

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 165
5326715

BETWEEN

NICOLA PENNEY
Applicant

AND

DIRECT FREIGHT LIMITED
Respondent

Member of Authority: M B Loftus

Representatives: Rex Hancock, Advocate for the Applicant
Mary Lindstrom, for the Respondent

Investigation Meeting: 24 August and 25 October 2011 at Christchurch

Submissions Received At the investigation meeting

Determination: 28 October 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Ms Nicola Penney, claims she was unjustifiably dismissed from the respondent's employ on what was, from her perspective, an unknown date some time in October 2010.

[2] The respondent, Direct Freight Limited (Direct Freight), is more specific. It accepts that it dismissed Ms Penney and states that it did so on 12 October 2010. It contends that the dismissal was justified by:

- (a) The existence of a 90 day trial period permitting dismissal as envisaged by section 67A of the Employment Relations Act 2000;
- (b) Ms Penney's poor performance during the period of employment; and
- (c) Ms Penney's inability to continue to perform the tasks normally expected of her as she was pregnant and no longer held required licences.

Citation of the respondent

[3] The proceedings, when initially filed, cited Mary and Ross Lindstrom as the respondent(s). Mary Liu and Ross Lindstrom are the directors of and, through a holding company, shareholders in Direct Freight. The content of the application raised doubts about whether they were the employer and it appeared more likely that the company was. This was raised with the parties at the commencement of the investigation meeting and both parties agreed that Ms Penney was employed by Direct Freight. By consent, the identification of the respondent was changed accordingly.

Background

[4] Ms Penney initially expressed some uncertainty about the nature of her relationship with Direct Freight. She says "*I understood I was a full time employee*" but thought that Direct Freight considered her a casual. Fortunately the issue was quickly resolved through questioning at the commencement of the hearing.

[5] Ms Penney was initially engaged by Direct Freight Limited as a casual but, as a result of a vacancy, she was offered and accepted full time employment. The effective date of that arrangement was, according to Direct Freight, 1 August 2010.

[6] She was engaged as a line haul driver and primarily tasked with moving freight between Christchurch and Picton. Essentially, the job involved departing Christchurch at 7pm with trailer borne goods which were to be delivered to the Inter-Islander ferry terminal at Picton. There, the northbound trailer(s) was to be replaced with a southbound one which would be returned to Christchurch. Payment was on a piece based system with earnings being calculated on a return trip basis.

[7] Ms Penney claims she understood that she would be provided with a written employment agreement but that she never received one. Direct Freight's view differs. They say two copies were prepared and signed by Mr Lindstrom. One was then retained at the Company's office in Otorohanga and the other forwarded to the company's Christchurch supervisor, Mr Dean Poynter, so that he could pass it to Ms Penney. Mr Poynter states that he is sure he gave the document to Ms Penney but that it was not returned and he did not pursue it.

[8] Contained therein was a provision, clause 3, which reads:

This contract of employment has a 90 day trial period commencing from 3rd August 2010.

[9] There were, from the company's perspective, ensuing problems with Ms Penney and the performance of her duties. The first intimation is said to have come on 27 August when Ms Liu, who was in Paris at the time, received a telephone call from one of her owner-drivers complaining about Ms Penney's behaviour and advising that he did not want to work in the same yard as her. Ms Liu telephoned Mr Poynter to gather more information and was advised that the man concerned was the father of Ms Penney's then unborn child. Ms Liu made a decision not to pursue the matter as she did not wish to become embroiled in a private dispute between her employees.

[10] There then followed what the company claims were three incidents which each led to a verbal warning. They were:

- (a) Ms Penney's damaging of a door at a freight yard in Blenheim when she hit it with a load on a forklift;
- (b) Her having telephoned the company's administration manager in Otorohanga, and, having complained about the father of her child, advising that she did not wish to work with him any longer; and
- (c) Ms Penney's use of the company's fleet link radio to converse (apparently somewhat argumentatively) with the gentleman in question.

