

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2014] NZERA Auckland 356  
5425453

BETWEEN                      ROGER SIMISTER  
   Applicant  
  
AND                              LUXURY AIRPORT  
   SHUTTLES LIMITED  
   Respondent

Member of Authority:      Robin Arthur  
  
Representatives:            Cate Andersen, Counsel for the Applicant  
   Lloyd Brewerton, Advocate for the Respondent  
  
Investigation Meeting:     6 May 2014 in Tauranga  
  
Determination:              28 August 2014

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**DETERMINATION OF THE AUTHORITY**

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- A.      The actions of Luxury Airport Shuttles Limited (LASL) in dismissing Roger Simister were not justifiable.**
- B.      Within 28 days of the date of this determination LASL must settle Mr Simister's personal grievance by paying him the following amounts (which have been reduced by 15 per cent because actions by him contributed to the situation giving rise to his grievance):**
- (i)      \$872.61 in reimbursement of wages lost for the period from 8 May to 21 May 2013 during which he was unjustifiably suspended without pay; and**
  - (ii)     \$4363.05 in reimbursement of wages lost as a result of his unjustified dismissal, for the period from 22 May to 31 July 2013; and**
  - (iii)    \$3400 as compensation for humiliation, loss of dignity and injury to feelings.**

**C. Costs are reserved.**

**Employment relationship problem**

[1] Roger Simister was employed as a trainee driver by Luxury Airport Shuttles Limited (LASL) from 12 March 2013 until he was dismissed on 21 May 2013.

[2] LASL's owner and director at the time, Ian Holroyd, made the dismissal decision. In a letter to Mr Simister dated 21 May Mr Holroyd gave three reasons for his decision – all related to how Mr Simister had carried out his duties on 3 May. The first, described as the “*most serious issue*”, was that GPS data for a passenger van driven by Mr Simister showed speeds 25 kmph or more in excess of the legal limit during some parts of a shuttle run from Tauranga to Auckland Airport. The two other reasons, said to be “*further very serious short comings*” in performing his duties, were that Mr Simister had failed to pick up a scheduled passenger and had failed to carry his log book in the van that day.

[3] During a disciplinary meeting held on 14 May 2013 Mr Holroyd also said Mr Simister upset two customers picked up in Tauranga and brought the company into disrepute. That allegation was not referred to in the dismissal letter but was referred to as an additional issue in LASL's statement in reply to Mr Simister's application to the Authority.

[4] Mr Simister said his dismissal was unjustified because LASL did not sufficiently investigate the allegations made, did not provide him with all the information it relied upon, and did not give him a reasonable opportunity to respond to that information. He said LASL failed to provide clear evidence that his behaviour constituted serious misconduct and the company had carried out his dismissal in a procedurally unfair manner.

[5] Mr Holroyd has sold his interests in LASL but any liability for Mr Simister's grievance remained with the company as that was the legal entity named as his employer on the employment agreement. LASL's statement in reply said Mr Simister's dismissal was justified in light of serious safety issues related to his driving.

**Issues and investigation**

[6] From Mr Simister's statement of problem and LASL's statement in reply the following issues were identified for investigation and determination:

- (i) Was Mr Simister's employment casual or ongoing, and if ongoing, was that on the basis of a valid 90-day trial period?
- (ii) Was Mr Holroyd's decision to suspend Mr Simister from duties on 8 May, pending a disciplinary meeting on 14 May, justified?
- (iii) Did Mr Holroyd fairly investigate allegations about Mr Simister's conduct before deciding to dismiss him?
- (iv) If fairly investigated, was the outcome of that investigation such that a fair and reasonable employer could have decided to dismiss Mr Simister (that was to conclude his conduct did amount to serious misconduct and dismissal for it was the appropriate outcome)?
- (v) If the answer to (ii) and/or (iii) and/or (iv) was no, should remedies be awarded to Mr Simister, considering:
  - (a) lost wages; and
  - (b) compensation for hurt and humiliation?
- (vi) Should any remedies awarded to Mr Simister be reduced for blameworthy conduct by him contributing to the situation giving rise to his grievance?
- (vii) Should either party contribute to the costs of representation of the other party?

[7] For the purposes of the Authority investigation Mr Simister and Mr Holroyd lodged written witness statements. At the investigation meeting the two men answered questions from me and the parties' representatives. I also heard oral closing submissions from the representatives there.

