Angel*, the Court thought that *incomprehensible dereliction of duty* probably would fall on the side of serious misconduct. These cases are relevant to the debate about whether a single act of negligence can amount to serious misconduct. In *W&H Newspaper Ltd v. Oram* [2000] 2 ERNZ 448, the Court of Appeal did not doubt that a single act of negligence could amount to serious misconduct. In that case, the negligence was probably towards the lesser end of a scale of carelessness but the

consequences were serious. The introduction of the statutory definition for justification is often seen as overturning *Oram*. Hence in *Angel*, the Employment Court said:

The classification of serious misconduct becomes more problematic where an employee acts out of ignorance, carelessness or accident that causes serious or potentially serious consequences for the employer or the employer's business.

The Employment Court then referred to *Makatoa* with the caution about *incomprehensible dereliction of duty* probably falling on the side of serious misconduct and it went on to say:

*Where an employer investigates an employee's failure to adhere to a policy or code of conduct, it has to assess whether the employee's failure to comply was because of inadvertence, oversight, or negligence or whether it was done deliberately in the knowledge that it was wrong. If the employee did not have knowledge of the relevant policy or rule, a fair and reasonable employer should find out whether that was the fault of the employee for ignoring or failing to take proper care to be familiar with the policy, or whether there was genuine room for misunderstanding as to what the policy meant. This is not to say that it was necessary for an employer to be satisfied that an employee who breaches policy or a code of conduct has done so deliberately in the sense of having mens rea or criminal intent (an approach firmly rejected in *Hepi*) but it is bound to investigate fully to establish why it occurred.*

[22] In *Makatoa*, the employee's carelessness lay in not properly following cash handling procedures that meant that the employer suffered an otherwise avoidable loss of \$15,000 from an armed robbery. The Employment Court upheld that dismissal as justified. The Court said that the employer was entitled to take the view that the employee's failure over the course of her shift was a *complete dereliction of duty amounting to serious misconduct*. *Angel* was decided in favour of the employees because of some ambiguity about training as to production requirements perhaps making their conduct a comprehensible dereliction of duty and because the employer did not follow their own dismissal policy.

[23] In the present case, WMP considered that excessive speed was the major cause of the accident. WMP naturally had an eye to the serious consequences that ensued and the risk or other consequences fortunately avoided. It was entitled to do so since the test for justification refers to *all the circumstances at the time*. However, principally, the employer's concern was Mr McCutcheon's *complete dereliction of duty* to drive at a safe speed. Mr McCutcheon was wholly responsible for the

excessive speed of the truck and trailer unit through the two corners which were clearly posted with 45kph advisory signs. There is a submission that this did not involve any breach of the law or recklessness. However, I do not accept that submission. Although it was irrelevant to the employer's decision, Mr McCutcheon was convicted later of a driving offence.

[24] A point is made that the handbook refers to *Acts of negligence* (original emphasis). I do not accept that, properly construed, the handbook limits serious misconduct to situations involving more than one act of negligence. The emphasis in the handbook is on negligence. The use of the plural *Acts* is just a style of drafting a list of discrete items. For example, the list includes *Assaulting other persons*, but that could not reasonably be taken to mean that the assault has to be on more than one person to amount to serious misconduct.

[25] There is a submission that WMP predetermined the dismissal. The evidence to support this submission is Mr Cochrane's memo dated 15 April 2009 referred to above. I reject the submission about predetermination. First, Mr Lockington made the decision to dismiss, not Mr Cochrane. The evidence is that Mr Lockington relied on Mr Cochrane's expertise to assess the quality of Mr McCutcheon's responses and the seriousness of his misconduct, but I do not accept that there was anything improper or unfair in that. It is no doubt much better to have someone very experienced in driving, such as Mr Cochrane, to assess alleged misconduct arising from a driving incident. Further, I note the conditional nature of Mr Cochrane's statement. I also accept the evidence of Mr Lockington and Mr Cochrane as to their open mindedness to consider any explanation put forward by Mr McCutcheon. WMP went to considerable efforts to give Mr McCutcheon a reasonable opportunity to explain. In the end, however, the accident was attributable to speed which is how it appeared to Mr Cochrane at an early stage. His early sound assessment does not now create a problem for WMP.

[26] It is also argued that WMP set out to prove driver gross negligence. The evidence to support this contention is that Mr Lockington and Mr Cochrane have not referred to Mr McCutcheon's qualification that his speed was probably less than 60kph. Unsurprisingly, Mr McCutcheon has tended to downplay his initial admission about his speed as time has gone on. The constable's notes have him saying *I guess I may have been travelling at around 60kph at the time of the crash*. The next day he

told Mr Cochrane he was going about 60kph at the time. By his 21 April statement, he softened that to say that *the maximum speed I would have been travelling would have been 60kph, more than likely less* These documents were all in front of Mr Lockington and Mr Cochrane. Indeed, Mr Lockington's briefing notes for the 15 May meeting show he was aware of Mr McCutcheon's 21 April statement. In the end, the precise speed was thought to be unimportant and Mr McCutcheon was doing no more than estimating it. The point was well established that Mr McCutcheon's speed was excessive, whichever formulation of admission was referred to.

[27] There is an argument about disparity of treatment. In particular, I am referred to the case of a Mr Salt. Mr Cochrane gave evidence about the difference between the two cases. He said that Mr Salt's accident occurred on a notoriously bad bend where the camber of the road is not right. That, as well as Mr Salt's speed, contributed to his accident. Here, speed was judged to be the only significant factor. As a result, I do not accept that there is a true case of disparity.

