IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2012] NZERA Auckland 191
5375202

	BETWEEN	COLIN MCKELLOW Applicant
	AND	TRANSPORTATION AUCKLAND CORPORATION LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Gary Froggatt for the Applicant Jo Douglas for the Respondent
Investigation Meeting:	30 April and 1 May 2012
Determination:	5 June 2012

DETERMINATION OF THE AUTHORITY

A. Colin McKellow was unjustifiably dismissed by Transportation Auckland Corporation Limited (TACL) on 22 February 2012.

B. Mr McKellow's conduct contributed to the situation giving rise to his grievance so remedies of lost wages and distress compensation awarded to him are to be reduced by one third.

C. After allowing for that reduction of remedies for contribution, TACL must settle Mr McKellow's personal grievance by:

(i) Reinstating him to his position as a bus driver from the date of this determination (subject to particular conditions set out in this determination); and

(ii) Paying him four weeks ordinary pay in lost wages under s123(1)(b) of the Employment Relations Act

2000; and

(iii) Paying him $4000 as compensation under s123(1)(c)(i) of the Act.

Employment relationship problem

[1] Colin McKellow has worked as a bus driver in Auckland for 26 years. Transportation Auckland Corporation Limited (TACL) dismissed him on 22 February 2012. A letter given to him confirming the termination of employment said the dismissal was for serious misconduct.

[2] The dismissal was the outcome of an investigation and disciplinary process into a complaint made by a bus passenger on 17 January 2012. That process included TACL senior duty supervisor Kartika Sharma and human resources consultant Dinah Lesoa meeting three times in the following weeks with Mr McKellow and his union representative, New Zealand Tramways Union Auckland branch president Gary Froggatt, to discuss the complaint and Mr McKellow's explanation of the events giving rise to it.

[3] The passenger – referred to in this determination as Mr P – wrote an email complaining Mr McKellow was "*so rude*" and had treated him and other passengers poorly. Mr P wrote that when the bus had arrived at the stop at the Britomart Transport Centre Mr McKellow had let passengers off but then closed the door on passengers waiting to board and had "*yelled, just wait*". Mr P wrote that "*less than a minute later*" Mr McKellow opened the door but then charged him the wrong fare when he boarded the bus. When Mr P corrected Mr McKellow about the fare, he was given a new ticket and fifty cents change in ten cent pieces and told by Mr McKellow that he needed to learn to speak up. Mr P wrote that he took a seat in the bus but then went up to Mr McKellow and asked for his name and a contact number so he could make a complaint about him. Mr P wrote that he repeated this request three times before Mr McKellow said to him: "*I don't have anything to say to you*". Mr P wrote that he then told Mr McKellow that "*he's asked for it*". Mr P sat down in the bus and used his mobile phone to find an email address for the bus company and sent an email asking how to make a complaint. After receiving a reply from a customer service

representative at TACL's call centre, Mr P emailed a detailed written complaint which was referred to Ms Sharma and Ms Lesoa for investigation.

[4] In addition to the account summarised above Mr P wrote that he had become "*fairly boisterous*" with Mr McKellow. He described Mr McKellow as "*a total jerk*" who "*needs to be fired*", a "*prick*", "*absolutely filthy*" and "*childish*". Mr P stated that if he saw Mr McKellow on another bus he would "*take matters further*" and "*for his sake, I had better not see him operating another bus*".

[5] TACL's letter to Mr McKellow giving the reasons for his dismissal said he had received training and support to help deal with difficult customers but it concluded that in the 17 January incident he had "*failed to resolve the conflict, and in some ways [his] actions exacerbated the situation, resulting in the customer becoming more agitated*". It also said Mr McKellow had not obeyed a previous instruction to report such incidents to the company. Later evidence established that this referred to an instruction given to Mr McKellow by his duty supervisor Filipo Patau. The instruction required Mr McKellow to report incidents where a customer approached him or said something to him and to make that report "*on the day*".

[6] In her witness statement to the Authority Ms Lesoa said the reference to serious misconduct in the termination letter "*may not clearly set out our decision*". She said Mr McKellow's employment was terminated "*for repeated misconduct or poor performance which we considered was sufficiently serious to justify dismissal*".

[7] This referred to previous written warnings given to Mr McKellow – a first written warning (dated 20 April 2011) for "*driving in an unsafe manner*" and a second written warning (dated 13 July 2011) for driving off before passengers (a mother with four children) were seated and then speaking rudely to the woman about moving her pushchair out of the way of other passengers.

