

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH OFFICE**

**BETWEEN** Hamish Timmins (Applicant)  
**AND** Aratuna Freighters Limited (Respondent)  
**REPRESENTATIVES** Steven Zindel, Counsel for Applicant  
Andrew Havill, Advocate for Respondent  
**MEMBER OF AUTHORITY** Helen Doyle  
**INVESTIGATION MEETING** 15 December 2005  
**DATE OF DETERMINATION** 21 February 2006

DETERMINATION OF THE AUTHORITY

*The employment relationship problem*

[1] Mr Timmins was employed in late November 2004 as a driver/drivers assistant with the respondent company, Aratuna Freighters Limited (“Aratuna”). He was not a party to a written employment agreement with Aratuna. From February 2005 Mr Timmins was paid an hourly rate of \$11.00.

[2] Aratuna are general, refrigerated and rural freight specialists and are based in Greymouth. The managing director of Aratuna is Durham Havill and the general manager is his son Andrew Havill.

[3] At his interview Mr Timmins disclosed to Andrew Havill that he had been released from prison on parole. Mr Havill understood that Mr Timmins was on parole from a term of imprisonment for assault but did not know who Mr Timmins had assaulted. Mr Timmins said he was more specific about the reasons he was on parole. It was open to Mr Havill to make further enquiries about this matter and I am not satisfied that there was any deliberate concealment by Mr Timmins of the nature of the assault. Mr Timmins also advised Mr Havill that he would be on occasion required to attend probation, psychiatric and parenting appointments.

[4] Mr Havill was prepared to give Mr Timmins a chance at employment and after a trial period of three weeks his permanent employment was confirmed.

[5] In the mornings Mr Timmins assisted a truck driver on the Mainfreight run to Hokitika. In the afternoons he did an offal run.

[6] Mr Timmins said that on occasion he worked hours beyond those permitted by law for a truck driver. He said that he would not record those additional hours in the log book but instead recorded

them separately in his diary and claims that he was not paid for 46.5 hours that he recorded in that way.

[7] Mr Timmins felt unwell on Monday 14 March 2005 with a head cold and ear ache. He did not work on the morning of 14 March and saw his doctor. I was provided with a medical certificate dated 16 March that confirmed Mr Timmins had reported to his doctor on 14 March 2005. The medical certificate provides that Mr Timmins was put off work from 14 March 2005 until 21 March 2005.

[8] Notwithstanding the medical certificate Mr Timmins still completed the offal run for the afternoon of 14 and 15 March 2005 although he did not work the morning of either of those days.

[9] On 16 March 2005 Mr Timmins sent a phone text to the depot manager, Dwayne Hackett at 5am. It read *2 sick*. Mr Hackett did not see the text until 5.58am. He telephoned Mr Timmins to ascertain if he was still going to do the offal run. Mr Timmins advised that he was not able to do so. Mr Hackett said that he would talk to the office and probably at that point advised Mr Timmins to get a medical certificate.

[10] Andrew Havill having been advised by Mr Hackett about Mr Timmins sent a text to Mr Timmins cellphone at 7.48am. Mr Timmins kept the text and I read it during the investigation meeting. Mr Havill confirmed that it was the one he sent. The text read *offal 2day m8 don't fuck me around*.

[11] Mr Timmins telephoned Mr Havill back and told him that he was too sick to do the offal run. Mr Havill told Mr Timmins to get a medical certificate to support his absence. Mr Havill said that Mr Timmins indicated that he was bringing in another piece of paper as well as the medical certificate and on that basis he said he thought that Mr Timmins may resign.

[12] Mr Timmins went to the medical centre to obtain a medical certificate. Mr Havill sent Mr Timmins another text that read *Make sure u bring your overall wet weather gear and time sheet with doctors cert m8*.

[13] Mr Timmins immediately telephoned Mr Havill and told him it sounded from the text message he was being fired. Mr Timmins said that Mr Havill said words to the effect *what else do you expect?* Mr Havill recalled saying in response to Mr Timmins question about sounding like he was being fired – *sounds like you are quitting*.

[14] Mr Timmins went to hand in his medical certificate to Mr Havill shortly after 9am and an arrangement was made that he would come back at 5pm on 17 March 2005 to return Aratuna's property.

[15] On 17 March 2005 Mr Timmins attended at Aratuna accompanied by Kerry Aston who had been Mr Timmins probation officer in Greymouth for some of the time he was on parole. Mr Ashton gave evidence at the investigation meeting about the meeting and I accept his evidence. Mr Ashton said that the purpose of the meeting he attended with Mr Timmins was to return property and for Mr Timmins to obtain a letter outlining the reasons for his dismissal. He recalled that when pressed by Mr Timmins for such reasons Mr Havill said that Mr Timmins had been *mucking around, due to his days off sick and one or two other things*. Mr Timmins also sorted out issues with his timesheet.

[16] Mr Timmins instructed an advocate in Christchurch. A meeting was then set up between Durham Havill, Andrew Havill and Mr Timmins for 7 April to see if resolution of the employment

problem could be achieved. Minutes were taken of the meeting. Mr Timmins largely agreed with the contents of the minutes but not necessarily the order of discussion. There were two particularly important matters arising from the meeting.

[17] The first matter was the disclosure that prior to dismissal a flat mate of Mr Timmins had advised the Havills that Mr Timmins was a *child molester and a drug user*. Mr Timmins denied that he was a child molester but admitted that he used cannabis recreationally. Mr Timmins also provided the Havills with a copy of his parole sheet that established clearly the offences for which Mr Timmins had served a sentence which did not include matters of any sexual nature.

[18] The second matter was that Mr Timmins was offered employment on the offal run only if he could provide a clean drug test. Mr Havill would not agree to payment of the previous three weeks wages.

[19] Mr Timmins did not accept the offer and he subsequently received a letter dated 18 April 2005 from Andrew Havill which provided the following reasons for dismissal:

- *Failing to comply with drivers instructions and refusal to work with others.*
- *Incompatibility with other staff members.*
- *Failing to turn up to work on time insufficient notification – phone text to depot manager – 2 sick - time received 5am – he was to start work 6.00am.*
- *Argumentative with depot manager.*
- *Mood swings – suspicion of drug usage.*
- *Verbal complaints from depot manager and other staff members.*
- *Frequent disappearances from work for 15 – 30 mins excuse was either doctor, probation officer or lawyer. He has no evidence to support these disappearances.*

[20] Mr Timmins says that he has been unjustifiably dismissed from his employment and he seeks lost wages from 17 March 2005 to the date of the investigation meeting on 15 December in the sum of \$23,577.48. He also seeks recovery of 46.5 hours of unpaid wages together with interest on that amount and compensation for hurt and humiliation in the sum of \$9000.00. A penalty was also sought in terms of the failure to provide an individual employment agreement.

[21] Aratuna do not accept that Mr Timmins was unjustifiably dismissed and do not accept that he is owed any unpaid wages or any other remedy whatsoever. It says that a genuine offer was made to Mr Timmins on 7 April for re-employment but that he would not stop his use of drugs.

### ***The Issues***

[22] The following issues require determination in this case:

- Was there a dismissal?
- If Mr Timmins was dismissed then was the dismissal justified and were the employer's actions and how the employer acted what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred?
- If the dismissal was not justified then what if any effect does the offer of re-employment on 7 April 2005 have on remedies?
- Are there any issues of contribution?

- Should there be a penalty?
- Is Mr Timmins entitled to recover unpaid wages of 46.5 hours?

***Was there a dismissal?***

[23] I have little difficulty concluding in this case that Mr Timmins was dismissed. I have relied on Mr Ashton's evidence of the meeting of 17 March 2005, the letter recording the reasons for the dismissal and subsequent events. Mr Timmins was dismissed on 16 March 2005 and he did not resign from his employment.

***Was the dismissal justified?***

[24] I have to firstly consider the reasons for dismissal and whether the grounds that were put forward at various times after dismissal are capable of amounting in the circumstances to serious misconduct. Section 103A of the Employment Relations Act 2000 requires consideration of the employer's actions in terms of fairness and reasonableness in the circumstances at the time the dismissal occurred. It is not clear what reasons were relied on to justify the dismissal of Mr Timmins when he was actually dismissed on 16 March 2005.

[25] Mr Timmins understood from the meeting on 17 March 2005 that he had been dismissed for mucking around, days off sick and one or two other things but that the reasons would be confirmed in a letter. Mr Timmins was told that the letter was with Aratuna's lawyers but in fact the letter was not written until 18 April 2005. There is a risk where it is not particularly clear why an employee is being dismissed that an employer may later try to justify the dismissal with new and different grounds. I am mindful of this because new grounds of dissatisfaction were mentioned at different meetings with Mr Timmins after the dismissal.

[26] The only grounds that I am of the view the employer can rely on for justifying the dismissal are those raised at the meeting on 17 March 2005 and those contained in the letter of 18 April 2005 which Mr Timmins was expecting to tell him the reasons for his dismissal. It arrived well after 16 March 2005.

[27] Andrew Havill said that he found the brevity of the text *2sick* offensive and unacceptable. That was one of the reasons for the dismissal. Mr Timmins was made aware of how Mr Havill viewed his absence when he sent a text. Within one hour Mr Timmins provided a medical certificate to Mr Havill which verified that he had been unwell since 14 March 2005 and was to be off work until 21 March 2005. This was the first time he had been asked to provide a medical certificate and the certificate provided a complete answer for the reasons he had been off work. He was sick. There was no history of abuse of sick leave.

[28] Mr Havill could have required Mr Timmins in future to provide more information if he was off sick or to telephone rather than text, but unless there was repeated behaviour of that nature it could not be a matter for disciplinary action. There was also an issue as to whether Mr Timmins advice to Aratuna as to his sickness had been timely. It was perhaps unfortunate that the depot manager did not spot the text until 5.58am. Timeliness though in these circumstances is not a ground for summary dismissal. Absenteeism for the mornings of 14 and 15 March 2005 and a full day off sick on 16 March 2005 could not have been a ground which justified summary dismissal.

[29] One of the other reasons for dismissal given in the letter of 18 April 2005 was Mr Timmins failure to comply with the depot manager's instruction and his refusal to work with a driver. This relates to a disagreement that Mr Timmins had with another employee, Mark. Mr Timmins was

asked to work with Mark and refused but he was not on the roster that day to work with Mark. At the date of dismissal Mark had apologised to Mr Timmins and they had been working together again from 7 March 2005. Whilst there may have been some views about that behaviour any issues had been resolved as at 16 March 2005 and could not have been a ground for dismissal.

[30] Three other reasons given in the letter were incompatibility with other staff members, being argumentative with the depot manager and verbal complaints from the depot manager and other staff members. Andrew Havill expanded on this during the investigation meeting and said in essence that no-one liked Mr Timmins. Aside from the issue with Mark which Mark described as a difficulty for about a fortnight it was not altogether clear what these reasons referred to. Mark said to me that he would not have had a problem working with Mr Timmins if he had returned to work. In the absence of warnings and in the absence of serious incompatibility issues as at 16 March 2005 this could not have been a ground for dismissal.

[31] Another reason in the letter given was that Mr Timmins disappeared frequently saying he was off to the lawyers, probation or doctors for 15 to 30 minutes. Andrew Havill knew that Mr Timmins was required to attend some appointments as a result of parole conditions from the time of his interview. He could have said to Mr Timmins if he felt it was becoming an issue that he required Mr Timmins to advise him in advance about his appointments. This could not though in the circumstances be a ground for dismissal.

[32] The last reason was that Mr Timmins had mood swings which created a suspicion of drug usage. At the time of dismissal this suspicion had not been put to Mr Timmins. Mr Timmins subsequently denied that his cannabis use had any impact on his mood. A suspicion with nothing more is not a ground for dismissal.

[33] I do not find that, as stated in the letter of 18 April 2005, Mr Timmins was verbally disciplined numerous times. That was not supported by any of the evidence.

### ***Determination***

[34] I do not find in this case that there was conduct on the part of Mr Timmins that was capable of amounting to serious misconduct that would justify dismissal. I do not need to proceed further but for completeness the procedure adopted by Aratuna was unfair. It did not meet the minimum requirements of a proper investigation, opportunity to be heard and for consideration of Mr Timmins explanations.

[35] A fair and reasonable employer would not have dismissed Mr Timmins in these circumstances on 16 March 2005.

[36] Mr Timmins has a personal grievance that he was unjustifiably dismissed on 16 March 2005.

### ***Remedies***

#### ***What is the effect of the offer of re-employment on remedies?***

[37] I need to consider whether Mr Timmins acted reasonably in turning down the offer of re-employment. There are several cases which provide guidance in this area. One of the leading cases is an Employment Court judgment of Travis J in *Finau v Carter Holt Building Supplies* [1993] 2 ERNZ 971. In that case Mr Finau was offered reinstatement effectively to his own position and reimbursement of wages from the date of dismissal. It was held in that case that Mr Finau was not entitled to lost remuneration from the date of the offer of employment or compensation.

[38] I recognise that the Havills did try to put things right but I am not satisfied in this case that the offer made to Mr Timmins went quite far enough for me to conclude that it was entirely satisfactory when considered in terms of *Finau*. The offer was for five hours work per day rather than the previous 11 plus hour days that Mr Timmins had been working. It was a part-time position only. Another factor in this case that I have considered along with the part-time nature of the job offer was the adamant refusal to reimburse Mr Timmins wages from the date of dismissal.

