

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2011] NZERA Auckland 150  
5311208

BETWEEN                      BRUCE PRESTON  
   Applicant

AND                              TRANSPORTATION  
   AUCKLAND CORPORATION  
   LIMITED trading as NZ BUS  
   Respondent

Member of Authority:        Alastair Dumbleton

Representatives:             Alan Taylor, advocate for Applicant  
   Joanne Douglas, counsel for Respondent

Investigation Meeting:        25 November 2010

Submissions Received        25 November and 16 December 2010

Determination:                13 April 2011

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     The Authority has investigated the employment of the applicant, Mr Bruce Preston, by the respondent Transportation Auckland Corporation Limited, a company trading as NZ Bus. In particular the investigation has been concerned with the termination of Mr Preston's employment and whether he has a personal grievance arising from that or from the way he was treated over a period of time before the employment ended.

[2]     Mr Preston claims that his employment as a bus driver ended when he was dismissed unjustifiably, and he claims that earlier he was disadvantaged unjustifiably by his employer's treatment of him. NZ Bus denies both claims. The company claims that Mr Preston chose to resign because for some months before termination of the employment he had been working as a bus driver for another company. The

company also denies that actions it took to rehabilitate Mr Preston after he was injured and required surgery disadvantaged him in the circumstances or, if they did, were unjustifiable actions.

[3] To remedy the personal grievances raised by him Mr Preston seeks orders for the reimbursement of lost wages and compensation for hurt feelings, humiliation and loss of dignity.

[4] The parties attended mediation but were not able to resolve the employment relationship problem. Following the mediation NZ Bus proposed a course of action which would have allowed performance of the employment to resume and continue indefinitely, or at least for as long as Mr Preston remained in good health and fitness.

[5] The proposal by NZ Bus was not acceptable to Mr Preston. He advised the company through his representative, Mr Taylor, that he regarded the employment relationship as having irrevocably broken down well before NZ Bus had offered to allow him to resume work. Mr Preston expressly rejected reinstatement as being a possible or appropriate solution to the dispute, pointing out in a letter from Mr Taylor that NZ Bus had failed to allow him to return to work for well over a year.

[6] Mr Taylor sought payment of holiday pay due to Mr Preston and confirmed the request by email to NZ Bus on 15 February 2010, in which he said:

*I wish to confirm that it is my client's clear position that his employment relationship with your company is at an end. What is now in dispute is whether or not he has been constructively dismissed.*

[7] At that point, NZ Bus paid Mr Preston a final pay and removed his name from its payroll.

[8] There is little dispute about the facts leading up to the termination of Mr Preston's employment, which I find are as follows. He had been a bus driver for over 30 years and was aged in his late 60's when he became employed by NZ Bus as a Bus Operator in April 2007. Initially his employment was covered by the NZ Bus collective agreement for bus operators, which Mr Preston chose to remain under until termination.

[9] In September 2007 while working Mr Preston slipped on a wet footpath and suffered a contusion. He reported the injury and was advised by NZ Bus that it would be covered as a work-related accident.

[10] After continuing to suffer pain in his right shoulder Mr Preston was examined by an orthopaedic surgeon, Mr Rodney Gordon, who diagnosed a problem that he considered should be treated with surgery. This was carried out to Mr Preston's right shoulder in November 2007 when an arthroscopy was performed.

[11] Following his accident Mr Preston had been certified unfit for work and he remained so for five months after surgery, until 20 February 2008. He was paid compensation based on 80% of his earnings up to that date, before returning to full bus driving duties in March 2008. Several months later, in early July, unfortunately he again suffered injury to his shoulder. This occurred before work while Mr Preston was getting dressed. After that he did not drive a bus again for NZ Bus.

[12] An occupational physician, Dr Tim Sprott, conducted a review of Mr Preston's file later in 2008. He agreed with Mr Gordon's recommendation that further surgery was appropriate, as he considered the repair from the earlier surgery had broken down and that more repair was not possible. Mr Preston's right shoulder was operated on in September 2008.

