

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 515
5498369

BETWEEN

PETIVA TUILOMA
Applicant

AND

TRANSPORT AUCKLAND
CORPORATION LIMITED
T/A WAKA PACIFIC
Respondent

Member of Authority: Vicki Campbell

Representatives: Gary Pollack for Applicant
David Gould for Respondent

Investigation Meeting: 8 and 16 October 2014

Determination: 16 December 2014

DETERMINATION OF THE AUTHORITY

A. Mr Tuiloma was not unjustifiably dismissed.

B. Costs are reserved.

Employment relationship problem

[1] Mr Petiva Tuiloma claims he was unjustifiably dismissed from his employment as a bus driver working for Transport Auckland Corporation Limited t/a Waka Pacific (Waka Pacific). The respondent denies the claims and says the dismissal was justified.

[2] Mr Tuiloma seeks reinstatement, reimbursement of lost wages and compensation.

[3] As permitted by s174 of the Employment Relations Act 2000 (the Act) this determination has not recorded all evidence and submissions received but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Background

[4] Mr Tuiloma was an experienced bus driver and had 19 years of service. Mr Tuiloma was a member of the NZ Tramways Union (NZTU). As such the terms and conditions of his employment were set out in the collective agreement (“CA”) between NZTU, the First Union Inc. and Transportation Auckland Corporation Limited & Cityline (New Zealand) Limited jointly trading as NZ Bus.

[5] On 5 May 2014 Mr Tuiloma was driving a bus on Kohimarama Road. The following day a member of the public (the complainant) contacted Waka Pacific and advised that Mr Tuiloma had hit the rear of his car when pulling out of a bus stop. The complainant says he waited for the driver at the next stop where he says Mr Tuiloma called the customer crazy and shut the bus doors on him. The complainant says he then moved to the front of the bus and Mr Tuiloma nudged the bus forward multiple times, as if threatening to hit him. The complainant says Mr Tuiloma then drove off.

[6] On or about 8 May 2014 the complainant submitted the following complaint about Mr Tuiloma online. The complaint states (verbatim):

Approx 9.05am Monday 5th driving along Kohimarama Road towards Kepa Road, I passed a bus which subsequently pulled out. My choices were limited to I accelerated past. The bus pulled out further and clipped the back of my car as I had comfortably passed.

I pulled into the next bus bay to view the damage and take details, the bus pulled up behind me, took on a passenger then went to leave. I stood in front of the bus and the bus nudged forward twice. The second with a small impact. I motioned for him to open the door and he did so telling me I'm crazy, it was my fault he clipped me then closed the doors and sped off.

I followed this driver whilst giving a police report. I am now also laying a formal complaint to you. ...

Please note, he clipped my car, he did not stop, when he did he intentionally nudged forward and ever so slightly hit me on foot, then fled the scene.

[7] Mr McLeod, Duty Supervisor, met with the complainant in person on 14 May 2014 and requested him to provide a further written statement. On 16 May 2014 Mr

McLeod made an electronic Central Incident Notification about the incident. That notification states:

Complaint ... has been received regarding an incident involving Operator Peti Tuiloma. The complaint alleges a minor collision occurred as the operator exited a stop approaching Selwyn College. The complainant pulled over in front of the next stop and after inspecting his vehicle he approached the front of his bus. At this stage the bus nudged forward twice towards him and the front of the bus made slight contact with his knee in the second movement of the bus towards him. He has then gone to the front door and comment was passed between the complainant and the operator. The bus has then pulled out of the stop and around his vehicle and passed through a red light on turning.

[8] On 22 May 2014 the complainant wrote to Mr Gavin McLeod the Duty Supervisor and set out his complaint for the third time. The narrative follows the narrative set out in the complaint received on 8 May 2014. In his letter the complainant expands on his previous reports when he includes the fact that the bus clipped the left rear bumper of his car as the bus pulled out. He also states that when standing in front of the bus and when the bus surged toward him the driver was looking straight at him and that the second time it lightly connected with him.