[11] Ms Penney admits damaging the door and telephoning the administration manager but denies any discussions about either of those events, or her use of the radio, was disciplinary in nature. She claims to be totally unaware of any possible warnings that may have resulted. Mr Poynter, when asked about the alleged warnings, stated that his main concern was Ms Penney's attendance which had turned tardy after she became pregnant. He says he raised it with her a couple of times. He also commented that when Ms Penney advised him of the incident in Blenheim he asked why it had occurred. It appears the reason was that Ms Penney had only raised the door to half its height and when asked why, is alleged to have replied that it was not her job. Mr Poynter states that he replied it was and that he considered that comment to constitute a warning. Mr Poynter accepts nothing was put in writing.

[12] Ms Liu also states that at some unspecified time and having learned of the pregnancy, she asked Ms Penney whether or not it would affect her ability to perform her job. She states that Ms Penney advised no and that she, Ms Liu, accepted that answer at the time.

[13] Another issue concerning Direct Freight was Ms Penney's dangerous goods licence. The employment agreement contained a provision requiring that:

You must at all times while employed, hold current and correct licences to operate the company vehicles plus a dangerous goods licence.

[14] Ms Penney's dangerous goods licence was due to expire on 1 October 2010 and it is alleged she was telling colleagues that she had no intention of renewing it. That said, and whilst the company has profiles of the staff and their licences to enable it to keep track of such things, it accepts it did not approach her about the issue and remind her of the need to renew the licence. Direct Freight considers renewal to be an employee responsibility. Whilst Ms Penney concedes that she did not renew the licence when it expired, she claims this was due to personal disorganisation and adamantly denies telling anyone that she was going to simply ignore the matter.

[15] There is some confusion as to when Direct Freight became aware of this. Mr Poynter's evidence would suggest he become aware of the issue on the morning of 12 October and that he advised Ms Liu, who was in Christchurch, forthwith. Ms Liu's evidence suggests that Mr Poynter told her of the impending expiry and Ms Penney's alleged reticence to renew on 20 September. Irrespective of which is correct, Ms Penney was not approached about the licence until 12 October which was the morning after the event which, from the company's perspective, broke the proverbial camel's back.

[16] Ms Penney was due to depart, as normal, for Picton at 7pm on the evening of 11 October. She did not. She left instead at 11pm. She claims that she did so because she was advised by Mr Poynter that the ferry sailing with which she normally connected had been cancelled due to maintenance on the vessel and that she should go later.

[17] Direct Freight is adamant that this did not occur. Mr Poynter states that sailings were being disrupted by poor weather and that Ms Penney had, as a result, had a delayed return on the morning of the 11th. He says he told her to go home, get

some rest but unless he sent a text advising otherwise she should be ready for a normal start that evening. The reason for the possible reticence about start time was that he was aware that when the Ferry schedule got disrupted, cancellations were possible but that did not occur that day and he did not amend Ms Penney's normal departure time. He states that his first intimation of something amiss was when he received a call from the yard about 10pm asking why the trailer was still there.

[18] When Ms Penney arrived in Picton, she states that she confirmed that the trailer was booked on the next sailing but, as events transpired, that did not occur. According to Ms Penney the trailer was further delayed because of an error made by TranzRail. Another result of Ms Penney's late arrival in Picton was that the southbound trailer that she returned to Christchurch did not arrive in time for it to be reloaded for its northern journey the following night. The company claims that, as a result, it lost revenue of some \$1,851.50.

[19] Ms Penney states that on her return to Christchurch she was advised by Mr Poynter that Mary Liu wished to speak to her.

[20] Mr Poynter accepts that and adds that he also told Ms Penney he was disappointed that she had let her initial high standards slip. His was a reference to what he considered Ms Penney's deteriorating timekeeping. He then left and did not hear the entire conversation, about which Ms Penney says:

When I met with Mary she said I was no longer qualified to drive her trucks any more as my dangerous good had expired on the 1 October 2010. And also she said she didn't believe I was up to the job any longer because of my condition (referring to the pregnancy). With this Mary asked for their work phone back as well as any uniform they may have provided. At this point I asked Mary am I being fired. Mary replied no and come back and see me when you get yourself sorted. At this point I was a little confused and asked Mary to put what she was relaying to me in writing. To this point she never has.

[21] Ms Liu's recollection of the conversation is that she told Ms Penney:

As far as I am concerned you must get your personal life sorted. Its incompatible with the company's requirements. You've been driving about without a dangerous goods licence for a couple of weeks and you're sacked.

[22] Ms Liu states that she advised Ms Penney that should she get her life sorted she could come back and seek a job, provided one was available.

[23] When asked whether or not the issue of Ms Penney's pregnancy was discussed, Ms Liu accepted it was and:

I advised her that I now thought her pregnancy was affecting her ability to perform the job to which she replied I have issues such as morning sickness etc and you have to give me some time off to cope.

[24] Ms Liu states that she replied by advising "I've a company to run and I can't have ferries waiting for morning sickness".

[25] Ms Liu also states that another factor in her mind was the recent advice that Ms Penney was alleged to have said she wouldn't renew her dangerous goods licence but this allegation was not discussed between the two.

[26] Ms Penney, who does not appear to have understood that she was being dismissed, considered the comment about getting her life sorted referred only to the fact she had not renewed her dangerous goods licence and that once she had done so she could return forthwith. She addressed the issue with alacrity and arranged to attend the next renewal course. This was completed, and the licence renewed, by 21 October 2010.

[27] However in the interim Freight Lines Limited, Direct Freight Limited's only client, had written advising:

Re: Driver – Nicola Jane Penney

I am writing to confirm our verbal conversation regarding the abovementioned driver, employed by Direct Freight Limited.

I now confirm that due to continued service failures that Nicola Jane Penney is no longer an approved Freight Lines driver.

Please contact me if you have any further queries regarding this information.

[28] The letter was signed by Lionel Smith, Freight Lines Christchurch area manager. It was dated 14 October 2010 and, according to Ms Liu's evidence, came after she and Mr Smith had discussed Ms Penney's dismissal.

[29] On 21 October, Ms Penney sent Ms Liu a text advising that she had now renewed her dangerous goods licence and asking when she could return to work. Ms Liu states that she responded to the text by telephoning Ms Penney, advising her

of the letter from Freight Lines Limited and telling her that there would be no return as she was no longer an approved driver.

[30] Ms Penney has no recollection of that conversation, but does not deny that it could have occurred.

[31] On 26 October, Ms Penney wrote to Mary and Ross Lindstrom asking whether or not they would attend mediation to discuss “*a few issues which need to be addressed relating to my employment*”. The issues were said to be:

1. *The issue of you saying I am now casual when since the beginning of August 2010 you have used me on full-time basis till the 6th October 2010.*
2. *Mary told me, I wasn't qualified to drive her truck and also I wasn't now up to the job because of my condition.*
3. *I need clarity on my job situation, whether I have a job or not.*
4. *Lack of contract, when I expected as I was told I was going to get one.*
5. *I have asked for pay slips 2 weeks ago and I'm still waiting for these to be sent to my home address. These are very important as I need them.*

[32] There was no response and Ms Penney filed her application with the Authority on 16 November 2010. Unfortunately, it has been the subject of significant delay due to a range of matters including earthquakes and the unavailability of various participants.

Determination

[33] The first issue is whether or not clause 3 of Ms Penney's employment agreement and s.67A of the Act combine to preclude her from bringing a personal grievance for dismissal.

[34] In my view, they do not.

[35] A detailed consideration of s.67A and its consequences occurred in *Smith v Stokes Valley Pharmacy (2009) Ltd* [2010] ERNZ 253. At paragraph 47 it was observed:

... that the statutory intention [was] that trial periods are to be agreed upon and evidenced in writing in an employment agreement signed by both parties at the commencement of the employment relationship and not retrospectively or otherwise settled during its course.

and

Employees affected are to be new employees.

[36] In *Stokes Valley Pharmacy* signature occurred the day after commencement and that was a factor in nullifying the effect of a clause purporting to invoke the provisions of s.67A. Here the employer signed two days after the employment commenced but, in any event, the agreement was never properly executed given Ms Penney's failure to sign.

