

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**CA 49/07
5039684**

BETWEEN Paul McLennan
Applicant

AND Tulloch Transport Limited
Respondent

Member of Authority: Helen Doyle

Representatives: Owen Johnstone, Advocate for Applicant
Christine French, Counsel for Respondent

Investigation Meeting: 22 March 2007 at Invercargill

Determination: 4 May 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Paul McLennan commenced employment with the respondent company on 2 November 2004 as a casual employee and was made a permanent employee on 1 December 2004. He undertook driving duties and was party to an individual employment agreement with the respondent.

[2] The respondent, Tulloch Transport Limited ("Tulloch Transport") is a duly incorporated company and carries on the business of road transport. John Morrison was at the material time the Invercargill branch manager. He is now the general manager of Tulloch Transport.

[3] At the material time in January 2006 Mr McLennan primarily worked for Tulloch Transport as a line haul driver, driving a B Train truck on an overnight run from Invercargill to Christchurch and then back, via Alexandra to Invercargill.

[4] On 15 October 2006 Mr McLennan was issued with a written warning about behaviour which was not related to driving.

[5] On 31 October 2005 Mr McLennan was issued with a final written warning for a six month period in relation to a dangerous overtaking manoeuvre involving the passing of two trucks. This was found to be a misuse of a company vehicle.

[6] On 11 January 2006 Mr McLennan was leaving Alexandra in his truck at 3am when he clipped a 100kph speed sign on the side of the road with his left hand wing mirror. His wing mirror spun around and hit the side window of the truck. The mirror shattered. Mr McLennan heard a loud noise and was immediately aware that something had happened but he was not sure what.

[7] He stopped the vehicle and put on the hazard lights to ascertain what had happened. Mr McLennan then made repairs to the sign and immediately notified the night supervisor at Tulloch Transport and advised him of the incident and what had occurred. The damage to the sign and wing mirror was minimal.

[8] Three meetings were then held to discuss the clipping of the traffic sign. The first meeting on 16 January 2006 was to decide whether there needed to be further investigation. The second and third meetings on 20 January 2006 and 27 January 2006 were disciplinary meetings. At the conclusion of the last meeting Mr McLennan was advised that he was to be dismissed on two weeks notice. A letter hand delivered to Mr McLennan that same day confirmed that the dismissal was based on Mr McLennan's misuse of the company vehicle in clipping the 100kph speed sign and on the basis of the two previous written warnings. The termination letter specifically referred to the final written warning having also been for misuse of a motor vehicle.

[9] Mr McLennan says that his dismissal was unjustified. He seeks lost wages, compensation for hurt and humiliation, a penalty and costs.

[10] Tulloch Transport say that Mr McLennan's claim is without merit and that a decision to dismiss him was justified and carried out in a procedurally fair way.

The issues

[11] There is no dispute that Mr McLennan was dismissed on notice. I find that the reasons for the dismissal are those set out in the written letter of termination which was handed to Mr McLennan on 27 January 2006.

[12] The question of whether Mr McLennan's dismissal was justified has to be determined on an objective basis. It is necessary to consider whether the actions of Tulloch Transport in investigating the incident of clipping a road sign, concluding that there was serious misconduct and dismissing Mr McLennan were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred – 103A Employment Relations Act 2000.

[13] It is necessary to consider the company's own policies and procedures in terms of the warnings relied on by Tulloch Transport in reaching its decision to dismiss.

[14] Mr McLennan suggested during the Authority's investigation meeting that something had subsequently come to light about the events that led to the final written warning and it should not have been issued. He said though that it was essentially his word against others at the time it was issued. Those comments aside, there was no challenge to the justification of the earlier warnings by way of evidence or submission.

The individual employment agreement and employee's handbook

[15] Clause 23.1 of the individual employment agreement provides that the employee handbook forms part of the individual employment agreement. The employment agreement contains a disciplinary procedure in clause 17.4. Clause 17.4.4 sets out a procedure to apply where the employee may have been guilty of misconduct or serious misconduct.

