

grievance was submitted within the 90 day period set out in s114(1) of the Act. It does not consent to the raising of the disadvantage grievance out of the time limit.

[3] Mr Meyrick makes no application to hear the disadvantage grievance out of time and raises the issue on the basis of relevance to the dismissal.

The Issues

The issues for determination are:

- i. Was Mr Meyrick unjustifiably disadvantaged in his employment with TACL?
- ii. Should leave be given to hear the disadvantage grievance be heard outside the 90 day time limit?
- iii. Was Mr Meyrick unjustifiably dismissed from his employment with TACL?

Background Facts

[4] Mr Meyrick was employed by TACL on 6 August 2007 as a bus driver. At the commencement of his employment Mr Meyrick underwent an induction and training programme lasting approximately 3 weeks. During this time Mr Meyrick says the induction process involved his spending time in the classroom receiving training in the company operating procedures and policies in addition to being trained to drive a bus and obtaining the appropriate licences.

[5] Part of this training covered the handling of cash fares and the use of the Electronic Ticket Machines (“ETMs”) used by TACL.

[6] Mr Meyrick was employed on an Individual Employment Agreement based upon the NZBUS Combined Unions Collective Agreement (“the Collective Agreement”). The disciplinary procedures to be followed are outlined in clause 47 of the Collective Agreement.

[7] Clause 47.2 provides that “*Where disciplinary action is being considered, the Company will usually follow the “Please Explain” process, but in cases where*

more serious misconduct or poor performance is being considered, it may move straight to an investigation under clause 47.9". Under the 'Please Explain' process TACL sends a letter to the employee outlining the matter of concern and inviting him or her to give an explanation. After consideration of the explanation from the employee, the company makes a decision whether or not to take the matter further.

[8] Clause 47.9 sets out the investigation procedure to be followed in the case of an issue considered by TACL to be 'serious misconduct' and clause 47.10 provides a non-exclusive list of examples of conduct which the company would consider serious in nature.

[9] Clause 47.11 sets out the disciplinary steps to be taken in relation to misconduct as being: Verbal Counselling, First Warning, Second Warning, Final Warning and Dismissal. Clause 47.11 states that "*in some circumstances, misconduct may be sufficiently serious to warrant the omission of one or more of the above warnings.*"

[10] As a bus driver, Mr Meyrick was also subject to the Operator Reference Handbook ("ORH"), which outlines company policies, procedures and instructions; and which Mr Meyrick told the Authority formed part of the induction training process.

[11] During the time Mr Meyrick was employed, TACL engaged auditors who would regularly board buses on various routes and whose primary purpose was to check the tickets held by the passengers in order to identify passengers who were "over-riding". Any instances of the correct procedure for cash handling not being followed by the drivers would also be identified during this process and these would be included in the report an auditor would provide to TACL.

Performance Issues

[12] Prior to the events which culminated in the dismissal of Mr Meyrick on 23 December, 2009, there had been a number of incidents related to Mr Meyrick's failure to follow ORH procedures prior to June 2008. Some, but not all, of these were in relation to correct ticket issue. 'Please Explain' letters had been issued and discussions held, but there had been no formal disciplinary outcome.

[13] On 2 July 2008 there was a further instance of Mr Meyrick failing to issue the correct tickets. Following investigation, verbal counselling, the first stage in the disciplinary process as outlined in clause 47.11 of the Collective Agreement, took place.

[14] On 30 June 2009 TACL raised concern with Mr Meyrick following a complaint from an auditor that there had been ticketing irregularities on the bus Mr Meyrick had been driving. Then on 6 July 2009 TACL raised concern with Mr Meyrick about the use of a 'Go Rider' card on the services he had operated from 11 June to 5 July 2009. Both of these concerns were discussed with Mr Meyrick and the company decided to be lenient and to take no further action.

Final Written Warning

[15] In September 2009 TACL received a complaint from an Audit Officer alleging that on 3 September there had been an incident involving Mr Meyrick and incorrect ticket issue. The Audit Officer also complained that Mr Meyrick had interfered in his investigation.

[16] In line with the company disciplinary process as outlined in clause 47.7 of the Collective Agreement, Mr Meyrick was issued with a 'Please Explain' letter. TACL conducted an investigation. The investigation meeting with Mr Meyrick was held on 2 October 2009 which Mr Coffey attended in the role of support person for Mr Meyrick. Attending for the company were Mr Singh, Mr Taylor and Ms Hooper, Senior HR Advisor.

[17] Following this investigation meeting and having considered the explanation given by Mr Meyrick, Ms Hooper wrote to Mr Meyrick on 5 October inviting him to attend a disciplinary meeting on 7 October 2009. All the same parties attended the meeting.

[18] The outcome of this meeting was a Final Written Warning issued by Ms Hooper and valid for 12 months. Although the letter stated that TACL regarded the actions of Mr Meyrick in issuing an undervalue ticket as 'potentially' serious misconduct, I accept that Mr Meyrick would have understood from the wording of

the letter as a whole that the issue was serious misconduct. The letter referred Mr Meyrick to the Collective Agreement, specifically to clause 42.7 (now clause 47.10 in the current Collective Agreement) and quoted: “*Serious misconduct includes, but is not limited, to the following: a) accepting money and failing to correctly issue tickets*”. The letter further advised Mr Meyrick that in order to avoid a similar incident he should adhere to the following steps:

- a. If an Auditor boards your bus do not become involved in confrontation with the Auditor*
- b. Do not interfere in the Auditor’s investigation of passengers’ fares*
- c. Ensure you have the correct tickets for the fare paid*

[19] Ms Hooper explained to the Authority that she had been influenced in the decision to issue Mr Meyrick with a Final Written Warning for serious misconduct by Mr Meyrick’s repeated failure to follow TACL policies and procedures, particularly in relation to cash handling and ticket issuance.

[20] Mr Meyrick had raised no objection to the Final Witten Warning, either at the time, or in the weeks following.

[21] The letter further advised that Human Resources would be advised of the Final Written Warning in order that counselling could be arranged. However counselling had not taken place before 9 December 2009 when the next incident occurred which lead to the termination of Mr Meyrick’s employment.

Termination

[22] The disciplinary process which resulted in Mr Meyrick’s dismissal was initiated by an Audit Report received in December by Mr Mark Smith, Operations Manager – Inner from Ms Anne Blomfield, an Auditor.

[23] This report stated that Ms Blomfield had boarded a bus driven by Mr Meyrick and proceeded to detail events on 9 December 2009. The bus was travelling on a route starting at Britomart and travelling towards Mission Bay. Ms Blomfield had detailed a number of areas of concern in her report, these being that:

- i. As soon as Ms Blomfield had boarded the bus, Mr Meyrick had informed her that there was a problem.
- ii. Mr Meyrick had then stopped the bus and requested that those passengers who had not paid for tickets to come forward and do so.
- iii. Mr Meyrick specifically requested the three men who had boarded the bus at traffic lights to step forward and pay.
- iv. A young man had come forward to pay for a child 2 stages, and had tendered a \$20.00 note which Mr Meyrick had complained he was unable to change, but then proceeded to issue the ticket and to give the correct change to the passenger.
- v. These actions by the driver had resulted in the bus being held up for 5 minutes to the displeasure of the passengers.
- vi. Ms Blomfield having requested a waybill and informing Mr Meyrick that she would be submitting a report based on what she had seen, Mr Meyrick had requested her not to do so.
- vii. Ms Blomfield having then carried out an audit of the bus had found various ticketing irregularities
- viii. Mr Meyrick followed Ms Blomfield off the bus at the conclusion of her audit and had again requested that she did not submit her report; following which Mr Meyrick had re-entered the bus and had shouted to Mrs Blomfield asking if he should resign in the presence of passengers.

[24] Mr Smith having considered the report issued Mr Meyrick with a 'Please Explain' letter on 10 December. Mr Meyrick was invited to bring a copy of his response to a meeting on 14 December. However Mr Meyrick responded to this letter the same day.

[25] In his response Mr Meyrick stated that the bus had been exceptionally busy on that particular day and admitted that he had allowed 4 passengers to board the bus at Britomart and travel without paying or being issued with tickets as he was unable to change a large note which had been proffered; he had allowed 3 passengers to board the bus when it was stopped at traffic lights; and that the Auditor had made a mistake in her report, having cited a \$1.20 fare which did not exist.

[26] Mr Smith considered the response from Mr Meyrick and concluded that this appeared to broadly concur with many of the facts contained in the audit report, and to confirm that Mr Meyrick had breached ORH policies and procedures, specifically in two significant areas: handling large notes and passenger boarding. It is noted that the Auditor had identified the \$1.20 as a typo and corrected it.

[27] After further analysis of the two documents, Mr Smith concluded that further investigation was required and that suspension of Mr Meyrick from duties was appropriate. Mr Smith consequently arranged a meeting with Mr Meyrick on 11 December 2009 to explain the need for further investigation and suspended Mr Meyrick on full pay in accordance with clause 47.9 c) of the Collective Agreement.

[28] TACL invited Mr Meyrick to attend a disciplinary meeting on 14 December in accordance with clause 47.8 of the Collective Agreement. In attendance at this meeting were Mr Smith and Ms Hooper for TACL and with Mr Meyrick was his representative Mr Michael Meyrick.

[29] At the meeting, Mr Meyrick had said that the bus on 9 December had been exceptionally busy, which to Mr Smith seemed to imply that Mr Meyrick had acted as he did in response to being under pressure. As a result of this and other comments, Mr Smith considered that he needed to undertake further checks on the information provided to ascertain passenger numbers and concluded that a further investigation meeting was necessary.

[30] Mr Smith on subsequently checking the bus and passenger numbers discovered that on the date in question Mr Meyrick had been driving one of the smaller of the fleet buses and that this had not been filled to capacity. Mr Smith did

not consequently accept that the bus had been exceptionally busy and that this constituted an extenuating factor. When questioned on this point Mr Meyrick confirmed to the Authority that he had not felt under any pressure or stress on that day.

[31] The next meeting was held on 22 December. All parties were present at the meeting.

[32] Following these further discussions, Mr Smith and Ms Hooper came to the view that Mr Meyrick:

- a. Had failed to follow proper ticketing and operating procedures
- b. Had allowed passengers to board without paying any fare
- c. Had allowed passengers to board the bus at traffic lights
- d. Had involved himself inappropriately in the Auditor's investigation

As a result Mr Meyrick was then invited to a further meeting on 23 December 2009.

[33] At the meeting on 23 December it was explained to Mr Meyrick that TACL had reached a preliminary view of the relevant facts to which he would be given an opportunity to respond, following which TACL would consider the appropriate disciplinary outcome. The facts were then reviewed with Mr Meyrick, following which there was an adjournment.

[34] When the meeting was resumed Mr Smith and Ms Hooper confirmed that they had formed a view of the facts and that they considered serious misconduct had occurred. There was a further adjournment for Mr Smith and Ms Hooper to consider the appropriate action for the company to take.

[35] The meeting resumed and Ms Hooper explained to Mr Meyrick that TACL held a preliminary view that the appropriate outcome was the termination of his

employment and she offered a further adjournment for Mr Meyrick to discuss the proposed outcome with his representative.

[36] Mr Meyrick's response was that there was nothing further to discuss. Ms Hooper then verbally confirmed the decision of the company to terminate the employment of Mr Meyrick.

[37] Ms Hooper confirmed in writing the decision to terminate Mr Meyrick on the basis of serious misconduct by letter dated 23 December 2009.

Was Mr Meyrick unjustifiably disadvantaged in his employment with TACL?

[38] The disadvantage grievance in respect of the Final Written Warning was not challenged within the 90 day time limit and there is no application for leave to bring it out of time. It was raised as being relevant to the subsequent dismissal.

[39] In examining the justifiability of the Final Written Warning I find:

- a.* It was issued in respect of conduct designated as 'serious misconduct' under clause 47.10 of the Collective Agreement.
- b.* The conduct was not viewed in isolation but followed a series of similar previous failures to adhere to TACL policies and procedures.
- c.* It was available to TACL to move directly to a Final Written Warning under clause 47.11 of the Collective Agreement.

Further the process involved throughout the investigation and subsequent disciplinary steps adhered to the principles of natural justice and procedural fairness.

[40] I find consequently that even if Mr Meyrick had raised a grievance regarding the Final Written Warning outside the 90 day period, it is unlikely I would have found that warning to have been unjustified.

Should leave to allow the disadvantage grievance be raised outside the 90 day time limit?

[41] There was no grievance raised at the time the Final Written Warning was issued and Mr Meyrick has not requested that leave be granted for him to raise a grievance out of time.

Was Mr Meyrick unjustifiably dismissed from his employment with TACL?

[42] Section 103A Employment Relations Act 2000 sets out the 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"

[43] A decision to dismiss an employee must be justifiable on both a substantive and procedural basis.

Procedural Justification

[44] The decision to dismiss must also be justifiable on a procedural basis. The basic requirements as outlined in *NZ Food Processing Union v Unilever NZ Ltd*¹ are notice informing the employee of the allegations, a real opportunity for the employee to respond to the allegations, and a decision not tainted by bias or pre-determination.

[45] I find that Mr Meyrick was informed of the breaches of TACL policies and procedures which TACL regarded as serious misconduct and was also informed of the penalties associated with a finding of serious misconduct. In particular Mr Meyrick was aware that dismissal might be the outcome if the misconduct was considered serious or was of a substantially similar nature to that which had resulted in a Final Written Warning which was still valid.

¹ [1990] 1 NZILR 35

[46] Upon consideration of all the facts I find that Mr Meyrick was fully informed of the allegations and given a real opportunity to explain. I further find that Mr Smith and Ms Hooper carried out a full investigation over a reasonable period of time, and in this context note that following the explanation proffered by Mr Meyrick at the meeting on 14 December, Mr Smith undertook further investigation prior to the meeting on 23 December. I also note that at the meetings on 23 December adjournments were taken to contemplate each stage in their deliberations by Mr Smith and Ms Hooper and that input was invited from Mr Meyrick at each stage. I have found no evidence of bias or pre-determination.

[47] I note that the counselling referred to in the Final Written Warning letter had not taken place at the time of the second incident, but accept Ms Hooper's explanation that the reason for this was that counselling would normally take place 6 to 8 weeks after the HR department was informed and the events of 9 December occurred before the 6 week stage.

[48] I find that TACL carried out a full and fair disciplinary procedure.

Substantive justification

[49] The company based their decision to dismiss Mr Meyrick on a finding that he had committed serious misconduct as defined under the Collective Agreement by failing to comply with the TACL's operating policies and procedures. As Mr Meyrick was subject to a Final Written Warning at the time, dismissal was an option available to TACL.

[50] In the course of the investigation meeting Mr Meyrick accepted that he had undergone a thorough induction process which had covered the policies and procedures as contained in the ORH, and further admitted that he had a good knowledge of Company policies and procedures. Mr Meyrick described himself as a "*professional bus driver*" who was "*confident with the use of the ETMs and ticketing.*"

[51] In making the decision to dismiss TACL had also taken into consideration the fact that Mr Meyrick was subject at the relevant time to a Final Written Warning

issued on substantially identical issues. The Final Written Warning issued to Mr Meyrick explained that further incidents of misconduct might lead to further disciplinary action “*which may result in the termination of your employment.*”

[52] Following a fair and reasonable investigation TACL found that the actions of Mr Meyrick on 9 December constituted breaches of the company policies and procedures, these being of a serious misconduct nature. I agree with that conclusion. Accordingly I find that TACL had substantive justification for dismissing Mr Meyrick on grounds of serious misconduct.

Decision to dismiss

[53] As confirmed in recent Employment Court decisions, the objective fair and reasonable tests for justification apply not only to the employer’s decision that serious misconduct had occurred but also to the decision the employer has made as to the outcome. The Court in *Air New Zealand v V²* stated:

“We conclude that the plain meaning of the words of s103A encompasses not just the employer’s inquiry and decision about whether misconduct has occurred and its seriousness, but also an inquiry into the employer’s ultimate decision in the light of that finding.”

[54] Chief Judge Colgan in *Secretary for Justice v Dodd³* further confirmed that although serious misconduct would usually constitute grounds for a justified dismissal, this was not necessarily the case in each instance.

[55] Having concluded that serious misconduct had been established, it is the evidence of Mr Smith and Ms Hooper that they gave consideration to the appropriate outcome. It was their conclusion that given the previous issues relating to breaches of TACL policies and procedures, they had lost trust and confidence in Mr Meyrick and had no belief that he would adhere to, or comply with,

² [2009] ERNZ 185

³ [2010] NZEMPC 84

[56] TACL policies and procedures in the future. This lead to the conclusion that his employment should be terminated.

[57] This conclusion was underpinned by the fact that Mr Meyrick was on a Final Written Warning for substantially similar breaches of policies and procedures and had refused further training as not being required when offered at this time.

[58] I find that the decision taken by TACL to terminate Mr Meyrick's employment was one which a fair and reasonable employer would have made in all the circumstances at the time the dismissal occurred.

[59] For the above reasons I find that Mr Meyrick was not unjustifiably dismissed from his employment with TACL.

Costs

[61] Costs are reserved. I note that the applicant is legally aided and while it is unlikely that a recovery of a contribution to its costs is available, the respondent has 28 days from the date of this determination to file and serve submissions with the Authority should it wish to do so. In this event, the applicant has a further 14 days to file and serve submissions in response.

Eleanor Robinson
Member of the Employment Relations Authority