[13] In early November 2008, a Case Manager from WellNZ Ltd, the ACC provider for NZ Bus, wrote to the surgeon, Mr Gordon. The Case Manager, Ms Sandy McLennon, asked Mr Gordon for a prognosis and an indication of whether he felt that Mr Preston would be able to return to driving a bus and, if so, when. She asked:

*Can he return to driving a bus in a safe and sustainable manner as the next time he requires surgery could involve a total shoulder replacement.....*

### **Mr Gordon's report**

[14] Ms McLennon received, in December 2008, a copy of a letter sent by Mr Gordon to Mr Preston's doctor. Mr Gordon's advice about Mr Preston included the following:

*He presently has a full range of motion and has very little pain in his right shoulder. He still has weakness of his shoulder and this is not unexpected. He is having physiotherapy at the moment and his therapy is aimed at strengthening the remaining muscles around his right shoulder and this seems to be effective.*

*Mr Preston works as a bus driver. Light duties would include cleaning buses and sweeping buses and I believe that the cleaning*

*and washing of buses would not be appropriate for this man. Sweeping the buses would not be such a big problem and driving will have to be re-instituted in a very graduated fashion and I do not believe it will be appropriate until mid January. I will be reviewing him in early January and will make a determination regarding suitability of him returning to work at that time.*

*Mr Preston is somewhat fearful of returning too early and re-injuring his right shoulder.*

[15] Ms McLennon wrote again to Mr Gordon at the end of December 2008 asking for any updated reports that were available regarding Mr Preston's condition. She sought once more a prognosis and timeframe for a return to normal work and duties, and asked:

*Can Bruce return to work in a safe and sustainable manner as last surgery the tendons ruptured and there was no further accident involved?*

*According to your report ... the next surgery will be a total shoulder replacement and NZ Bus needs to be advised of chances of risk if he returns to driving a bus.*

[16] At the same time as Ms McLennon sought further advice she arranged for Mr Preston to have an assessment by a consultant occupational physician, Dr CTC Kenny.

[17] Early in January 2009, Mr Gordon gave in writing his advice that Mr Preston was then "doing very well" and was safe to return to work as a bus driver. He said:

*It is possible that this man may develop pain in the future that may prevent him from continuing to drive but this is not the case at the present time. Should he develop pain in the future a reverse articulation total shoulder replacement would be a possibility. If this man had a successful reverse articulation total shoulder replacement there is no reason why he could not drive a bus. I have talked to this man at length about his job today and he believes that he can safely return to work and I understand that he has to go through a driving test and have an instructor with him for two or three days when he does return. I do not foresee any difficulties with this process.*

### **Occupational Therapist's assessment**

[18] Mr Preston then became the subject of a work site assessment report and recommendations, which were completed by an Occupational Therapist. The assessment dated 30 January 2009 concluded with the following:

*Bruce is in my opinion able to resume his pre-injury role as a bus driver at present time. He has made an excellent recovery from his*

*surgery and has regained strength and range of movement in his R (right) shoulder joint.*

*I understand that until such time as Dr Kenny has carried out a worksite review he is to remain on alternate light duties. The only light duty available that would require less physical activity of the upper limbs/shoulder would be passenger checks at this stage.*

[19] On 2 February 2009, after receiving Mr Gordon's latest report, the Occupational Therapist provided an addendum to her work site assessment report. With reference to Mr Gordon's report she said:

*I note in that report that the R (right) biceps tendon was relocated into the bicipital groove but that no repairs were made to any of the rotator cuff tendons. I also note that major surgery would be involved should he re-injure his shoulder. While I maintain that he currently presents as being quite capable of driving I would be concerned that any future mishap could result in major surgery. Given his age and previous leg injury with its ongoing functional limitations this risk could be deemed to be significant especially when working in wet weather.*

[20] Mr Preston was then aged 68. In 2007 he had slipped over on a footpath in wet weather and injured his shoulder. On 16 February, Mr Gordon reported again to Mr Preston's GP and a copy was sent to Ms McLennon. Mr Gordon advised:

