

Richie, you were invited to attend an investigation meeting held on 14th April to discuss allegations of taking excessive breaks and smoking in company vehicles. During the meeting you admitted to these actions and went on to admit that you fraudulently completed your Logbook and urinated in public.

[4] I find that Mr Clarke had written to Mr Ta'amilo on 9 April requesting his attendance at an investigation meeting on 14 April. The letter referred to allegations that Mr Ta'amilo had been involved in taking excessive breaks and had been smoking inside company vehicles. Mr Clarke said in it:

At the meeting you will be given the opportunity to address our concerns, describe your version of events and give an explanation. Full consideration will be given to any explanation before a decision about pursuing disciplinary proceedings is reached.

[5] Present at the meeting on 14 April were Mr Clarke, Mr Ta'amilo and Mr Matt Sheehy, Auckland Operations Manager of CTS.

[6] I find it was emphasised to Mr Ta'amilo by Mr Clarke that the meeting was an investigation meeting and that the outcome from it could be:

- Mr Ta'amilo's explanation was accepted and the investigation would end; or
- His explanation was deemed unsatisfactory and disciplinary action and/or possible termination of employment could result.

[7] I find both from notes made by Mr Clarke of the discussion at the 14 April meeting and from what he in person told the Authority, that Mr Ta'amilo frankly and willingly gave a full account of all his actions and conduct being inquired into.

[8] Mr Clarke considered that Mr Ta'amilo had admitted to all the allegations made against him and that disciplinary action should follow.

[9] Accordingly Mr Ta'amilo was asked to attend a further meeting on 17 April and to bring a support person with him. For that purpose the attendance was arranged of Mr Steve Thompson, the union delegate on site.

[10] I find that at the meeting on 17 April the following allegations were raised by Mr Clarke:

1. *Parking up the truck between 2-3 times per week over an extended period of time.*
2. *Being parked up between 1-2 hours at a time.*
3. *Taking well over the permitted break time while being fully aware that break time is half hour.*
4. *Knew that procedure was to call Dispatch to be allocated jobs.*
5. *Knew that at the time when he was meant to be working was wrongly being paid while not working.*
6. *Smoking in a Company vehicle.*
7. *Urinated in a public place breaking the law.*
8. *Falsely filled out his logbook breaking the law.*

[11] Mr Ta'amilo had readily admitted to all of the above actions or conduct on 14 April. At the meeting on 17 April when they were reviewed, I find that Mr Ta'amilo confirmed his earlier admissions to Mr Clarke in relation to each item of conduct. Further, I find from the evidence of Mr Thompson, his representative, that Mr Ta'amilo discussed with him the allegations and Mr Ta'amilo had admitted to him each one of them.

[12] At the 17 April meeting Mr Thompson said Mr Ta'amilo had acknowledged to Mr Clarke what he had done wrong and said he had no excuses for any of it. For that reason, Mr Thompson explained, there was little he could do to support Mr Ta'amilo except try to mitigate the misconduct by holding up his length of service and the fact that he had a good attendance record and had worked well.

[13] Mr Ta'amilo was advised that his actions had brought CTS into disrepute and were deemed to be of a very serious nature amounting to serious misconduct. Mr Clarke advised the penalty was immediate termination of employment.

[14] In raising an employment relationship problem on behalf of Mr Ta'amilo, his representative, Mr Feist, described the concerns about this dismissal to be:

... essentially that Mr Ta'amilo was not told that a disciplinary meeting on Tuesday 14 April was a possible termination meeting or advised to bring a representative. He was also not told the allegations in sufficient detail.

[15] It appears to be correct that Mr Ta'amilo was not told before the 14 April meeting of an allegation of urinating in public, but that particular conduct was raised by Mr Clarke during the meeting and Mr Ta'amilo readily admitted to it. He

explained that while going to the toilet he had remained discreetly out of view. Even so, a member of the public had seen from across the street in a residential area Mr Ta'amilo urinating and had contacted CTS to complain.