[8] The parties had lodged some relevant background documents but other documents, despite earlier directions, were not provided until during the investigation meeting. I have not seen notes said to have been made by Mr Brewerton during the 14 May meeting with Mr Simister (and later copied to Ms Andersen). As advised to the parties I have made this determination without regard to those notes as neither party considered it necessary to lodge that document, either with their respective statement of problem and statement in reply or their witness statements. I have relied

instead on the evidence of Mr Simister and Mr Holroyd, in their witness statements and answers to questions, about that meeting.

[9] As permitted by s174 of the Employment Relations Act 2000 (the Act) this determination has not recorded all evidence and submissions received but has stated findings of fact and law and expressed conclusions on the issues for determination.

### **The nature of Mr Simister's employment with LASL**

[10] LASL's statement in reply said the procedural fairness of its actions in dismissing Mr Simister should be considered in light of two factors:

- (i) He was within the 90-day trial period and the company "*should be able to dismiss him without a personal grievance being lodged*"; and
- (ii) His employment was on a "*casual as required*" basis so the company had no obligation to offer him any shifts.

[11] Neither assertion withstood analysis.

[12] As Mr Brewerton conceded in answer to questions on LASL's closing submissions, neither the job offer made to Mr Simister on 11 March 2013 (which referred to a proposed 90-day trial period) nor the employment agreement signed on 13 March met the statutory requirements for excluding grievance rights.<sup>1</sup> Neither document included a term about notice of termination before the end of a trial period or a term about such an arrangement precluding the employee from bringing a personal grievance for dismissal. Even if the agreement had contained those terms, I would have accepted Mr Simister's evidence (based on his driving log book) that he had worked for LASL for a day, doing a return run to Auckland, before he signed the employment agreement. He was, thereby, an existing employee – a category of employee to whom the statutory trial period cannot apply.<sup>2</sup> Having failed to comply with the Act's strictly interpreted provisions on trial periods, LASL was disqualified from the immunities that would otherwise have prevailed.<sup>3</sup>

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<sup>1</sup> Sections 67A and 67B of the Employment Relations Act 2000 (the Act).

<sup>2</sup> Section 67A(3) of the Act.

<sup>3</sup> *Smith v Stokes Valley Pharmacy (2009) Limited* [2010] ERNZ 253 at [48] and [83] and *Blackmore v Honick Properties Limited* [2011] NZEMpC 152 at [66] and [68].

[13] The employment agreement included a provision about its nature and term with a heading reading “*casual individual agreement of ongoing and indefinite duration*”. It said the employment relationship was “*as required*”. However the reality of the work and its allocation was that Mr Simister and other drivers were expected to confirm their availability at the beginning of a week (which took account of commitments to other employment and absences for sickness or recreation) and then accept driving work within those parameters notified to them by the LASL operations staff. Rather than truly casual, the expectation of availability and acceptance meant the actual nature of the employment was ongoing (albeit part-time and with variable hours). The parties’ conduct, I considered, established there were legitimate expectations of further work being provided and accepted, with corresponding mutual obligations on the parties to satisfy those expectations.<sup>4</sup>

[14] An email Mr Holroyd sent Mr Simister on 8 May, suspending him from duties, demonstrated this expectation that drivers would be offered available work. Mr Holroyd wrote that he would “*refrain*” from placing Mr Simister “*on the drivers roster*” until they had a meeting he wanted to hold on 14 May.<sup>5</sup>

[15] If that conclusion about the expectation was wrong, there was an alternative view to the same effect based on the fact that an employee may be unjustifiably dismissed during the course of casual engagement.<sup>6</sup> Arguably, but for Mr Holroyd’s decision to suspend him from the roster, Mr Simister would have been available for and likely have been assigned some work on the day or during the week in which he was, instead, barred from working for LASL and required to attend what turned out to be a disciplinary meeting. Mr Holroyd also accepted in questioning during the Authority investigation meeting that there were ongoing good faith obligations in how he dealt with Mr Simister on days where he was not working (such as meeting with him to hear his explanation in response to concerns about his work on a previous day).

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<sup>4</sup> *Jinkinson v Oceana Gold (NZ) Limited* [2009] ERNZ 225 at [52].

<sup>5</sup> *Jinkinson*, above, at [36].

<sup>6</sup> *Rush Security Services Limited v Samoa* [2011] NZEmpC 76 at [3].

**Was Mr Simister unjustifiably suspended from 8 May?**

[16] LASL's statement in reply denied Mr Simister was "*illegally suspended*" because, it argued, he was a casual employee and described the issue as a technicality.