[16] The employee handbook contains rules in clause 5.2.3 and conduct considered to be serious misconduct and less serious misconduct. Mr McLennan's conduct in clipping the sign post with his wing mirror was considered by Tulloch Transport to be misuse of a company vehicle which is listed as serious misconduct. The hand book provides that where an act of serious misconduct has not resulted in summary dismissal or in cases of less serious misconduct employees shall be dealt with in accordance with the warning procedure in clause 15.4.4 of the agreement. In Mr McLennan's employment agreement the warning procedure is set out in clause 17.4.4 not 15.4.4. The handbook also contains a warning and dismissal system. Four steps are set out as part of that system. There are three warnings before dismissal with notice. The warnings issued have to outline the nature of the offence or non-performance and the corrective action to be taken by the employee.

The process to investigate the incident

[17] There was a dispute about what was said during the three meetings that took place about the clipping of the road sign. Mr McLennan attended all three meetings with his union advocate, Owen Johnstone. Mr Morrison attended the three meetings with another staff member Gavin McCall. I find the best evidence about what was said is contained in the notes that were taken by Mr Johnstone and Mr Morrison at the time of each disciplinary meeting.

[18] For the meeting on 16 January 2006 Mr McLennan was advised of the incident to be discussed and that he should bring a support person. He knew that an investigation of the incident may lead to a disciplinary investigation. A photograph of the 100kph sign which has a slight lean toward the road was produced during the meeting. Both Mr Morrison and Mr Johnstone realised that it was important whether Mr McLennan had crossed the white line marking the outside of the road when the wing mirror clipped the road sign. Mr McLennan maintained that he remained between the white lines. It was agreed that Mr Morrison would measure the distance from the outside of the road sign to the inside road edge of the white line and the truck mirror. It was agreed that if there was no evidence of crossing the line Mr McLennan's pay review meeting was to continue on the following Wednesday. If however it was considered the line had been crossed then a disciplinary meeting would be scheduled on Friday 20 January 2006.

[19] Mr Morrison arranged for the measurement at the site to be taken by the Alexandra manager. Mr Morrison measured the truck mirror. As a result of measurements taken Mr Morrison was of the opinion that Mr McLennan must have crossed the white line in order to clip the road sign. Mr Morrison telephoned Mr McLennan and advised that there would be a disciplinary meeting on Friday which could possibly lead to dismissal and that Mr McLennan would require a support person. Mr McLennan's pay review meeting did not continue.

[20] I am not satisfied that Mr McLennan advised Mr Morrison that he had undertaken a reconstruction of the incident that established that the wing mirror could clip the road sign notwithstanding the truck was within the white line between the meeting of 16 January 2006 and the second meeting. The notes do not reflect a discussion of that nature which, given its significance, would in all probability have been recorded in at least one set of notes.

[21] The second meeting took place on 20 January 2006. It was confirmed by Mr Morrison that the meeting was in the nature of a disciplinary meeting. I am satisfied that the measurements taken by the Alexandra manager, Barry, were provided at the meeting. The measurement that Barry took from the inside of the white line to the edge of the sign was 600mm with the white line itself being 80mm. I do not find that Mr Morrison provided the measurements he had taken of the truck mirror to Mr McLennan and Mr Johnstone. Mr Morrison said by way of explanation that Mr McLennan moved away from measurements during the second meeting. Mr Morrison thought it had been accepted by Mr McLennan that there had been a crossing of the white line, rather than simply the wing mirror clipping whilst the truck remained between the white line. Mr Morrison did not have a record of the measurements that he took of the truck mirror but said that the distance must have been less than the 520mm from truck wheel to the edge of the mirror.

[22] Both sets of notes record that there was discussion of other matters at that meeting. Mr McLennan described the weather as windy, with heavy rain. For some reason this is different to what Mr McLennan filled in for insurance purposes with respect to the mirror. In the insurance form he noted that the weather was dry and fine although was not sure why when questioned during the Authority meeting. Mr McLennan did not appear to have been questioned about this inconsistency at the time of the disciplinary meeting. Mr Morrison said that he took the weather conditions as described by Mr McLennan into account when he made his decision. He concluded though that the weather was not exceptional and that the sign was on a sheltered part of the road.

[23] Mr Johnstone obtained a NIWA climate report after Mr McLennan's employment was terminated. The report was obtained from the nearest hourly recording station to Alexandra which is Clyde some 7km from Alexandra. The report would support at least a possibility that there was rain that morning. The distance though from the recording station meant that Alexandra's rainfall and wind direction and speed could have varied from Clyde. The report writer could not rule out the possibility of isolated higher wind speeds than those measured at Clyde.

