

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Ladd Oki Oki Wade (Applicant)
AND Owens Transport Limited (Respondent)
REPRESENTATIVES Rob Davidson, Counsel for Applicant
Lorne Campbell, Counsel for Respondent
MEMBER OF AUTHORITY James Crichton
INVESTIGATION MEETING 12 October 2004
DATE OF DETERMINATION 24 November 2004

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] In his statement of problem lodged in the Authority on 8 April 2004, Mr Wade sought interim reinstatement and alleged unjustified dismissal in respect to his employment by the respondent, Owens Transport Limited (Owens).

[2] In an amended statement of problem lodged in the Authority on 19 May 2004, Mr Wade withdrew his claim for interim reinstatement but persevered with a claim for permanent reinstatement.

[3] Owens denied all of Mr Wade's claim.

Background

[4] Mr Wade was employed by Owens on 8 December 2003 pursuant to a written employment agreement in a position of night shift supervisor at Owens Sockburn freight depot.

[5] Mr Wade's work involved the organization and oversight of loading and unloading freight together with supervision of five team members. Plainly this was a position of responsibility within the employer.

[6] It is common ground that there were no employment issues between the parties until on 4 February 2004 Mr Wade was summoned to a management office and interviewed by two private investigators contracted to Owens.

[7] There is dispute as to what happened at that meeting but without wishing to dwell on the detail of that dispute, it is sufficient to say that Owens position is that during this meeting, which by

all accounts was a lengthy one of some two hours or so, Mr Wade made certain admissions touching on a matter that was of particular concern to Owens, namely the theft of a significant quantity of cigarettes from the freight forwarding depot of a sister company, Mainfreight Limited (Mainfreight).

[8] Conversely, for his part, Mr Wade in evidence before me denied making those admissions but said that he felt bullied and harassed by the two private investigators into confessing to have an involvement in something which he knew nothing about.

[9] Nothing further of relevance happened until 12 March 2004 (some six weeks later) when Mr Wade was again summoned to a management office and advised that the branch manager, Mr Richard Doell, wished to see him. I pause at this point to simply record for the sake of completeness that throughout his written evidence, Mr Wade refers to this individual as Mr Dyson but he accepted without reservation in evidence before me that in fact he had got the name wrong and it was Mr Doell that he was referring to.

[10] Mr Doell advised Mr Wade that he had been instructed to terminate Mr Wade's employment. It appeared from the evidence that Mr Doell had no real stomach for this task and although Mr Doell did not give evidence before me, the evidence that was before me supported my view that Mr Doell was simply the messenger and an uncomfortable messenger at that.

The facts

[11] The factual issues that I am required to determine revolve around two specific incidents, the first of which was the investigation meeting between the two private investigators and Mr Wade and the second of which was the dismissal itself. In order to appropriately apply the necessary legal principles to the facts I set out below brief details of the relevant facts concerning each of these significant events in the employment relationship between the parties.

[12] The investigation meeting as I have already noted took place on 4 February 2004. It seems to be common ground that there was no prior notice to Mr Wade about the purpose or nature of that meeting. He was simply summoned to attend a meeting with people he had not met before. It seems to be common ground that once the meeting got underway, Mr Wade was quickly told what the meeting was about, namely that it was about serious misconduct and the theft of cigarettes but prior to the meeting Mr Wade had no knowledge of its purpose.

[13] The respondent says that Mr Wade was given a proper opportunity to consider whether he needed to have representation or a support person with him during the course of this investigation and they make something of the fact that Mr Wade signed a release which was produced to me during the course of the hearing. The document itself is a printed form headed up *Employee Interview* and this is followed with a series of pieces of information for identifying purposes such as the date, employee name, and so on. Then about a third of the way down the page is the following printed sentence:

I have been advised that I am free to have any representative/support person present that I desire during this interview. I have been advised that the representative/support person can be anyone of my choice and could be a lawyer, fellow employee, union representative, family member, counsellor, minister of religion, etc.

[14] Then the next paragraph commences with the words *I nominate* and then there is a blank space followed by the words *as my representative/support person*. Next is the printed statement *I decline a representative/support person* and then there is a place for the employee's signature.

[15] Mr Wade's evidence which was not contradicted was that he signed a blank form and he signed it in the place where by doing so he effectively declined representation. He says that at the same time as he signed his name, he also started to write his name in the final paragraph of the printed form in a sentence which, given that he had completed writing in his name, now reads:

I, Ladd Wade acknowledge that the foregoing correctly reflects what I have been told at this stage.

However, Mr Wade did not sign the form again at the bottom immediately under this last acknowledgment although there is a place for him to do so. He says in his evidence that he signed the form declining a representative then completed writing in his name towards the bottom in the piece I have just referred to but then had the form removed from him.

[16] Mr Wade acknowledges that he signed the release confirming he did not want a support person or representative but he told me in evidence he did not read the whole document before signing it and he certainly seems to have had little or no opportunity to prepare himself for the meeting having not been given any notice by the employer of the purpose of the meeting, its likely duration, or his entitlement to have a support person present until the meeting actually commenced.

[17] Once the meeting actually commenced, Mr Wade described how he felt bullied by the interviewers. He said that the two private investigators Mr Wilkinson and Mr Brownlee had some sort of arrangement going between them such that whenever Mr Wade answered a question put to him by Mr Wilkinson, Mr Brownlee would nod to Mr Wilkinson. It seems that after a reasonably short period of time into the interview, Mr Wilkinson asked Mr Wade whether Mr Wade would prefer it if Mr Brownlee left the interview and Mr Wade said that he would prefer that and so Mr Brownlee left.

[18] Once that happened, Mr Wade said that Mr Wilkinson became more aggressive. Mr Wilkinson on the other hand, in giving his evidence, indicated that he simply worked on the basis of trying to put psychological and emotional pressure on the witness Mr Wade to get him to make admissions of matters that he knew something about. Mr Wilkinson portrayed himself as an expert interviewer having had a long career in the police as well as a further period as a private investigator doing this kind of work. Mr Wilkinson said that he was encouraged by Mr Wade's body language and he agreed that when Mr Brownlee was in the room with Mr Wade and himself, Mr Brownlee was there specifically to watch Mr Wade's body language.

[19] Mr Wilkinson agreed that he was playing on Mr Wade's emotions which he said was a very successful technique. He referred particularly to two behaviours of Mr Wade which he thought were significant, one of which was Mr Wade putting his head in his hands and the other was a swinging leg motion which he had noticed during the interview.

[20] The short point is that the evidence on what was actually said during this interview is plainly in conflict. During the relatively short period that Mr Brownlee was involved in the interview between Mr Wilkinson as the primary interviewer and Mr Wade, Mr Brownlee of course was able to corroborate the view that Mr Wilkinson advances but that does not get us very far as the bulk of the interview took place without Mr Brownlee present at all.

[21] Mr Wade says that although he was bullied and pressured into making admissions he said that Mr Wilkinson told him that he, Mr Wilkinson, had information that Mr Wade was part of the Mongrel Mob and that he (Mr Wilkinson) knew that Mr Wade did it. Mr Wade quoted Mr Wilkinson as saying to him words to the effect: *You have been here for three years* (presumably Mr Wilkinson was including in that three year period of duty that Mr Wade had working for Mainfreight Ltd, the sister company) *pick someone*. Mr Wade said that in response he mentioned

one name and Mr Wilkinson promptly retorted with words to the effect: *come on Ladd* (Mr Wade's first name) *you're just trying to shift the blame because we know you did it.*

[22] Mr Wade said in his evidence that he denied involvement in the theft of cigarettes from Mainfreight, denied involvement with the Mongrel Mob but that he did know that the cigarettes had been stolen from Mainfreight because it was reasonably well known amongst the Owens staff.