[8] Ms Sharma and Ms Lesoa also confirmed in their oral evidence to the Authority that they had taken account of four complaints about Mr McKellow received from passengers in the five months between his second written warning in July 2011 and their investigation of the 17 January 2012 complaint.

[9] The disciplinary procedure agreed in the applicable collective agreement provided for a four step warning system (verbal counselling, first written warning, second written warning and final written warning) before dismissal. However the agreed terms also allowed for omission of one or more of those warnings where the misconduct was "*sufficiently serious*". In their evidence Ms Sharma and Ms Lesoa confirmed they had applied this term to omit the final warning step and dismiss Mr McKellow.

[10] In raising his personal grievance with TACL and lodging his application in the Authority his representative argued Mr McKellow was unjustifiably suspended from work at the start of the investigation and the company representatives had not properly followed or applied the steps required by the disciplinary procedures in the collective agreement. He claimed the incident was not fully investigated, the disciplinary outcome was predetermined and, at worst, he should have received a final written warning, not dismissal. He sought reinstatement to his position as a driver, lost wages for the period from his dismissal to reinstatement and compensation for distress to him resulting from the dismissal.

[11] TACL replied that Mr McKellow's dismissal followed a full and fair investigation and was justified for performance reasons due to the serious complaint of 17 January and his previous warnings. It opposed reinstatement as neither practical nor reasonable because Mr McKellow's behaviour towards customers had not changed despite warnings and training and because it no longer trusted him.

The Authority's investigation

[12] Mr McKellow, Mr Froggatt, Ms Sharma, Ms Lesoa and Mr Patau lodged written witness statements for the Authority's investigation. Each witness attended the investigation meeting and, under oath, confirmed their written statement and answered questions from the Authority member and the representatives. The representatives gave closing submissions on the facts and the law.

[13] As permitted under s174 of the Employment Relations Act 2000 (the Act) this

determination has not set out all evidence and submissions received but has stated the Authority's findings of facts and law and its conclusions on matters requiring determination. The Authority's findings were made on the civil standard of the balance of probabilities, assessing the evidence to determine what was more likely than not to have happened.

The issues

[14] The issues for determination were:

(i) whether TACL unjustifiably disadvantaged Mr McKellow by suspending him from work on 19 January 2012 while the 17 January complaint was investigated; and

(ii) whether the decision that Mr McKellow committed serious misconduct or serious poor performance was one a fair and reasonable employer could have reached in all the circumstances at the time; and

(iii) whether the decision to dismiss Mr McKellow on the basis of its conclusions about the 17 January incident was one a fair and reasonable employer could have reached in all the circumstances at the time; and

(iv) if TACL's decisions or actions were unjustified, what remedies should be awarded, considering whether:

  (a) reinstatement was practicable and reasonable; and

  (b) he should be awarded any lost wages; and

  (c) he should be awarded compensation for humiliation, loss of dignity and injury to feelings; and

(v) whether any remedies awarded to Mr McKellow should be reduced due to conduct by him contributing to the situation giving rise to his grievance.

No disadvantage from suspension

[15] There was, I find, no unjustified disadvantage to Mr McKellow by his suspension on 19 January 2012. He had attended a meeting that day with Ms Sharma and Ms Lesoa to discuss another matter and was told there of the 17 January complaint. Ms Lesoa's notes of that meeting, which I accept fairly recorded key points in the conversation, showed Ms Sharma asked Mr McKellow whether he

wanted to have a representative present to discuss her intention to suspend him while the complaint was investigated. Mr McKellow chose not to have a conversation on the proposed suspension but instead treated it as a *fait accompli*. He wanted to give an explanation straight away about the allegations made in the complaint. Quite rightly Ms Sharma stopped him and asked him to give his response in writing (which was consistent with the disciplinary procedure set out in the collective agreement). He went to leave the meeting and the premises but was asked to wait until a letter confirming his suspension was completed.

[16] The letter he was given referred to the suspension as being in his own "*best interests*". In her oral evidence to the Authority Ms Lesoa explained that phrase related to some of the content of Mr P's email of complaint which she and Ms Sharma read as a potential threat to Mr McKellow's safety, particularly Mr P's statement that he would "*take matters further*" if he saw Mr McKellow on a bus again. In that light I find TACL's decision to stand Mr McKellow down from work (on pay so there was no financial disadvantage to him) was prudent and an action open to a fair and reasonable employer in the circumstances at the time.

[17] During the Authority's investigation Mr Froggatt suggested there was a protocol previously agreed with TACL on how suspensions would be carried out but which its representatives had not followed in this case. His oral evidence on this point was insufficient to confirm whether such an agreement was in place. No documentation confirming its existence was lodged and TACL had no real opportunity to inquire into and respond to his allegation about whether such procedures had been agreed. Had there been such evidence and opportunity, the conclusion in this determination on justification of the suspension might have been different.

Was serious misconduct or poor performance adequately established?

[18] TACL submitted its disciplinary inquiry established, on the balance of probabilities, that Mr McKellow had committed the following acts amounting to serious misconduct and serious poor performance:

(i) deliberately giving Mr P an incorrect ticket; and

(ii) deliberately giving Mr P small change; and

(iii) generally being rude and unhelpful (including by staring straight ahead when Mr P spoke to him); and

(iv) failing to follow a lawful and reasonable instruction by not reporting the incident (because Mr Patau told him in November to report any such incidents with customers).

[19] In its case in the Authority investigation meeting TACL strongly emphasised Mr McKellow's failure to report the 17 January incident, which he admitted breached Mr Patau's instruction. Under the disciplinary procedures in the collective agreement such a failure to obey such an instruction could be classified as serious misconduct (clause 47.10(i)) and potentially justify summary dismissal. However that was not the basis of the decision to dismiss at the time it was taken as Ms Lesoa's evidence said it was due to "*repeated misconduct and poor performance which we considered was sufficiently serious to justify dismissal.*"

[20] In her evidence Ms Sharma confirmed she and Ms Lesoa had concluded Mr McKellow's conduct reported in the 17 January complaint was "*sufficiently serious*" to amount to serious misconduct or serious poor performance. In their view at the time, that then permitted use of the term in the collective agreement allowing TACL to 'leapfrog' (my word, not theirs) the step of a final written warning that the agreement provided would "*normally be used*". In doing so, they considered the ultimate disciplinary sanction of instant dismissal was then open to them if they were satisfied Mr P's allegations correctly described Mr McKellow's conduct in that incident.

[21] In using the 'leapfrog' provision TACL was then obliged, I find, to establish the facts of the situation to a level that was more convincing than would be required for a less serious matter. I make that finding as a matter of interpretation of the collective agreement and the application of the so-called '*Honda* principle'. That principle holds that where a serious charge is the basis of the justification for the dismissal, the evidence in support of it must be as convincing in its nature as the

charge is grave.[1] TACL's decision that the charge was more serious – which brought with it, if established, the potentially graver consequence of dismissal rather than a final written warning for Mr McKellow – elevated the need for proportionately convincing proof of his unsatisfactory conduct or behaviour.[2]

[22] TACL also submitted it had not alleged that Mr McKellow's actions were serious misconduct (apart from the accusation of failing to follow the instruction to report). That is factually incorrect. When Mr Froggatt asked at the 9 February disciplinary meeting what "*the charge*" against Mr McKellow was, Ms Lesoa's own notes show she replied "*serious misconduct*". That phrase was repeated in TACL's dismissal letter to Mr McKellow. That was the level at which TACL pitched the matter at the time of its inquiry and decision to dismiss. Consequently, convincing proof was required to justify its findings and the sanction imposed.

[23] TACL's inquiry – through the actions of Ms Sharma and Ms Lesoa – was, I find, not adequate to establish what had happened to a sufficiently convincing level given the nature of the allegation. Having regard to the resources available to TACL (including its professional human resources team and review by two senior managers of the process undertaken by Ms Sharma and Ms Lesoa), its inquiry into the allegations against Mr McKellow was insufficient and resulted in defects which were more than minor and, more likely than not, resulted in him being treated unfairly.[3]

[24] I reached that conclusion for the following reasons:

(i) TACL failed to adequately inquire into the credibility and veracity of the complainant – which was unfair when it then decided to prefer Mr P's untested and uncorroborated account over Mr McKellow's explanation of the incident; and

(ii) TACL declined a request from Mr Froggatt to interview Mr P as Ms Lesoa said it could not "*allow*" that to happen – however at the time of saying so, she did not disclose that she had failed in repeated attempts to contact Mr P so could not check any of Mr

[1] *Honda NZ Ltd v NZ Shipwrights Union* ERNZ Sel Cas 855 at 858 (CA).
[2] *NZ Shipwrights Union v Honda NZ Ltd* [1989] 3 NZILR 82, 85 (LC).
[3] Section 103A(3)(a) and (5) of the Employment Relations Act 2000.