[17] Mr Holroyd sent his 8 May email to Mr Simister without any prior discussion of the prospect that Mr Simister would be stopped from working until he attended a meeting that Mr Holroyd wanted to hold with him on 14 May. Mr Holroyd wrote that he had reviewed information from Mr Simister about his 3 May 'transfer run' to Auckland and wanted the meeting due to "*the seriousness of the issues*" for review, including "*incidents that occurred on this run and other matters concerning your employment with LAS*".

[18] Mr Simister was assigned work for one day during that 8-14 May period but it was withdrawn when he asked the LASL operations worker who contacted him whether she had checked with Mr Holroyd. Another operations worker referred to him as having been "*stood down*".

[19] The employment agreement did not provide for suspension, either with or without pay. Mr Simister submitted the effect of suspension was punitive because it denied him pay for at least one day (and probably more) that he would otherwise have received for work between 8 and 14 May.

[20] An opportunity to comment on the prospects, terms and effects of suspension might not be required in cases of imminent danger.<sup>7</sup> However there was no evidence in the present circumstances that matters were so unusually sensitive as to time and safety. Although Mr Holroyd was concerned about information that Mr Simister was speeding at some times while driving on 3 May, Mr Holroyd was not so concerned that he immediately stopped Mr Simister from driving on subsequent days. Neither, as far as Mr Holroyd could remember, did he check whether there was any similar GPS data about Mr Simister's driving for any other days before 3 May or the days up

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<sup>7</sup> *Graham v Airways Corporation* [2005] ERNZ 587 at [104].

to 8 May (and, if so, what such data might have shown about Mr Simister's driving speeds on other runs).

[21] There was nothing to indicate any real difficulty in Mr Holroyd first taking the opportunity to talk with Mr Simister about whether stopping him driving was necessary and, if so, what basis that it might be on. Failing to do so was unjustified. It resulted in Mr Simister being treated unfairly because he missed out on pay he might otherwise have earned.

### **Were the allegations fairly investigated?**

[22] LASL's statement in reply said the company acted in good faith and was procedurally fair in investigating its concerns about Mr Simister's work on 3 May. It said it had agreed at the 14 May meeting that the GPS readings from the van would be calibrated but "*no further meeting was requested and nothing further changed after the explanations were offered in the meeting*". In closing submissions LASL said that Mr Simister knew the 14 May meeting was about serious issues because he had brought his solicitor along with him and, although he was not provided with a copy of the GPS data, he was told the details of the time and place of the speeding and given "*every opportunity*" to make comments about it.

[23] For the following three reasons I have not accepted those submissions. Instead I have concluded, after considering the evidence of what Mr Holroyd actually did, that LASL failed to observe the requirements under s103A of the Act to conduct a full and fair investigation of its concerns.

[24] Firstly, Mr Holroyd did not advise Mr Simister that the meeting on 14 May could result in disciplinary consequences for him. Mr Holroyd's oral evidence confirmed he had dismissal in mind as an outcome when he set up the meeting. However he did not refer to the possibility of dismissal in the 8 May email calling Mr Simister to a meeting. Neither did Mr Holroyd, as far as he could remember, mention during the meeting that dismissal was a potential outcome. As he recalled it, he only told Mr Simister that he would review his answers and get back to him. A fair and reasonable employer should be upfront about possible consequences (along with

keeping an open mind about them) as part of its good faith obligations when considering a decision that may have an adverse effect on the continuation of a worker's employment.<sup>8</sup>

[25] Secondly, Mr Simister was asked to provide explanations about how he had carried out his duties but was not, at that time, shown the two documents on which Mr Holroyd's concerns were based. One document was a customer complaint. Mr Holroyd had already replied to the complaint, blaming Mr Simister for having given wrong information to the customer. Later information from Mr Simister and the customer suggested there were other aspects to the story that should first have been considered before reaching conclusions about blame. The other document was the GPS data on which Mr Holroyd based his allegation of excessive speeding by Mr Simister. Although a technical hitch in printing out and providing the GPS data at the 14 May meeting was explicable, Mr Simister was not subsequently given an opportunity to respond to the detailed information once it was printed out. A fair and reasonable employer could not have failed to provide such an opportunity as part of conducting a full investigation, particularly in circumstances where doing so required no great additional effort or delay. That was important in the specific circumstances because Mr Simister was not properly informed, either before or at the meeting, that it was a disciplinary meeting and dismissal could result.