[23] For his part, Mr Wilkinson says in his evidence that Mr Wade made various admissions specifically that Mr Wade knew a member of the Mongrel Mob, had told a member of the Mongrel Mob about the cigarettes, had an idea about the name of a particular person who may have been involved in the theft and that in consequence, there was a reasonable basis for a belief to be formed that Mr Wade had had an involvement with the theft of the cigarettes from Mainfreight.

[24] For reasons which will become evident later in this determination, I have not found it necessary to completely resolve the conflict in the evidence between Mr Wilkinson and Mr Wade, although I think that it is possible to reconcile some of the issues appropriately. For instance, on the central issue of whether Mr Wade knew members of the Mongrel Mob or not, both he and his wife gave evidence before me that he had for many years played rugby league on a social basis and had played with members of the Mongrel Mob in that environment. Mr Wade readily admitted telling a man nicknamed Bullet (a member of the Mongrel Mob) about some cigarettes that had been stolen from Mainfreight but the theft that Mr Wade was referring to was a theft that had happened some three years before and was not the theft that Mr Wilkinson and Mr Brownlee were investigating on behalf of their client. The conversation that Mr Wade admitted to having with Bullet was itself a conversation that had taken place contemporaneously with the earlier theft. Accordingly while Mr Wade readily conceded that he had spoken to a member of the Mongrel Mob about a theft of cigarettes it was a conversation which had taken place after the theft had taken place and it related to a theft that was itself three years old and the conversation itself was also some three years old.

[25] I mention for the sake of completeness that there were other matters on which the respondent relied in reaching its conclusion about Mr Wade. There was evidence that Mr Wade had been seen on two occasions in the dead of night at the Mainfreight depot. The respondent says that Mr Wade gave it two explanations at the interview with Mr Wilkinson. The explanation that Mr Wade gave me in evidence before me was that he went to the Mainfreight depot to socialize with his friends who still worked there. Mr Wilkinson in one of his reports to his client seems to accept that explanation at one point.

[26] Owens were also concerned about evidence that Mr Wade had been seen smoking marijuana in a car at the Mainfreight depot which Mr Wade accepted and there was also an allegation that Mr Wade took a six pack of beer which was unauthorized. Mr Wade said in response to that last allegation that in fact the six pack of beer was given to him by a supervisor at Mainfreight.

[27] The other significant factual issue is the dismissal which took place on 12 March 2004. The unchallenged evidence is that Mr Wade was summoned to the manager's office where Richard Doell told Mr Wade that he had received a call from his superior and had been instructed to dismiss Mr Wade. When pressed by Mr Wade as to why this was happening, Mr Doell is alleged to have indicated that he did not know. No evidence was given by Mr Doell so it is difficult to form any view about that issue.

[28] It is clear that Mr Wade had no advance warning of the nature or extent of the dismissal meeting and it is plain that he was given no opportunity whatever to consider any allegations or respond to any concerns that the employer might have had but was simply told immediately on the meeting opening that he was dismissed. Mr Wade confirmed to me that at the time of the dismissal

he was not provided with a copy of any report from the investigators and was given no opportunity whatever to rebut any allegation or presumption.

[29] After the dismissal, Mr Wade went home. He spoke to his wife. His wife's evidence was that he was distraught when he got home and that he told her that he had been fired.

[30] Ms McLeod, Mr Wade's wife went to Owens to seek some kind of explanation. She spoke with Rodney White, one of Owens management staff. She says that Mr White apologized to her for what had happened and asked after Mr Wade. She said that Mr White told her that he was unsure of the reason for the termination but assumed it had something to do with the private investigators. Mr White said to Ms McLeod that dismissing Mr Wade was the hardest thing he had ever had to do.

The process

[31] The employer, Owens was confronted with a significant theft from a sister company which caused Owens substantial loss of revenue by the withdrawal of a major account. An investigation was inevitable. A wide ranging enquiry was conducted through private investigators. The evidence of the private investigators Mr Brownlee and Mr Wilkinson tended to suggest that they had formed a view that Mr Wade was involved in the theft before they even spoke to him. Both Mr Brownlee and Mr Wilkinson indicated that they had sources which confirmed that Mr Wade was involved and that they had that information before they spoke with Mr Wade.