*This man was cleared to return to work when I last saw him on 5 January 2009. Since that time he has not returned to work but it appears that he has been obstructed in his cause to return to work. He was sent to another doctor, Dr Kenny. He has not seen the report from this doctor. He has not been through a driving test but has had one interview.*

*This man seems to have excellent movement and function of his right shoulder and I believe that this man is easily able to do his pre-injury job. I have encouraged him to pursue this by getting a copy of the letter from Dr Kenny and also to approach his ACC Case Manager and possibly also the union regarding return to work.*

### **Dr Kenny's report**

[21] Dr Kenny, who had examined Mr Preston on 19 January, reported his assessment to Ms McClennon on 20 February and sent a copy to Mr Preston. Included in Dr Kenny's assessment was the following:

*Given the marked degenerative changes within the rotator cuff tendons, and the defects within the rotator cuff it is highly likely that Mr Preston will continue to experience right gleno-humeral joint instability, which is very likely to lead to further shoulder pain and disturbance of function.*

*It is probable that such symptoms will eventually occur in association with any vocational driving (as a Bus Driver) and should this be the case, then it is almost certain that such symptoms would be attributed to injury (including from driving), for which his employer would be seen to be liable.*

*Any significant further pain or shoulder dysfunction could only be surgically managed by shoulder arthroplasty (joint replacement) which, again, would likely end up being the responsibility of his employer.*

*Contrary to the advice provided by the orthopaedic surgeon, it is my opinion, given Mr Preston's age (nearly 70 years), the poor structural integrity and underlying marked degenerative changes within the right shoulder/rotator cuff, and the nature of work as a Bus Driver, that Mr Preston should not return to this type of employment.*

[22] Dr Kenny also noted the surgical findings which confirmed “extensive and advanced degenerative changes within the right shoulder bony, joint and tendon structures.” He noted those advanced changes were “highly likely to lead to further symptoms should Mr Preston continue a physically demanding job”.

[23] Dr Kenny closed his report to Ms McLennon with the following opinion:

*Mr Preston is unlikely to be able to continue bus driving in a safe and sustainable manner.*

### **Dr Wall's report**

[24] Another opinion of Mr Preston's condition was obtained from a third medical expert, Dr Chris Walls. He reported on 10 March 2009, noting that with safety critical work such as bus driving in emergency situations it was customary to set up a practical test to simulate the required actions and to test for responses against those. Dr Walls advised and suggested:

1. *From the information he [Mr Preston] is currently fit for work.*
2. *The radiographic and operative findings do show a fragile shoulder.*
3. *He should undergo a driving evaluation by a competent inspector including a practical aptitude test (PAT) of an emergency situation (skid recovery, violent steering manoeuvres, unlocking of emergency doors etc) and if he can complete these satisfactorily without causing pain he would (in my opinion) be considered fit for work.*
4. *In other safety critical transport injuries where such situations arise I recommend annual licensing tests (with the agreement of both parties) which include such a PAT. These tests have defined outcomes agreed in advance by both parties.*

[25] By the time of Dr Walls's report in March 2009, the union to which Mr Preston belonged had become involved in trying to help him return to work. The union's lawyer, having read the medical reports from Mr Gordon, Dr Walls and Dr Kenny, expressed her view in correspondence that "it seems that Dr Kenny is out of kilter with his colleagues".

### **Vocational Independence Assessment**

[26] WellNZ arranged for Mr Preston to undertake a vocational independence assessment under the Injury Prevention, Rehabilitation, and Compensation Act 2001. This was scheduled to take place on 24 March 2009. The next day Mr Preston's union wrote to Ms McLennon proposing that Mr Preston undergo a driving evaluation by a competent inspector and have a Practical Aptitude Test and an evaluation of his ability to handle an emergency situation (skid recovery, violent steering manoeuvres, unlocking of emergency doors, etc), a test Dr Walls had earlier referred to. The union described this course as one able to provide an "objective" determination of Mr Preston's ability to safely continue his role as a bus driver. The union said that once the results of the test had been obtained there could be a meeting to discuss Mr Preston's rehabilitation and return to work options.