[37] Nor was she a new employee on the day upon which the trial commenced. That, the agreement states, was to be 3 August yet Ms Penney not only commenced as a full time employee on 1 August, she had been previously engaged by Direct Freight as a casual. Finally I also conclude the abbreviated provision contained in this agreement does not comply with the requirements of either ss.67A(2)(b) or (c). There is no mention of the employers' ability to dismiss and the fact that the employee is then precluded from bringing a personal grievance in respect to that dismissal.

[38] The conclusion that Ms Penney is not precluded from pursuing her grievance by virtue of s.67A and her employment agreement leads to a consideration of the dismissal. Direct Freight accepts it dismissed Ms Penney. It therefore accepts, albeit perhaps unknowingly, that it has to justify the dismissal.

[39] Pursuant to s.103A of the Employment Relations Act 2000 the question of whether a dismissal is justifiable

... must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal ... occurred.

[40] The test of justification referred to in 39 above is that which existed prior to an amended version coming into force on 1 April 2011. It is used as the dismissal being considered here occurred prior to the change coming into force. Section 7 of the Interpretation Act 1999 provides *An enactment does not have retrospective effect.* Section 4 makes it clear that all enactments are subject to the Interpretation Act 1999 unless the enactment provides otherwise. Applying the new statutory test to this dismissal would be giving it retrospective effect without that being expressly or impliedly provided for in the Act (as amended). I conclude that justification must be assessed in accordance with the law prior to 1 April to the dismissal claim.

[41] In *Air New Zealand Ltd v V* [2009] ERNZ 185, the Court observed that the Authority is required to objectively review the actions of an employer up to and including the decision to dismiss, against the test of what a fair and reasonable employer would have done in all the circumstances.

[42] It is clear that there were three concerns which influenced Direct Freight's decision to dismiss. They were:

- a. The fact Ms Penney no longer held a valid dangerous goods licence (21 above);
- b. The pregnancy and the company's belief it was impeding Ms Penney's ability to perform her duties (see 23 and 24 above); and
- c. The allegation that she was advising colleagues that she was not going to renew the dangerous goods licence (25 above).

[43] The first factor – namely Ms Penney's failure to renew her dangerous goods licence may well be a factor warranting disciplinary action but I doubt that a fair and reasonable employer could rely upon it to justify dismissal in circumstances such as those which existed here. First there is evidence, admittedly contradicted (see 15 above), that Direct Freight had forewarning of the issue and whilst I accept prime responsibility for renewal lies with the employee, that does not exonerate the company. They could have acted to forestall a potential problem and I would suggest the duty to be active and constructive in maintaining a productive employment relationship (section 4(1A) of the Employment Relations Act 2000) would have compelled them to do so. The situation would not change even if Direct Freight had no knowledge of the problem until 12 October. The fact they record licence expiry dates on induction means they should have. Acquisition and retention of that information brings, along with s.4(1A), a duty to use the data to forestall problems and a failure to do so would, in my view, render dismissal an excessive penalty and not one open to a fair and reasonable employer.

[44] The second concern, which the evidence suggests was paramount, simply should not have been a consideration, let alone a pertinent factor in the decision to dismiss. It is unlawful to dismiss someone by reason of pregnancy and/or their state of health during the pregnancy (section 49(1)(a) of the Parental Leave and

Employment Protection Act 1987) yet that is exactly what Direct Freight openly admits to having done here.

[45] A fair and reasonable employer does not act unlawfully and Ms Penney's application must, for this reason alone, succeed.

[46] The third factor raised by Direct Freight as influencing the decision (42(c) above) also creates problems for their defence as the allegation, and the possibility of it influencing Ms Liu's decision, was never put to Ms Penney.

[47] Here I refer to the new test of justification (s.103A of the Act) as amended with effect 1 April 2011. Part therefore reads:

(3) In applying the test in subsection (2), the Authority or the court must consider—

...