[32] The view of the private investigators was that Mr Wade confirmed that earlier intelligence by making admissions during the course of their interview. Mr Wilkinson for instance said in his evidence that he was satisfied that Mr Wade was involved in the theft of the cigarettes and presumably he reaches that conclusion by a combination of the earlier information provided to him and his colleague Mr Brownlee, and the subsequent interview that they had with Mr Wade wherein they say Mr Wade made the admissions referred to.

[33] Having arrived at that conclusion, the private investigators then filed their report with the employer. In fact there were two reports, one dated 21 January 2004 and the second and final report dated 19 February 2004.

[34] Mr Craig Evans, a senior manager with Owens, gave evidence that as a consequence of those two reports he concluded that Mr Wade was guilty of serious misconduct and that he had no option but to instruct Mr Wade's immediate superior Mr Doell to dismiss Mr Wade.

The legal principles

[35] An enquiry process leading to a decision adverse to an employee, including in particular a dismissal of that employee, must proceed before any disciplinary action against the employee and the process so engaged in must be fair: *Airline Stewards and Hostesses of NZ IUOW v Air New Zealand Ltd* [1993] NZLR 549.

[36] It follows there is an onus on the employer to establish an honest and reasonable belief based on a full and proper enquiry that there has been misconduct justifying dismissal, or some other lesser sanction.

[37] Generally the employer cannot substitute an investigation conducted by a third party for the employer's own investigation: *Hati v Auckland Farmers Freezing Co-op Ltd and Auckland and Tomoana Freezing Works etc IUOW* [1998] 1NZLR 662.

[38] The employer must give the employee an opportunity to explain: *Pitolua v Auckland City Council Municipal Abattoir* [1992] 1NZLR 6.

[39] Finally, the enveloping legal principle is whether the decision to dismiss is one which a reasonable and fair employer could have taken: *W & H Newspapers Ltd v Oram* [2002] ERNZ 448.

Discussion

[40] Applying those legal principles to the facts of the case takes us first to a consideration of whether the enquiry process in this particular case was fair. I have reached the conclusion that the enquiry process was unfair for a number of reasons. First, the physical way in which the enquiry was conducted by the two private investigators almost by definition seems to have excluded the normal incidences of a proper investigative process. Mr Wade certainly had no warning of the enquiry meeting. Although he signed a waiver of legal representation he really had no opportunity in my view to properly reflect on that and given that he was not on notice as to what the subject matter of the meeting was before the meeting started, he really had no way of assessing the magnitude of what was about to happen to him or the importance of having some advisor present to assist him. The meeting clearly went on for a significant period of time (by all accounts over two hours) and during that time, even by the respondent's own admission, the applicant was under significant emotional stress. For those reasons also I find that the enquiry process was unfair.

[41] Further, in relation to this first legal principle I note that there was some evidence before me that the two private investigators had formed a view in advance of the interview that Mr Wade was responsible for some wrongdoing. I accept it is difficult to draw the distinction between investigators who have conducted some preliminary enquiries or come in to the possession of certain information in advance of actually speaking to the witness but certainly based on the answers elicited from Mr Brownlee and Mr Wilkinson at the investigation meeting, I am inclined to accept the applicant's submission that the private investigators had in fact formed a view prior to the meeting with Mr Wade that he was somehow responsible. That of course raises the spectre of bias and predetermination and given that this interview process and the subsequent report of the private investigators was the only enquiry that the respondent employer was to conduct in relation to this matter before dismissal, any flaw or potential flaw is difficult to, or indeed cannot be, corrected.

[42] The second legal principle requires the employer to accept an onus that it had an honest and reasonable belief that misconduct occurred. Again, one has to doubt on the basis of the evidence that any such onus had been satisfied. Without any possibility given to the employee to be heard on the allegations by the employer it is difficult in my judgment for the employer to succeed in establishing the onus. The honest and reasonable belief which the employer requires can only be based on the report of the private investigators and their contention which was roundly challenged at the investigation meeting that Mr Wade made certain admissions which, if made out, would properly ground an allegation of serious misconduct. Had the employer put those allegations to Mr Wade either by giving him a copy of the report of the private investigators and asking for comment thereon or by summarizing the allegations with sufficient particularity to enable them to be responded to the employer might well have been put on notice that Mr Wade's version of events was different from the version of events advanced by the private investigators.

[43] The general legal principle is that a third party's investigation cannot properly substitute for the investigation of the employer and yet in this case that is precisely what happened. The employer, having engaged private investigators, received their two reports, noted that they contained material suggesting that Mr Wade had been identified as a guilty party by informants and subsequently made some admissions at interview, then proceeded to issue an instruction for

Mr Wade's immediate superior to dismiss him without further notice. In my view, that does not properly fulfill the employer's duty to be a good and fair employer and it is in my judgment a breach of the good faith principle to act in such a way.

[44] Next we need to consider the opportunity to explain which has effectively already been dealt with what I have had to say earlier but for the sake of completeness I simply reiterate that this is a case where by common consent, there was no opportunity for the employee to proffer any explanation. The respondent argues that *Amaltal Fishing Company Ltd v Morunga*, 23 August 2002, Goddard C J, WC 31/02 is evidence for the proposition that an explanation is not always required.

[45] The decision in the *Amaltal* case can in my view be distinguished from the present factual matrix. His Honour, the Chief Judge makes it clear in his judgment that it will be a rare case in which the employer is entitled to act without further enquiry (paragraph 26).

[46] Then at paragraph 32 His Honour goes on to say:

It is a serious mistake to regard following the requirements of procedural justice prior to dismissing employees as niceties. It is not a matter of good manners or etiquette; it is a requirement of the law of the land from which neither the appellant nor the fishing industry is exempt. ... In the absence of employers extending procedural justice before dismissing, such an independent tribunal would ordinarily conclude that the employer did not have an honest and reasonable belief in the ostensible grounds for the dismissal but was motivated by other reasons and was using the supposed ground as a pretext.

[47] In my view, as I think the Chief Judge makes clear, the *Amaltal* case is a case involving really atrocious behaviour on the part of employees which was so graphic as to avoid the necessity for the employer to follow the usual rules. In my judgement, the present case is not in the same category.

Determination

[48] I have carefully considered the evidence put before the Authority and the submissions of counsel for each party. I note in passing that the respondent's case was not assisted by the absence of a principal witness, the respondent's decision maker, although I was able to speak to that witness by telephone.

[49] I find that Mr Wade was unjustifiably dismissed. I reach that decision because in essence I do not think that it was the action of a reasonable and fair employer to dismiss Mr Wade in circumstances of the kind I have analysed in this determination. Had the employer put the results of its third party enquiry to Mr Wade and sought his response in the traditional way then the outcome might well have been different.

Reinstatement

[50] Mr Wade claims reinstatement as a remedy for his personal grievance. Owens strongly oppose reinstatement on the grounds that the passage of time makes reinstatement impractical, Mr Wade's health problems make reinstatement a health and safety issue, Mr Wade's health also makes a return to a supervisory role itself problematic, and they have a continuing anxiety that Mr Wade's possible reinstatement would have a negative effect on their business.

[51] Section 125 of the Employment Relations Act 2000 makes reinstatement the primary remedy when it is claimed and the Authority is charged with the obligation of giving effect to that primacy wherever practicable.

[52] I am not persuaded that Mr Wade's application for reinstatement ought to be granted. Mr Wade's own evidence was that his health is not robust and he has not worked since the dismissal. A night time supervisory role is in my view inconsistent with Mr Wade's present medical condition particularly given he has not worked since March this year. My overwhelming impression is that Mr Wade's health does not allow him to return to what is clearly a potentially dangerous and stressful occupation, working in a supervisory role and at night, especially since he has not worked since dismissal because of that health.

Contribution

[53] Section 124 of the Employment Relations Act 2000 requires me to consider the extent to which the actions of the employee contributed to the situation that gave rise to the grievance and contemplate reducing the remedies that would otherwise have been awarded accordingly.