[9] In his letter the complainant does not say which part of his body the bus connected with. The complainant says that when he spoke to the driver through the open door of the bus the driver told him he was crazy and that it was his fault.

[10] On 4 June 2014 Mr Tuiloma was suspended on full pay while an investigation into the complaint was undertaken. That same day Mr Tuiloma drafted a written response to the allegations contained in the letter of complaint in which he says:

- a) at about 9.00am on 5 May 2014 after he pulled out of a bus stop and had moved about 20 meters onto the road proper, a car overtook Mr Tuiloma's bus on the median strip and then suddenly cut across in front of him without indicating and because the lights turned red he had no option but to brake suddenly and stop.
- b) the driver angle-parked his car facing the footpath and got out of his car and walked around it while checking it. Mr Tuiloma says this happened at the lights and not at the bus stop as asserted by the complainant. Mr Tuiloma says the driver moved back to his car and opened the door. Mr Tuiloma says he thought the driver was going to move off, instead he

suddenly walked in front of the bus and hit the front windscreen with both hands.

- c) Mr Tuiloma opened his doors and there was a verbal exchange of words, then Mr Tuiloma drove off because the bus was blocking the road way and the driver was getting angry. Mr Tuiloma was not aware until he received a copy of the complaint that it was alleged that he had hit the car. Mr Tuiloma says no collision occurred.

Disciplinary process

[11] Mr Tuiloma was represented by his Union Organiser Mr Gary Froggatt throughout the disciplinary process. The allegations of serious misconduct included allegations that Mr Tuiloma had used his bus in a threatening or intimidated manner by advancing on the complainant who was standing in front of the bus and had failed to report the incident.

[12] The first investigation meeting took place on 13 June 2014. Mr Tuiloma relied on his written statement dated 4 June 2014 as his explanation of events.

[13] Waka Pacific raised with Mr Tuiloma the discrepancies between what Mr Tuiloma said happened and where the incident took place, compared to the information provided by the complainant. Mr Tuiloma denied he had made contact with either the car or the complainant.

[14] Waka Pacific investigated the incident using information gathered through its GPS technology. The data obtained through the telematics system indicated that the incident as described by the complainant was more likely to have occurred than the description given by Mr Tuiloma. The telematics data was provided to Mr Tuiloma to show why Waka Pacific were concerned with the differences in the detail provided by him as compared with the information provided by the complainant.

[15] During this first meeting Mr Froggatt, on behalf of Mr Tuiloma accepted the incident should have been reported and accepted reporting of incidents is an important process to be followed.

[16] Mr Tuiloma raised by way of explanation that he thought the complainant was angry and explained that he closed the door of the bus to avoid a confrontation. The meeting was adjourned.

[17] The investigation meeting reconvened on 19 June 2014. Mr McLeod was leading the meeting and took the time to draw on the whiteboard his understanding of Mr Tuiloma's explanation as well as the information received from the complainant. Mr Tuiloma was told that the telematics data did not support his version of events but did support the complainant's version. There was some discussion about whether the telematics data was accurate and reliable. Mr McLeod was satisfied the telematics data was accurate and the equipment is calibrated regularly.

[18] After a brief adjournment Mr McLeod returned to the meeting and advised Mr Tuiloma that the complaint raised three concerns for the company:

- a) that Mr Tuiloma had operated his vehicle in such a way as to threaten or intimidate another person;
- b) that Mr Tuiloma had deliberately operated his bus in a forward direction with a pedestrian in his direct path, placing that person at risk;
- c) that Mr Tuiloma failed to report the incident in accordance with company procedures and in breach of the CA.

[19] Mr McLeod advised Mr Tuiloma that he did not accept his version of events, preferring instead the information provided by the complainant and which was corroborated by the telematics data.

[20] Mr McLeod concluded the meeting by advising Mr Tuiloma that in his view the complaint had been validated in all respects, that this amounted to serious misconduct and it was appropriate to move to a formal disciplinary meeting.