[28] I was also referred to *Rapana v. Northland Cooperative Dairy Company*. In that case, Mr Rapana was dismissed for serious misconduct as a result of driving too fast and rolling the tractor unit but not the truck unit causing more than \$100,000 repair costs. The incident happened in the yard at a dairy factory as Mr Rapana was doing a u-turn. From the applicant's perspective, the importance of *Rapana* is the Employment Court's decision ([1998] 2 ERNZ 528) that disparity of treatment is a potential source of lack of justification. However, the facts of Mr Rapana's case provide an interesting point of comparison. The Court at [545] found that *except as to the disparity of treatment issue which goes to the fairness and reasonableness of the decision, the employer's conduct of its inquiry into the accident and decision as to the outcome were fair and reasonable. Mr Rapana can really have no valid complaint in these other regards*. It must be said that Mr McCutcheon's conduct in this case is at least as serious a breach of his obligations to WMP as was Mr Rapana's to his employer. At [540], the Court also refers to a case dealt with as a private arbitration of a Mr Schreurs who rolled his truck and trailer unit on a public road as a result of excessive speed. No criticism is made of the arbitrator's decision to uphold justification for that dismissal. The similarities between Mr Schreurs' case and the present case are much greater than the differences. Overall, a careful reading of *Rapana* tends to support the idea that Mr McCutcheon's conduct can properly be regarded as serious misconduct.

[29] I should note that Mr McCutcheon did not raise any disparity argument until after his dismissal. Nonetheless during the investigation Mr Lockington asked Mr Cochrane to consider whether dismissal of Mr McCutcheon would be out of step with outcomes in other accidents that season and earlier. On Mr Cochrane's considered view, dismissal was not inconsistent with earlier outcomes and I accept his evidence to that effect.

[30] There is a submission that the Authority must stand back and consider whether a fair and reasonable employer would have summarily dismissed Mr McCutcheon. I accept that submission. It is submitted that Mr McCutcheon's carelessness was at a low level since speeds exceeding advisory speeds must be less culpable than exceeding legal speed limits. There is no merit in this submission. Mr McCutcheon was later convicted of an offence so his driving at the time was not in accordance with the law. I note again that the prosecution was unimportant to WMP's investigation. The simple point is that Mr McCutcheon was going far too fast to safely negotiate the two bends in the road. He had the benefit of advisory signs reflecting a safe speed for a vehicle in those corners. In evidence, there was the suggestion that there is a rule of thumb that heavy vehicles should drive at 10kph less than speed advisory signs. That was not a feature of the disciplinary investigation and it is not important to this determination.

[31] There is a challenge to WMP's reference to the September 2008 discussion given apparently conflicting recollections of that event. I should say more about this matter. Mr Cochrane came to hear some rumours that Mr McCutcheon was driving too fast and cutting corners in a tight and winding stretch of road. He spoke to Mr McCutcheon about these rumours. I accept Mr Cochrane's evidence that he made it clear to Mr McCutcheon that such driving would not be tolerated and Mr McCutcheon acknowledged that he understood and would be more careful in the future. Mr McCutcheon was given a copy of Mr Cochrane's diary note as part of the disciplinary investigation. Mr McCutcheon's evidence is that he told Mr Cochrane on 22 September 2008 that it was not possible to get around many of the corners on that stretch of road without the trailer crossing the centre line. I accept Mr Cochrane's evidence that no such thing was said by Mr McCutcheon. If it had been, Mr Cochrane would have been more concerned at the time about Mr McCutcheon's attitude and driving skills. I accept Mr Cochrane's evidence that it is not acceptable to WMP for drivers to cut corners or drive in such a manner or at such a speed that vehicles cross

the centre line on corners. I should note that Mr McCutcheon did not dispute the way Mr Lockington or Mr Cochrane characterised the 22 September exchange during the disciplinary investigation. He simply said it was not relevant and that others would want to have a go at him (being a reference to his former employment). The point for WMP was that Mr McCutcheon had been counselled previously as to excessive speed. That is undeniably true. Any fair and reasonable employer would have taken that counselling into account in the circumstances of the April 2009 accident caused by excessive speed.

[32] Although not pressed in submission, in his statement of problem Mr McCutcheon makes something of WMP not being prepared to have regard to the Police file. The statement of problem alleges that WMP refused to accept the Police file. That is not correct. WMP at first was prepared to delay its investigation on the understanding from Police that the file would be made available to WMP in due course. Later, Police advised WMP that the whole of the file would not be released. At that point, WMP decided to proceed with its disciplinary investigation making the point to Mr McCutcheon that the whole Police file was not available to it. That was not a refusal to consider it. Apparently, Mr McCutcheon arranged for the file to be copied and left in the transport office for Mr Cochrane but there is no reason to doubt Mr Lockington's and Mr Cochrane's evidence that they never saw the file at the time. At the disciplinary meeting following the date that the file was apparently left in the transport office, neither Mr McCutcheon nor his representative felt the need to refer to anything in the Police file not already known to WMP so the fact that Mr McCutcheon mistakenly thought that WMP had the whole file did not emerge. The file was provided to the Authority. There is nothing in it to assist Mr McCutcheon's position. To the contrary, the witness statements support the conclusion about excessive speed. The summary of facts on which Mr McCutcheon subsequently pleaded guilty records his statement to the constable that he was travelling at 60kph. That, too, would have been at least marginally unhelpful to Mr McCutcheon. If there was anything in the Police file that Mr McCutcheon wanted to draw his employer's attention to, he had every opportunity to do so. WMP conducted itself as would any fair and reasonable employer in respect of the Police file.

Summary

[33] WMP's actions and how it acted were those of any fair and reasonable employer. Mr McCutcheon was justifiably dismissed.

[34] Costs are reserved. Any claim for cost should be made within 28 days by lodging and serving a memorandum. The other party may then lodge and serve a reply within a further 14 days.

Philip Cheyne
Member of the Employment Relations Authority