[24] Mr McLennan explained that he was *full attention* at the time the wing mirror clipped the road sign and quickly stopped and put his hazard lights on. He advised he did what he could to make the sign safe and reported the incident immediately to his employer. Mr McLennan said that he was driving at about 70kph which was the speed limit for that part of the road.

[25] I accept that Mr Morrison was at the start of the investigation open to the possibility that the truck itself was within the white line. Somewhat surprisingly the mirror measurements were not provided to Mr McLennan and Mr Johnstone during the second disciplinary meeting and there are no measurements provided in the letter of termination. I have considered Mr Morrison's evidence that he felt that it was accepted that Mr McLennan must have crossed the white line but I do not accept that was the case.

[26] There is an issue about why the mirror measurements were not asked for by Mr Johnstone and/or Mr McLennan. The second meeting ended on the basis that Mr Morrison would obtain a report on the incident from Raymond Harris who is the group training officer for the Tulloch Group of companies. Mr McLennan thought that Mr Harris's report would contain the measurements. I find this explains why more was not made of the mirror measurements at that time by Mr McLennan and Mr Johnstone. Mr McLennan was also invited to undertake a report of the incident himself. Mr McLennan said that he did not do that because he was unwell as a result of stress associated with the disciplinary process. Tulloch Transport, notwithstanding the extension of that invitation, was still obliged to carry out a full investigation and communicate the results of that investigation to Mr McLennan.

[27] Mr Harris is a fully qualified driving instructor and course provider. Mr Harris visited the site by the road sign and gave Mr Morrison a verbal report on 26 January 2006 which he then put into an email on 27 January 2006. On 27 January 2006 the final disciplinary meeting was held. The following report from Mr Harris was read out by Mr Morrison.

Hi John, as per our conversation I have viewed the 100kph road sign in question at Alexandra yesterday and in my opinion a driver would have to driving a vehicle without due care or attention to hit this sign as it is a good metre outside of the white line that vehicles should remain within. In this case the driver would have crossed over the shoulder of the road to hit it. All of our drivers are trained not to take the vehicle onto the shoulder of the road. I would recommend that this driver be spoken to and some action taken against him as he has been assessed recently and is fully aware of how to drive our vehicles in a safe and proper manner.

*Regards
Ray Harris
Group Training Officer*

[28] Mr McLennan and Mr Johnstone were asked if there was anything further they wanted to add. They did not have anything further to add and Mr McLennan was advised of the decision to terminate his employment with two weeks notice. I find that Mr Morrison referred to Mr McLennan during the short meeting as a *danger on the road*. I am not satisfied that Mr Morrison told Mr McLennan that the reason he was dismissed was because he had misused a company vehicle. I find that it was not until Mr McLennan was handed his notice of termination later in the day that he understood that was the reason for his dismissal.

[29] Mr Harris is very experienced in the transport industry and in investigating traffic related incidents. It was clear to me from his evidence that Mr Harris believed that Mr McLennan should have had the whole truck on the road and therefore measurements of the mirror were really irrelevant for the purposes of his investigation. Mr Harris was also very clear in his report that drivers are trained not to take the vehicle onto the shoulder of the road.

[30] I do not find that the change in focus during the disciplinary investigation away from the wing mirror measurements was properly communicated to Mr McLennan and Mr Johnstone. It is quite understandable in those circumstances that they would have expected some reference in Mr Harris's report to the mirror measurements particularly when Mr Harris did not undertake his report relying on measurements given to him by

Mr Morrison. The letter of termination provides that the basis of Mr Morrison's investigation, that Mr McLennan crossed the shoulder of the road, was supported by Mr Harris's report. The difficulty is that Mr McLennan did not know what the measurements relied on by Mr Morrison were. A fair and reasonable employer would have provided the mirror measurements to substantiate a conclusion that Mr McLennan did drive outside of the white line. The failure to do so in this case was unfair.

[31] A fair and reasonable employer would have provided Mr Harris's report to Mr Johnstone and Mr McLennan before the third disciplinary meeting so that they could properly comment on it. Mr Harris said in his report that the sign was a good metre outside of the white line. That measurement is inconsistent with the measurement Mr Morrison already had from the Alexandra manager. Mr Harris explained to me that he measured to the middle of the sign as opposed to the edge of the sign. The fact that Mr Johnstone did not point out to Mr Morrison the obvious discrepancy between the measurements at that time supports in my view that there was an inadequate opportunity for a proper response about that report.

[32] Considering the matter objectively I find there was an inadequate investigation undertaken by Mr Morrison to conclude as Mr Harris did in his report that Mr McLennan would have crossed over the shoulder of the road to hit the sign, rather than simply driven on but, not necessarily over, the shoulder of the road.

[33] I now turn to the substance of the dismissal and whether a fair and reasonable employer would have found that the conduct disclosed during the investigation was serious misconduct.

[34] Mr Morrison found that the clipping of a sign was misuse of a company vehicle which is classified as serious misconduct in the employment agreement. Mr Morrison explained to me that misuse of a company vehicle is the term Tulloch Transport uses for careless or dangerous use of a motor vehicle. Misuse of a company vehicle would usually involve a vehicle being deliberately used for purposes other than work purposes, such as unauthorised private or sports use. I do not find that it was a term used correctly to describe Mr McLennan's conduct. Mr McLennan accidentally clipped the road sign whilst driving his truck for work purposes. The employee handbook has a specific section on accidents. The handbook does not suggest that every accident is serious misconduct. Mr McLennan followed the correct procedure after the accident in accordance with the handbook and notified his night supervisor. Accidents occur for a variety of reasons and often the person involved in the accident does not know why. Mr Morrison concluded that Mr McLennan misused a company vehicle and as a result of this Mr McLennan lost an opportunity for a disciplinary penalty short of dismissal to be considered and there was reliance placed on the fact that the final written warning was also for misuse of a company vehicle by Mr McLennan.

[35] I do not find that a fair and reasonable employer would have concluded that Mr McLennan's conduct was misuse of a company vehicle. I do not find that it was open to a fair and reasonable employer to conclude that following investigation Mr McLennan's conduct in clipping the sign could be regarded in terms of the collective agreement as serious misconduct.

[36] I now consider whether Mr McLennan should have been dismissed. Although the final written warning did not specifically state that Mr McLennan would be

dismissed for any other matter, he knew, as he put it to me that *he had to keep his nose clean*. Mr McLennan said that he understood if he did something serious he would be *down the road*.

[37] The employee handbook provides in terms of conduct that does not warrant summary dismissal or unsatisfactory work performance that an employee will be formally warned and may be liable to dismissal upon any established and proven breach or unsatisfactory performance. Clause 17.4.4(v) of the individual employment agreement provides:

If, after having hearing the Employee's explanation, the Employer is satisfied that either:

- (a) There has been misconduct, but not such as can fairly be described as serious; or*
- (b) There has been serious misconduct but that there are mitigating circumstances,*

The Employer may in the Employer's sole discretion either:

- (c) Give the Employee a written warning which is expressed in terms to warn the Employee that any repetition of the conduct in question, or similar conduct, or any further incidents of unacceptable behaviour or performance issues within twelve (12) months of the date of the warning will result in further disciplinary action taken, up to and including dismissal, or*
- (d) Take the matter no further.*

[38] The issue as to whether a fair and reasonable employer would have dismissed is much more finely balanced when there is a final written warning. A fair and reasonable employer would undertake, notwithstanding the final written warning, a full and fair investigation and a careful consideration of the substance of the conduct. In this case with the words *may be liable to dismissal* in the employee handbook and the discretion in clause 17.4.4(v) dismissal was not an inevitable conclusion even though there was a final written warning.

[39] Safety is of paramount importance to Tulloch Transport and the company provides driver training and assessments to their drivers. This includes safety for drivers and the public. Mr McLennan had had some driving issues in his employment and Mr Morrison said that Mr McLennan's driving when he clipped the road sign had some serious potential consequences. He said that it was very unusual for a truck to hit a stationary object to the side of the road on the open road and it is very concerning that Mr McLennan did so. Mr Morrison described Mr McLennan as an *at risk driver*. He said that it is a fundamental rule of road safety that drivers keep within the white lines. Mr Morrison said that there was *hard evidence* that Mr McLennan had crossed over the white lines although I have already made a finding that there was not a full and fair investigation into that matter.

[40] Balanced with that I find that a fair and reasonable employer would have placed considerable weight on the immediate reporting by Mr McLennan of the incident to the night supervisor and the repairs to make the sign safe. Those were steps in accordance with Tulloch Transport's procedures that supported that Mr McLennan

was honest and an employer could have trust and confidence in him. In taking these steps Mr McLennan did think of general public safety and the rules of his employer. Mr Morrison advised me that he had taken this into account but he also said that he felt Mr McLennan had to report it because of the damage to the wing mirror. I am of the view that if it was considered, too little weight was placed on it. The actual consequences of clipping the sign were minimal.