[39] I did not find that there was evidence for me to conclude that the Havills' had spread any rumours about Mr Timmins being on parole for sexual molestation. I am also of the view that it was not unreasonable, given the job was driving and Mr Timmins admitted smoking cannabis, that Mr Timmins be required to undergo a test for cannabis levels.

[40] When viewed overall though and given that the hours offered were more than halved I cannot conclude that Mr Timmins acted unreasonably in turning down the offer.

### ***Contribution***

[41] I am not satisfied in this case that there was any contributing behaviour on the part of Mr Timmins to the personal grievance of unjustified dismissal that would reduce the remedies that I now go on to consider.

### ***Lost Wages***

[42] Mr Ashton said that there were employment opportunities available for people on parole in the West Coast. It seems that there are plenty of opportunities for truck drivers. I have also taken into account that it was almost inevitable that Aratuna, given strongly felt views about drug use, would require when Mr Timmins affirmed his use of cannabis that he undertake some form of test. This may have impacted on any continued employment beyond the three month period as a truck driver. In all the circumstances I am not satisfied there are good reasons to extend reimbursement beyond the three month period for lost wages.

[43] I have averaged the hours Mr Timmins worked from 31 January 2005 to 12 March 2005, a period of six complete weeks, from his log book and pay slips. Mr Timmins often worked on Sundays. The average weekly hours were 68.5 hours per week.

[44] Mr Timmins is entitled to lost wages for a period from 17 March to 16 June 2005 being 13 weeks at an hourly rate of \$11.00 per hour for 68.5 hours per week. That is a total of \$9795.50 gross.

[45] I order Aratuna Freighters Limited to pay to Hamish Timmins the sum of \$9795.50 gross being the reimbursement of part of the wages lost under section 123 (1)( b) of the Employment Relations Act 2000.

### ***Compensation***

[46] Mr Timmins appeared to me to be an emotionally strong man and was fairly resilient. What I accept was particularly hurtful to him was the raising of new allegations to support his dismissal after the event that he felt compelled to answer. Mr Timmins felt that he had been treated unfairly. He also felt that Aratuna had damaged his reputation by spreading rumours and untruths about him. I am not satisfied that this occurred. Compensation cannot therefore be awarded for an associated hurt in terms of that matter. The relationship with Aratuna was not a long one.

[47] In all the circumstances I am of the view that a suitable award would be \$5000.00 for humiliation, loss of dignity and injury to feelings.

[48] I order Aratuna Freighters Limited to pay to Hamish Timmins the sum of \$5000.00 without deduction being compensation for humiliation and loss of dignity under section 123(c)(i) of the Employment Relations Act 2000.

### ***Penalty***

[49] Aratuna should be aware that it is required to provide employees with a written employment agreement under the Employment Relations Act 2000. I am not minded to order a penalty be paid in this case. Mr Timmins said that the absence of a written agreement was *not a big deal*.

### ***Recovery of wages for 46.5 hours***

[50] Mr Timmins kept meticulous records and he impressed me as an honest witness who wrote everything down. He said that he had been told that he was to keep the separate records in this way. That was to some extent supported by Mr Hackett's evidence. Mr Havill also agreed to pay Mr Timmins for 11½ hours not recorded in his log book but worked. This was during discussions about the final pay. Mr Havill agreed that the 11½ hours could be spread over the log book for 14 and 15 March although Mr Timmins had only worked afternoons on those days. Mr Timmins also raised the 46.5 hours at the time. Mr Havill said he would look into those hours. There is no reason for me not to accept Mr Timmins claim. I limit it however to 42.5 hours which is in accordance with the information in the spread sheet I was provided with at the investigation meeting. The hours from that period up to 21 January 2005 were paid at a lower rate of \$10.00 per hour.

[51] Mr Timmins is entitled to recover unpaid wages in the sum of \$425.00 gross. He is also entitled to interest on that sum from the date of the lodging of the statement of problem with the Authority on 11 July 2005 to the date of payment. The interest is payable at the rate of 8.5% in accordance with clause 11 of the schedule 2 of the Employment Relations Act 2000.

### ***Costs***

[52] I reserve the issue of costs. I would encourage the parties to see if agreement could be reached about costs. If agreement cannot be reached then the applicant has 20 days from the date of this determination to lodge and serve submissions as to costs and the respondent has a further 20 days to lodge and serve submissions in reply.

Helen Doyle  
Member of Employment Relations Authority