[21] After the meeting had concluded Mr Froggatt and Ms Amanda Wood, HR Consultant for NZ Bus¹ agreed that the outcome of the investigation meeting would

¹ Waka Pacific is a subsidiary of NZ Bus. NZ Bus provides HR resources to its subsidiaries.

be confirmed in writing and the formal disciplinary meeting would be held on 26 June 2014.

[22] During their discussion Ms Woods says Mr Froggatt asked for a copy of the notes she had taken during the meeting. Ms Woods agreed to copy them immediately for him and asked whether Mr Froggatt still wanted written confirmation of the formal disciplinary meeting. Mr Froggatt told Ms Woods he did not need written confirmation because the details were recorded on the bottom of her notes.

[23] The formal disciplinary meeting took place on 26 June 2014 as arranged. Early on in the meeting Mr Froggatt expressed his astonishment that the nature of the meeting was disciplinary. This came as a surprise to Ms Wood given that the date was agreed on 19 June 2014 and that Mr McLeod had made it clear at the end of the meeting that they were moving into a disciplinary process. In the interests of ensuring a fair process and to enable Mr Froggatt to prepare for the disciplinary meeting, Mr McLeod agreed to adjourn the disciplinary meeting until 1 July 2014.

[24] Mr McLeod advised Mr Tuiloma and Mr Froggatt that his [Mr McLeod's] preliminary decision would be to terminate Mr Tuiloma's employment but their views on that proposal and any other options would be welcome.

[25] The parties met again on 1 July 2014. Mr Froggatt made submissions on behalf of Mr Tuiloma. Following a brief adjournment the decision to dismiss was confirmed.

Issues

[26] The issues for determination are:

- a) Was the dismissal justified?

- b) In the event that I find the dismissal to be unjustified is reinstatement practicable?

Was the dismissal justified

[27] Mr Tuiloma says the dismissal is unjustified because Waka Pacific failed to follow the timetabled requirements set out in clause 47 of the CA. Other procedural concerns raised by Mr Tuiloma include:

- a) A request to question the complainant was declined;
- b) A request to visit the site of the incident was declined;
- c) There was no opportunity to make submissions on the penalty prior to it being confirmed.

Collective Agreement

[28] Clause 47.4 of the CA sets out the procedure to be followed when external complaints are received and states:

Subject to clause 47.7 a complaint from a person who is not an employee of the Company shall only be acted upon where:

- a) The complaint is in writing and signed or is an e-mail from the person making the complaint or their representative.
- b) The complaint is received by the Company within 5 days of the incident leading to the complaint being made, Saturdays, Sundays, Statutory and other holidays excepted, unless the delay in making the complaint was due to injury to the person making the complaint or their representative. Injury can include e.g. accident, assault, harassment concerns etc.
- c) The complaint and any supporting documentation is submitted to the Business Unit within 24 hours after receipt by the Company. The complaint and any supporting documentation will then be submitted to the employee concerned no later than 48 hours after the Business Unit receives receipt of the, days off and holidays excepted.
- d) Complaints initiated from minors (aged 16 or below) are in writing or an e-mail and shall be made by or counter signed by the parent or guardian.

[29] Clause 47.7 states:

Reports and complaints should ordinarily be processed within the times specified above. If a matter is processed out of time this may still be raised with the employee concerned and may result in formal disciplinary action being taken, including termination of employment, only where the following applies:

- a) The report or complaint discloses serious misconduct which could be a hazard as defined by the Health and Safety in Employment Act 20002; or
- b) The report or complaint discloses serious misconduct, potential dishonesty; or
- c) The report of complaint discloses conduct which is potentially in breach of the Human Rights Act 1993.

[30] The clause 47.4(a) requirement that the complaint be in writing and signed or is an email from the person making the complaint was not technically met. The online form submitted by the complainant was an electronic form. It included all the

information that would be contained in an email including the complainants contact details such as name, address, and email address. Email is an electronic message system. I am satisfied the completion of the online form, whilst not in an email form, complied with the spirit of the CA in that it was submitted online with full details.