[26] Thirdly, although Mr Holroyd agreed to have the van speeds calibrated in order to check the reliability of the GPS, he decided to dismiss Mr Simister without waiting for the result of that exercise. His oral evidence confirmed he made the dismissal decision on 15 May, before the calibration exercise was done on 20 May. He described calibration as a formality to prove the accuracy of data he already thought was correct. A fair and reasonable employer – having agreed to take steps to check the accuracy of information being relied on to make potentially very serious disciplinary decisions and who was genuinely keeping an open mind – could not have gone ahead without first looking at those calibration results.

[27] Because of the inadequacy of Mr Holroyd's investigation it was difficult to reliably conclude that the outcome would have been different if those failures of

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<sup>8</sup> Section 4(1) and (1A)(b) and (c) of the Act.

fairness had not occurred. Mr Holroyd's evidence was to the effect that he had many years of experience of using GPS data and felt he could reasonably rely on its accuracy. Mr Simister's evidence in the Authority investigation cast doubt on some of the reference points for distance and time shown in the data provided by Mr Holroyd, which in turn raised an issue about the speed calculated using those points. I could not say that a fair and open-minded employer, if given the opportunity to properly consider and discuss that doubt soon after the 14 May meeting, could necessarily have rejected it at the time.

[28] The defects in Mr Holroyd's investigation were not attributable to inadequate resources. He said he did not have employment relations expertise but accepted that he had access to professional advice throughout (including having his advocate attend the 14 May meeting). At the time he was in charge of two businesses with more than 40 employees so could be expected to have some familiarity with an employer's obligations in such situations.

[29] The identified defects were not minor variations from well-established expectations of fairness in an employer's actions and resulted in Mr Simister being treated unfairly.

### **Were LASL's conclusions on serious misconduct and dismissal justified?**

[30] In his oral evidence Mr Holroyd accepted that his conclusion Mr Simister had committed serious misconduct, and should be dismissed for it, was principally reached because of his concerns about Mr Simister speeding while driving the 3 May Auckland run. Other concerns were performance matters that Mr Holroyd said would otherwise have been dealt with by training and monitoring.

[31] LASL's conclusion about serious misconduct was flawed because it had not met its obligation of showing that position resulted from a full and fair investigation.<sup>9</sup> However there was also some doubt that a fair and reasonable employer, in all the particular circumstances of this case, could have reached the conclusion LASL did if

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<sup>9</sup> W & H Newspapers Ltd v Oram [2000] 2 ERNZ 448 at [32].

it had avoided the defects in its procedure and that, if it had done so, dismissal of Mr Simister was the inevitable result.

[32] Mr Simister accepted that he had, without necessarily being aware of it, exceeded the speed limit while driving between Tauranga and Auckland during the early hours of the morning on 3 May 2013. At law his carelessness in doing so did not necessarily amount to serious misconduct although a single incident of such carelessness, when serious, may so deeply impair an employer's trust and confidence that it does amount to serious misconduct.<sup>10</sup>

[33] Mr Holroyd's oral evidence confirmed that other drivers identified as having been speeding while driving for LASL had not been dismissed. Some such information came from traffic fine notices sent to LASL because the vans being driven were registered to the company. LASL's standard employment agreement included a term – also in Mr Simister's agreement – allowing the company to deduct the amount of any unpaid fines from a driver's wages if the fines were incurred while responsible for a LASL van. Mr Holroyd said LASL received about five or six such fine notices each year.

[34] In answer to a question from LASL's advocate Mr Holroyd also referred to his practice of looking at GPS information for those of its vans installed with the necessary equipment when a fine notice alerted him to a speeding issue with a driver. He said he looked at that data for “*a consistent level of speeding*”. I considered that comment indicated his concern was not typically with a one-off event but with whether there was a pattern that required management intervention.

[35] Mr Holroyd did not consider any alternatives to dismissal or provide Mr Simister with an opportunity to provide any information or comment that might have militated against a decision to impose the severest disciplinary sanction. They could have discussed whether there were any monitoring or training options or personal undertakings by Mr Simister that could satisfy Mr Holroyd that his performance would be satisfactory in future – actions that a fair and reasonable employer could

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<sup>10</sup> *Makatoa v Restaurant Brands (NZ) Ltd* [1999] 2 ERNZ 311 (EmpC) at 319, *W & H Newspapers Ltd v Oram* [2000] 2 ERNZ 448 (CA) at [45]; and *Northern Distribution Union v BP Oil NZ Ltd* [1992] 3 ERNZ 483 at p487 (CA).

have at least considered before making a decision of such finality. As Mr Simister was not expressly advised, either prior to or at the 14 May meeting, that dismissal was an option, Mr Holroyd's failure to arrange a further meeting for comment on the printed GPS data and his intended disciplinary decision was doubly unfair.

