

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN David Davies (Applicant)

AND Cityline (NZ) Limited trading as Stagecoach Auckland
(Respondent)

REPRESENTATIVES Joeli Baledrokadroka, Advocate for Applicant
Trudy Golder, Advocate for Respondent

MEMBER OF AUTHORITY Leon Robinson

INVESTIGATION MEETING 11 October 2006
12 October 2006

DATE OF DETERMINATION 17 October 2006

DETERMINATION OF THE AUTHORITY

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- A. Cityline (NZ) Limited trading as Stagecoach Auckland is ordered to pay to David Davies the gross sum of \$3,900.00 as reimbursement.
- B. Cityline (NZ) Limited trading as Stagecoach Auckland is ordered to pay to David Davies the sum of \$2,500.00 as compensation.
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The problem

[1] Mr David Davies ("Mr Davies") claims he was unjustifiably dismissed by the respondent Cityline (NZ) Limited trading as Stagecoach Auckland ("Stagecoach"). Mr Davies also claims he has a personal grievance for duress. Stagecoach says Mr Davies was justifiably dismissed and denies he has a personal grievance for duress.

[2] Mr Davies applies to the Authority for an investigation of these problems and asks that they be resolved in his favour by orders for reimbursement and compensation.

[3] The parties were unable to resolve the problem by the use of mediation.

Unjustifiable dismissal

[4] Mr Davies has worked for Stagecoach as a bus operator since August 1998. He was dismissed at a disciplinary meeting held on 12 April 2006. That dismissal was confirmed in writing by letter dated 18 April 2006 which materially stated: -

... we did not accept your explanation that you at no time raised your voice, swore at, or were aggressive to the complainant at any time. The Company believed that you acted in a manner which was verbally abusive and aggressive towards this employee.

As discussed, the Company believed your actions amount to serious misconduct and that you were in breach of your employment agreement which states that:

Serious misconduct includes, but is not limited to, the following:

e) Abuse of a member of the public or another employee

[5] Stagecoach had received a complaint from a supervisor Ms Denise Bremner ("Ms Bremner"). She wrote by email dated 23 March 2006 to Stagecoach's southern area manager Mr Geoff Farrell ("Mr Farrell"). That email stated: -

This morning Davies was the 5.15am straight shift standby. Last night John had allocated Davies to duty 3105. As the need to cover this shift came about last night after Davies had left, he didn't know about it until I told him.

When informed that he had a duty he became agitated and was pissed off. I'm not too sure exactly why as it was a straight duty and a decent one. Davies then asked me why Eishca was on 3113 and not him. I told him that was because she was on the holiday relief roster and had been rostered to the shift and wasn't on it via being on standby duties like him. "Since fucken when has she been on that roster?" Davies came back with. I informed him that it was since she had become fulltime, a few months earlier. Davies then accused us in Ops of "playing with the rosters." I pointed out to him that John and I don't do the rosters, that Ralph and/or Steve do them and that any changes that we may make are generally minor ones.

I don't know exactly what was said as I wasn't in the room when Eishca came in to sign on but he then had a go at her about her being rostered on 3113. Eishca was a bit pissed off with the flak she got.

Davies then went to go out on the road. I had allocated him bus 7193 which there are only a few duties we can allocate this bus to as it doesn't have all of the destination signs on it. Its destination blinds are totally different from the other buses, so we just keep it to certain duties. I always allocate it to 3105 in the morning. In the past all the drivers would just make do and on the 270 Mt Eden to Downtown trip they will just put "Downtown Auckland" and take a board sign with 270 on it.

I was at the CDS machine when Davies came storming back in. "That bus is fucken useless, it doesn't have destination signs". Davies was loud and over the top. I explained to him what the other drivers do but he wouldn't listen. He was being aggressive and totally disrespectful towards me and other drivers in the room with his language. Just so as to shut him up and get him out of my face, I gave him another bus. He didn't need to leave the depot for another 15 minutes and spent a fair bit of that time complaining about me "Stupid bitch, gave me a bus that doesn't even have the right destination signs" "Fucken Ops" and so on. After he went on the road, another driver came to inform me that he had left his bus in the middle of the yard, lights on and all. He couldn't be bothered I presume.

Davies attitude towards his job, his passengers, his co workers and us Ops staff is shocking. Quite frankly he drags the depot down (when he's not off work sick that is).

I'd appreciate it if you could take this further

Denise

[6] By letter dated 24 March 2006, Mr Farrell wrote to Mr Davies providing him with Ms Bremner's email. Mr Davies was asked to provide a written explanation by Tuesday 28 March 2006.