[27] Ms McLennon responded by advising Mr Preston's union that its proposal was not considered appropriate, as the concern of NZ Bus was not Mr Preston's driving ability but of his being exposed to further injury, or his "sustainability" in being able to drive buses in the future without reinjuring his shoulder.

[28] The General Manager of NZ Bus, Mr Gavin Cook, then wrote on 4 May 2009 to Mr Preston, referring to the differing professional views he had by then been given about his ability to continue driving for the company. He said in his letter:

*There is no debate around the fact that you are able to drive today, however, the main contentious issue is that our specialist Dr C T C Kenny (Consultant Occupational Physician) believes that any ongoing driving will place too much strain on your shoulder and this may cause further damage. If this was to occur the Company would be in breach of the H&S Act.*

[29] Mr Cook advised Mr Preston that the company intended to invoke the Injury Prevention, Rehabilitation, and Compensation Act 2001 with a view to assisting him to find another job either within or outside NZ Bus.

**Dr Scott's report**

[30] Mr Preston was examined by a fourth medical expert, Dr David Scott, on 15 May 2009. His report included the following:

*Bruce demonstrated his ability to drive the buses again after the first repair [to the right shoulder], but was fortunate that when the relatively trivial event which resulted in a complete tear occurred, he was safely at home. In my opinion, Dr Kenny has rightly said that a further return to bus-driving would be unwise given the constant use of the arms and shoulder, and the safety-critical aspects of that job. Bruce is still keen to work, and should have no difficulty managing any of the suitable jobs listed below.*

[31] The suitable jobs included those of chauffeur, service station attendant, call or contact centre team leader, radio dispatcher and alarm security and surveillance monitor.

[32] The Vocational Independence Occupational Assessment was completed at the end of June 2009 and a report was presented to Ms McLennon. In it several vocational options were identified as appropriate for Mr Preston. Bus driving was not one of them but chauffeuring was. The options were regarded as being sustainable vocations for Mr Preston.

[33] The report to Ms McLennon noted that Mr Preston had been a bus driver for 30 to 40 years, he had a continuous employment record and had demonstrated "an excellent work ethic." It noted that Mr Preston wanted to keep working and was willing to consider any viable work option. The report referred to an earlier one in which Mr Preston's age had been considered relevant as follows:

*Considering Bruce's age it was relevant at this point to discuss Bruce's retirement plan and to begin to consider action steps to achieve this. Bruce had not given serious consideration to retiring as he reported he enjoys work and at this stage needs a full time income. However Bruce did discuss his working life for the next five years and would ideally like to continue being employed on a part time basis.*

[34] The June 2009 report drew attention to Mr Preston as having applied for and been offered a position as a bus driver in which he intended to commence the work on 13 July. In this regard, it was stated:

*It was explained to Bruce that the occupational and medical assessor had not cleared him for this work type option.*

[35] Later in July, Mr Preston instructed his representative, Mr Taylor, to take up with NZ Bus his concerns about his employment. In a letter to the company, Mr Taylor outlined the history of Mr Preston's injury and his rehabilitation following that, referring to the opinions that had been obtained from Mr Gordon and Dr Walls and that supported a return to work by Mr Preston. Mr Taylor advised NZ Bus:

*It therefore appears that your company is seeking to terminate the employment of our client – not on the grounds of any event that has occurred, but on the grounds of some event that may occur at some time in the future.*

[36] Mr Taylor expressed his opinion that the company's action was unfair from a legal point of view. He advised that current employment law placed a clear obligation on employers to take all reasonable steps to assist employees who have suffered injuries to return to the workforce, and he said in his letter:

*We therefore wish to raise a personal grievance for “unjustified disadvantage”, with the possibility of a further personal grievance being raised for “unjustified dismissal.”*

[37] Mr Taylor advised that Mr Preston believed it was sensible to try mediation as a way of resolving the dispute over his return to bus driving with NZ Bus. That process was undertaken by the parties towards the end of 2009.