McKellow's explanation of events with Mr P anyway; and

(iii) TACL did nothing about Mr Froggatt's suggestion of attempting to identify and contact other passengers on the bus that day who might be able to corroborate one or other version of events; and

(iv) TACL took account of four passenger complaints about Mr McKellow received between September and December 2011 but did not give him the opportunity to explain those events in the disciplinary process; and

(v) TACL did not fairly balance the complaints received with positive information from assessments of Mr McKellow.

(i) Unbalanced assessment of credibility

[25] In his written explanation to TACL about the incident Mr McKellow confirmed he had told a female passenger to wait a minute before she boarded the bus while he changed the destination signs and reset the ticket machine. As he closed the door, a man (now known to be Mr P) banged on the door. Mr McKellow said that when he opened the door Mr P pushed past the other passengers and put a $1 coin in the fare tray. Mr McKellow said he asked three times where Mr P was going but the reply was mumbled and he could not hear it. He then issued a $1 fare. After Mr P queried the fare and was given a 50 cent ticket and 50 cents change, Mr McKellow said it would be helpful if he could speak more clearly. When Mr P returned to ask for Mr McKellow's name so he could make a complaint about him, Mr McKellow said he told Mr P to contact MAXX (referring to Auckland Transport's information call centre). Mr McKellow said that after he told Mr P he had nothing more to say to him, Mr P replied "*that he had more to say to me and … he was going to get me the sack and that I was not fit to drive a bus*".

[26] During the meetings with Ms Sharma and Ms Lesoa Mr McKellow said he had felt intimidated by Mr P, the 50 cents change was legal tender, and he had issued a $1 ticket initially because he was told at the driver training school to issue a fare for the amount of money tendered by the passenger if he could not find out where the passenger was going or was difficult to understand.

[27] There were important differences in the accounts given by Mr P and Mr McKellow, particularly about Mr P's demeanour and behaviour (although Mr P had described himself as being "*fairly boisterous*" in the interaction).

[28] Initially Ms Lesoa tried to contact Mr P to discuss his complaint. She told the Authority that she did so because she "*anticipated if there were differences between the two stories we would need to talk to [him] to verify*". Mr P did not respond to emails sent to him by Ms Lesoa and TACL had no phone number or address at which he could be contacted.

[29] Instead TACL preferred Mr P's account as being more likely to be correct because of Mr McKellow's record of previous complaints. In doing so, I find, TACL failed to fairly assess the credibility of Mr P as a complainant. His own written account included what was plainly a threat of physical violence against Mr McKellow and verbal abuse (such as describing Mr McKellow as "*filthy*"). The tone was extravagant and intemperate and should have put Ms Sharma and Ms Lesoa on notice about the need for further inquiry into the reliability of Mr P as a complainant.

[30] A further purpose in speaking to Mr P about his complaint would have been to check he had no ulterior purpose in complaining about Mr McKellow – created by previous contact with him as a driver or having some connection with him outside work – and to check that Mr P was reliable in the sense of having no obvious mental health issues which might have affected his perception of the interaction.

[31] There was also the possibility that, if spoken to, Mr P may have revised his account and view of whether Mr McKellow's behaviour was worthy of complaint.

[32] However, by not having contacted Mr P and not having interviewed him, Ms Sharma and Ms Lesoa were not able to make any fair assessment of whether his self-described "*fairly boisterous*" behaviour was provoked by Mr McKellow's actions or were the result of something else that affected his mood and conduct that day. Mr McKellow's account of Mr P banging on the bus door and pushing past other passengers to board indicated the possibility of some other cause.

[33] Instead Ms Sharma and Ms Lesoa decided that even if Mr P was already irate about some other event, or only became so when Mr McKellow closed the bus doors to reset the signs and ticket machine, Mr McKellow had then made the situation worse. They reached that view on the basis of Mr McKellow having previous passenger complaints made about him. In short, they substituted a conclusion based on what they saw as Mr McKellow's propensity rather than a full inquiry to establish the facts in the particular situation (which should have included a more rigorous assessment of the reliability of Mr P's complaint). Repeated references to Mr McKellow's previous record during the inquiry into this event did, I find, indicate predetermination on whether what was alleged to have happened on 17 January was more likely than not to be the case.

(ii) Not disclosing the inability to contact Mr P

[34] During a disciplinary meeting on 9 February Mr Froggatt "*nominated*" Mr P as a witness. This was a reference to a clause in the collective agreement that allowed an employee to 'name' witnesses he or she considered relevant to an inquiry or hearing on alleged serious misconduct.