[31] The clause 47.4(b) requirement that the complaint be made within five days of the incident leading to the complaint was met. The notification of the incident was received by Waka Pacific on 8 May 2014 which was three days after the incident.

[32] That is the extent to which the timeframes set out in clause 47.4 of the CA were met. Mr McLeod says he received the complaint and documentation on 13 May 2014. This was outside the 24 hour timeframe set down in clause 47.4(c).

[33] Given the above findings, the complaint received on 8 May 2014 could only be acted on if one of the exceptions set out in section 47.7 is established. There are two possible exceptions. Clause 47.7(a) and or (b). That is, that the report or complaint discloses serious misconduct which could be a hazard, serious misconduct or potential dishonesty. There was no allegation that Mr Tuiloma had acted in breach of the Human Rights Act.

[34] Mr McLeod considered the complaint disclosed conduct which, if proven, would amount to serious misconduct. I am satisfied the conduct complained of fell within the exception as stated in clause 47.4(b) and therefore the timeframes did not need to be strictly adhered to.

[35] In accordance with the CA and given that serious misconduct was alleged, Mr Tuiloma was suspended on full pay. No personal grievance has been raised with respect to the suspension.

[36] Even if the suspension had been challenged it is unlikely the Authority would view the suspension as an unjustified action causing disadvantage. Mr Tuiloma was represented at the suspension meeting by a Union delegate and had the opportunity to express his views on the proposal to suspend him.

Request to question the complainant

[37] During the disciplinary meetings and in closing submissions given on Mr Tuiloma's behalf it was argued that Mr Tuiloma had the right to bring any witnesses or evidence to his disciplinary meetings and that this right included the right to interview the complainant.

[38] The Authority accepts that Mr Tuiloma was entitled to know everything said about or against him in accordance with the principles of natural justice. However this principle does not entitle Mr Tuiloma to directly confront or question the complainant during the employer's disciplinary process.

[39] Waka Pacific had the responsibility to conduct a full and fair enquiry into the allegations against Mr Tuiloma. This included Waka Pacific interviewing the complainant and then making all the relevant information available to Mr Tuiloma and providing him with an opportunity to provide an explanation.

[40] In some cases an employee's explanation may require the employer to seek further information from the complainant or other people who may have relevant information and to give the employee a further opportunity to respond to what is then said. This is not such a case.

[41] Waka Pacific had technological data which supported the complainants version of events. Copies of all the data being relied on by Waka Pacific was provided to Mr Tuiloma during the investigation and disciplinary processes. Mr Tuiloma has not established that anything would be gained by having the complainant subjected to questioning by him or Mr Froggatt.

[42] The refusal to allow the complainant to be interviewed by Mr Tuiloma or Mr Froggatt was fair and reasonable in all the circumstances.

Request to visit the site of the incident was declined

[43] During the disciplinary meetings and in closing submissions given on Mr Tuiloma's behalf it was argued that the parties should have made a visit to the site of the incident, particularly in light of the divergent views of what, and where, the incident occurred.

[44] I am satisfied the documents provided to Mr Tuiloma during the investigation meetings and the disciplinary meeting, including the google map pictures of the site of the two bus stops and the roadway in between, negated the need for a site visit. The submissions from Counsel on this point do not identify what, if any benefit, would have been gained from such a visit and what difference a site visit would have made to the outcome of the employer's enquiries.

[45] The refusal to allow a site visit was reasonable in all the circumstances.

No opportunity to make submissions on the penalty prior to it being confirmed

[46] Mr Tuiloma says the decision to dismiss him was predetermined and Waka Pacific did not provide him with the opportunity to make submissions on the penalty prior to it being confirmed.

[47] The contemporaneous notes taken at each of the meetings records Mr Froggatt's submissions to Mr McLeod that in his view the matter had been predetermined. The notes from the meeting on 19 June 2014 records that it was made clear to Mr Tuiloma and Mr Froggatt that the proposal to dismiss was preliminary only and that submissions on the penalty were welcome.