[54] In all the circumstances, I am not persuaded that the applicant, Mr Wade, has contributed significantly to his own misfortunes. Certainly it may well have been better if he had not been seen socializing in the dead of night with friends who worked for Mainfreight and he should also not have smoked cannabis on Mainfreight premises or have drunk beer there with his friends and former workmates. He may also have been well advised to have refused to meet with Owens private investigators without the benefit of a representative present. However it is difficult to see how these matters looked at in their totality can actually be said to have contributed to the decision that the employer made to dismiss Mr Wade, at least to the extent that it is unlikely there would have been a dismissal if the other more significant charges against Mr Wade had not been there.

Loss of benefits

[55] I have considered the question of loss of benefits which were referred to by Mr Wade's counsel in his closing submissions but no such claim was made in the statement of problem, nor was there any evidence given to me of what those losses might be. I make no award in that regard.

Reimbursement

[56] Having found that Mr Wade has a personal grievance and having established through the hearing of the evidence that he has lost remuneration as a result, section 128 of the Employment Relations Act 2000 applies.

[57] Mr Wade gave evidence that he was employed at the rate of \$17 per hour and that he worked on average between 50 and 60 hours a week. He claims reimbursement of lost income from the date of dismissal down to the date of the *resolution of this matter*.

[58] The evidence before the Authority was that the applicant by reason of his clinical depression was unable to seek alternative work after his dismissal and accordingly has not been able to materially mitigate his loss. Owens says that the lost remuneration incurred by Mr Wade is a function of his pre-existing illness and not a function of the dismissal. Mr Wade said that his depression was under control while he worked in the freight forwarding industry and was not reinvigorated until his dismissal.

[59] Mr Wade's own evidence was that he had suffered from depression for some time and this was clear from a medical certificate which he put into evidence from his general practitioner. That indicates that the general practitioner first saw him in 1996, that he had struggled with depression for some time prior to that and was medicated for that illness for about four years presumably from 1996. It then goes on to say that anti-depressants were prescribed again after the dismissal. I do not think it just to visit all of the consequences of Mr Wade's illness on the employer. While the evidence is plain that there is both an underlying depressive condition and a deterioration in Mr Wade's health after the dismissal, I consider there should be some discount applied to reimbursement of lost wages to take account of the reality of a longstanding medical condition which clearly has an impact on Mr Wade's ability to earn income.

[60] Accordingly, I exercise the discretion of the Authority in awarding reimbursement of lost remuneration for three months at ordinary time rates and assuming only a 40 hour week. Ordinary time weekly remuneration on a 40 hour week basis would be \$680.00 gross so I award the sum of \$8,840 in lost wages. Owens is ordered to pay Mr Wade that sum.

Compensation

[61] Mr Wade claims \$30,000 in compensation under section 123 (c)(i) of the Act. I cannot see anything in the case which would justify an exceptional award at the level claimed. I do accept however that Mr Wade has suffered hurt, humiliation and injury to his feelings as a consequence of this unjustified dismissal and I accept also that a consequence of the dismissal has been the dislocation of his family life. To compensate him for those deficits, I award Mr Wade the sum of \$10,000 under section 123 (c)(i) of the Act which Owens is also ordered to pay to Mr Wade.

Summary

[62] I have found that Mr Wade has been unjustifiably dismissed by Owens.

[63] I do not consider that Mr Wade has contributed behaviour sufficient to justify my reducing the remedies which I would otherwise have awarded: section 124 Employment Relations Act 2000 applied.

[64] I award Mr Wade the sum of \$10,000 under section 123 (c)(i) of the Employment Relations Act 2000 and I direct that that sum be paid to Mr Wade by Owens.

[65] I have found that Mr Wade has lost remuneration as a consequence of his personal grievance and I have found that that lost remuneration amounts to the sum of \$8,840 gross. I direct that that sum less the appropriate provision for tax be paid to Mr Wade by Owens.

Costs

[66] In accordance with the request of both parties, costs are reserved.