### **Proposal by NZ Bus for a return to work**

[38] Following the mediation NZ Bus wrote to Mr Taylor in January 2010 with a proposal for his resumption of bus driving work. This was expressed as follows:

*Further to mediation between Mr Preston and Transportation Auckland Corporation Limited, the Company is seeking written confirmation from Mr Preston as to whether he considers himself fit to operate all bus types at this time and on a full-time basis.*

*If Mr Preston considers himself fit then the Company proposes that in light of conflicting medical opinions, the best way forward would be to roster Mr Preston on for active duty and monitor his performance.*

*Please advise Mr Preston of the above and we await his written response.*

[39] Mr Taylor replied to this proposal later in January. He expressed amazement at having received it because, he said, at mediation Mr Preston had clearly confirmed his view that the employment relationship had irrevocably broken down and he had made it clear he was not seeking reinstatement as a way of resolving the employment

dispute. Mr Taylor advised, “our client continues to reject reinstatement as being a possible or appropriate solution to this dispute”. He referred to the circumstance that Mr Preston had obtained employment with another company driving buses, and he referred to earlier advice from NZ Bus that he would only be paid his outstanding holiday pay “if/when he formally resigns from his position”. Mr Taylor concluded:

*Can I respectfully point out that your company has failed to allow our client to work for well over a year – and it is therefore inappropriate for his holiday pay to be further withheld.*

[40] Mr Taylor followed up his letter with an email to NZ Bus on 15 February, in which he gave the following advice:

*I wish to confirm that it is my client’s clear position that his employment relationship with your company is at an end. What is now in dispute is whether or not he has been constructively dismissed.*

*I am aware that this whole situation is causing him extreme financial stress. It would therefore be appreciated if the holiday could be paid out ASAP – thus resolving one component of the whole problem.*

[41] Mr Preston was then paid by NZ Bus his entitlement to holiday pay and his name was removed from the company payroll. As matters remained unresolved between the parties, the Authority proceeded with an investigation.

### **The Authority’s investigation – evidence and submissions**

[42] Although a number of other problems had been raised on behalf of Mr Preston for the Authority to consider, only the claims of unjustified dismissal and unjustified disadvantage were pursued by him.

[43] NZ Bus denied that it in any way acted unjustifiably. It denied dismissing Mr Preston and argued that he resigned his employment as a result of obtaining a bus driver job with another employer.

[44] For NZ Bus, its National Human Resource Manager, Mr David Gould, gave evidence as follows:

41. *In summary, after having obtained specialist medical reports, NZ Bus made a decision that Mr Preston should not work as a busdriver, due to serious and realistic concerns that he may further injure himself at work as a result of his previous shoulder injury. His shoulder had been operated on twice within a year, and there was a possibility that he might injure his shoulder again, which would result in a full shoulder*

*replacement. NZ Bus was not prepared to place Mr Preston in a situation where he would risk his own and others' safety. Mr Preston was employed in a safety sensitive role – should he suffer an injury while driving a bus, he could potentially place at risk the safety of his passengers.*

42. *Prior to terminating his employment, NZ Bus initiated, through WellNZ, a vocational assessment process to determine what, if any roles, Mr Preston could undertake either for NZ Bus or for other employers. NZ Bus engaged in a thorough process to ensure that Mr Preston would not be disadvantaged by its decision to not return him to a role as a busdriver with NZ Bus.*

[45] Mr Gould explained to the Authority that NZ Bus had changed its stance in January 2009, in proposing that Mr Preston undertake a controlled return to driving work, because by that time the company had become aware he was driving buses for another company. Mr Gould said that while earlier NZ Bus had not been prepared to take the risk of letting him start driving duties again, his new employer had apparently taken that risk and a controlled or monitored return to the workplace therefore seemed a reasonable step forward. Mr Gould considered that NZ Bus had not acted previously with undue caution and that its reservations about allowing Mr Preston to drive had been warranted by medical opinion obtained.

[46] Mr Preston in his evidence said that from the beginning of 2009 he had felt able to carry out all the duties involved in bus driving effectively and safely. He felt he had provided NZ Bus clear medical evidence to support his view that he was ready and able to return to driving buses, a job he said he really enjoyed.