[35] At the time Ms Lesoa replied that TACL "*can't allow*" Mr P to be called as a witness unless the union could prove the company had not been fair in its investigation.

[36] The closing submissions given on Mr McKellow's behalf in the Authority argued he had "*a fundamental right*" to question Mr P at the disciplinary meeting, either directly or through his union representative, or, at least, to be present when TACL representatives questioned Mr P. He submitted that a fair and reasonable employer must allow or arrange questioning of a complainant by or on behalf of any worker accused of serious misconduct.

[37] I do not accept that submission correctly states the law. While a worker is entitled to know everything said about or against him or her and have the opportunity to respond to it, the principles of natural justice as interpreted and applied in our employment law do not generally entitle the worker (or his or her representative) to

directly confront or question the complainant during the employer's disciplinary inquiry (unless there is some contractual term which provides for such a procedure). Rather it is the employer who must conduct a full and fair inquiry into the allegation. Generally this will involve the employer interviewing the complainant and then making all the relevant information given or accusations made by that person available to the accused worker and giving the worker an opportunity to provide an explanation. It is an instance subject to the good faith obligations under s4(1A)(b) and (c) of the Act. In some cases the explanation given may require the employer to seek further information from the complainant or other people who may have relevant information and to give the worker a further opportunity to respond to what is then said. The worker's explanation must be evaluated with an open mind. That evaluation would normally include steps to consider, check and corroborate any information relied on for decisions subsequently made.

[38] Those principles have been expressed in the following way:[4]

> *Obviously the employer who has a business to run cannot be expected to conduct a formal hearing in the nature of a trial but equally obviously the employer has not made reasonable enquiries if the employee has not had a sufficient opportunity to answer the employer's complaint. (my emphasis)*

[39] However there was an element of unfairness in how Ms Lesoa dealt with Mr Froggatt's request to 'name' Mr P so that he would interviewed through the disciplinary process. At the time Ms Lesoa said the company could not "*allow*" such an interview, she knew Mr P had not replied to emails from her asking to speak with him about his complaint. Even if the company wanted to talk with him and check anything in relation to Mr McKellow's account of events, TACL was not able to do so. Neither Ms Sharma nor Ms Lesoa disclosed this to Mr Froggatt at the time he made his request. Ms Lesoa acknowledged in her oral evidence that she should have done. Failure to do so, I find, was a breach of good faith.

[40] It was not a minor point because Ms Lesoa said that if Mr McKellow had not remembered the event, TACL would not have been able to continue with its inquiry.

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[4] *Airline Stewards and Hostesses IUOW v Air New Zealand* ERNZ Sel Cas 985, 993 (CA).

Instead Mr McKellow "*vividly*" remembered the encounter with Mr P and it became what Ms Lesoa called a "*he said-he said scenario*". If Mr McKellow and his representative knew Mr P had not been interviewed, they could have made stronger submissions about whether TACL could fairly rely on his complaint.

(iii) No attempt to corroborate accounts

[41] Ms Sharma and Ms Lesoa did nothing about Mr Froggatt's suggestion that attempts be made to contact other passengers who had been on the bus at the time of the 17 January incident. Although the journey occurred during the school holidays when there was some variation to the standard timetable, there may have been some prospect that canvassing passengers at the stop at a similar time on the same day of the week would have identified someone who had witnessed the encounter and could corroborate one or other account. Mr Froggatt said he knew of other disciplinary inquiries where this had been attempted.

[42] Such a measure may not have been practical or fruitful but the TACL representatives did not even consider the possibility of acting on the suggestion.

(iv) Earlier complaints considered without an opportunity to explain

[43] If Ms Sharma and Ms Lesoa were also going to take account of four passenger complaints received about Mr McKellow in the last half of 2011 – as they conceded in the Authority investigation meeting that they had – they should have put that squarely to him rather than what Ms Lesoa's notes record as a passing reference to continuing to receive complaints (in the plural). He should then have had the opportunity to provide an explanation about each one. They said they had not done so because they were out of time to do so under the time limits set in the collective agreement for raising complaints with drivers.

[44] Mr McKellow accepted that he remembered – for at least three out of four of those complaints – being asked for an explanation of the events giving rise to them close to the time they had occurred.

[45] TACL records showed those complaints comprised:

(i) A mother travelling with two children reporting Mr McKellow was unhelpful and charged the wrong fare (22 September 2011); and

(ii) A passenger reporting an elderly passenger had fallen off a seat when Mr McKellow braked sharply – which Mr McKellow explained had occurred because he had to avoid a car that cut right in front of his bus (19 November 2011); and

(iii) A passenger reporting Mr McKellow was rude because he "*snatched*" the $20 note she offered for the fare from her hand (8 December 2012); and

(iv) A passenger reporting Mr McKellow was rude because when she had a problem 'tagging off' from the bus with her HOP card (an electronic smartcard ticket), he told her it was not his problem – which Mr McKellow explained as because he had no control over the HOP card machines on the bus (16 December 2011).

[46] At the time of each complaint Mr McKellow was not notified his explanation was not accepted and could be the subject of further disciplinary action.

(v) Positive information not fairly weighed

[47] In the 9 February disciplinary meeting Ms Lesoa expressed an unequivocal view that, although Mr McKellow was given support and training, TACL continued to receive complaints about his performance and behaviour towards passengers and "*nothing has ever changed*". It was a conclusion I consider could not have been fairly reached on the basis of the assessment information available.

[48] Mr McKellow was sent on a four day retraining course in April 2011. That was a measure undertaken as a part of a disciplinary inquiry which concluded with his first written warning. That inquiry included Mr McKellow being assessed by TACL driving instructor and licence assessor Michael Livia on 7 April 2011. Mr Livia's report recommended the retraining and made strong criticisms of Mr McKellow as being "*not very helpful*" and having "*no consideration for customers*". A further assessment on 18 April, after the training course, concluded Mr McKellow had an

improved attitude to communicating with customers and was confident and competent to resume duty.

[49] In a follow-up assessment on 18 November Mr Livia marked Mr McKellow's courtesy and interaction with passengers as "*excellent*". He wrote that Mr McKellow "*showed a different Colin from the old one*" and "*[c]ustomer service was another huge change from Colin, polite and helpful and I have no problem in saying that we should give him a pat on the back for putting in a huge effort and the improvement he made in the last few months*". On 19 November Mr Patau, the duty supervisor, made a file note that he had congratulated Mr McKellow on his good performances as well as informing him of a complaint made that day.

[50] During investigation of the January complaint Ms Lesoa spoke to Mr Livia about the content of training Mr McKellow had received in the previous year but did not ask whether Mr Livia thought more could be done with Mr McKellow. Ms Lesoa said this was because Mr Livia's assessment was that Mr McKellow "*did not have any issues*".

Decision to dismiss not justified

[51] Having concluded, for the reasons given above, that a fair and reasonable employer could not have reached the decisions TACL made about its employment of Mr McKellow on the basis of the inquiry it conducted and the manner in which it was carried out, its decision to dismiss him was unjustified and I have determined the remedies necessary to right that wrong.

Remedies

Reinstatement

[52] TACL submitted reinstatement of Mr McKellow was not practicable and reasonable. It said the 15 passenger complaints about Mr McKellow received in a two year period showed he had a poor attitude and lacked self-awareness. He was also said to have a poor relationship with his superiors demonstrated by the occasion on 19

November 2011 when Mr Patau instructed him to report any further incidents with customers. On that occasion Mr Patau said Mr McKellow had responded in a raised voice that he was "*not fucking doing that*" and at other times had responded to some complaints by saying "*this didn't fucking happen*".

[53] In considering Mr McKellow's application I was mindful of the following longstanding guidance of the Employment Court about the exercise of the discretion to award reinstatement:[5]

> *"The important criterion is that employees are entitled not to be deprived of their employment unjustifiably and when they have been they ought ordinarily to be put back, if that is their wish. That would be a proper exercise of a discretion conferred on the Tribunal for the benefit of employees unless there are features in the case or indications pointing in a contrary direction that outweigh the employee's right to have his or her job back. Factors that produce that result ought to be substantial reasons and not mere assertions by an employer that it does not want to be forced to employ the employee whom, it will be recalled, it should never have dismissed in the first place. Such an assertion, if anything, aggravates the injury and renders reinstatement an even more compelling imperative. That is so notwithstanding the alteration in emphasis on reinstatement in the current statute. While each case must be determined on its own facts, the statistics given above indicate that the Tribunal is not mindful to an adequate degree that it is called upon to be the impartial referee in a playing field dominated by the goal of job protection.*
>
> *That goal is not attained by substituting a money judgment for the job. Unless the employee has done something to merit forfeiting his or her employment, or unless reinstatement is for other good reasons unjust, to award routinely compensation for the job loss instead of reinstating is to create a system for licensing unjustifiable dismissals."*

[54] That guidance was given at a time when the then-applicable legislation – the Employment Contracts Act 1991 – provided reinstatement as a remedy to settle a personal grievance of unjustified dismissal but did not accord that remedy any primacy over money remedies. That is again the statutory position following the amendments to the present Act effective from 1 April 2011.

[55] Having regard to the Court's guidance and the statutory criteria and because

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[5] *Ashton v Shoreline Hotel* [1994] 1 ERNZ 421 at 436.

Mr McKellow seeks reinstatement, he should be awarded that remedy unless it is not practical and not reasonable to do so or the remedy must be denied due to factors considered under the s124 inquiry about contributing behaviour by the employee.

[56] Practicability concerns the prospects for successfully re-establishing the employment relationship.[6] It involves the question of whether Mr McKellow would be a sufficiently harmonious and effective member of TACL's workforce if he were reinstated to his former position as a bus driver.[7] Assessing the reasonableness of reinstatement requires "*a broad inquiry into the equities of the parties' cases*" and into the prospective effects of an order for reinstatement not only on Mr McKellow and TACL but also any relevant third parties such as, in this case, bus passengers.[8]

[57] I find TACL has not met the onus on it to establish that reinstatement of Mr McKellow to his former position as bus driver is not practicable and reasonable. In reaching that view I have not discounted its concerns about Mr McKellow's patchy record. However, by dint of the disciplinary procedures in the collective agreement it negotiated with the union, TACL has accepted that there could be some drivers with less than satisfactory performance who would continue to work for it albeit under various levels of disciplinary sanction, so that cannot be impractical and unreasonable of itself. Mr Patau said in his evidence that Mr McKellow had more complaints made about him than other drivers he supervised but no records were produced to confirm that comparison. As TACL took no further action at the time on the four complaints received between September and December 2011 and did not adequately investigate the 17 January 2012 complaint, I cannot safely rely on those allegations to support its contention about practicability and reasonableness.

[58] Rather I find reinstatement is practicable and reasonable because:

(i) An order for it will be subject to a condition that Mr McKellow is to be reinstated on a final written warning. Through his union representative he accepted in TACL's disciplinary inquiry that he should receive such a warning. Given that any subsequent, fairly

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[6] *NZEI v Board of Trustees of Auckland Normal Intermediate School* [1992] 3 ERNZ 286 (EC)
[7] *Northern Hotel IUOW v Rotorua RSA Inc* (1989) ERNZ Sel Cas 535, 540 (LC).
[8] *Angus v Ports of Auckland Limited* [2011] NZEmpC 160 at [65] and [68].

established complaint of inadequate passenger service or failing to obey a supervisor's instructions could then result in a justified dismissal, he will have a strong interest in maintaining good standards in his work interactions with passengers and supervisors.

(ii) The risk of inconvenience to passengers from poor service by Mr McKellow is balanced by their relatively easy access to TACL's complaints service (by phone or email) and TACL's ability to provide further training and assessment of Mr McKellow (including use of its regular 'mystery shopper' reports).

(iii) Mr Patau appeared to me to be a measured and robust person who, while having felt frustrated at some of his interactions as Mr McKellow's supervisor, would be capable of re-establishing the working relationship.

(iv) Mr McKellow has 25 years experience as a bus driver but limited prospects of re-employment elsewhere in the present economic climate so he has considerable incentive to successfully re-establish the working relationship at TACL.

[59] I have not ignored Mr Patau's evidence about Mr McKellow swearing and being uncooperative in some conversations where complaints were raised with him. However I also consider Mr McKellow had some cause to be disgruntled on occasions when he was asked to comment about a complaint at 5am as he clocked on for his shift and had only a few minutes to check his bus and get on the road or fall behind on the timetable. Complaints should, fairly, be raised at a time when the driver has a reasonable amount of time to explain what happened and discuss it with their supervisor (which Mr McKellow suggested could more easily occur during the meal break at the depot later in the shift).

Lost wages

[60] Mr McKellow sought lost wages from the date of his dismissal on 23 February 2012 until the date of the Authority's determination. TACL opposed this on the grounds he had given "*scant evidence*" of the loss.

[61] He gave oral evidence that he had received no earnings since the dismissal but had sought assistance from Work and Income, done a WINZ job search course, applied to a labour hire firm but got no response, unsuccessfully applied for a bus driving job, applied for other unspecified jobs on the Trade Me and Seek websites and begun a computer course at the Manukau Institute of Technology which he had not continued as he could not afford the petrol for his car to get there. Without supporting documentation I could not be satisfied that his attempts to mitigate his loss were reasonable endeavours for the full period. Instead I assessed the amount that could be awarded for lost wages under s123(1)(b) of the Act as being the amount that he would otherwise have received as ordinary pay for six weeks work for TACL.

Distress compensation

[62] Mr McKellow sought an award of compensation under s123(1)(c)(i) of the Act but gave somewhat restrained evidence in support of it, in a way typical of many older pakeha New Zealanders. He described himself as feeling "*a bit down*" after his dismissal. He also suffered distress from the consequences of losing his income and the difficulty paying his mortgage and rates. He also referred to knowing a lot of people at the bus depot he had worked at for many years and I took him to be suggesting it was humiliating for him to have those social connections severed in the way that occurred.

[63] The humiliation, loss of dignity and injury to his feelings should be compensated for by a modest award of $6000 under s123(1)(c)(i) of the Act.

Contribution

[64] In the event that the dismissal was found unjustified and remedies awarded, TACL sought a "*significant*" reduction for contributing behaviour by Mr McKellow. Submissions on his behalf acknowledged "*a chequered past*" but described it as at the lower end of the scale for performance matters rather than serious misconduct.

[65] I do not accept the evidence established grounds for any reduction for contribution as a result of Mr McKellow's conduct on 17 January 2012. Fault on Mr

McKellow's part cannot be clearly established in light of his evidence about Mr P banging on the bus door and pushing past other passengers and Mr P's description of his own behaviour as "*fairly boisterous*".

[66] He did not cause TACL's failure to fully and fairly investigate the allegations against him. However elements of Mr McKellow's behaviour on other occasions did contribute to the situation giving rise to his grievance. These were:

(i) his conduct had resulted in two unchallenged written warnings; and

(ii) an abrasive attitude in meetings with TACL representatives about the 17 January complaint (including, for example, simply answering the query about the 50 cents change by saying it was legal tender, rather than the more plausible explanation he gave only in the Authority investigation about needing to save change for his float for the next day); and

(iii) not reporting the 17 January incident when he returned to the depot that day (contrary to the instruction Mr Patau had given him on 19 November to report such incidents).

[67] Such behaviour I consider warrants a reduction of remedies awarded for lost wages and distress by one third under s124 of the Act but no reduction to the remedy of reinstatement. Reinstatement is not a remedy amendable to partial reduction.

Orders

[68] In summary, the orders made (after allowing for the reduction for contribution) are for TACL to settle the personal grievance by doing the following:

(i) Reinstate Mr McKellow to his position as a bus driver from the date of this determination (subject to particular conditions set out below); and

(ii) Pay Mr McKellow four weeks ordinary pay in lost wages under s123(1)(b) of the Act; and

(iii) Pay Mr McKellow $4000 as compensation under s123(1)(c)(i) of the Act.

[69] The reinstatement is subject to the following conditions:

(i) Mr McKellow is to be reinstated under a final written warning for having failed on 17 January 2012 to comply with an instruction given to him on 19 November 2011 to report driving and passenger incidents to his supervisor on the day such incidents occur; and

(ii) Mr McKellow is to be reinstated to the pay roll from the date of this determination; and

(iii) TACL may, at its discretion, direct Mr McKellow not to return to driving duties for a period of up to 14 days; and

(iv) During that period of up to 14 days TACL may direct Mr McKellow to undertake such retraining and reorientation activities it deems necessary for him to resume duties as a driver (which may include training and counselling, by either in-house or external providers); and

(v) The parties are to seek mediation assistance should they not be able to resolve any problems re-establishing working relationships.

Costs

[70] Costs are reserved.

[71] The parties are encouraged to agree any matter of costs between themselves. If they are not able to do so and an Authority determination of costs is sought, Mr McKellow's representative may lodge and serve a memorandum as to costs within 28 days of the date of this determination. TACL would then have 14 days from the date of service to lodge any reply memorandum. No application for costs will be considered outside this timetable without prior leave.

[72] If a determination on costs is sought, the Authority is likely to make an award on its usual tariff basis, subject to the parties' submissions about any factors requiring an upward or downward adjustment of the notional daily rate of $3500 in the particular circumstances of the case.[9] Although the investigation meeting extended

[9] *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808.

beyond one day, with the representatives returning for an hour-and-a-half the following day to give oral submissions, the whole I think could be fairly treated on the same basis as a straight forward one day meeting.

Robin Arthur
Member of the Employment Relations Authority