[16] As to the point about a lack of representative, I accept that the 14 April meeting was intended to be investigative rather than disciplinary, in the sense that the purpose of it was to find out what happened rather than to attribute blame or fault for the conduct. I agree that CTS was entitled to have a fact-finding meeting with Mr Ta'amilo without that being regarded as a disciplinary meeting to which a representative should have been invited. Discipline was the purpose of the later meeting held on 17 April, at which Mr Ta'amilo had a representative.

Test of justification

[17] In determining a personal grievance claim, the Authority must have regard to the statutory test of justification. It is provided at s103A of the Employment Relations Act 2000 as follows:

The question of whether dismissal or an action was 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 or action occurred.

[18] The Authority is required to investigate and consider the way that CTS inquired (*the employer's actions*) into what it thought Mr Ta'amilo had done or might have done and the conclusion CTS reached that there had been serious misconduct by Mr Ta'amilo. Also, the Authority is required to investigate the conclusion of CTS that dismissal was the appropriate final outcome from its inquiry (*how the employer acted*).

[19] Section 103A requires the Authority to objectively consider those matters against the standard of what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[20] The totality of the circumstances at the time CTS decided to dismiss Mr Ta'amilo, was as follows.

[21] On 9 April 2009, following a complaint made by a member of the public, Mr Clarke drove to a location where he found Mr Ta'amilo in his vehicle parked on

the side of the road. That vehicle, a six wheeled heavy truck, is part of the Fliway fleet operated by CTS and has the company or business name prominently displayed over its bodywork. Mr Ta'amilo told Mr Clarke that he parked there on 9 April for 50 minutes, between 12.40pm and 1.30pm.

[22] The lunch break that is a term or condition of Mr Ta'amilo's employment is 30 minutes. Mr Ta'amilo was told of a complaint that men in the Fliway uniform had been seen going to the toilet in public view. He admitted urinating but said he had faced away from the houses and towards a tree. He said that no one could see, to which Mr Clarke gave the obvious response that the person complaining had seen him. Mr Ta'amilo admitted smoking in the truck while it was parked on the side of the road and confirmed that he knew the company rule which prohibited smoking in company vehicles. He said that he had no excuse for doing that. When asked why he had put his hi-viz jacket over the window of the cab, Mr Ta'amilo said this was to prevent anyone observing him and his assistant driver.

[23] Mr Clarke had also found a second Fliway vehicle parked alongside so that there were four employees there on 9 April. Mr Clarke mentioned the music that was being loudly played on a radio.

[24] After finding Mr Ta'amilo on 9 April, Mr Clarke later obtained from him his driver's logbook, a document required to be kept under road transport regulations.

[25] When interviewed on 14 April, Mr Ta'amilo had admitted that he parked in the particular place he was found on 9 April two or three times a week, usually for between one hour and one hour 45 minutes each time. Mr Ta'amilo was shown the GPS data which indicated extended stopping times of between one to two hours a day since the beginning of March for Mr Ta'amilo's vehicle.

[26] Mr Ta'amilo confirmed that he had not followed the required practice of contacting dispatch when he had time available from finishing one job, to see whether there was other work he could be directed to. He had simply parked up on the side of the road knowing that he was entitled to no more than a half hour break for lunch.

[27] The logbook Mr Ta'amilo had filled out showed that on every day he had parked up for an extended period of time, he had recorded only 30 minutes as his meal break.

[28] The driver's logbook is an important document which must be available for inspection by the Commercial Vehicle Investigation Unit (CVIU). It is an offence for a driver to make a false statement in a logbook, the maximum fine for which is \$2,000.

[29] It should go without saying that every employer has a strong interest in ensuring that employees do not commit offences or break the law in the course of their employment.

[30] Mr Feist argued that urinating in a public place is not necessarily a breach of the law. Perhaps that is so but depending on how and where that bodily function is performed, it may constitute offensive behaviour.