[47] Mr Preston said it devastated him in May 2009 to find out from Mr Cook that he would not be able to return to bus driving work. He said he had felt disappointed that NZ Bus was not willing to provide him with even a test to confirm whether he could safely drive a bus or not. His evidence was:

*By early July I began seeking advice on how I could resolve the impasse with my employers – and also began looking for other bus driving jobs.*

*I managed to gain a new bus driving position with Howick and Eastern Buses. I was honest and open with my new employers about my whole situation – and, after testing my driving ability, they appointed me to the position.*

[48] In about mid-July 2009, without telling NZ Bus, Mr Preston had entered into a new employment agreement as a bus driver with a different employer. Mr Preston

says that he told NZ Bus about this at the time of the mediation, which was not until late November 2009. At that time, he says he had also confirmed he was not seeking reinstatement as he felt the employment relationship with NZ Bus had irrevocably broken down.

[49] In his written evidence, Mr Preston referred to the proposal that had been made by NZ Bus in January 2010 for him to be rostered back on again for bus driving duties and for his work performance to be monitored. He described this proposal as having been “too little, too late” and said that it should have been made about a year earlier. When questioned about this he said the proposal had been “too late” because by the time it was made he already had another bus driving job. He said he also believed NZ Bus eventually would have dismissed him if he had returned to bus driving with the company as it had proposed. He said he had chosen to work for Howick and Eastern Buses and had been doing so quite happily in the months before receiving the proposal to return to work with NZ Bus. Mr Preston also explained his reaction to the proposal by saying that he could not do two jobs. He said he had seen no need to advise NZ Bus of his new job. He accepted that NZ Bus had been genuinely concerned about whether he could drive a bus safely.

[50] When asked, Mr Preston could not explain to the Authority why the proposal by NZ Bus for him to return to work made in January 2010 was “too little,” as he had put it in his written evidence. Later on Mr Taylor, in written submissions supplied at the end of the investigation meeting, tried to give evidence for Mr Preston about this. Obviously what was offered by Mr Taylor was not Mr Preston’s evidence and was not evidence at all.

[51] In submissions for Mr Preston it was conceded by Mr Taylor that NZ Bus had had to consider “conflicting medical opinions on the Applicant’s fitness and physical ability to return to work driving buses.” Mr Taylor noted that Mr Gordon and Dr Walls had assessed Mr Preston as “fit to drive buses”, whereas Dr Kenny and Dr Scott had assessed him as “not fit to drive buses”. Mr Taylor suggested ways to distinguish those opinions by looking at the particular clinician who had supplied each one, his role in treating and assessing Mr Preston, and any personal allegiance the clinician had to those who had sought his advice.

[52] I find there is nothing to support the submission of Mr Taylor that Dr Kenny could be expected to provide medical opinions that would “err on the side of caution,”

because he had been retained under agreement by WellNZ and had an interest in protecting the medical and legal liability of that client.

[53] Mr Taylor also made the same submission in respect of Dr Scott as having weighted his advice to favour his client, WellNZ, and protect it from liability. There is no evidence of Dr Kenny or Dr Scott or any doctor or surgeon as having favoured anyone in giving their professional advice, and this seems unlikely to have occurred.

[54] Mr Taylor in his submissions acknowledged that an “impasse” had existed relating to the four medical opinions the employer had received for its consideration, but he contended that NZ Bus had the ability to seek further medical advice and/or to initiate an appropriate trial or test of Mr Preston’s ability to return to bus driving duties. It was submitted the company had failed to do so at the first reasonably available opportunity.

[55] Mr Taylor’s concluding submission was that a fair and reasonable employer faced with such an impasse would not simply have opted to “err on the side of caution,” by supporting one side of the dispute, but would have taken further steps to resolve the impasse.