[7] Mr Davies provided a response by letter dated 27 March 2006. He wrote: -

For the week beginning 19-3-2006 I was rostered on as 5503 which signs on at 0515. It covers any duties that need covering. Denise in her complaint has stated I became agitated and was pissed off. Why would I become that when it is the job of that duty to do what ever arises, in covering duties. So I can say Geoff that she is wrong in stateing what she has.

I did ask Denise why Eischa was doing duty 3113 as I had done it earlier in the week. I did not realise that she had been made holiday relief. I do not recall swearing at all.

I did make mention about op's changing duties. As I have said I did duty 3113 early in the week, and then on Friday 24th March 2006 they took Eischa off 3113 and put her on a Pukekohe duty. Also they have done the same today 27th March 2006. If that is not changing duties Geoff "what is" when clearly she is rostered on to do 3113.

I was given bus 7193 to do duty 3105. I asked for a bus change as it does not have the correct signage for the routes it covers. For Denise to say she always uses that bus for duty 3105 is not correct. I have done that duty a few times in the past couple of months and this was the first time I have been given this bus. Also I donot ever recall seeing a signboard made for route 270 which is Mt Eden to Downtown. I was never aggressive or disrespectful towards Denise. I actually showed her a duty that she could use that bus on. But she has conveniently forgotten about that, and this I did at the time when I asked her for a bus change. Denise has also stated that I left my bus in the middle of the yard and with the lights on. This is a blatant lie on her part.

And for Denise to write what she has in her last paragraph of her letter is beyond me. Therefore I wish to request a meeting with myself, my rep, and the writer and Denise to sort out her allegations.

*Yours sincerely
David Davies*

[8] Mr Farrell acknowledged receipt of Mr Davies response by letter dated 30 March 2006. He repeated the allegation that Mr Davies had been abusive and threatening towards company

employees. Mr Davies was requested to attend a meeting on 5 April 2006 with a representative. The letter concluded that following the meeting and after considering the matter further, Mr Farrell would decide whether to take disciplinary action.

[9] Mr Davies duly attended that meeting on 5 April 2006 with Mr Murray Forbes ("Mr Forbes"), another driver with Stagecoach. Present for Stagecoach were Mr Farrell and human resource adviser Ms Trudy Golder ("Ms Golder"). Ms Golder took notes of the meeting which Mr Davies accepts are accurate in terms of what they record. Mr Davies denied swearing at Ms Bremner, raising his voice and being aggressive.

[10] By letter dated 7 April 2006, Mr Farrell wrote to Mr Davies. Mr Davies was advised the company had completed its investigation into the allegation that he had acted in a manner that could be deemed serious misconduct. The company believed that a disciplinary meeting to discuss the allegation further was necessary. Mr Davies was requested to attend a serious misconduct disciplinary meeting on Wednesday 12 April 2006 with his representative.

[11] Mr Davies says Ms Golder's notes of the meeting held on 5 April 2006 are incomplete in that they do not record certain comments made by Mr Farrell to him. He prepared a letter dated 11 April 2006 but did not send it. Stagecoach did not see it until the Authority's investigation. It stated:-

Dear Trudy

Further to the meeting held at the depot on 5 April 2006. Present were:- Davies, Forbes, Golder, Farrell. I require a explanation to the abusive and threatening attack from the southern area manager with reference to his comments he made at the latter part of the meeting. Comments.

- 1) What am I "F" doing here*
- 2) I have no interest in the "F" company*
- 3) I could not get another job outside of the company because of my medical condition*
- 4) Always swearing and picking on other staff*
- 5) Mentioned union business*
- 6) Threatened job was on the line.*

I believe his actions were abusive and he was directly in my face, to me it was intimidation. I would appreciate a response.

*Yours sincerely
D Davies*

[12] Having seen and heard the various witnesses, I prefer Stagecoach's evidence and find Mr Farrell did not behave in an abusive and intimidatory fashion.

[13] Also on 11 April 2006, Mr Davies signed this statement:-

I, Dave Davies, understand that this issue is one that could potentially lead to dismissal and wish the following person to investigate and make the decision in the disciplinary hearing:

He nominated a representative of the human resources department.

[14] Mr Davies attended the meeting on 12 April 2006 with Mr Forbes. Present for Stagecoach were Mr Farrell and Ms Golder. Ms Golder took notes which Mr Davies confirms are accurate. Mr Davies continued to maintain he had not been aggressive to Ms Bremner and he said he *"didn't swear to the best of my knowledge"*. The meeting adjourned at 3.00 pm.

[15] At 3.20 pm Ms Golder advised that a decision had been reached. She had perused Mr Davies' personnel file and taken note of a number of complaints and accidents demonstrating Mr Davies' demeanour over the years had been aggressive. She particularly noted a similar occurrence in February 2004 concerning abuse of another employee. She advised Mr Davies she believed Ms Bremner, based on probability and Mr Davies' history. She said abuse of another company employee was serious misconduct and such behaviour was not acceptable. She told Mr Davies he had been given a chance before for similar behaviour but his behaviour had been aggressive throughout his history. He had not learned or changed. Mr Davies was informed a decision had been made to terminate his employment on one weeks' notice.

[16] The Authority scrutinises Stagecoach's actions in accordance with the statutory test of justification set out at section 103A of the *Employment Relations Act 2000* ("the Act"). That section is as follows: -

103A. Test of justification—

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[17] The relevant question is how would a fair and reasonable employer have acted in all the circumstances of the case. These circumstance include not just the employer's reaction to the misconduct, but also the circumstances under which the misconduct occurred and the circumstances of both the employee and employer. An employer does not have to prove the incident which it characterised as misconduct happened. It is not required to conduct a trial or even a judicial process and natural justice requires that the employee is given a proper opportunity to comment on the allegations against them.

[18] The Authority reviews Stagecoach's actions to ascertain whether it carried out a full and fair investigation that disclosed conduct which a fair and reasonable employer would regard as serious misconduct. The statutory test obliges the Authority to then separate out the

employer's actions for evaluation against the specified objective standard of what a fair and reasonable employer would have done in the circumstances.

[19] Stagecoach had received Ms Bremner's complaint by email. I am satisfied that Mr Farrell reverted to her with Mr Davies' denials, although he did not at any stage provide Mr Davies' written response to her. Mr Davies' was given three opportunities to respond to what had been alleged against him. On each occasion he essentially denied the allegations although in response to swearing at Ms Bremner, he gave the equivocal response that *"to the best of his knowledge he didn't swear"*.

[20] I am satisfied that Mr Davies was dealt with fairly in that he was given an opportunity to respond and did respond to the allegations against him. He was also assisted by his support person Mr Forbes. My investigation does not yield any evidence of unfairness in process.

[21] However, there are matters relating to the contractual provisions that require discussion. Stagecoach referred to the meeting held with Mr Davies on 5 April 2006 as the "investigatory" meeting, and that held with him on 12 April 2006 (where he was dismissed) as the "disciplinary" meeting. Mr Baledrokadroka for Mr Davies, makes a meritorious observation about this in terms of the relevant collective and clauses 22.8 through 22.11.

[22] The first observation Mr Baledrokadroka notes is that if the meeting of 12 April 2006 is a "disciplinary" meeting, then clause 22.8 entitled "Disciplinary meetings" precluded Stagecoach from dismissing Mr Davies because by subclause (e) thereof, the specified permissible outcomes are either a verbal counseling/warning or a further investigation under clause 22.9. Of course, in this instance neither of those things occurred and Mr Davies was dismissed without more. Mr Baledrokadroka submits Stagecoach was not authorised to dismiss Mr Davies accordingly.

[23] I agree with Mr Baledrokadroka that there are issues which arise. I do not agree however with his assessment for a number of reasons. Firstly, I rather consider the heading of clause 22.8 "Disciplinary meetings" to refer generally to meetings being disciplinary in nature and not specifically to a particular meeting which is designated with that label. It is the substance of the meeting that is relevant not the label which is attached to it. I also agree that the reference to clause 22.10 should be to clause 22.11.

[24] Secondly, I conclude that the word "explanation" in subclause (a) refers to the response to the *"please explain"* letter. On that analysis, the remainder of clause 22.8 operates so that "the meeting" referred to throughout is that which occurred in Mr Davies' case on 5 April 2006. The "further investigation" referred to in subclause (e) under clause 22.9 will then necessarily

be the process which followed the 5 April 2006 meeting. Clause 22.9 then becomes operative. Mr Baledrokadroka no doubt considers that cannot be so because the meeting of 12 April 2006 was called "disciplinary meeting" and cannot therefore be the "serious misconduct investigation" referred to at clause 22.9. As I have already observed, it is the substance of the meetings which is relevant for the contract, not the labels put on them. I suggest that the parties clarify the contractual provisions relating to disciplinary process so as to avoid future difficulties.

[25] Having heard from both Ms Bremner and Mr Davies, Stagecoach had to decide who it believed. It was entitled to prefer Ms Bremner's statement to Mr Davies' denials, some of which were equivocal. After a full investigation which I find was fair, Stagecoach concluded that Mr Davies had abused another employee, contrary to clause 22.10(e) of the relevant collective. That conduct was deemed serious misconduct thereby justifying summary dismissal.

[26] In preferring Ms Bremner's statement, Stagecoach had evidence that Mr Davies had become agitated, although no detail was provided of this. Mr Davies is expressly stated to have said *"Since fucken when has she been on that roster?"* and that he accused *"us in Ops of 'playing with the rosters."* He is also reported to have *"had a go at her [Eishca]"* but no detail is provided. He is said to have come *"storming back in 'That bus is fucken useless, it doesn't have destination signs"*. He is then said to have been loud and over the top although no detail is given either about that. Nor is there any detail of the statement that *"He was being aggressive and totally disrespectful towards me and other drivers in the room with his language"*. Ms Bremner says that Mr Davies spent a fair bit of time complaining about her and she expressly states he said *"'Stupid bitch, gave me a bus that doesn't even have the right destination signs" 'Fucken Ops" and so on*. It is then said Mr Davies left his bus in the middle of the yard.

[27] Mr Davies suggests that Ms Bremner's complaint is not that he said directly to her *"Stupid bitch, gave me a bus that doesn't even have the right destination signs" 'Fucken Ops" and so on*. I accept this was never raised in either of the meetings by Mr Davies himself or Stagecoach. I accept too that it was not clarified with Ms Bremner either. Mr Davies says it is reported by her as a comment made about her and not to her. After considering the context of the statement, I agree with him.

[28] There is a distinction between "bad language" and "abuse". Bad language and swearing is a feature of many workplaces. I have no doubt and I am told it is so, that bad language is common in the smoko room at the depot. But swearing or bad language is not on its own sufficient to always justify summary dismissal. Abusive behaviour however is something

different altogether. It is typically behaviour that is repudiatory in nature and which raises serious doubts about the continuation of the employment relationship.

[29] I have reached the view that the evidence before Stagecoach was that Mr Davies had behaved aggressively and he was agitated. There is also evidencing of his swearing. I do not agree that Stagecoach was entitled to find that Mr Davies had "swore at" Ms Bremner or that he had "verbally abused" her. There is evidence that he used very bad language and displayed an appalling attitude towards her as his superior. However, although that behaviour is not acceptable, it was not abuse directly personally at Ms Bremner so as to constitute the abuse of an employee contemplated by clause 22.10(e) and as would justify summary dismissal. I am satisfied that his behaviour as described, cannot be characterized as intimidatory or threatening. I do not appreciate Ms Bremner to allege it was either. It was however, clearly disrespectful and unacceptable. But it did not constitute abuse of an employee.

[30] I rather consider Ms Bremner complains about Mr Davies' very bad attitude and not that she felt that she had been abused. She is quite right to complain. Mr Davies should not have referred to Ms Bremner, a person in authority, in the terms that he did or the manner that he did.

[31] Nothing I have said should be mistaken for condoning Mr Davies' inappropriate and unacceptable behaviour. But his behaviour was not repudiatory rendering the employment relationship impossible to continue. I note too that Mr Davies was issued a first written warning for verbally abusing an employee in February 2004. That behaviour was not considered serious enough to justify dismissal on its own. Nor do I consider the behaviour on this occasion is either.

[32] After its disciplinary process, which I find was full and fair, Stagecoach concluded Mr Davies had abused another employee. I must now separate out Stagecoach's decision to dismiss and evaluate it against the specified objective standard of what a fair and reasonable employer would have done in these circumstances. I take into account Mr Davies' service of some 8 years with Stagecoach, and also his previous warnings. I also take into account Stagecoach's legitimate concerns for the health and safety of its employees.

[33] Standing back and assessing matters objectively from the perspective of a fair and reasonable employer in these prevailing circumstances, I conclude that Stagecoach's decision to dismiss Mr Davies was not what a fair and reasonable employer would have done. I conclude that a fair and reasonable employer in these prevailing circumstances would have regarded the appropriate response was to issue Mr Davies with a final written warning.

Accordingly, I find that Mr Davies has a personal grievance for unjustifiable dismissal. He is entitled to remedies in settlement of his personal grievance.

[34] Having made those findings and in considering both the nature and the extent of the remedies to be provided by way of settlement, I am bound by section 124 of the Act to consider the extent to which Mr Davies' actions contributed towards the situation that gave rise to the personal grievance, and if those actions so require, to reduce the remedies that would otherwise have been awarded accordingly.

[35] I assess Mr Davies' contribution to the situation that led to the personal grievance. His behaviour is blameworthy conduct that requires a reduction in both the nature and extent of his remedies. I consider he was equally responsible for the personal grievance as his employer was. I conclude it appropriate then that his remedies be reduced by 50%.

[36] Mr Davies does not seek reinstatement. I have clarified with Mr Baledrokadroka that the only permissible way to challenge a dismissal is by pursuing a personal grievance. That disposed of Mr Davies' claim for damages for breach of contract arising out of the dismissal.

[37] Mr Davies claims reimbursement of lost wages from the time of his dismissal. However, he tells the Authority he has not taken any steps to find alternative employment because of the Authority's investigation. I find then that he has failed to mitigate his losses contrary to his duty at law to do so. On that basis Stagecoach is not to be held responsible for his entire loss since his dismissal on 12 April 2006. I award Mr Davies three months lost wages but reduced by his contribution which I have assessed at 50% ([\$650.00 gross x 12 weeks] reduced by 50%). **Cityline (NZ) Limited trading as Stagecoach Auckland is ordered to pay to David Davies the gross sum of \$3,900.00 as reimbursement.** Any issues regarding Mr Davies war and disablement pension is a matter between him and WINZ.

[38] Mr Davies' witness statement did not deal with his claim for compensation. That is quite remarkable given he claims \$50,000.00 compensation. He was also somewhat resentful of the Authority's enquiries in this regard. Having questioned him, I conclude there is no evidence to support an award of the level sought. Having regard to his evidence and his length of service I make a modest award of \$5,000.00 but reduced by his contribution. **Cityline (NZ) Limited trading as Stagecoach Auckland is ordered to pay to David Davies the sum of \$2,500.00 as compensation.**

[39] Mr Davies also claims loss of future benefits in the form of six years wages. He says that he would have remained at Stagecoach until his retirement in six years time. If Mr Davies had that expectation, he ought to have had more respect for the relationship. I decline to grant

this award for two reasons. Firstly, I am not persuaded that Mr Davies' medical condition would have permitted him to do so for the entire duration of the next six years. As well, Mr Davies' behaviour on this occasion and his previous conduct leave me with serious doubts that his employment would have continued uninterrupted for the next six years. These are contingencies that I must have regard to in fixing compensation. They lead me to conclude that Mr Davies cannot reasonably have expected to obtain six years future income from Stagecoach. I also decline to make such an award because I would have made an order for Mr Davies' reinstatement had that been sought. That being so, there would be no lost future benefits. In any event, I do not consider Mr Davies is not able to obtain other employment and I do not understand him to be presently incapacitated so as to prevent him from securing an alternative future income stream.

The duress grievance

[40] Mr Davies alleges he has a personal grievance for duress. He says that Stagecoach exerted undue influence on him to remain a member of his union at a meeting held on Sunday 12 March 2006. This grievance is said to have been raised in the statement of problem, lodged in the Authority on 7 June 2006. Although it is raised out of time, Stagecoach very generously consented to the grievance being raised.

[41] Mr Davies is a member of the NZ Cityline Collective Incorporated ("the union"). Stagecoach had alerted the union its numbers had apparently fallen below the legal requirement. Whether or not that was true, the parties accepted it was and conducted themselves on that basis. The union's executive did not take any issue or challenge Stagecoach's assessment of the situation. Astonishingly, nor did the union executive take any steps to verify its membership.

[42] I find that Mr Forbes made an express request of Stagecoach for assistance. He asked Stagecoach's National Human Resources Manager Mr Gavin Cook about the union's options. Stagecoach's response was to convene a meeting of members of the NZ Cityline Collective Incorporated ("the union") on Sunday 12 March 2006 in concert with Mr Forbes and Mr Rhett Vincent.

[43] At the meeting, I am satisfied that Mr Farrell presented various options to the members of the union to assist them collectively to deal with the situation both parties believed existed at the time. But I find that Stagecoach did not exert any undue influence on Mr Davies or any other person to become or remain a member of the union. Quite the contrary, Stagecoach's involvement and assistance was expressly sought by the union executive. The parties believed there was a problem with membership that was necessary to deal with. They operated on the

basis that the union could no longer exist. They sought and welcomed Stagecoach's assistance.

[44] For the above reasons, **I find that Mr Davies does not have a personal grievance that he was subjected to duress.**

Costs

[45] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Mr Baledrokadroka is to lodge and serve a memorandum setting out Mr Davies claim for costs within 14 days of the date of this Determination. Ms Golder is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination. I will not consider any application outside that timeframe.

Leon Robinson
Member of Employment Relations Authority