

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2013] NZERA Wellington 41
5378558

BETWEEN DANNY WIKAIRA
 Applicant

AND TRANSPACIFIC
 INDUSTRIES GROUP (NZ)
 LIMITED
 Respondent

Member of Authority: Trish MacKinnon

Representatives: Ken Mair, Advocate for the Applicant
 Daniel Erickson, Counsel for the Respondent

Investigation Meeting: 12 December 2012 at Whanganui

Submissions Received: Orally 12 December 2012
 Written 12 December 2012, 11 January, 29 January and
 8 February 2013

Determination: 3 April 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Wikaira was employed as a driver by Transpacific Industries Group (NZ) Limited (Transpacific) from November 2007 until his dismissal for serious misconduct in January 2012. The dismissal arose from a driving incident which took place in December 2011 resulting in significant injury to a member of the public.

[2] Mr Wikaira views the incident as a genuine mistake on his part and believes the person he injured contributed to the situation that led to her injuries. Mr Wikaira sees his dismissal as a heavy-handed response to the incident. He says his employer did not sufficiently take into account his excellent driving record as an employee with

no previous traffic offences. He also says his employer predetermined the outcome of its investigation into the matter.

[3] Transpacific says it dismissed Mr Wikaira following a full and fair investigation and disciplinary process. It rejects the allegation of predetermination. Mr Wikaira had operated his vehicle in a negligent manner which was contrary to the Code of Conduct and contrary to Transpacific's reasonable expectations of a professional driver in its employment. Additionally, Mr Wikaira had failed to report the incident immediately as required by company policy.

[4] Transpacific says if Mr Wikaira was unjustifiably dismissed, which it denies, his conduct on the morning of the driving incident in December 2011 was blameworthy and directly causative of his dismissal. As such, it says any remedies should be reduced by up to 100%.

The accident

[5] The accident which resulted in Mr Wikaira's dismissal happened in Whanganui city around 7.45 a.m. on Saturday 10 December 2011 when Mr Wikaira was driving a Transpacific LEV on a rubbish bin collection run. He entered a car park behind the Stationery Warehouse to collect a bin and found his passage was partially blocked by a parked Crew Cab Ute.

[6] Mr Wikaira stopped his vehicle briefly to speak with a woman standing beside the Ute. She told him her husband was replacing roofing iron on an adjacent building, and she was putting the old roofing material in the Ute as he threw it down. She offered to move her vehicle in order that Mr Wikaira's truck could pass through. Mr Wikaira judged the distance and decided he had sufficient room to pass. He says he expected her to move her vehicle as she had offered or at least move herself out of the way.

[7] The LEV and Ute were not parallel and as Mr Wikaira moved slowly forward the distance between the vehicles decreased, trapping the woman between them. The woman's husband shouted to alert Mr Wikaira who immediately stopped his vehicle. He says he thought she was trying to catch the small dog she had with her when she was caught between the vehicles. Mr Wikaira and the woman's husband went to assist her as she lay on the ground. At some point she lost consciousness, although Mr Wikaira says he did not know that at the time.

[8] Emergency services and Police arrived very quickly. Mr Wikaira provided a statement to the Police, which he says took until approximately 9.00 a.m., and he then continued on the bin collection run. He says he did so because he was unaware the woman had been seriously injured, as the Police had told him she was bruised and had been taken to hospital for observation. The woman's husband had already gone back up on the roof and was continuing his work there.

[9] Mr Wikaira returned to the Whanganui Transfer Station, where he was based, at around 9.30 a.m. and telephoned the Branch Supervisor, John Ross, to explain what had happened. He wrote an accident report and statement of events while he waited for Mr Ross to arrive at the yard. Mr Ross telephoned his New Plymouth-based manager, Rick Simeon, to alert him to the incident. Mr Wikaira spoke to Mr Simeon and spent the rest of the day working at the Transfer Station, leaving at approximately 5pm.

[10] He says the person he had accidentally injured (Ms S¹) came to his workplace on Tuesday 13 December 2011 to see how he was, and to show him her bruising. She told him not to worry and they parted on friendly terms.

[11] On Thursday 15 December 2011 Mr Wikaira says he was questioned by Andrew Sargent, a Transpacific manager based in New Plymouth, who wanted Mr Wikaira to explain what had happened the previous Saturday. After he had done so, Mr Sargent informed him the matter would be investigated.