[56] For NZ Bus, counsel Ms Douglas submitted that Mr Preston had resigned from his bus operator position on about 15 February 2010 after the proposal had been made by NZ Bus in January for him to return to driving duties. Ms Douglas submitted that Mr Preston had resigned because it was his preference to do so and not because of any breach on the part of NZ Bus. The employer, Ms Douglas submitted, had treated Mr Preston fairly by consulting him with regard to his health and his ability to drive, by considering all the medical information available about whether he could drive safely and by considering whether there were alternative jobs available. It was submitted that the review of Mr Preston’s employment and consideration of whether he could drive in a safe and sustainable manner was reasonable in all the circumstances, given the need to ensure that the employer’s bus operation was carried on safely, not only for the protection of employees but for members of the public as well.

[57] It was submitted in particular that Mr Preston had resigned because he recognised he could not work for two employers at the same time and had had to choose one or the other. He had also failed to seek and obtain written approval from

NZ Bus before engaging in other employment, which under the NZ Bus collective agreement binding on Mr Preston, at clause 34, was a failure capable of being serious misconduct and subject to the employer's disciplinary process. Also, it was submitted that the vocational assessment process that Mr Preston had been required to undertake was authorised by the collective agreement and within the employer's legal powers to apply. There was no breach of duty causing the resignation and the employer had been under a duty to provide a safe workplace as well as try and satisfy the wishes of its employees. It was submitted there was no disadvantage to Mr Preston in any of NZ Bus's actions, as he had obtained alternative employment while still on ACC and therefore had lost no income.

[58] Both parties, in their submissions, referred the Authority to s 103A of the Employment Relations Act 2000, which provides the test of justification in respect of dismissals and disadvantage actions.

#### **Unjustified dismissal grievance claim**

[59] I find that there was no actual dismissal of Mr Preston. He was not "sent away" by NZ Bus in any sense. His removal by NZ Bus from driving duties was a reasonable and necessary action to be taken when Mr Preston had first injured himself. The recurrence of injury and the uncertain prognosis as to sustainable recovery and maintenance of his health also made it reasonable for the employer to defer returning him to driving duties until it could be satisfied it was safe for him and for the employer to do so.

[60] Mr Preston was still on the payroll of NZ Bus until February 2010 when he asked to be paid out his holiday pay, signalling that he and not NZ Bus was bringing the employment to an end. Up until then NZ Bus had also been treating him as an employee by trying to discharge its duty to assess his vocational independence with a view to finding him alternative employment.

[61] I find that NZ Bus had no intention of dismissing Mr Preston at any time up to and including the point where it was requested to pay him out his holiday pay. I consider that rather than being sent away Mr Preston "went away" by choice, as he had found an employer prepared to let him drive a bus which he had strongly wished to continue doing. That was his choice and not something NZ Bus could do anything

about, especially since it did not know until near the end of 2009 that Mr Preston had taken up other driving work.

[62] Applying the well known meter-readers decision of the Court of Appeal (*Auckland Power Board v Auckland Local Authorities Officers Union* [1994] 1 ERNZ 168), I do not consider there was in the circumstances a constructive dismissal of Mr Preston either. I agree with the submissions for NZ Bus that there was no breach of duty, and certainly no breach of such seriousness as to make it foreseeable that Mr Preston would not be prepared to put up with the breach but would leave his employment. The employer in my view had been very careful to see that it did not breach its particular duty to take all practicable steps to ensure the safety of employees while at work; s 6 of the Health and Safety in Employment Act 1992. Also, under the collective agreement at clause 6, Mr Preston and NZ Bus had expressly committed themselves to ensuring a safe and healthy working environment.

[63] Mr Preston correctly noted that an impasse had developed because of the medical opinions and the differences between some of them. Those medical opinions represented information that the employer was reasonably entitled to obtain, but it had no control over the fact that there were differences of professional view about Mr Preston and his condition. Mr Preston realised that and elected to follow a different path back to bus driving work. His exercise of choice in that regard was not an action of NZ Bus.

[64] NZ Bus was an employer not a medical expert. It could not reasonably be expected to resolve the impasse by making a critical analysis of the various reports to expose professional flaws, if there had been any in their making. The concerns NZ Bus had about capacity or sustainability with regard to bus driving work if performed by Mr Preston was a reasonable basis for attaching greater significance to the advice in some of the medical reports, and lesser to others, thereby overcoming any impasse arising from those reports.

