

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 24
5380741

BETWEEN GALIL MOUKHARRIS
Applicant

A N D NORTHLAND WASTE
LIMITED
Respondent

Member of Authority: James Crichton

Representatives: Mike Harrison, Advocate for Applicant
Raymond Lambert, Advocate for Respondent

Investigation Meeting: 18 December 2012 at Whangarei

Date of Determination: 24 January 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Moukharris) alleges that he was unjustifiably dismissed from his employment with the respondent (Northland Waste). The respondent resists the application on the footing that the dismissal was justified because of a significant breach in health and safety.

[2] Mr Moukharris commenced employment with Northland Waste as a Refuse Removal driver in June 2010 and the dismissal took place on 25 January 2012.

[3] As a Refuse Removal driver, Mr Moukharris was employed to drive what are colloquially referred to as rubbish trucks collecting rubbish from outside residents' properties on a regular dedicated run.

[4] During the employment, Northland Waste made modifications to its vehicles with a view to improving the safety of its staff. One such modification was a new

button fixed to the back left corner of the truck which effectively provided another control to use when operating the machinery at the back of the rubbish truck. With this second button operative, the runner had to push both the second button and an original button already fixed to the truck to operate the machinery at the rear of the truck. By requiring the depressing of two separate buttons, it was hoped to ensure that the runner would not have either hand in the vicinity of the machinery when it started to move.

[5] However, the Authority heard evidence from Mr Moukharris that the runners habitually disabled the second safety switch by sticking a stick into it to keep the circuit open at all times so that all they had to do to operate the machinery at the rear of the truck was push the other button. The effect of this process was of course to remove any benefit of the safety device.

[6] Mr Moukharris told the Authority that while he was aware that runners habitually disabled the safety system he did not condone that behaviour and that he spoke to the runners on his truck each day at the start of work telling them not to disable the safety system. He also maintained that he was unable to see what the runners were doing at the back of the truck because of course he was responsible for driving the vehicle. That view was not accepted by Northland Waste who said that the safety switch was on the back left corner of the vehicle and so would have been clearly visible to the driver through the rear vision mirror on the side of the truck.

[7] At the end of December 2011, Mr Moukharris reported problems with the clutch operation on his particular vehicle. He recorded the difficulty in the vehicle log and he reported it to the company mechanic seeking an investigation.

[8] The problem with the clutch was not immediately addressed (Northland Waste say it was not urgent and that in any event parts needed to be acquired to effect the repair) and Mr Moukharris again noticed the problem on 16 January 2012 and again reported it. He was offered alternate vehicles but considered neither of them was satisfactory for what he considered safety reasons.

[9] On 20 January 2012 Mr Moukharris proceeded on his rubbish collection run as usual in his "own" vehicle. Instead of proceeding up a steep street on his run (Raewyn Street, Whangarei) Mr Moukharris decided to collect the refuse in that street by travelling downhill. This meant that Mr Moukharris had to cross the centre line

from time to time as he collected the rubbish in the street. When he did this manoeuvre, he engaged his hazard lights and he says he proceeded cautiously. This procedure is called “double siding ...”

[10] Northland Waste management saw the Raewyn Street collection that day. Mr David Peter, the Branch Manager and Mr Ivan Botica were in a company vehicle and both observed Mr Moukharris *travelling down Raewyn Street on right hand side of the road driving directly into the path of oncoming traffic.*

[11] This manoeuvre was considered unsafe by Northland Waste and specifically outlawed by the company’s health and safety policy. The Authority heard that there were circumstances where Northland Waste allowed some variation to the normal rule that their trucks should invariably operate on the correct side of the carriageway but that each of those circumstances was the subject of a particular exception which had been recommended by the company’s drivers at first instance and then approved by management after Mr Botica had driven the route in question himself and satisfied himself that the proposed change to the usual rule was in the interests of the health and safety of the employees. It follows that Northland Waste’s policy was that drivers:

... could not cross the centre line in any streets that had not been approved of by the company. Certainly the street in question (Raewyn Street, Whangarei) was not approved and all drivers are aware that they have no discretion to add new areas without specific management approval. The company’s safety records clearly show this process and company records show that Mr Moukharris was in attendance when these rules were discussed.

[12] The Authority heard that Mr Moukharris took the view that the process he adopted on Raewyn Street was safer for his runners than following the company’s policy. This was because of his anxiety about the state of the booster on his truck’s clutch. He described to the Authority how, if the vehicle was moving uphill and he sought to change gears while the vehicle was in motion, and the clutch failed because of the booster problem, the gear change would be missed, and the vehicle could potentially lose way and roll back on to the runners travelling behind. It was to avoid this prospect that Mr Moukharris chose to drive down the road, from time to time on the wrong side, in order to pick up rubbish on that side. The Authority heard that this is called in the trade “double siding”.

[13] Northland Waste disputed Mr Moukharris' conclusions in respect to the operation of the vehicle. First, and most importantly, the evidence of Mr Peter was that the vehicle would be much safer and more manageable going up the hill than going down it and that any truck driver would confirm that was the position. Mr Peter went on to tell the Authority that a driver going up a hill in a large vehicle should select a gear and not change gears especially given that the vehicle was inevitably going to be moving slowly and stopping regularly.

[14] Secondly, Northland Waste said there was no evidence that the problem with the clutch booster would have caused sufficient difficulty in changing gears in any event. That evidence is countered by Mr Moukharris with testimony that late in the previous month, he had been forced to stop the same vehicle because the clutch failed completely and it was only because he was able to top up the hydraulic fluid which had leaked out because of the failing booster seal, that he was able to proceed back to the depot.

[15] Having been observed driving his vehicle in breach of company policy, Mr Moukharris was suspended on pay by Northland Waste until a meeting could be held. That meeting was also to consider another alleged breach of the employer's safety policy, in that, on examination, it was found that the truck Mr Moukharris had charge of had had the safety switch at the rear disabled. That meeting took place on 25 January 2011 and resulted in his employment being terminated.

Issues

[16] The only question for the Authority to consider is whether Mr Moukharris was unjustifiably dismissed or not.

Was Mr Moukharris unjustifiably dismissed?

[17] The Authority is satisfied on the evidence it heard that the dismissal of Mr Moukharris was a justified one in all the circumstances. Despite the sterling efforts of Mr Moukharris' advocate Mr Harrison, the Authority is not persuaded that Mr Moukharris can avoid the inevitable consequences of his actions. While there may be some infelicities in the procedure adopted by Northland Waste, their earnest commitment to health and safety principles and their refusal to deviate from the very sensible basis on which they have developed their policy on double siding, is to their great credit. This is an example of a small company developing a health and safety

regime with the active participation of the people it is designed principally to protect and then implementing that procedure as company policy.

[18] It will be remembered that Northland Waste determined to deal with the double siding issue by first getting its drivers to identify particular areas of difficulty where double siding or driving on the wrong side of the road might be inevitable and then having its operations supervisor drive the spots identified by staff as particularly problematic and where he thought fit, accept variations to the company's general rule that double siding is outlawed as is driving on the wrong side of the road, unless there is a specific exemption already agreed to.

[19] What happened here was that Mr Moukharris decided without consulting the company that, in effect, he knew best. There is no question that Mr Moukharris acting with the best of motives. His dominant motivation was not an unwillingness to follow company policy but a belief that it was safer to do what he did than what the company policy mandated.

[20] But as the Authority has just emphasised, this was a company policy which had not just been enacted from on high but had been developed with the active collaboration of the people who it was principally designed to protect. The rules were clear that double siding was outlawed as was driving on the wrong side of the road save where there had been a particular exemption granted.