The investigation

December 2011

[12] Mr Sargent did not give evidence but the report he emailed to his manager, Stephen Matthews, on Friday 16 December was part of the agreed bundle of documents provided to the Authority. Mr Sargent had learned of the incident from Mr Simeon on the day it occurred. He had remained in contact with Mr Simeon during that day and around midday on Saturday 10 December had "*Considered then that severity/urgency downgraded*".

[13] He did this after Mr Simeon had reported to him the Police advice that Ms S's injuries were minor and she was being treated for bruising. At that stage Mr Simeon

¹ Name withheld to protect privacy

had also reviewed the accident information Mr Ross had faxed to him and had attempted to contact Ms S, leaving a message for her with his contact details.

[14] Mr Sargent's report notes that on the morning of Monday 12 December he discussed the investigation of the incident with Mr Simeon. The investigation was to be carried out pending the Police report.

[15] The report then refers to Ms S telephoning Mr Simeon on Tuesday 13 December, asking for a meeting with him and giving her version of the accident. She had said Mr Wikaira seemed angry when he stopped to talk with her in the car park and had rejected her offer to move her vehicle if the LEV could not get through. She thought his anger may have contributed to the accident. Mr Simeon had advised Ms S to report this to the Police but she said she did not want the driver to lose his job.

[16] Mr Sargent's report notes Mr Simeon obtained the Police report on Thursday 15 December following which "*we have considered the incident closed*".

[17] The incident was not closed, however. On Monday 19 December Stephen Matthews, the Regional Manager Central, Transpacific Waste Management (a division of Transpacific) and 2 other Transpacific employees, one of whom was the company's Health and Safety Compliance Officer, arrived at Mr Wikaira's workplace. They met him to ask questions about the accident and how it had happened.

[18] Mr Matthews gave evidence he became aware of the incident when he telephoned Kevin Boniface, the General Manager of Transpacific Waste Management, about an unrelated matter on the morning of Friday 16 December 2011. Mr Boniface informed him he had just received a phone call from Ms S who had expressed concern no one from Transpacific had contacted her to follow up on her wellbeing. At that time neither Mr Boniface nor Mr Matthews had known anything about the matter. Mr Matthews said the General Manager had delegated to him the task of investigating the incident.

[19] Mr Matthews had spoken with Mr Sargent on Friday 16 December and obtained a report from him that day. From the notes and report of his preliminary investigation on 19 December, it seems one of Mr Matthews' main concerns at that time was the breakdown in communication in the Transpacific chain of command.

[20] Mr Matthews' preliminary inquiries, which he referred to as being for the purposes of fact finding, revealed a failure on the part of a number of employees to escalate the matter to senior management in accordance with Transpacific policies. He said they had apparently all assumed there was no need to report the matter based on the Police information that Ms S's injuries were minor. It later emerged Ms S's injuries were more serious than initially thought, and she had suffered a fractured pelvis. However, this was not known until after she had undergone an MRI on the afternoon of Tuesday 20 December.

[21] Mr Matthews spoke with a number of people on 19 and 20 December, in addition to Mr Wikaira. These included Andrew Sargent, Rick Simeon, John Ross, Ms S and her husband, and the police constable who had attended the scene and subsequently issued Mr Wikaira with a warning for careless driving.

[22] Following his preliminary inquiries Mr Matthews decided the matter was sufficiently serious to warrant a formal investigation process. He telephoned Mr Wikaira at work on 21 December and informed him of his decision. He also suspended Mr Wikaira on full pay.

[23] Mr Matthews says he did so after seeking Mr Wikaira's comments on his proposal to suspend him. He says Mr Wikaira commented that suspension seemed harsh, and asked how long it would last. Mr Matthews told him he was planning to meet with him on 5 January 2012, and advised Mr Wikaira of his right to bring a support person with him to the meeting.

[24] Mr Wikaira's gave evidence of being upset that he "*didn't really have an opportunity to respond to my Supervisor*", but did not deny that Mr Matthews had asked for his feedback before suspending him.

[25] Mr Matthews sent a written confirmation of suspension on full pay to Mr Wikaira the following day. He sent, separately, notification of the formal investigation he had instigated into the incident of 10 December, enclosing a copy of the notes from the 19 December meeting with Mr Wikaira.

[26] Mr Matthews' letter of 22 December required Mr Wikaira to attend a formal investigatory meeting on 5 January 2012, and provided comprehensive information regarding the purpose of the meeting and the company's concerns. It outlined a number of allegations against Mr Wikaira, and informed him he would have full

opportunity to respond to those allegations and the company's concerns at the investigatory meeting. The letter referred to the possibility of a disciplinary meeting being scheduled depending on the outcome of the 5 January 2012 meeting, and reiterated that Mr Wikaira was welcome to bring a support person to the meeting.