[41] Mr McLennan's conduct in clipping the sign was not serious misconduct. It could be viewed as a performance issue in terms of driving too close or on the shoulder of the road. A full and fair investigation may have established that Mr McLennan was over the shoulder of the road. Mr McLennan could have been warned in that respect and required to undergo training. To the extent that Tulloch Transport saw the clipping of the sign to be misconduct in that Mr McLennan was momentarily inattentive it was open to Tulloch Transport to impose a penalty short of dismissal.

[42] The matter is finely balanced because of the warnings. In my view it is the steps that Mr McLennan took after clipping the sign that tips the balance in this matter in his favour. They show that he was aware of the importance of rules and safety. I have considered the nature of the previous warnings and Mr McLennan's overall conduct on 11 January 2006. I find that a fair and reasonable employer would not have dismissed Mr McLennan for clipping a road sign with his wing mirror.

Determination

[43] I have not found Tulloch Transport to have carried out a full and fair investigation into the allegation that Mr McLennan clipped a road sign with his wing mirror. I have not found that the conduct disclosed when the road sign was clipped was conduct a fair and reasonable employer would find as serious misconduct.

[44] I find that the decision to dismiss Mr McLennan was unjustifiable because it was not what a fair and reasonable employer would have done in the circumstances at the time of dismissal.

[45] I find that Mr McLennan has a personal grievance that he was unjustifiably dismissed and he is entitled to remedies.

Remedies

Contribution

[46] Tulloch Transport could have given Mr McLennan a warning for clipping the sign. Although the sign does appear to be closer than usual to the road there was no suggestion that any other drivers had clipped it. Mr McLennan had other driving issues as an employee although only one had been the subject of a warning. I assess the level of contribution in all the circumstances at 20%.

Lost wages

[47] Mr McLennan did not work out his notice period because he said it was too

humiliating for him to stay at work serving out his notice. I accept that he did not actually have a job to go to but told Mr Morrison that he did. Mr McLennan said that despite having applied to every transport company in Invercargill and surrounding areas he had not been successful in getting a permanent driving job, although he has had other work. His details of earnings from IRD records were provided from dismissal until shortly before the investigation meeting. I am satisfied that Mr McLennan has attempted to mitigate his loss. He applied for his first job within one week of dismissal. I accept he applied to transport companies in the Southland area but only had one interview. I should make it clear that there was no evidence that Tulloch Transport interfered with or influenced Mr McLennan's employment opportunities after termination. Mr McLennan explained that he would have left Invercargill to look for driving work but for personal reasons I accept that he must live in Invercargill.

[48] In this case I am prepared to exercise my discretion and order that Mr McLennan is entitled to lost earnings for a period of 12 months from the date that the notice period would have ended if he had worked his notice less income earned and the contribution. I will leave it to the parties to see if they can reach agreement about the amount of lost wages and I reserve leave for either party to return to the Authority if agreement is not possible.

Compensation

[49] Mr McLennan gave evidence that he was humiliated when he was dismissed and has struggled to obtain a full time position driving, notwithstanding the national shortage of truck drivers. I accept that Mr McLennan was humiliated and hurt by his dismissal. In all the circumstances of the case I am of the view that a suitable award for compensation is \$5,000.

[50] Taking contribution into account I order Tulloch Transport to pay to Paul McLennan the sum of \$4,000 without deduction being compensation under s.123(1)(c)(i) of the Employment Relations Act 2000.

Penalty

[51] The claim for a penalty for a breach of an employment agreement and breach of good faith was not made by the applicant until final submissions. I do not find that there should be an order for a penalty in this case.

Costs

[52] I reserve the issue of costs.

Summary of findings and orders

- I have found that Paul McLennan was unjustifiably dismissed;
- I have assessed Mr McLennan's contribution to his dismissal at 20%;
- I have ordered that Mr McLennan be paid lost wages for a twelve month period from the date his notice period would have ended less income earned and

contribution;

- I have ordered Tulloch Transport to pay to Paul McLennan the sum of \$4,000 compensation without deduction;
- I have not made any orders for a penalty in this case;
- I have reserved the issue of costs.

Helen Doyle
Member of Employment Relations Authority