[21] The Authority is absolutely clear that Mr Moukharris knew those were the rules and knew that Raewyn Street, Whangarei was not one of the exempted areas. He ought to have simply followed the company's policy and not sought to second guess it by making his own independent decision. If, as he maintained, safety on the day required an amendment to the company's clearly established policy, then he ought to have telephoned the company office before he took to deliberately breaking company policy. In his evidence to the Authority, Mr Moukharris had no explanation for why he did not telephone the company first despite that being a clear option to him. The Authority heard that, from time to time, drivers would ring in to seek advice or to seek amendments to routes or operational practice; Mr Moukharris did not take that step.

[22] In the staunch defence of his position provided for him by Mr Harrison, Mr Moukharris maintained that he was not given sufficient credit by Northland Waste

for his motivation in doing what he did and that the company failed to take proper account of the defect to Mr Moukharris' vehicle. As to the first, it is certainly the Authority's considered view that Mr Moukharris was activated not by insolence or unwillingness to conform but by his own judgment about what was safe. But the difficulty with this argument is that it ultimately leads to a conviction that any person's judgment is as good as any other and particularly in matters of health and safety, the employer must be entitled to make its rules and expect them to be enforced. This is particularly so when this employer has gone to considerable trouble to engage with its workforce on this very aspect and to have the workforce actively involved in the extent to which there will be departures from the usual rule. In those circumstances, for the Authority to accept that Mr Moukharris' judgment on this point is to be preferred over the collective wisdom of not just the employer but the employees who diligently participated in the development of the employer's policy, would be sending the wrong message entirely.

[23] Mr Harrison's argument is also subject to a practical criticism. Mr Peter gave evidence to the Authority that even if the truck had a defect (which Northland Waste did not accept) ... *it would have been safer going up not down. Any truck driver would say the same. The driver should select a gear and not change gears especially given they were picking up rubbish.*

[24] It follows from the foregoing evidence that Northland Waste do not accept the fundamental premise behind Mr Moukharris' action. In essence they say the truck and its occupants would have been safer going up the hill than down principally because a prudent truck driver would not attempt to change gears going up a hill at a slow speed with frequent stops. The problem with the clutch booster seal (if any) would only manifest itself on gear changes. Once gear changes are not made the problem removes itself. Northland Waste say that this is what Mr Moukharris ought to have done whether or not there was a problem with the booster.

[25] Turning to the question of whether he was given adequate credit for the problem with the vehicle, the Authority heard a great deal of evidence about the state of the clutch booster seal. Northland Waste's position was that the booster seal needed replacing but that it was not urgent and certainly not significant enough to require the truck to be removed from service. That view was supported by Northland Waste's contractor Commercial Diesel Limited. Their evidence was that the

particular vehicle had been seen by Commercial Diesel Limited on 28 December 2011 when ... *it was noted that the clutch booster was showing signs of deterioration with a weeping seal and would require replacement in the near future. This was not a safety issue and the clutch was still functioning so the vehicle was allowed back into service and a follow up note made to order the part. ... The replacement part was subsequently ordered and replaced at the next service a few weeks later. The truck remained in service awaiting the part and we are not aware of any further concerns being raised by the new driver over this time. As is our standard policy, had we viewed this maintenance issue as a safety concern or significant defect we would have immediately advised Northland Waste Ltd to take the truck off the road, however this was not the case here. We understand that a claim has been made that the truck would have been safer to driver downhill than uphill due to the clutch booster unit. Based on the condition of the truck when it left our yard, it would have been safe to drive both uphill and downhill.*

[26] On the face of it, that appears to conclusively deal with the aspect save for one further piece of evidence. Mr Moukharris through his advocate Mr Harrison tabled an opinion from another brake and clutch expert in Whangarei, Lamberts Brake and Clutch Ltd. In an opinion dated 26 July 2012, the Managing Director of Lamberts answered in the negative a question whether if an air assisted hydraulic clutch system were to run out of hydraulic fluid it would still work. The answer is not surprising. And it is fair to record that Mr Moukharris told the Authority that he had had an earlier incident with this same vehicle where it had completely run out of hydraulic fluid in the clutch system. But there is nothing to suggest that that is what happened on 20 January 2012 or indeed that that was likely to happen that day and no evidence from anyone to the Authority suggested that the clutch was not operating properly on 20 January 2012.

[27] Even aside from those considerations, given Mr Peter's evidence that the safe approach to driving a heavy vehicle up a hill was to select a gear and not change it, the Authority's considered view is that the performance of the clutch, as a justification for Mr Moukharris' decision, is effectively a red herring because a prudent truck driver would not have used the clutch at all in the circumstances described.

[28] A further complaint from Mr Moukharris concerns the disabled safety system at the back of the vehicle. The Authority has already recited how this was the second

allegation faced by the employee at the disciplinary meeting. Mr Moukharris says he was driving the truck and therefore not directly responsible for what happened at the back. Further, he says that he could not see what the runners were doing anyway.

[29] But as the driver of the vehicle, Mr Moukharris was responsible for the safety of the vehicle and all its associated staff. While he says he told the runners not to disable the safety system, the fact remains that the safety system was disabled when the vehicle was inspected.

[30] His point that he could not see what the runners were doing is resisted by Northland Waste who point out that he could see the safety switch area of the truck from the cab, via the rear view mirror. A subsidiary point was that there was disparate treatment in that Mr Moukharris was dismissed and the runner responsible for disabling the safety gear was only given a final written warning. Northland Waste say the reason for the difference was that Mr Moukharris was responsible for two breaches of the Company's health and safety policy while the other man had been responsible for only one. The employer reasoned that the driver had ultimate responsibility for the safety of the vehicle and its staff, a contention the Authority accepts at face value.

[31] The final basis of Mr Harrison's spirited challenge to the dismissal was his contention that there were procedural irregularities in the way that Northland Waste undertook the disciplinary process. His principal contention is that Mr Peter was effectively witness, prosecutor and decision maker. Mr Harrison makes this claim because it was Mr Peter who observed the vehicle on Raewyn Street, it was Mr Peter who chaired the disciplinary meeting with Mr Moukharris and it was Mr Peter who made the decision to dismiss.

[32] Even if these contentions are factually correct, and that is denied, there are some practical realities which must be taken into account. Mr Peter is the Branch Manager of Northland Waste and it is inevitable that he would be involved in a disciplinary matter such as this. The fact that he happened to see the commission of the offending behaviour as well does make him a witness but there is no way that a small employer can avoid that inevitable dual role. It is clear on the evidence that the Authority heard that Mr Peter was not the sole decision maker, the final meeting being attended by Mr Peter and Ms Noor for the company. Ms Noor is Senior Administration Manager for Northland Waste. Further, Mr Peter discussed the

potential outcomes with Mr Lambert before Northland Waste decided that dismissal was the only possible response.

[33] In the end, while the fact that Mr Peter was a witness to the wrong doing as well as the decision maker might give him a dual role, that is an inevitability in a small employer. The infelicities aside, the Authority is satisfied that the decision which Northland Waste made was a decision that a fair and reasonable employer could have made in all the circumstances at the time the dismissal occurred: s.103A of the Employment Relations Act 2000 (the Act) applied.

[34] The Authority is satisfied that the investigation conducted by Northland Waste was sufficient, given the circumstances. Given that Mr Peter saw the offence complained of, that rather short circuited the investigation stage.

[35] But Mr Moukharris was given a proper opportunity to be heard, was offered the opportunity to bring a support person but chose not to and was advised by the employer of the two safety issues of concern, namely the driving of the truck on the wrong side of the road and the disabling of the safety system at its rear.

[36] It is evident from the paper trail provided to the Authority that Mr Moukharris had views about his culpability in relation to both of those issues and that he advanced his views to the employer clearly. The Authority is satisfied that Northland Waste *genuinely considered the employee's explanation* before the dismissal and the Authority is not persuaded that any procedural infelicities in the process adopted by Northland Waste were major or resulted in unfairness to the employee.

[37] That being the position, Mr Moukharris' claim fails entirely.

Costs

[38] Costs are reserved.

James Crichton
Member of the Employment Relations Authority