[48] The meeting on 26 June 2014 was adjourned as a result of Mr Froggatt expressing his concern that this was a disciplinary meeting and he was not prepared to give submissions on the preliminary decision. The notes from the meeting held on 26 June 2014 records the words "*preliminary decision termination*". With no evidence to the contrary this indicates that the issue of dismissal was raised at that meeting as a preliminary decision only.

[49] Mr Froggatt then had a full opportunity at the reconvened meeting on 1 July 2014 to provide submissions on the preliminary decision prior to it being confirmed.

[50] I am satisfied that Waka Pacific alerted Mr Tuiloma to its view that it preferred the complainant's version of events which was supported by the telematics data and that a preliminary decision had been made that his employment would be terminated. I am satisfied Mr Tuiloma was then given a full opportunity to make submissions on the findings and proposal.

Other submissions

[51] Other submissions made on behalf of Mr Tuiloma were critical of Waka Pacific for relying on its GPS systems on the basis that the GPS system did not assist in Waka Pacific's investigation into whether Mr Tuiloma touched the complainant with the bus or whether he drove through a red light.

[52] This submission overlooks the fact that Mr Tuiloma was not dismissed for either touching the complainant with his bus or for driving through a red light. The evidence for Waka Pacific is that the incident regarding the red light was not taken any further due to it not being able to be substantiated.

Determination

[53] The Authority is required to apply the test of justification to the decision to dismiss Mr Tuiloma for serious misconduct having regard to all the circumstances at the time of the dismissal.

[54] Mr Tuiloma was subject to a final written warning which was still current at the time of his dismissal. That was a factor taken into account by Mr McLeod when making his decision to dismiss. Mr Tuiloma was reminded of the existence of the final written warning during the disciplinary process.

[55] However, Mr McLeod did not rely on the warning to make his decision to dismiss. Mr McLeod was satisfied the incident on 5 May 2014 constituted serious misconduct. Had Mr McLeod determined the conduct on 5 May 2014 amounted to misconduct, Mr Tuiloma's job was still in jeopardy. The difference being that he would have received notice of his dismissal rather than being dismissed without notice.

[56] Mr McLeod was satisfied Mr Tuiloma's conduct on 5 May 2014 constituted serious misconduct in that he had used his bus to intimidate a member of the public, he had caused risk to a member of the public while that member of the public was standing in front of his bus, and Mr Tuiloma had failed to report the incident.

[57] After reviewing the telematics data Waka Pacific was satisfied the complainant's version of events should be preferred over Mr Tuiloma's version of events. The Authority has had the benefit of reviewing the telematics data in situ

during this investigation process. I am satisfied the information available through the telematics system supports the complainants version of events.

[58] While it was not necessary for Waka Pacific to allow a site visit and I accept that the telematics data combined with the google map pictures of the site which were provided to Mr Tuiloma were sufficient to demonstrate why Waka Pacific did not accept Mr Tuiloma's explanations, it would have been extremely useful to have shown Mr Tuiloma and Mr Froggatt the complete video compilation of the movement of the bus.

[59] The Authority had the benefit of viewing this information and it clearly demonstrated that Mr Tuiloma did not stop suddenly, or indeed at all, at the lights as he asserted and he did make two minor movements with his bus while stopped at the bus stop, as described by the complainant. Taking this step would have been useful to assist Mr Tuiloma with his recall of the events, however, I am satisfied the failure to do so did not result in any unfairness to Mr Tuiloma. Mr Tuiloma had copies of all the telematics data relied on by Waka Pacific and had a full opportunity to respond to it.

[60] I find the decision to dismiss Mr Tuiloma for serious misconduct was within the range of what a fair and reasonable employer could have done in all the circumstances at the time. I am unable to be of further assistance to Mr Tuiloma.

Costs

Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Waka Pacific shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Mr Tuiloma shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Vicki Campbell
Member of the Employment Relations Authority

