

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 45
5641832

BETWEEN MOHAMMAD ASLAM
 Applicant

A N D TRANSPORTATION AUCKLAND
 CORPORATION LIMITED
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Applicant in person
 Scott Worthy, Counsel for Respondent

Investigation Meeting: 13 and 14 February 2017 at Auckland

Submissions Received: 14 February 2017 from Applicant
 14 February 2017 from Respondent

Date of Determination: 22 February 2017

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. Mr Mohammad Aslam was not unjustifiably dismissed by Transportation Auckland Corporation Limited. Accordingly, he has no personal grievance and no remedies are payable.**
- B. Costs are reserved.**

Employment relationship problem

[1] The respondent, Transportation Auckland Corporation Limited (Transportation Auckland) is owned by NZ Bus Limited and operates public bus transportation services throughout Auckland. Buses owned and operated by Transportation Auckland include Metrolink, North Star and GO WEST.

[2] Mr Mohammad Aslam, the applicant, was an experienced bus driver and was employed by Transportation Auckland for approximately six years until his summary dismissal on 11 August 2016 following a complaint by a passenger.

[3] Mr Aslam was a member of the NZ Tramways Union (the Union) and his terms and conditions of employment were set out in the collective agreement (the collective) between the Union, the First Union Inc. and Transportation Auckland & Cityline (New Zealand) Limited jointly trading as NZ Bus.

[4] Mr Aslam had never received any complaints from passengers during his 6 years of employment and until the incident for which he was dismissed, was never the subject of any disciplinary action by Transportation Auckland.

[5] Transportation Auckland says Mr Aslam was suspended while an investigation took place into a passenger complaint. After telling Mr Aslam during a bus trip that he was taking the wrong route, the passenger complained that he had been verbally abused and physically assaulted by Mr Aslam.

[6] Following an investigation, Transportation Auckland concluded the incident had occurred as described by the passenger and that this action and other actions by Mr Aslam during the investigation amounted to serious misconduct.

[7] Transportation Auckland decided Mr Aslam's conduct had caused an irretrievable breakdown in the necessary trust and confidence it must have in Mr Aslam as its employee and that summary dismissal was appropriate in all the circumstances. Mr Aslam was dismissed on 11 August 2016.

[8] Mr Aslam says the dismissal was unjustified. Mr Aslam says he was not at fault in respect of the incident involving the passenger on the bus he was operating. Mr Aslam says if Transportation Auckland had given him the correct route for the trip, the incident with the passenger would never have occurred. Mr Aslam denies verbally abusing or physically assaulting the passenger.

[9] Mr Aslam says the process followed by Transportation Auckland including its investigation into the incident on the bus and its actions in suspending and dismissing him were unjustified.

[10] Mr Aslam says he has been unable to find a job since his dismissal despite applying for numerous positions and he seeks remedies including lost remuneration from the date of his dismissal at the rate of \$100,000 a year until the date he hoped to retire in approximately 10 years. The total claimed amounts to \$1,000,000.

The investigation meeting

[11] Mr Aslam filed a witness statement and a reply witness statement prior to the investigation meeting. Mr Gavin McLeod, Regional Operations Supervisor at Transportation Auckland, and Ms Amanda Wood, who was formerly employed by Transportation Auckland in the role of Regional HR Manager, Central each filed witness statements prior to the investigation meeting. Mr Scott Borren who attended the disciplinary meetings and took notes, answered questions at the investigation meeting. Each witness confirmed by way of affirmation or on oath that their evidence was true and correct.

[12] As allowed under s.174 of the Employment Relations Act 2000 (the Act), this determination does not set out all of the evidence. Rather, relevant facts and legal issues are set out, along with the Authority's conclusions.

Grounds for dismissal

[13] In a letter dated 18 August 2016 from Mr McLeod, the grounds for Mr Aslam's dismissal on 11 August are confirmed to be as follows:

- Mr Aslam's actions on the bus at the time of the complaint;
- Mr Aslam's conduct during the investigation process which Transportation Auckland believed was deliberately dishonest and that he had withheld information;
- Mr Aslam's actions resulting in a loss of trust and confidence in his ability to deal with passengers appropriately in the course of his employment.

Was Mr Aslam's dismissal justified?

The bus incident – 4 July 2016

[14] Mr Aslam worked from Transportation Auckland's Onehunga bus depot. On 4 July 2016, Mr Aslam was the bus driver operating trip 392 at approximately 5.45pm. Just before Newmarket the route for trip 392 should have made a left turn into Market Road. However, Mr Aslam was unaware the route had changed and did not turn.

[15] A passenger on the bus (the complainant) told Mr Aslam he was not driving the correct route. The complainant said Mr Aslam's response was to verbally abuse him and to manhandle him off the bus.

The complaint

[16] At 7.20pm on the same day, the complainant made a verbal complaint to Auckland Transport's call centre about the incident with Mr Aslam.

[17] A verbatim transcript of the relevant section of the complainant's phone call is as follows:

.... **Customer** So basically I got on the 392 bus.

CSR Right.

Customer Um, I got the pick up ... road at ... stop.

CSR Mmhmmm.

Customer Um, bus driver pick up – that was fine. I felt that the bus driver almost forgot to stop because he stopped like – a couple of minutes after the bus stop. Anyway, I got on in time um and the bus is on a redirection at the moment so it goes up Great South Road.

CSR Right.

Customer And its meant to turn left um into Manukau Road.

CSR Right.

Customer It didn't. It just kept going up Great South Road and then turned out into Newmarket ...

CSR Ahhh okay.

Customer ... um which is the wrong way, it means I have a 20-20 minute walk home.

CSR Oh I see.

Customer Um. So, um, so I said to him “oh yeah, uh hey I think you’re going the wrong way. I think you were meant to turn left – back there”.

CSR Yeah

Customer So his instant response to that was to tell me to “*****” um.

CSR Oh dear.

Customer And then when I said “Well you know I-I know bus drivers ...” Because the bus driver this morning um actually didn’t know which way to go and I had to direct him.

CSR Oh yeah.

Customer Ah, so ok look that – that can sometimes happen when someone calls in sick and you’ve gotta get another bus driver in ...

CSR Sure.

Customer ... so I can understand that and at least he’s being honest and saying “You know, like if you take this route every day help me out a bit”.

CSR Yes, sure.

Customer I don’t mind that. But anyway, so I said he’s going the wrong way. He told me to “*****”. Then he said, um, then ***** . Told me he’d “*****” um and then um yeah so took ***** .. gave me *****and said “*****”.

CSR Oh okay.

Customer Um which is – which is obviously not you guys.

CSR No.

Customer Um, then yeah, like I said “*****”of all of this, by the way and then he, um, he *****.

CSR Wow.

Customer Um.

CSR My gosh. ...

[18] The complaint was logged and sent to Transportation Auckland. The logged complaint was as follows:

[the complainant] wants to report a verbal and physical assault by a bus driver. [The complainant] stated that he was on the 5.57pm, 392

bus that travelled from Rockfield Road to Newmarket. The bus was meant to turn left into Manukau Road but instead of doing this the driver went into Newmarket. [The complainant] said to the driver “hey I think you’re going the wrong way”. The driver said to [the complainant] “f**k off and sit back down on your seat”. [The complainant] said that the driver then took a picture of him and then further stated he would find out where he works and go to his job and f**k him over”. The driver then roughly pulled the bus over to the side as [the complainant] asked to get off the bus and the driver grabbed [the complainant’s] arms as he was walking off the bus and proceeded to shove [the complainant] off the bus. The driver gave [the complainant] a card but it didn’t seem like it was a legit business card and said that’s all his details. ...

Transportation Auckland’s receipt of the complaint

[19] Mr Aslam’s supervisor, Mr Sikuki Noa received the complaint and went to see Mr Gavin McLeod, Transportation Auckland’s Regional Operations Supervisor about it on 7 July 2016.

[20] Mr McLeod says Mr Noa was concerned at the content of the complaint. Mr McLeod asked Mr Noa to provide Mr Aslam with a copy of the complaint and to seek his response to it.

[21] On 8 July 2016, Mr McLeod rang and spoke to the complainant about the complaint. After speaking to him, Mr McLeod asked the complainant to email the complaint to him which he did on 9 July 2016.

[22] The contents of the email were consistent with the complainant’s initial complaint. The complainant included some further details including offering to show Mr Aslam the correct route on his Track my Bus app. The complainant attached the business card he was given by Mr Aslam when he requested his details. The complainant also attached a video recording of the incident he had taken on his phone.

[23] Mr Noa spoke to Mr Aslam about the incident on 12 July 2016 and on the morning of 13 July 2016, Mr Aslam emailed his account of the bus incident to Mr Noa. Mr Noa sent the email to Mr McLeod.

[24] Mr McLeod decided a meeting with Mr Aslam was necessary and when Mr Aslam arrived at work that day he was asked to attend a meeting at 3pm to discuss the complaint by the complainant and his response to it.

Meeting with Mr Aslam to discuss complaint - 13 July 2016

[25] Mr McLeod asked Ms Amanda Wood, Transportation Auckland's Regional HR Manager at the time to assist him to deal with the complaint.

[26] Mr McLeod and Ms Wood met with Mr Gary Froggat, the Union's President, spoke with him about the complaint and showed him the video from the complainant of the bus incident. Mr Froggat met with Mr Aslam and attended the meeting with him.

[27] Ms Wood, Mr Scott Borren, Transportation Auckland's HR Advisor and Mr McLeod attended the meeting. Ms Wood and Mr Borren took notes.

[28] Mr McLeod asked Mr Aslam about the incident on 4 July 2016 and Mr Aslam said he had had a "bad" argument with a passenger about the route and the passenger had got off the bus. Mr McLeod questioned Mr Aslam about his actions on the bus. Mr Aslam denied touching the passenger or using rude language.

[29] Mr McLeod then showed Mr Aslam and Mr Froggat the video taken by the complainant. In Mr McLeod's view the video seemed to show Mr Aslam "manhandling" the complainant. The video was screened three times. Mr Froggat claimed Mr Aslam was defending himself.

[30] Having seen the video, Mr McLeod was concerned about Mr Aslam returning to work. Following further discussion, Mr McLeod informed Mr Aslam and Mr Froggat that he had very serious concerns regarding the issue and felt it would be appropriate to suspend Mr Aslam on full pay while a full investigation was conducted.

Commencement of investigation

[31] Mr Aslam was provided with a letter confirming his suspension on pay while Transportation Auckland conducted an investigation into the allegation that "on 4 July 2016 you threatened a passenger and forcibly removed him from your bus."

[32] Mr Aslam was requested to provide a written response to the allegation by 15 July 2016, was informed the allegations could amount to serious misconduct and that an outcome may include termination of employment. Mr Aslam was encouraged to seek advice from his union or support people.

[33] Mr Aslam was given another letter on 13 July 2016 along with a copy of the written complaint. Mr Aslam was also informed of a further allegation that he may have been “intentionally dishonest” at the meeting in which he was suspended. Mr Aslam was asked to attend a formal investigation meeting on 19 July 2016 and was encouraged to seek advice and to bring a support person.

Investigation Meeting – 19 July 2016

[34] Mr McLeod led the meeting. Mr Borren took notes. Mr Aslam attended along with Mr Froggat. Mr McLeod asked Mr Aslam for his “version of events”. Mr Aslam said that the complainant had touched him and that he had told him to go back to his seat. Mr Aslam maintained that Transportation Auckland was at fault, and that was why he took the wrong route.

[35] Mr Aslam explained that the complainant became angry, the complainant took a photo of him and Mr Aslam told the complainant to get off the bus. Mr Aslam accepted he also got angry but said he had not touched the complainant and did not go in to the aisle of the bus.

[36] Mr Aslam was also asked about the business card that the complainant said he had obtained from him after the incident. The business card was headed “Face of New Zealand”. Mr Aslam accepted the card was his but maintained throughout the meeting, Transportation Auckland’s investigation and the Authority’s investigation that he did not give the card to the complainant. Mr Aslam said at the investigation on 19 July 2016 that “All of Auckland has these cards. Its huge all over New Zealand...” When asked by Mr McLeod that it seemed strange that the complainant had “produced a card saying you gave it to him and he identifies you also”, Mr Aslam said “Everybody has my card & knows me.” Mr Aslam gave a similar explanation to the Authority.

Investigation Report

[37] Following the meeting, Mr McLeod wrote a detailed investigation report. Mr McLeod accepted that at the time of the incident on 4 July 2016, Mr Aslam genuinely believed he was driving the correct route for trip 392. However, Mr McLeod concluded that it was most likely that Mr Aslam “had threatened the complainant in some form and he has physically removed him from the bus which would amount to a form of assault”.

[38] Mr McLeod decided that there were sufficient grounds to move to a disciplinary meeting for serious misconduct. On 22 July 2016, Mr McLeod wrote to Mr Aslam informing him that he had concluded his actions constituted serious misconduct. At the Authority's investigation meeting, Mr McLeod said there had been a typing error, he had not decided there had been serious misconduct at that time, he had decided there **may** have been serious misconduct.

[39] Mr Aslam was invited to attend a meeting on 29 July 2016 to discuss the matter further. On 28 July 2016, the investigation report dated 19 July 2016 was sent to Mr Aslam.

Disciplinary meeting - 29 July 2016

[40] Mr Aslam attended. Mr Borren and Ms Wood attended and took notes. Mr McLeod ran the meeting. Mr Aslam did not have a support person and confirmed he was happy to proceed without one.

[41] At the Authority's investigation meeting, Mr Aslam repeatedly denied receiving the investigation report of 19 July 2016 until after the meeting on 29 July 2016. Mr Aslam said a copy of the report was stuffed under his door at his home after the meeting.

[42] Both Mr Borren's and Ms Wood's respective notes record that Mr Aslam was asked at the meeting on 29 July 2016, whether he had received the report and he had answered "yes". Both confirmed that Mr Aslam had said he had received the report when asked at the meeting and that is what they recorded.

[43] Mr Aslam said their notes were wrong and that he had said "no" at the meeting.

[44] Ms Wood said if Mr Aslam had not received the report or had not had the time to review the report before the meeting it would not have proceeded, and that is why he was asked if he had received the report before the meeting started.

[45] Mr McLeod said the report had been emailed to Mr Aslam on 28 July 2016. Mr Aslam denied this.

[46] The Authority's investigation meeting was adjourned to enable the relevant email to be provided. The email was produced and showed that it was sent to Mr

Aslam's email address at 11.39am on 28 July 2016. Mr Aslam confirmed the email address was his and that he had been sending and receiving emails from that address at that time. When asked why he had not received the email on 28 July 2016, Mr Aslam responded that he received hundreds of emails a day, he also said he had not received the attachment.

[47] I prefer the evidence of the witnesses for Transportation Auckland. This was one example of many in which Mr Aslam's evidence to the Authority was inconsistent and unreliable.

[48] I find that Mr Aslam did have a copy of the investigation report of 19 July 2016 at the meeting on 29 July 2016 and that he had received it before the meeting.

[49] At the meeting, Mr McLeod went through the investigation report and his findings. Mr Aslam denied moving toward the complainant during the incident and denied going into the aisle. Mr Aslam also denied that there had been any aggression between him and the complainant. Mr McLeod referred again to the video footage which in his view showed Mr Aslam moving and suggested he had touched the complainant.

[50] Following a break, the video was shown again and Mr Aslam accepted moving down the aisle towards the complainant.

[51] Mr McLeod concluded that Mr Aslam's conduct amounted to serious misconduct. In reaching this decision, Mr McLeod took into account the consistency of the complainant's initial complaint which he subsequently confirmed verbally and in writing. Mr McLeod also decided the video footage was congruent with the complainant's complaint. On the balance of probabilities, Mr McLeod preferred the complainant's version of events over Mr Aslam's.

[52] Mr McLeod was also of the view that Mr Aslam changed his story throughout the investigation and withheld information. These actions related to his conduct on the bus in moving towards the complainant, possibly touching him, even though he had previously denied doing so and taking a photo of the complainant. These factors were taken into account in reaching the decision that Mr Aslam's actions amounted to serious misconduct.

[53] Mr McLeod considered there were two options available to him. The first option was a final written warning, the second being termination of Mr Aslam's employment. The meeting was adjourned and Mr Aslam was told a further meeting would be held after Mr McLeod had considered everything that Mr Aslam had told him.

Letter of 5 August 2016

[54] In a letter of 5 August 2016 to Mr Aslam, Mr McLeod set out the details of the investigation, the disciplinary investigation and his findings. Mr McLeod confirmed his finding that Mr Aslam's actions constituted serious misconduct and his preliminary view that Mr Aslam's employment should be terminated summarily. Before a final decision was to be made Mr McLeod invited Mr Aslam to a further meeting on 11 August 2016. This was to discuss appropriate disciplinary action.

Dismissal meeting – 11 August 2016

[55] Following further discussions, Mr McLeod confirmed his preliminary view to dismiss Mr Aslam.

Dismissal letter

[56] In a letter to Ms Aslam on 18 August 2016, Mr McLeod confirmed his decision that termination of Mr Aslam's employment was appropriate.

The issues

[57] The issues for the Authority to determine are as follows:

- (a) Was Mr Aslam's dismissal justified?
- (b) If the dismissal was not justified, what remedies should be payable to Mr Aslam?
- (c) If remedies are payable to Mr Aslam, did he contribute to the dismissal, and if so, should the remedy be reduced by the Authority pursuant to s.124 of the Act?

Was Mr Aslam's dismissal justified?

[58] When considering the question of whether Mr Aslam's dismissal was justified, the Authority must apply the test for justification under s.103A of the Act. Under the test, the question of whether Mr Aslam's dismissal was justifiable must be determined, on an objective basis, by considering whether Transportation Auckland's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[59] In applying s.103A of the Act, the Authority must also consider four particular factors set out at s.103A(3), as well as any others it thinks appropriate.

[60] The factors in s.103A(3) relate to the investigation undertaken by an employer into allegations against an employee and the procedure undertaken in that process.

[61] The test in s.103A is to be applied with the proviso that a dismissal must not be determined to be unjustifiable solely because of process defects if they were minor and did not result in the employee being treated unfairly.

[62] Mr McLeod was satisfied that Mr Aslam's actions on the bus on 4 July 2016 and during the investigation amounted to serious misconduct. Mr McLeod preferred the complainant's description of the bus incident.

[63] I have viewed the video. It shows Mr Aslam stopping the bus abruptly, putting the handbrake on, getting up, saying "out" at the same time as gesturing to get out. Mr Aslam is then shown moving into the aisle of the bus. The complainant is heard saying "ok, ok I will get out" and then saying in a tense voice "Get your hands off of me, get your hands off of me". I am satisfied the video footage supports the complainant's version of events.

[64] I find the decision to dismiss Mr Aslam for serious misconduct was within the range of what a fair and reasonable employer could have done in all the circumstances at the time.

Transportation Auckland's process of investigation

[65] Mr Aslam complained about the process of the investigation meeting.

[66] Throughout the investigation process and the disciplinary process, Transportation Auckland's concerns were clearly put to Mr Aslam for comment. In its letter of 13 July 2016, Mr Aslam was informed by Transportation Auckland of concerns about the incident with the complainant and its concerns that he was "intentionally dishonest" in some of his responses.

[67] Again, at the meetings on 19 and 29 July 2016, Transportation Auckland confirmed its concerns about the incident with the complainant and whether he had been manhandled and also about the business card. Mr Aslam was informed clearly that on the weight of the evidence, Mr McLeod believed the complainant's version of events and was concerned at Mr Aslam not being "up front".

[68] Mr Aslam met with Transportation Auckland on four separate occasions between 13 July to 11 August 2016 and had plenty of opportunity to respond to the allegations.

[69] It is my view that the process followed by Transportation Auckland complied with s.103A(3) of the Act and was a process which a fair and reasonable employer could have followed.

Collective agreement

[70] Clause 47.4 of the collective sets out the procedure to be followed by Transportation Auckland when external complaints are received. That clause is specifically subject to clause 47.7 which states that a matter may be processed out of the timeframes provided for in clause 47.4 if "*the report or complaint discloses serious misconduct, potential dishonesty ...*".

[71] Clause 47.4 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 email from the person making the complaint or their representative.
- b) The complaint is received by the Company within five 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 eg 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 email and shall be made by or countersigned by the parent or guardian.

[72] Clause 47.7 states:

Timeframes

Reports and complaints should ordinarily be processed within the time 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 2002; or
- b) The report or complaint discloses serious misconduct, potential dishonesty; or
- c) The report or complaint discloses conduct which is potentially in breach of the Human Rights Act 1993.

In all other circumstances no formal action will be considered if a report or complaint is processed out of time.

[73] An initial verbal complaint was made on 4 July 2016 and the complaint in email form was made on 9 July 2016 which was five days after the incident. This was submitted within 48 hours to Mr Aslam, not counting holidays or days off.

[74] I am satisfied that the provisions of clause 47.4 were complied with by Transportation Auckland. However, if there was a minor breach in the timeline contained in clause 47, it is my view that because the matter concerned potentially serious misconduct, Transportation Auckland was able to proceed under clause 47.7(b).

[75] In any event, any minor defect did not, in my view, result in Mr Aslam being treated unfairly.

[76] The Employment Court in *Chief Executive of UNITEC Institute of Technology v. Henderson*¹ stated:

Fairness and reasonableness must be assessed broadly and not by the application of inflexible principles of minute and pedantic scrutiny. Put another way, even if in some instances over a long process, the employer might be found to have failed to meet all ideal standards of a fair and reasonable employer. This will not necessarily mean that the resultant dismissal it may itself have been justified, will thereby be declared to have been unjustified and remedies should be awarded accordingly.

[77] Mr Aslam was aware of the incident and was aware of it before the suspension meeting on 13 July 2016 as he had spoken to Mr Noa, his duty manager about it. Mr Aslam was also represented at the meeting on 13 July 2016 and at the meeting on 19 July 2016.

[78] At all steps of the disciplinary investigation, Mr Aslam was notified in advance of meetings and was provided with relevant material.

[79] I am satisfied that the process undertaken by Transportation Auckland in investigating the matter and reaching its decision to dismiss Mr Aslam for serious misconduct was that of a fair and reasonable employer.

Costs

[80] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Transportation Auckland has 14 days from the date of this determination in which to file and serve a memorandum on the matter. Mr Aslam 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.

Anna Fitzgibbon
Member of the Employment Relations Authority

¹ AC12/07, 19 March 2007