(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and

(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and

(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

[48] While not the test being applied here, I refer to it as its content, or at least subsections (b) to (d) inclusive, succinctly codify that which case law has, for many years, considered the basic requirements of a fair process. By failing to put the issue, and therefore failing to allow a reply let alone consider it, Direct Freight has again failed to act as a fair and reasonable employer.

[49] There is the possibility of a fourth concern, and that is the alleged warnings. I raised this as Ms Liu referred to them when justifying the decision to dismiss when giving evidence. Whilst I have concerns that the conversations referred to in evidence could actually be construed as constituting warnings and it is unclear that they were a factor in the decision making process, I observe that if they were they would not justify the decision to dismiss. This is for the same reasons outlined in respect to the allegation that Ms Penney was not intending to renew her dangerous goods licence, namely the possibility they might influence the decision was never put to her as an issue during the dismissal process.

[50] Given the foregoing, I must conclude that a fair and reasonable employer would not have dismissed Ms Penney for the reasons, and in the circumstances, Direct Freight did. The dismissal is unjustified.

Remedies

[51] My conclusion that Ms Penney's dismissal was unjustified leads to a consideration of remedies. She only sought one - \$30,000. She did not, in her statement of problem, identify under which head of compensation she sought this amount.

[52] The Act contemplates various forms of remedy but two are paramount – lost wages and compensation for hurt and humiliation under s.123(1)(c)(i) of the Act. I consider it appropriate to consider remedies under these heads as the total awarded will be less than that claimed. No disadvantage will therefore accrue to Direct Freight.

[53] The evidence indicates Ms Penney remained unemployed until early February, at which time she obtained temporary seasonal employment. An exact date could not be identified. The seasonal role was then replaced with a permanent position but she had to leave soon after for the birth of her baby. That would suggest a loss of slightly in excess of 16 weeks pay. 16 weeks at Ms Penney's guaranteed contractual minima (4 trips per week) is \$10,240 net. For some reason I cannot fathom, the employment agreement expresses the pay rate as a net amount. That amount is payable.

[54] As is, unfortunately, often the case, little evidence was proffered in support of a claim for compensation for hurt and humiliation. That said it is clear from Ms Penney's evidence and demeanour that she felt some anguish at having, as a key reason for her dismissal, an unlawful rationale. In such circumstances I consider an award appropriate but it must, in the absence of supporting evidence, be a moderate one. I consider the sum of \$4,000 to be appropriate.

[55] Finally, the conclusion Ms Penney has a personal grievance and that remedies are appropriate means I must consider whether or not she contributed to the situation in which she found herself (s.124 of the Act). In this case there is the obvious issue of her failure to renew her dangerous goods licence and possible questions over her performance however I dismiss both and conclude there was no contribution. Neither relate to the issue foremost in the employers mind, namely the pregnancy and the

view it precluded Ms Penney from adequately performing her duties. Here, and as an aside, it should be noted that Mr Poynter also questioned a pregnant woman's ability to perform this work but his comments were not cited as the decision to dismiss was not his.

[56] The alleged deficiencies in Ms Penney's performance are also irrelevant. Aside from my doubts about whether or not warnings were ever given, the fact they were never discussed means Direct Freight is incapable of proffering a substantive justification supportive of a finding of contribution.

Orders

[57] For the reasons given the following orders are made:

- (i) The respondent, Direct Freight Limited, is to pay to the applicant, Ms Nicola Penney, the sum of \$10,240.00 (ten thousand, two hundred and forty dollars) **net** as reimbursement of wages lost as a result of Ms Penney's unjustified dismissal; and
- (ii) The respondent is to make such arrangements with the Inland Revenue as may be required to ensure the above payment is made to Ms Penney as a net amount; and
- (iii) The respondent is to pay the applicant a further \$4,000.00 (four thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act.

Costs

[58] I reserve the issue of costs. I ask that the parties try to resolve the issue but failing that, and in the event that Ms Penney wishes to seek costs, she is required to file her application within 28 days of this determination. A copy shall be served on the respondent who is to file any response within 14 days of the application.