## **Remedies**

### *Lost wages*

[36] I have calculated wages lost as a result of the unjustified suspension as totalling \$1026.60. That is equivalent to two weeks' pay at \$513.30 a week, which is what Mr Simister said were his average weekly earnings while employed by LASL. The period of loss was from the day after his suspension on 8 May until the day he was notified of his dismissal, 21 May. Mr Simister had claimed lost wages for the suspension back to 3 May but he was not suspended until five days later and, according to his oral evidence did work on one of the days between 3 and 8 May.

[37] Mr Simister claimed lost wages for his unjustified dismissal from 22 May until 11 November 2013. His statement of problem said the latter date was when he formed a new business of his own. He amended that period in his oral evidence saying he had started earning income from that business by around 20 October and had stopped searching for alternative jobs by around mid-August. His evidence confirmed reasonable endeavours to mitigate his loss of wages. He diligently searched for a new job after his dismissal but it was not really clear that search continued beyond the end of July. Accordingly I conservatively assessed the period of loss under s123(1)(b) and s128(2) of the Act as ten weeks (22 May to 31 July 2013). My assessment took account of Mr Simister's job search efforts and allowed for the contingency that his employment might have come to an end in any event for other reasons (including possibilities such as leaving to set up his own business or termination due to performance concerns).<sup>11</sup>

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<sup>11</sup> *Telecom NZ Limited v Nutter* [2004] 1 ERNZ 315 (CA) at [73] and [81].

[38] The parties had different views on whether Mr Simister's average weekly earnings during this period would have increased or decreased as a result of seasonal variations in LASL's business but neither provided information corroborating the likelihood of either change. As a result the lost wages award was based on Mr Simister's account of his average weekly earnings in the period he was employed, an amount not contested by Mr Holroyd. The resulting amount for the ten week period of lost wages awarded under s123(1)(b) and s128(2) of the Act to Mr Simister for his unjustified dismissal was \$5133.00.

*Compensation for hurt and humiliation*

[39] Mr Simister's evidence in support of his claim for compensation under s123(1)(c)(i) of the Act was that he was embarrassed to explain to friends and family that he was without work and when, after Mr Holroyd told former work colleagues he was fired, they had asked him what happened. He said he found Mr Holroyd's treatment of him humiliating. He had some social contact with people who were clients of LASL and was embarrassed when asked why he no longer worked for the business. There was no evidence of significant, ongoing effects to his confidence or health as a result of the manner or fact of the dismissal.

[40] On that evidence, and taking account of the general range of awards, a compensation award at the lower end of the scale was appropriate. I set that award at \$4000.

**Reduction of remedies for contributory conduct**

[41] In closing submissions Mr Simister accepted the fact of his speeding during the 3 May trip contributed to the situation giving rise to his grievance but submitted any resulting reduction in remedies should be modest in light of LASL's procedural failings in dealing with the GPS data. The company submitted that the seriousness of the speeding was a factor that should result, under s124 of the Act, in a reduction of remedies due to contributing behaviour by Mr Simister.

[42] Mr Holroyd said that but for the issue of speeding identified on 3 May he would have used only the measures of monitoring and training to deal with his other

concerns about Mr Simister's performance of his duties in the weeks since he had started work for LASL (to do with keeping an accurate log book, having moved a bolt holding a seat, missing a client on one run, and how he interacted with office staff over work allocations). I concluded that Mr Holroyd's evidence confirmed Mr Simister's action in driving too fast on parts of the journey that night had contributed significantly to the situation giving rise to Mr Simister's grievance. It was blameworthy conduct that put Mr Simister, passengers and other members of the travelling public at increased risk and was unlawful. As a matter of public policy that required a significant reduction of remedies to mark disapproval of that conduct and to impose a real consequence for it. I have set that reduction at the level of 15 per cent of the remedies awarded to Mr Simister.

### **Costs**

[43] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed Mr Simister may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum LASL would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted. The parties could expect the Authority to determine costs, if asked to do so, on its usual daily tariff basis unless particular circumstances or factors required an adjustment upwards or downwards.<sup>12</sup>

Robin Arthur  
Member of the Employment Relations Authority

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<sup>12</sup> *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808.