[31] CTS was obviously and understandably concerned for its reputation if one of its drivers dressed in the company uniform and alongside a highly visible company vehicle could be seen obviously going to the toilet in public in the open.

[32] The point as to Mr Ta'amilo's intention in filling out his logbook with incorrect information is also a minor one in this case. He clearly intended to write the times that he put in the logbook, and they were false in the sense that he was not driving his vehicle in the course of work while parked alongside the road. It is a breach of the law to make a false statement in a logbook.

[33] At the investigative meeting on 14 April when questioned by Mr Clarke, Mr Ta'amilo did no more than was expected of him as a responsive and communicative employee. There is no entrapment in that situation and I do not accept that an employee should be told of the possibility of disciplinary action so that he can then have an opportunity of responding or not in such a way as to make it more difficult for the employer to reach a conclusion and determine whether disciplinary action may be taken. Mr Ta'amilo was asked simple questions and in response he did what employees in his situation do all the time; he told the truth.

[34] Mr Feist's view, given to CTS in his email of 21 April, that Mr Ta'amilo had been dismissed "*for essentially a performance allegation regarding long lunches*" simply fails to grapple with the reality and totality of Mr Ta'amilo's conduct and actions which, in relation to the logbook, were dishonest and in relation to the public urination were offensive, at least apparently to the person who complained to CTS.

[35] I reject completely the suggestion that Mr Ta'amilo had implicated himself in misconduct because by cultural trait or personal nature he is deferential to persons in authority such as his employer or its managers. There is no suggestion that Mr Ta'amilo did anything other than own up to what he had done.

[36] I find the conclusion of CTS that Mr Ta'amilo had in all the circumstances committed serious misconduct was a conclusion a fair and reasonable employer would have reached. The same applies to the conclusion of CTS that dismissal was the appropriate outcome. The employer's inquiry was a fair and reasonable one, also.

Determination of personal grievance

[37] Applying s 103A of the Act, I find that the dismissal of Mr Ta'amilo was justifiable. He therefore does not have a personal grievance.

Wage arrears claim

[38] Mr Feist himself described this in a document he handed to the Authority as "*probably dodgy.*" That is something of an understatement as I have found absolutely no basis for the claim. I am satisfied that CTS, through its Payroll Officer, Ms Christine Wood, carried out an assessment exercise after Mr Ta'amilo had agreed to a change of the basis on which he was paid. No arrears were found to be owed to him. This claim does not succeed.

Penalty claims

[39] The claim for penalties in relation to the alleged arrears cannot therefore succeed either.

[40] As to the claim that Mr Ta'amilo was forced to resign from the Northern Distribution Union, that too must be rejected. I find there was no coercion or undue persuasion brought to bear on Mr Ta'amilo. He had agreed to one particular proposal of several made by CTS to change the basis on which he was paid, and because this involved a new employment contract he was asked if he wanted to withdraw from his union. The only interest Ms Wood had in that matter was that if he did resign then she would stop the deduction of his union fees from his pay. In March of 2009 she had emailed Mr Clarke and Mr Sheehy to say that she needed a signed letter from him withdrawing from the union, "*if he wants to.*"

[41] Mr Thompson the NDU site delegate said he did not see any sign that Mr Ta'amilo had acted under duress in resigning from that union.

[42] Therefore, none of Mr Ta'amilo's claims has been successful.

[43] I order Mr Ta'amilo to pay \$175 to CTS for the use of Mr Clarke, as a contribution towards the transport costs and loss of time involved in Mr Clarke attending the Authority's investigation meeting. He left CTS recently for new employment out of Auckland and had to spend time travelling and assisting in preparation for this investigation. If there was power to do so, the Authority would make Mr Feist contribute to these expenses as his slackness unnecessarily delayed by an hour the start of the investigation meeting.

A Dumbleton
Member of the Employment Relations Authority