[65] I do not accept that NZ Bus can fairly be described as overly or unduly cautious in a situation where its business was public transport and safety was therefore of paramount importance. It may be other employers would have been less cautious, but in my view NZ Bus acted reasonably from the information it had and, in the light of the genuine concerns it had about the risk to the safety of passengers on its buses and also to Mr Preston itself.

[66] Neither do I consider that it can reasonably be turned against NZ Bus that it seemingly changed its stance when, in January 2010, it proposed to Mr Preston that he could return to work under monitored conditions. I do not accept that this was in any way an admission or acknowledgment that its earlier stance of declining to allow Mr Preston to work had been unreasonable, arbitrary or unwarranted in the circumstances. Clearly, NZ Bus did not simply change its mind on a whim but it reacted or responded to a situation where Mr Preston had resumed bus driving for another employer and had therefore already put himself in a position where he risked further injury at some time, according to at least two of the experts.

[67] Mr Preston I find rejected a proposal that would have substantially if not fully resolved his employment relationship problem. That he had chosen to work for another employer is no indication that the return to work proposal by NZ Bus was not a reasonable one in the circumstances. Even where an employer has acted unjustifiably it is not prevented from trying to undo what has been done so that a problem can be rectified.

[68] As I find there was no dismissal, actual or constructive, the Authority is not required to consider the question of justification for dismissal under s 103A. I find that Mr Preston ended his employment by resignation.

### **Unjustified disadvantage grievance claim**

[69] I accept Mr Gould's evidence as to the way NZ Bus had proceeded in the situation it was faced with. I consider that NZ Bus acted in the way that a fair and reasonable would have done in the circumstances.

[70] While it is clear that Mr Preston was disadvantaged in his employment or conditions of employment by being prevented from actually performing the job he had been employed by NZ Bus to do, in my view the immediate and primary cause of the disadvantage was the injury Mr Preston suffered, rather than any actions of NZ Bus. Any actions of the employer which delayed the attempt to have Mr Preston return to driving duties were justifiable in the circumstances. I find that, viewed objectively, the actions of NZ Bus were what a fair and reasonable employer would have done in all the circumstances at the time those actions occurred.

[71] I do not consider that there was any lack of justification arising out of the timing which had NZ Bus propose a return to work in January 2010 and not at some

earlier date closer to the middle of 2009. The circumstance that was missing until the end of 2009 was knowledge by NZ Bus that Mr Preston had secured other employment in which he was driving again. If he had told NZ Bus about this much earlier, it might be the company could be criticised for not responding then with a proposal to return Mr Preston to driving duties under monitored conditions.

[72] In any event in the circumstances where he had obtained other paid employment there was no loss of wages suffered by Mr Preston out of any disadvantage to him in his employment. He had received ACC payments, a 20% top-up by NZ Bus and, later, a payment of wages from his new employer. I do not consider it is a situation where Mr Preston was humiliated or suffered hurt feelings by not being made the proposal earlier. The evidence indicates that Mr Preston was very happy to have found other employment by July 2009 and to have been able to resume bus driving from that time. After then he did not experience continuing anguish about the effects his medical problems had had on his employment with NZ Bus.

### **Determination**

[73] For the above reasons, I consider that Mr Preston has no personal grievance in relation to his claim of unjustified dismissal or his claim of unjustified disadvantage. If he had a grievance in the latter type of grievance, I consider that he would not have been entitled to remedies of lost wages or compensation for hurt feelings or humiliation.

### **Costs**

[74] Following the usual practice of the Authority, any question of costs is left to the parties' representatives, Mr Taylor and Ms Douglas, to discuss and try and resolve. Any application for costs that is made to the Authority should be in writing and filed and served within 21 days of the date of this determination. A reply to any application made is to be filed and served within a further 14 days after that time.

A Dumbleton

**Member of the Employment Relations Authority**