January 2012

[27] Mr Wikaira attended the investigation meeting on 5 January without a support person. Mr Matthews and Eric Teokotai, from Human Resources, attended for Transpacific. Mr Matthews took hand written notes of the meeting and Mr Teokotai, in conjunction with Mr Matthews, subsequently produced a typed document which was headed "*Investigation Meeting Minutes*", a copy of which was sent to Mr Wikaira.

[28] The records of the meeting show Mr Wikaira acknowledged in hindsight he should have parked the LEV, walked to the rubbish bin, and carried it back to his vehicle. He may have misjudged the gap between the rear of his vehicle and Ms S's Ute. While he thought he had shown due care to Ms S, he acknowledged he was looking up at the roof where her husband was working rather than at Ms S's position as his vehicle moved forward. He stopped immediately on hearing her husband shout, and thought Ms S's dog had run under his vehicle.

[29] When asked why he had not immediately reported the incident Mr Wikaira said he had a lot on his mind and had been interviewed by the Police for an hour after which he had tried to contact his supervisor on the vehicle's RT without success. He could not call his supervisor at home as he did not have his contact number with him. Mr Wikaira stated that he had not immediately returned to the Transfer Station to report the incident because he did not think the matter was serious. He relied on Police advice that Ms S had suffered only minor injury but would be taken to hospital for observation. He had returned to the Transfer Station within 15 – 20 minutes of leaving the scene of the accident, after completing his bin collection run.

The disciplinary process

[30] Following the 5 January 2012 meeting Mr Matthews wrote to Mr Wikaira on 10 January to inform him the company had formed the view he had been grossly negligent in the manner in which he operated his truck on 10 December 2011. Notes of the 5 January meeting were enclosed with Mr Matthews' letter. Mr Matthews also

said Mr Wikaira had failed to take all reasonable steps to report the matter to his supervisor after the incident. Transpacific regarded Mr Wikaira's actions very seriously and they could constitute serious misconduct.

[31] The letter required Mr Wikaira to attend a disciplinary meeting on 12 January 2012 at which he could comment further on the matter and provide further explanation which would be considered fully before any decision on an appropriate outcome would be made. The outcome could be disciplinary action, including termination of his employment. Mr Wikaira was encouraged to seek advice and bring a representative or support person to the meeting. The letter informed Mr Wikaira that if the proposed date for meeting was not suitable he could advise Mr Matthews so an alternative date could be agreed.

[32] Mr Wikaira elected to attend the disciplinary meeting of 12 January 2012 without representation. In the course of the meeting he acknowledged he had chosen the wrong option on the day; accepted the woman he had injured had done nothing wrong; and stated the fact of the matter was that he had *f*****d* up. He said he was sorry and would take the incident as a huge learning curve and it would never happen again.

[33] After a 30 minute adjournment for management to consider Mr Wikaira's comments and explanation, Mr Matthews informed Mr Wikaira the company had decided to terminate his employment for serious misconduct, effective immediately. After considering Mr Wikaira's explanation and responses the company considered his driving conduct on the day to be grossly negligent.

[34] His actions had severe consequences for the person he had injured, and brought the company into disrepute. Transpacific had lost trust and confidence in him as an employee. Mr Matthews asked Mr Wikaira if he had any comment to make, to which Mr Wikaira responded he now had no option but to bring a personal grievance. The company's decision was confirmed by letter dated 17 January 2012.

Issues

[35] The issue I have to determine is whether Transpacific was justified in dismissing Mr Wikaira.

[36] If I determine Mr Wikaira's dismissal was not justified, I must consider what remedies are appropriate for his personal grievance. That will include a consideration of whether Mr Wikaira contributed to the situation that gave rise to his personal grievance and, if so, whether the remedies awarded to him should be reduced accordingly.

Was Mr Wikaira's dismissal justified?

[37] The test for assessing whether Mr Wikaira's dismissal was justified requires an objective assessment of whether Transpacific's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time it dismissed him².

[38] The Act requires me to consider the following factors, in addition to any others I consider appropriate:

- Whether Transpacific sufficiently investigated the matter before dismissing Mr Wikaira, taking into account the resources available to it; and
- Whether it raised its concerns with Mr Wikaira before dismissing him; and
- Whether it gave Mr Wikaira a reasonable opportunity to respond to its concerns before dismissing him; and
- Whether Transpacific genuinely considered Mr Wikaira's explanation in relation to the matter before dismissing him.

