

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2011] NZERA Wellington 13
5299652

BETWEEN

BETH WOLAK
Applicant

AND

CITY LINE NZ LIMITED
TRADING AS THE VALLEY
FLYER LIMITED
Respondent

Member of Authority: P R Stapp
Representatives: Kevin O'Sullivan for Applicant
David Gould for Respondent
Investigation Meeting: 21 October 2010 at Wellington
Submissions by: 19 November 2010
Determination: 28 January 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Wolak was a bus driver employed by City Line (NZ) Limited (The Valley Flyer) until her dismissal on 15 March 2010. She was dismissed by the employer for using highly offensive language that was not acceptable in the workplace. The decision maker Mr Matthew Lear, general manager, has relied on reaching an honestly held belief in regard to a dispute about the words allegedly used by Ms Wolak. Ms Wolak has challenged the dismissal on the grounds that she denied the allegation in regard to the words attributed to her, that Mr Lear relied upon statements from witnesses that were deficient and that in the circumstances a fair and reasonable employer would not have dismissed her.

[2] The respondent has claimed its decision to dismiss Ms Wolak was open to it as a fair and reasonable employer as Ms Wolak's behaviour amounted to serious misconduct for making offensive sexual and racist comments.

[3] The respondent has denied the remedies sought by the applicant including reinstatement, compensation for lost earnings, compensation for humiliation and injury to feelings and costs.

Issues

[4] The issues for me to decide include:

- a. Were the statements and information from other witnesses reliable?
- b. Would a fair and reasonable employer have reached an honestly held belief that Ms Wolak directed offensive sexual and racist language at another employee?
- c. Were there any circumstances mitigating the decision made to dismiss her?
- d. If there is a justified personal grievance is it impracticable to reinstate Ms Wolak? What other remedies apply?

The facts

[5] Ms Wolak commenced her employment in August 2003 as a bus driver with the Valley Flyer.

[6] On Thursday 19 February 2010 she parked her car in a visitor's park next to the office block in the Waterloo yard in Lower Hutt. Upon completing her shift she parked her bus and deposited her ticketing tin in the office. Upon returning to her car she found it had been blocked in by one of the Valley Flyer buses that had been parked to upload "*Snapper*" information.

[7] What followed was an altercation between her and a yardman. It is alleged that the applicant abused him by saying words along the lines “*a fat black c...*”, “*a fat black bastard with a small dick*” and a “*wanker*”. He took exception to her comments, finding them offensive and racist. He made a complaint and put it in writing, signing it off. The yardman’s statement was witnessed by another employee (the first employee) and that employee agreed with the written statement recorded by the yardman. That first employee later made his own separate statement about what he says he witnessed happening and hearing.

[8] Ms Wolak also wrote a statement that was dated 19 February 2010. She said that this was not the first time the yardman had blocked her car in. At the Authority’s investigation meeting she produced a copy of a complaint report dated October 2009 sent to the current general manager and the current workshop manager. She said at the Authority’s investigation meeting that as she was Polish there was no way she would make a racist comment and questioned the first employee’s attendance at work on 20 February when it was not his shift. The first employee went into work because of Ms Wolak’s conduct and had a statement taken down in writing. Ms Wolak did not raise these points at the company’s investigation meeting and did not produce the details of her complaint about it not being the first time her car was blocked in.

[9] Upon receiving the yardman’s complaint Mr Lear and a senior HR advisor, met with Ms Wolak on 19 February 2010. Mr Lear informed Ms Wolak that he needed to investigate the matter. He proposed suspending her on pay, and when she had no comment to make about that, he did suspend her pending the completion of an investigation. There is no personal grievance claim associated with the suspension. The suspension and investigation were confirmed in writing: letter dated 19 February 2010 signed by Mr Lear. Ms Wolak denied using the alleged words “*a big black c...*” but did admit to using the words “*a big man with a small dick*” and a “*wanker*”. She claimed that these were part of the usual banter and the yardman had provoked her by deliberately parking and blocking her car in. She accepted she was loud and angry, but says that she would never say “*a big black c...*” as alleged.

[10] Another employee (the second employee) came forward as a witness who says she saw that Ms Wolak was upset, and says that she heard Ms Wolak make an abusive comment on 18 February. The second employee signed off a written statement on 22

February 2010 which was prepared during a meeting on the same date with Mr Lear and the HR advisor. In the statement she said she heard Ms Wolak use the words the yard man had a *“big fat ass with a small penis”*.

[11] The second employee later found out that the other two witnesses referred to much stronger language in their statements and she has added to her evidence what she says she actually heard.

[12] On 1 March 2010 Ms Wolak was informed of the arrangements for the investigation, that the matter was serious and potentially could involve serious misconduct.

[13] On 3 March 2010 the parties met in an investigation meeting. Ms Wolak had her supporters and a Union Official present. Ms Wolak had been given the statements received from the yardman, the workshop manager, and the two other employees. The workshop manager did not witness the altercation, but his written statement at the time contained information about what he had been told, and that Ms Wolak had contacted him. An issue was raised about the yardman deliberately parking the bus to block her car. The notes of the meeting certainly record that Ms Wolak’s team did raise that she had been provoked (3 March 2010 document F).

[14] Mr Lear decided from that meeting that Ms Wolak had used the words complained about and that they had been heard by other witnesses, who were clear and consistent. Also he commented at the meeting that the explanation about her being deliberately provoked was not credible. Indeed Ms Wolak had got upset on another occasion in regard to another matter that supports that conclusion, I hold. Mr Lear adjourned the meeting to determine an outcome.

[15] A letter was produced that alleged she had been provoked, the statements were deficient and provided a character reference for her

[16] On 9 March 2010 the parties met again in a disciplinary meeting. Ms Wolak was informed that one outcome could be dismissal. Mr Lear says her demeanour was not what he expected when she demonstrated no contrition at that meeting, and that she made no apology for abusing the yardman. In his evidence at the Authority’s

investigation meeting Mr Lear said that he was aware of another incident involving Ms Wolak that occurred on 21 August 2009 when she abused another employee and had blamed her mood on her cat disappearing. He could not be sure whether or not he put this to Ms Wolak on 9 March 2010. Mr Lear based his decision at the time on the clear and consistent evidence from the witnesses and that Ms Wolak showed no remorse. In other words he believed the witnesses, and not what Ms Wolak says about what was said. He decided that the words they alleged she used were offensive. Also, he says that at the time he did not believe that the yardman would have parked the bus to block her car to deliberately annoy her. I am satisfied that this would probably have related to duties associated with the “snapper card”. Mr Lear decided there was the risk that Ms Wolak would repeat the behaviour if given another opportunity and this was a risk he was not willing to take.

[17] The respondent’s decision to dismiss was communicated to Ms Wolak on 11 March 2010. He formalised his decision in writing dated 15 March 2010.

Determination

[18] I hold that it was open to Mr Lear to come to an honestly held belief that Ms Wolak made offensive remarks that had been heard by other witnesses, despite her denials. This is because:

- a. Mr Lear relied on the yardman’s statement made at the time.
- b. Mr Lear relied on two other witnesses who both provided written statements at the time. I hold that their statements were not influenced by Mr Lear and the HR advisor when they were prepared. The first employee wrote his statement soon after the event and after signing off the yardman’s statement first. In regard to the second employee her statement was taken down in the presence of Mr Lear and the HR advisor, but did not include the words they knew had been put in the other statements from the yardman and the first employee. Also, the second employee attended the Authority’s investigation meeting and informed me what she actually heard. She explained in her evidence what the words were and that she had great difficulty in saying them

because of her religious beliefs and being embarrassed. Finally each statement is different as to the number of words used and the comments recalling what Ms Wolak said. However they were all consistent that Ms Wolak was in the car when she yelled out.

- c. Ms Wolak was given all the statements to consider. In addition she had provided her own written statement that was scrutinised by Mr Lear and a letter produced that alleged she had been provoked, the witness's statements were deficient and provided a character reference for her.

- d. Mr Lear rejected Ms Wolak's explanation and her claim that the yardman had deliberately placed the buses to block her car. The explanation that he parked the buses to finish down loading the "Snapper" information was plausible, I hold. Also, although there was no authorised parking in front of the office block and beside the car park, which Ms Wolak used, I accept that after 4 pm employees on the late shift are allowed to use the parks and that the area can be used for parking buses to finish down loading "snapper" information. In any case moving buses and down loading "snapper" information is part of the yardman's role. Also, the parking of Ms Wolak's car and the parking of buses are not the issue and any issue arising from what happened about that was not relied upon by Mr Lear in making his decision. I hold that the reference to the parking referred to in Mr Lear's letter dated 9 March listing his findings was a response to Ms Wolak's team raising that matter.

[19] Ms Wolak criticised the statements from the yardman and the other two employees as being inconsistent and deficient as to the detail and content. Mr Lear says there was enough of a common thread in their statements to accept that Ms Wolak made the alleged comments. I accept this. He could rely on at least the yardman who was supported by the first employee, and they both were reasonably consistent in regard to the incident. Also, although Mr Lear failed to put Ms Wolak's statement and denial back to the witnesses and did not meet with those witnesses again, there was no prejudice to Ms Wolak because Ms Wolak had not provided

anything materially new. Also, a fair and reasonable employer would not be obliged to have informed Ms Wolak and her representatives that he (Mr Lear) and the HR advisor had been involved in taking the second employee's written statement in a separate meeting. This is because the second employee has stood by her statement and has given reasons for why she wrote it in the way she did at the time, and Ms Wolak was given the statement to comment on at the time.

[20] There was insufficient evidence provided to Mr Lear at the time, or the Authority, to challenge the credibility of the witnesses. Any deficiencies in the statements would not have affected the outcome because of the consistent thread of the evidence from the witnesses. Mr Lear had to make a decision on credibility. In this regard I accept his reasons for accepting the yardman's version because:

- a. There were written statements volunteered by three witnesses. The yardman was found to be credible and consistent with the other witnesses. His response was limited to telling her the consequences and moving away and putting distance between them. His action of parking the bus was consistent with workplace practice. The yardman was clearly offended.
- b. The first employee confined his statement to what he remembered the applicant saying. This accounts for the differences in the length of statements.
- c. There was a high degree of correlation between the statements that support Mr Lear's finding of a common thread of information supporting the yardman's complaint.
- d. The second employee was a credible witness who probably was embarrassed and offended.
- e. Ms Wolak was angry and loud at the time. She admitted saying some of the words used.

[21] There has been no evidence of any improper motives as to why the yardman and the two witnesses would not be telling the truth, especially as they were prepared to put in writing their information on what they say they heard and saw and they came forward to give evidence before the Authority in a public setting, I hold. . I hold that they were credible and convincing witnesses because they never waived on the statements that they had previously made. Their evidence was generally consistent with their statements written at the time. The second employee added to her evidence and I was satisfied that she genuinely would be embarrassed and offended to say the words Ms Wolak used. Unfortunately for Ms Wolak their evidence was more persuasive than hers and she had no one to support her version.

[22] In all other respects Mr Lear acted fairly to enable Ms Wolak to be represented, gave her the opportunity to comment in the investigation on the allegation and all the statements (3 March) and in the disciplinary meeting on the possible outcome and options (11 March). He also put to her the possibility of disciplinary action including the possibility of dismissal to her.

[23] In conclusion, Mr Lear came to an honestly held belief that Ms Wolak did say the words alleged by relying on the witnesses. He also had an admission from Ms Wolak that she had been angry and abused the yardman loudly. The procedure followed was fair. I hold that for this reason Ms Wolak does not have a personal grievance.

[24] For completeness I find that the decision to categorise the alleged behaviour as serious misconduct was open to the employer. The words she used were offensive and had a sexual and racial connotation. Sexually offensive and racist comments are totally inappropriate in the workplace. The company does not have a list of categories of misconduct and serious misconduct in the employment agreement and the code of behaviour. The absence of any such prescribed lists is not fatal at all, because implied terms of employment between the parties allow for an employer to make such a decision, I hold. Even excluding the offensive words, the other comments admitted by Ms Wolak would nonetheless give rise to the possibility of misconduct for inappropriate language and behaviour towards another employee in the workplace warranting discipline. I do note that this was never relied upon at the time, and I have not included it in the assessment of the employer's justification of the dismissal.

[25] Mr Lear gave Ms Wolak an opportunity to comment on the possibility of being dismissed for the offence and she had an opportunity to raise any options in the range open to the employer to consider. Her explanations now are not sustained because she had every opportunity to raise them with sufficient particularity during Mr Lear's investigation and in her written evidence for the Authority, but instead she has relied on surprising the respondent with her evidence. I accept that Ms Wolak has been trying to genuinely defend herself. For instance she relied on an earlier complaint, but unfortunately there was some doubt about what happened to it and she has not been able to make a link between that and her current situation. Also she raised other matters in the relationships that had no direct bearing on this claim. As such her evidence has not been enough to challenge and or to put in doubt the evidence from the other witnesses.

Outcome

[26] Since there was no unjustified personal grievance there can be no remedies. However, on the evidence, if I was required to consider reinstatement as claimed, I would have held that it would have been impracticable to reinstate the applicant given the nature of the allegations. In particular, the yardman was emphatic that he would leave if she was reinstated. Mr Lear believed that it would be difficult to integrate Ms Wolak back in the workplace given the feelings witnesses have shown against her and her lack of any contrition. This was supported by other witnesses who had some antipathy towards Ms Wolak because of her behaviour at the time. I accept that on the balance of probabilities and given that Ms Wolak was angry with the yardman on the night of 18 February, there was a verbal altercation to such a degree that the yardman took great exception to Ms Wolak's comments. It is more than likely those comments were offensive and beyond the banter that apparently occurred between them on other occasions. I do not accept that just because she is Polish that she would not have made objectionable remarks, because she was angry and upset. As such any reinstatement would be too disruptive, I hold.

[27] I would have found under s 124 of the Act that Ms Wolak contributed to her personal grievance. She would have been found to be blameworthy because she reacted by abusing the yardman whatever the arrangements were for the parking of

any vehicles after 4pm in the yard and she was angry, which she acknowledged. It was more than likely others heard her too. She could have behaved differently, but instead deliberately abused the yardman. Her abuse at him given the witnesses and their statements and evidence in the Authority means her contribution would have been 100% of any remedies.

Orders of the Authority

[28] The applicant's claim is dismissed.

[29] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority