

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2011] NZERA Auckland 170  
5303755

BETWEEN

ALAN SLATER  
applicant

AND

TRANSPORTATION  
AUCKLAND CORPORATION  
LTD, T/A NZ BUS, respondent

Member of Authority: James Wilson

Representatives: Garry Froggatt for the applicant  
Joanne Douglas for the respondent

Investigation Meeting: 10 November 2010 at Auckland

Submissions received: 7 December 2010 from the applicant  
21 December 2010 from the respondent

Determination: 28 April 2011

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**DETERMINATION OF THE AUTHORITY**

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**Alan Slater's employment relationship problem**

[1] Alan Slater ("Mr Slater") was employed as a bus operator by NZ Bus t/a Transport Auckland Corporation Ltd ("NZ Bus") for about 22 months. On 14 April 2010 Mr Slater was dismissed by the Company for poor performance. Mr Slater says that his dismissal was unjustified and, in a statement of the problem filed on the 21 June 2010, sought reinstatement to his position and compensation for the wages he has lost as a result of that dismissal. NZ Bus says that Mr Slater's dismissal was justified and has declined to reinstate him.

### **The issues for determination**

[2] The primary issue for determination is whether or not, in the words of section 103A of the Employment Relations Act (the Act), NZ Bus's actions, and how NZ Bus acted, in dismissing Mr Slater *were what a fair and reasonable employer would have done in all the circumstances at the time....* If they were not then Mr Slater has a personal grievance against NZ Bus. I will then be required to decide whether or not Mr Slater should be reinstated and what other remedies he should be awarded.

### **The collective employment agreement**

[3] In order to determine whether or not the actions of NZ Bus were those of a fair and reasonable employer it is first necessary to outline the disciplinary process set out in the relevant collective employment agreement (cea). Mr Slater was employed in terms of the *NZ Bus Combined Union's Collective Agreement 2009 – 2012*. Under the heading Disciplinary Procedures the cea sets out:

*47.1 The Company regards misconduct and failure to conform to acceptable standards as a serious matter which may result in disciplinary action being taken.*

*47.2 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*

The cea then sets out how the Company should act on various types of complaints (internal reports, external compliance and telephone complaints) and continues:

#### **47.6 Time Frame**

*A report or complaint shall only be acted on where it has been made within the time specified, and the employee has been notified in writing (in the form of a please explain) as stated above.*

#### **47.7 Inquiries**

*a) The employee shall make a written explanation with regard to any complaint or report within 48 hours after receipt of a please explain (a written request for an explanation) from the company.*

*b)...*

**47.8 Disciplinary Meetings**

- a) *The Company, after considering the employees explanation, shall advise the employee if, in the Company's opinion, the matter is one that may result in disciplinary action being taken. If it is, then the Company will give the employee an opportunity to attend a meeting.*
- b) ...

**47.9 Serious Misconduct Investigations**

- a) *If the Company believes that an incident, allegation or matter is one of serious misconduct or serious poor performance an investigation meeting will be arranged.*
- b) *All investigation meeting shall be conducted in consultation with the Human Resource Department.*
- c) ...

**47.10 Serious Misconduct**

- In cases involving serious misconduct, an employee may be dismissed without having previously received a written warning. Serious Misconduct includes, but is not limited to, the following;*
- a) *Accepting money and failing to correctly issue tickets.*
- b) ...

**47.11 Warnings**

- The internal procedure will be one or more of the following;*
- a) **Verbal counselling** *which will be noted and retained on the employee's file and will be confirmed in writing to the employee.*
- b) **First warning:** *to be issued in writing. A copy will be retained on the employee's file and a copy will be given to the employee.*
- c) **Second warning:** *to be issued in writing. A copy will be retained on the employee's file and a copy will be given to the employee.*
- d) **Final warning:** *to be issued in writing stating that any further misconduct may result in dismissal. A copy will be retained on the employee's file and the copy will be given to the employee.*
- e) **Dismissal:** *when an employee is deemed to have had further instances of misconduct or the misconduct is deemed serious enough by the Company that the Company can no longer employ the employee.*
- f) *All written warnings are to be receipted by the employee concerned. The giving of the warnings is to be carried out in the presence of a second Company representative and a person of the employees choice, if they so wish.*
- g) *An employee does not need to infringe in the same manner to be the subject of a subsequent warning.*
- h) ...

**Mr Slater's performance history**

[4] In her statement of evidence the Company's Operations Manager, North Star/North Bus, Ms Sally Brigg's sets out in some detail, Mr Slater's employment history, including in particular details of the various incidents and performance issues. Mr Slater disagrees with the details and interpretation of some of these events, and the

actions the Company took as a result. However he does not dispute that they did occur. I have therefore taken the liberty of paraphrasing Ms Briggs evidence.

**28 May 2008:** Mr Slater commenced employment with NZ Bus.

**15 July 2008:** Assessed as “competent to drive solo”.

**29 July 2008:** Tutor Operator expressed concerns about Mr Slater’s driving performance. Referred for further assessment. Noted issues re positioning of bus and concentration.

**6 August 2008:** Observed “having trouble staying in lane”. Complaint investigated (no action noted)

**7 August 2008:** Supervisor identified issues with driving/customer service/ticketing. Mr Slater declined offer of further training.

**15 October 2008:** Mr Slater’s bus collided with wheelie bin. Mr Slater did not accept responsibility (“Owner should not have placed wheelie bin so close to curb”) Supervisor discussed need to identify hazards but no formal action taken.

**14 January 2009:** Failed to wait for passengers: Verbal counselling

**3 February 2009:** Collided with van’s tailgate. Mr Slater’s version of events differed from van owners. Given benefit of the doubt but counselled again re identification of hazards.

**11 February 2009:** Hit a bus stop sign. Again advised re identification of hazards and sent on defensive driving course.

**18 February 2009:** Audit report that Mr Slater had accepted fare without issuing ticket. Company accepted Mr Slater’s apology and issued final warning.

**20 February 2009:** Please explain letter re failure to uplift a passenger. Given benefit of doubt.

**3 April 2009:** Investigation of 2 “at fault” accidents. No formal disciplinary action but required to attend defensive driving course.

**May 2009:** Attended and completed defensive driving course.

**25 May 2009:** Involved in accident involving another vehicle. Company accepted Mr Slater’s argument (that the car had driven into the bus) and no action taken.

**10 June 2009:** Another collision. Mr Slater explained that he had a dizzy spell due to gastroenteritis. Investigation held but no further action taken. Independent medical assessment that Mr Slater ok to drive.

**31 August 2009:** Collided with another, stationary, bus. Letter setting out guidelines but no formal disciplinary action.

**18 September 2009:** Verbal counselling re failure to report for duty on time on at least 3 occasions.

**7 October 2009:** Collided with stationary object. Did not accept responsibility and given letter setting out expectations.

**7 October 2009:** Collided with another bus parked at depot.

**30 October 2009:** Issued with first written warning for collision with bus on 7 October 2009.

**1 March 2010:** Attempted to enter buswash from wrong lane causing damage to bus and buswash.

**12 March 2010:** Mr Slater failed to turn up at work until phoned by supervisor.

**19 March 2010.** Second written warning - for buswash incident.

**19 March 2010:** Collided with concrete bollard. Please explain letter issued. Mr Salter says he had to swerve to avoid a vehicle. Company later recreated scene but concluded that Mr Slater made an error of judgement

**6 April 2010.** Final written warning - for failing to report for work on 12 March 2010.

**14 April 2010.** After investigation of 19 March 2010 incident, Mr Slater dismissed. Ms Briggs states in her evidence that the Company had lost trust and confidence in Mr Slater's ability to safely operate a bus.

## **Discussion**

[5] Mr Slater, and Mr Froggatt on his behalf, have raised two primary reasons why they say Mr Slater's dismissal was unjustified.

### *Issue one: investigation of the final incident*

[6] Mr Slater says that the Company did not properly investigate the accident which occurred on 19 March 2010. He says that he requested that a further visit be made to the accident site with his union representative, a professional accident investigator be engaged and that the Company view the council CCTV footage. All of these requests were declined. In response the Company says that they did fully and fairly investigate this incident and that further review would have made no difference. In the letter of dismissal the Company said:

*The accident was caused by a poor manoeuvre and wrong judgment while making a left hand turn in Hurstmere Rd Takapuna; You failed to use defensive driving principles, such as failing to identify hazards, asses the situation and make correct decisions that are needed to avoid an accident.*

I accept the Company's position on this point. They carried out an assessment of the accident using experienced operators, including a union delegate. However difficult the situation, a competent driver should have avoided a collision. Mr Slater did not.

***Relevance of warnings for lateness***

[7] Mr Slater says that he was severely disadvantaged by being given a final warning for being late and then being dismissed for a minor accident. He says that he had not had any problems with lateness since September 2009 and the Company had been told a final warning appeared to be an extreme penalty for such minor allegation of poor performance. The Company points out that the verbal counselling Mr Slater received in September 2009 related to at least three incidents of failing to attend work on time. They also say that the Company was entitled to dismiss Mr Slater as he already had a second written warning on file and had been warned that he could be dismissed if there were any further poor performance incidents. The accident in Hurstmere Rd was not “minor” and caused extensive damage to the bus. The warning for lateness in the intervening period was not the reason for dismissal. Rather the key reason for dismissing Mr Slater was his driving performance which was so poor that the Company did not have confidence in him to drive safely. Again I accept the Company’s position. Mr Slater must have known that his employment was in jeopardy and that any further poor performance could result in his dismissal. It is a hypothetical point but it is likely, in my assessment, that Mr Slater would have been dismissed even without the final written warning for lateness.

[8] I do not accept that these two issues render Mr Slater’s dismissal unjustified. Nor do I accept that the other matters raised by Mr Slater, even taken as a whole, make that dismissal unjustified. Mr Slater was involved in a number of accidents and, despite a good deal of counselling, additional training and warnings he seems to have failed to accept that his performance did not meet the necessary minimum standards. If the Company can be faulted, it can only be that they were overly tolerant. It may be that a more direct and formal disciplinary process undertaken earlier in Mr Slater’s term of employment may have encouraged him to be more careful and more attentive. However Mr Slater cannot have been oblivious to the fact that his performance was not of sufficient standard and that there would reach a point where the Company had no option but to terminate his employment. The Company, in this instance, were extremely tolerant of Mr Slater’s deficiencies but of course also have an obligation to the public to ensure that its drivers operate its buses in a safe manner. I accept Ms Brigg’s statement that the Company could no longer be confident that Mr Slater could safely drive one of the Company’s buses.

**Determination**

[9] **In dismissing Mr Slater, NZ Bus acted in a way that a fair and reasonable employer would have acted in all the circumstances. His dismissal was justified and he does not have a personal grievance. It follows that he is not entitled to the remedies he seeks.**

**Costs**

[10] Costs are reserved and the parties are encouraged to settle the question of costs between themselves. If they are unable to do so NZ Bus may file and serve submissions in respect to costs within 28 days of the date of this determination. Mr Slater will then have 14 days in which to file and serve a response.

James Wilson

Member of the Employment Relations Authority