² S. 103A Employment Relations Act 2000.

Submissions of the parties

[39] Mr Mair focussed primarily on the last of those bullet points and he submitted that Transpacific had predetermined the outcome of its investigation into the 10 December 2011 incident and failed to consider alternatives other than dismissal. In his view the company was biased from the outset and no explanation Mr Wikaira made would have changed the outcome.

[40] He also submitted Transpacific had failed to take into account Mr Wikaira's good work record, length of service, the likelihood of such an incident recurring, and the fact that this was a one-off incident. Further, that alternative work not involving driving LEVs should have been considered if the employer considered there was a requirement for further training.

[41] Mr Mair said Mr Wikaira acknowledged he had contributed to the incident and accepted that any remedies awarded would be reduced accordingly.

[42] Mr Erickson rejected any element of predetermination on the part of Transpacific and pointed to case law supporting the view that an employer was not prevented from forming conclusions, including preliminary conclusions. He noted that the employer's preliminary conclusions were put to Mr Wikaira for comment in the disciplinary meeting.

[43] Mr Erickson further submitted there was no evidence Mr Matthews had closed his mind as to the outcome of the process. The evidence showed he had given Mr Wikaira the opportunity to comment at every step in the process and he had considered those comments.

Discussion and findings

[44] I am satisfied from the evidence that Transpacific carried out a thorough investigation into the 10 December 2011 incident before proceeding to a disciplinary phase and ultimately dismissing Mr Wikaira. I am also satisfied the employer raised its concerns with Mr Wikaira and gave him a reasonable opportunity to respond to those concerns prior to dismissing him. As already noted, these were not the matters focussed on in Mr Mair's submissions on behalf of Mr Wikaira.

[45] In alleging predetermination by Transpacific Mr Mair particularly noted comments made by Mr Matthews in his initial investigation report. This was the

report compiled after conducting interviews with Mr Wikaira, other Transpacific employees, Ms S and her husband and the Police on 19 and 20 December 2011. One such comment was in relation to Mr Wikaira's delay in reporting the incident, which was 1 hour 45 minutes after the incident occurred, or approximately 20 – 30 minutes after he had completed his statement to the Police.

[46] Mr Wikaira had acknowledged he was wrong not to report the incident earlier, but qualified that acknowledgment by saying he was not aware of Ms S's condition at the time, despite seeing her leaving the scene in an ambulance. Mr Matthews' comment was to the effect that Mr Wikaira's qualifying statement was irrelevant as the company's policy required Mr Wikaira to report the incident immediately.

[47] I do not find this comment in Mr Matthews' report to indicate predetermination of outcome. At the time of compiling the report Mr Matthews was in the early stages of gathering facts to determine whether a formal investigation was warranted. His initial focus appeared to be on the reporting aspects of the incident but, while that remained an important concern for Mr Matthews, his letter of 17 January 2012 did not cite reporting delays as a reason for dismissing Mr Wikaira. The reason given was Mr Wikaira's driving conduct on 10 December 2011 which Mr Matthews concluded to be grossly negligent resulting in injury to a member of the public. He found Mr Wikaira's conduct fell well short of the company's expectations of him as a professional driver and amounted to serious misconduct damaging the trust and confidence necessary for the maintenance of the employment relationship.

[48] Mr Mair also pointed to a second comment in Mr Matthews' initial report concerning vehicle insurance. This was in the context of Mr Simeon's discussion with Ms S's husband over damage to their Ute. Mr Simeon had expressed the view to Mr Matthews that he did not believe the fault for the damage to the Ute lay with Transpacific. Mr Matthews took a different view.

[49] I do not find a sinister intent in Mr Matthews' comments at this early information-gathering stage. I find it more likely he was focussing simply on the insurance aspect of the matter and reflecting his view that it was obvious damage had been caused to Ms S's stationary Ute by the moving Transpacific LEV. I do not find it reasonable to infer from Mr Matthews' comments a predetermined decision that Mr Wikaira was guilty of serious misconduct for which he should be dismissed.

[50] Mr Mair submitted that a third comment indicating Transpacific's predetermination of the matter appeared in the undated Investigation Report compiled by Mr Teokotai in conjunction with Mr Matthews shortly after the formal investigation meeting with Mr Wikaira on 5 January 2012.

[51] The statement, which is highlighted below, was part of the recommendation section of the report relating to Mr Wikaira's action.

*“After consideration of all the information it is recommended that the matter with Danny Wikaira (Driver) be progressed to a disciplinary meeting. **His lack of good judgement in the manner he handled the LEV truck on the day of the incident was negligent** and it would appear that he did not pay due care and attention in the circumstances knowing that there was a member of the public in close vicinity of the LEV truck that he was operating.”*

[52] I disagree with Mr Mair that this indicates predetermination by Transpacific. I am satisfied this was a preliminary conclusion the company was entitled to formulate on the basis of its investigation up to that point. By that time Mr Teokotai and Mr Matthews had interviewed all the key people involved in the incident and had considered all the information gleaned to date. They had interviewed Mr Wikaira twice, the first time in a fact-finding setting and the second time as part of a formal investigation.

[53] Mr Matthews had forewarned Mr Wikaira in his letter of 22 December 2011 that an outcome of the investigatory meeting on 5 January 2012 could be a disciplinary meeting. Having considered the information obtained from the investigation it was reasonable for the employer to conclude that a disciplinary process was warranted. Once it had done so, it was obliged to inform Mr Wikaira of its thinking and give him the opportunity to comment on it.

[54] Mr Matthews' letter of 10 January 2012 to Mr Wikaira at the conclusion of the investigation phase clearly and comprehensively gave Mr Wikaira information about the views Mr Matthews had formed. It told him he would *“be given full opportunity at the disciplinary meeting to comment on this matter and provide a further explanation”*. The letter noted that his explanation would be *“given full consideration before any decision on the most appropriate outcome is made”*. It also properly informed him of the seriousness with which the employer viewed the matter and alerted him to the possibility of disciplinary action *“including termination of employment”*.

[55] I find Transpacific did not predetermine the outcome of the investigation, or of the disciplinary meeting on 12 January 2012. Mr Wikaira was kept informed throughout the process of his employer's progress and views and was afforded reasonable opportunity to respond.

[56] In the course of the 5 January 2012 investigation meeting with Mr Matthews and Mr Teokotai, Mr Wikaira accepted in hindsight he could have done things differently and should have stopped the truck and walked to get the bin. He acknowledged he may have misjudged where he was in relation to Ms S and her vehicle. He also acknowledged he had read and understood the Transpacific Driver/Operator Code of Conduct and he expressed remorse for what had happened.

[57] During the disciplinary meeting of 10 January 2012 Mr Wikaira made further concessions and acknowledgements, including that he:

“chose the wrong option on the day”;

“should not have driven forward at the time”;

“accepts (Ms S) did nothing wrong”; and

(on the day) *“f*****d up”*.

[58] Mr Wikaira partly resiled from these acknowledgements during the Authority's investigation meeting, in particular by throwing blame for the accident on Ms S. I was not convinced by his attempt to justify his actions on the day of the incident. Mr Wikaira asserted Ms S had said she would move her Ute and he expected her to do so. However, under cross examination he acknowledged that he gave her no time to move her vehicle before he moved the LEV forward.

[59] Regardless of any belated justification Mr Wikaira may have made, his employer could only come to a decision about his actions on the basis of the information it had at the conclusion of its investigation and disciplinary meetings. That information included Mr Wikaira's acknowledgements that I have already referred to regarding his misjudgement and Ms S's blamelessness.

[60] I find Transpacific acted as a fair and reasonable employer in the manner in which it investigated the incident of 10 December 2011. On the basis of the information obtained through that process it reached a reasonable conclusion that Mr

Wikaira's conduct on the day constituted serious misconduct and damaged the trust and confidence necessary for the maintenance of the employment relationship.

[61] Having reached that conclusion, dismissal was, I find, among the disciplinary options open to Transpacific as a fair and reasonable employer. The evidence suggests Transpacific is a company with a significant focus on health and safety, and the education of its workforce on such matters. The division in which Mr Wikaira was employed operates heavy machinery carrying a risk of harm to employees and others if it is not operated safely. Mr Wikaira acknowledged his awareness of the company's safety considerations and of his recent participation in a "tool box" session on driver conduct.

[62] I accept Mr Matthews' evidence that he gave consideration to lesser disciplinary sanctions as an alternative to dismissal. He concluded the seriousness of Mr Wikaira's conduct outweighed the possibility of any lesser action, and his loss of confidence in Mr Wikaira's judgement precluded his continued employment with Transpacific. Again, I find that to be a conclusion reasonably available to the employer to make in all the circumstances at the time.

Determination

[63] Mr Wikaira does not have a personal grievance against Transpacific Industries Group (NZ) Limited. He was justifiably dismissed following his employer's finding of serious misconduct after it had conducted a full and fair investigation.

Costs

[64] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority