

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
ER AUTHORITY AUCKLAND OFFICE**

BETWEEN Ki Auro Pepe

AND Transportation Auckland Corporation Limited

REPRESENTATIVES Gary Froggatt, advocate for Ki Auro Pepe
Gavin Cook, advocate for Transportation Auckland Corporation Limited

MEMBER OF AUTHORITY Rosemary Monaghan

INVESTIGATION MEETING 19 May 2006

SUBMISSIONS RECEIVED 30 May, 2 and 9 June 2006

DATE OF DETERMINATION 15 June 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Transportation Auckland Corporation Limited, trading as Stagecoach ("Stagecoach") employed Ki Auro Pepe as a bus driver. It dismissed Mr Pepe for serious misconduct after investigating a complaint from a passenger about his inappropriate behaviour towards her.

[2] Mr Pepe says the dismissal was unjustified, and seeks remedies including reinstatement.

Mr Pepe's employment

[3] Mr Pepe was recruited from Samoa in May 2005, but because of delays in obtaining the necessary driver's licence he did not commence his driving duties until 20 October 2005.

[4] In the late afternoon of 27 October 2005 Mr Pepe was driving a bus on a route terminating in Manukau City. One of the passengers on the latter part of the route was a young woman of 16. Another passenger was a male friend of Mr Pepe's. The young woman complained to Stagecoach about incidents involving the passenger and Mr Pepe, and which occurred near the end of the route.

[5] The young woman's written complaint, as put to Mr Pepe, was:

"I sat in the bus near the back doors. There were quite a lot of passengers. A male passenger, who was already seated, came and sat in a seat across the aisle from me. This happened in St George St Papatoetoe. As quite a few passengers got off the bus, I moved to the back seat. The male passenger followed me.

The male passenger spoke to me:

'If I was from around here' (I said 'yep')

'What was my name' (I gave him a false 1st name only)

'Could I teach him how to kiss (I stopped talking)

'Did I have a boyfriend'

'Could he kiss me'

'I should have a man who would love me and look after me'

'He was looking for a New Zealand lady'

The male passenger stated that he was a brother of the driver (of the bus) and that they were Samoan. He also explained the route that the bus took and that the bus was on the 2nd to last route before he and his brother were finished for the day.

The last passenger got off at the Warehouse in Manukau, leaving myself and male passenger.

The driver and male passenger were talking to each other in their language, which included some laughing. This was until the bus stopped at Ronwood Ave Manukau.

In Ronwood Ave the driver stopped the bus and came down towards the back of the bus. The driver spoke to me which sounded 'suggestive' but I didn't quite hear the exact words. I said 'what'. He then asked me 'if I was coming on the 2nd round'. I said 'no' and got off the bus.

On this bus trip I felt 'insecure', 'what the hell's going on'.

[6] The initial complaint was made by telephone to the customer services department at Stagecoach, and separately to the City Council's 'Rideline'. The young woman's mother made those approaches. The complaint was referred to Geoffrey Farrell, the Southern Area Manager for Stagecoach. Mr Farrell contacted the mother, who advised that she felt strongly enough to make a report to the police, and that a written complaint would follow. She forwarded her own written account of her involvement, as well as the account set out above.

[7] Mr Farrell ascertained that the driver was probably Mr Pepe, and arranged a preliminary meeting with him. The meeting went ahead on 3 November 2005. Mr Pepe attended with his union representative. Mr Farrell gave Mr Pepe copies of the written complaints from the mother and daughter, and the written records of the telephone complaints. He also gave Mr Pepe a letter from Stagecoach of the same date, asking for a written explanation by 7 November. The letter identified the company's concerns as:

- (a) Mr Pepe acted in an inappropriate manner to the young female passenger;
- (b) Mr Pepe failed in his duty of care to ensure that the passenger was safe at all times and free from harassment; and
- (c) During the course of his duty Mr Pepe knowingly allowed a person, who claimed to be related to him, to act in an inappropriate manner to another passenger without making any attempt to prevent it occurring.

[8] Mr Pepe was suspended on pay pending the completion of the investigation. No issue has been taken with that action.

[9] Mr Pepe's written response, prepared with the assistance of his union representative and dated 4 November 2005, explained that the male passenger was a friend, not a relative, and denied any conversation with the friend while driving. It also denied any inappropriate behaviour towards the young woman, or having any contact with her prior to her indicating that she wished to get off the bus at Ronwood Avenue. At that point:

"I stopped the bus and went down the back of the bus and asked the passenger if she was going to get off the bus. I did not ask her if she wished to carry on for the next trip. She said she was going to get off the bus and then she got off the bus."

[10] The response also denied failing to look after a passenger, allowing another person to act in an inappropriate manner, or knowing that there was a problem.

[11] At a further meeting on 7 November, Mr Farrell pointed out that there were two different interpretations of events. He said he was not satisfied with Mr Pepe's explanation and would seek more information from the complainant. He told Mr Pepe he believed a disciplinary meeting would be necessary.

[12] On 10 November Mr Farrell, together with Stagecoach's human resources advisor Trudy Golder, went to the young woman's home to speak to her. The woman's mother showed them a text message she had received from her daughter at the time, and which read:

'Ew mum the bus drivin his brotha were bein dodge'

[13] The young woman said the driver had not turned into the road that was normal for the route (being Davies Ave, and the direction in which the young woman wanted to go) and that she did not ring the bell to get off the bus. When the bus stopped (much further down Ronwood Ave than it should have been) the driver got up and walked down the bus, and motioned to start unbuckling his pants. There was more talking between the driver and the male passenger in their own language. The driver made a comment to her that she did not hear, but sounded like 'suck'. The young woman said she felt something bad might happen to her and that she was intimidated.

[14] The written notes from that meeting were forwarded to Gary Froggatt, Mr Pepe's union president, under cover of a letter dated 14 November 2005. The letter reiterated the concerns expressed in the 3 November letter, and asked Mr Pepe to attend a 'serious misconduct disciplinary meeting' on 16 November.

[15] The disciplinary meeting went ahead on 16 November, with Mr Froggatt representing Mr Pepe. Mr Farrell asked Mr Pepe why he had departed from the bus route, to which the reply was Mr Pepe sometimes forgot the route. That explanation was not satisfactory to Mr Farrell as Mr Pepe had a run sheet for reference, and the delay in obtaining his licence meant he had more opportunity for learning and training than many drivers.

[16] Mr Pepe continued to deny that anything had happened, denying in particular that he had walked down the bus, spoken to the young woman except to tell her to get off the bus after she pressed the bell, or had a conversation with his friend. He also denied being aware of his friend's behaviour, and said no complaint had been made to him about it at the time.

[17] In further support of Mr Pepe, Mr Froggatt queried the training Mr Pepe had received regarding conduct towards passengers, and expected standards of behaviour. He told me he did so because of concerns (b) and (c) in the letters to Mr Pepe. Stagecoach's response was to say Mr Pepe had received training in customer service, but his alleged behaviour was short of any basic standard of general application and it could not be expected to provide specific training about those standards.

[18] During the adjournment which followed, Mr Farrell and Ms Golder discussed the information then available. Mr Farrell was concerned about the differences between Mr Pepe's and the young woman's accounts, but had found the young woman to be a credible witness. He did not believe she was likely to make up a complaint of that kind.

[19] On the resumption of the meeting, Mr Froggatt asked for an opportunity to interview the young woman, which was declined. He also said there was a discrepancy between the young woman's original statement and her additional evidence, that Mr Pepe had not been taught about that kind of behaviour, and that Mr Pepe had a clean work record to that point. The alleged discrepancies in the young woman's statements were not identified, but bearing in mind the mother conveyed the original complaint, I did not find any material discrepancies.

[20] During a further adjournment Mr Farrell and Ms Golder concluded that, on the balance of probabilities, something had happened. Mr Pepe's only explanation was to deny that anything had happened. On the other hand Mr Farrell and Ms Golder had viewed the contemporaneous text message, there was no dispute that the bus was off-route, and it did not make sense that the young woman would have pressed the bell to alight as Mr Pepe said she did. They also noted that Mr Pepe had originally admitted at least to walking towards the back of the bus after he had stopped it, but later denied doing so. At the Authority's investigation meeting he denied doing any more than standing up by his driver's seat to stretch his legs. As the company representatives found the young woman to be more credible, they believed her.

[21] Mr Farrell considered behaviour of that kind to be unacceptable. He said in evidence he did not hold Mr Pepe responsible for the earlier exchanges between his friend and the young woman, but he believed there had probably been some communication between Mr Pepe and his friend about the young woman and that led to Mr Pepe behaving as the young woman said he did. Mr Farrell also took into account that Mr Pepe was denying that anything had

happened, so was not taking any responsibility for his actions. This so undermined the company's trust and confidence in him that dismissal was appropriate.

[22] On the next resumption Mr Farrell discussed his reasoning and advised of his decision that Mr Pepe was to be dismissed with immediate effect.

[23] Mr Froggatt then asked for an opportunity to produce another witness. He meant that he wanted to find, and obtain a statement from, Mr Pepe's friend. Mr Farrell declined because he believed the union had already had ample opportunity to address that matter, but had not done so. In addition, he did not consider the friend's statement would be relevant since Mr Pepe's was the behaviour being addressed.

[24] I agree that the union could have sought a statement from Mr Pepe's friend early in the investigation process, rather than waiting until the decision to dismiss had been advised before even raising the matter. Moreover, there was nothing to suggest the friend could even be contacted or was available to be interviewed. My reservation is that, whatever his role in it, the friend was present during the incident and was a witness to it. He was in a position to give an account of Mr Pepe's behaviour and the young woman's, and I do not agree his account was irrelevant.

[25] The union obtained a statement from the friend some two months later. In it the friend accepted he had been talking to the young woman, but said she talked to him and sometimes she laughed. He denied talking to Mr Pepe while Mr Pepe was driving. He said that when the bus stopped 'at the last stop', Mr Pepe 'just walked out through the back door'. The first of these statements was not correct as the bus was off-route, and the second is not consistent with Mr Pepe's eventual denial that he walked to the back of the bus at all. The friend also said the young woman told him she was going to the Manukau District Court to pay a fine. There are many reasons why that allegation is dubious, but even if it is true then, depending on the woman's route through Manukau city centre, the bus had stopped about a kilometre away. I doubt that the friend's statement would have assisted Mr Pepe.

[26] The letter of dismissal summarised the company's conclusion that Mr Pepe had acted inappropriately towards the young woman, and did not accept that Mr Pepe was unaware his friend was harassing the young woman. It said Mr Pepe's actions were deliberate, and undermined the company's trust and confidence in him. Although it was not necessary to do any more the letter also advised that the actions were considered to be a breach of the applicable collective employment agreement, and referred to a part of a definition of serious misconduct which included: "Abuse of a member of the public or a Company employee."

Justification for the dismissal

[27] If the incident occurred as the young woman described it, then Mr Pepe's conduct was unacceptable and amounted to serious misconduct. This conclusion is not affected by the definition of serious misconduct in the collective employment agreement, because the types of conduct listed in the definition are examples and the definition is not limited to the listed conduct alone. The long-established legal definition of 'serious misconduct' is:

"Usually what is needed is conduct that deeply impairs or is destructive of that basic confidence or trust that is an essential part of the employment relationship."¹

[28] While it is true that the allegation that Mr Pepe 'abused' a member of the public was not put to him, the incident in question was put to him. However the incident might be labelled, the resulting loss of trust and confidence was the reason for the dismissal.

[29] I have a reservation about the statement in the dismissal letter to the effect that Stagecoach did not accept Mr Pepe was unaware the young woman was being harassed by Mr Pepe's friend. That statement went too far since there was no evidence of precisely what the friend told Mr Pepe of his interaction with the young woman – for example whether or not he

¹ **Northern Distribution Union v BP Oil NZ Limited** [1992] 3 ERNZ 483.

was telling the truth he could have told Mr Pepe she was a willing participant - and no suggestion that the young woman complained to Mr Pepe. At best the available information allowed an inference that the friend had said something to Mr Pepe about the young woman, and instead of putting a stop to the interaction Mr Pepe went some way towards participating in whatever he thought it was. However I do not believe this reservation detracts from the essentially unacceptable nature of Mr Pepe's conduct.

[30] There were submissions on behalf of Mr Pepe to the effect that Stagecoach did not comply with the disciplinary procedures in clause 47 of the collective agreement. In particular it was said that the company's letter of 14 November failed to refer to an investigation meeting, and failed to advise Mr Pepe of his right to name witnesses relevant to the enquiry.

[31] In the light of those submissions, I summarise the clause and the way in which it was applied as follows:

- (a) the company received an 'external complaint' as defined in clause 47.4, within 5 days of the incident in question;
- (b) the complaint, and supporting documentation were placed in Mr Pepe's mailbox 2 days later;
- (c) Mr Pepe was asked for a 'please explain' letter in terms of clause 47.2 and 47.7(a), and he provided one dated 4 November 2005;
- (d) on receiving and considering the explanation, Stagecoach had an investigation meeting on 7 November;
- (e) Mr Pepe was suspended, following consultation, under clause 47.9 (d);
- (f) at the investigation meeting, and subsequently in writing on 14 November, Stagecoach advised that it saw the matter as one in which disciplinary action might result and a disciplinary meeting was necessary, under clause 47.8;
- (g) a disciplinary meeting went ahead on 16 November, under clause 47.9.

[32] From that, I do not accept there was any material deviation from the disciplinary procedure.

[33] In addition clause 47.9(f) refers to the employee's right to name witnesses considered relevant to an investigation. It does not oblige the employer to advise the employee of this right, but it was said in submissions that there was such an obligation. Since Mr Pepe was represented by his union, and the representative can be expected to be aware of the right, I do not consider Stagecoach was in breach of any obligation regarding Mr Pepe's right to name relevant witnesses.

[34] It was also alleged, on behalf of Mr Pepe, that the level of disciplinary action was not consistent with the company's response to allegedly similar behaviour on the part of another employee. However the evidence did not support that allegation. Although a complaint of a similar nature had been made against the employee in question, when it investigated the matter Stagecoach found the complainant had contributed to the relevant incident. It took into account, too, that the employee acknowledged his role and was apologetic. For those reasons the employee was not dismissed. I am not satisfied there was any disparity of treatment here, let alone disparity sufficient to call into question the justification for Mr Pepe's dismissal.

[35] Mr Farrell was entitled to conclude that the young woman's account of Mr Pepe's conduct was the more credible. He did not do so arbitrarily.

[36] I conclude the dismissal was justified. The remedies Mr Pepe seeks are not available to him.

Costs

[37] Costs are reserved.

[38] The parties are invited to reach agreement on the matter. If they seek a determination from the Authority they are to file and serve memoranda on the matter within 28 days of the date of this determination.

Rosemary Monaghan
Member of Employment Relations Authority