

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2021] NZERA 330
3107536

BETWEEN	JIM HARPHAM Applicant
AND	NEW ZEALAND BUS TAURANGA LIMITED Respondent

Member of Authority:	Marija Urlich
Representatives:	Oliver Christeller, for the Applicant Andrew Caisley and Melissa Hu-Davidson, for the Respondent
Investigation Meeting:	30 March 2021
Submissions and further information received:	19 April 2021 and 30 April 2021, from the Applicant 23 April 2021, from the Respondent
Determination:	29 July 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Harpham was employed as a bus driver by New Zealand Bus Tauranga Limited (NZ Bus) from October 2018 until 27 May 2019.

[2] NZ Bus operates passenger transport services including public buses in and around Tauranga where Mr Harpham worked. Under the terms of NZ Bus' provider contract it must operate closed circuit television (CCTV) during bus operating times. On 5 July 2019 Mr Harpham covered three CCTV cameras on a bus during a stop on the route he was driving. After some time he uncovered two of the three cameras. On 16 July NZ Bus wrote to Mr Harpham commencing a disciplinary investigation into

conduct which could amount to serious misconduct because “It appears that you intentionally interfered with, or disabled internal CCTV cameras on bus 4262”. Mr Harpham was suspended and, following a disciplinary investigation, he was dismissed on 26 August.

[3] Mr Harpham says his dismissal was unjustified. He seeks reinstatement to his position with NZ Bus, reimbursement of lost wages, compensation for humiliation, loss of dignity and injury to feelings and costs.

[4] NZ Bus says the disciplinary investigation was fair and reasonable and the decision to dismiss was one a fair and reasonable employer could take in the circumstances. In the alternative, it says if the dismissal is found to be unjustified Mr Harpham’s actions have contributed significantly to the circumstances of his grievance and disentitle him to any remedies.

The Authority’s investigation

[5] During the investigation meeting I heard evidence from Mr Harpham, his wife Ruby Harpham, Graham McKean, Mr Harpham’s union representative in the investigation and Gavin McLeod, who at the relevant time was employed by NZ Bus as regional operations supervisor and who undertook the disciplinary investigation and was the decision-maker.

[6] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Issues

[7] The issues identified for investigation and determination are:

- a) Was Mr Harpham unjustifiably dismissed?
- b) If so, is Mr Harpham entitled to a consideration of remedies sought including:
 - i. Reinstatement;

- ii. Lost wages pursuant to section 123(1)(b) of the Act?
 - iii. Compensation pursuant to section 123(1)(c)(i) of the Act?
- c) Should any remedy awarded be reduced (under section 124 of the Act) for blameworthy conduct by Mr Harpham which contributed to the circumstances which gave rise to his grievance?
- d) Is either party entitled to an award of costs?

The test for justification

[8] When the Authority considers justification for the actions of NZ Bus and the dismissal it does so by applying the test of justification in s 103A of the Employment Relations Act 2000 (the Act). In determining justification of actions or a dismissal the Authority does not consider what it may have done in the circumstances. It is required to consider on an objective basis whether the actions of NZ Bus and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.

[9] As part of this process the Authority must consider the four procedural fairness factors set out in s 103A(3) of the Act. These are whether the allegations against Mr Harpham were sufficiently investigated, concerns were then raised with him, he had a reasonable opportunity to respond to them and his explanations were considered genuinely by NZ Bus before dismissal. The Authority may take into account other factors as appropriate and must not determine an action or a dismissal to be unjustified solely because of defects in the process if they were minor and did not result in Mr Harpham being treated unfairly.

[10] NZ Bus could also be expected as a fair and reasonable employer to comply with the good faith obligations set out in s 4 of the Act.

The parties' employment agreement and relevant policy and guidelines

[11] The parties' employment agreement is the New Zealand Bus Tauranga Limited and First Union Incorporated Collective Agreement 10 December 2018 – 9 December 2019 (the CEA) which includes:

14. Health and Safety

- 14.1 The Company is committed to maintaining a health and safety environment for all employees and customers. The employee agrees to take responsibility for ensuring their own health and safety and the health and safety of others in the workplace including complying with all health and safety requirements, policies, procedures, training, guidelines and recommendations which may be in force from time to time.

[12] Schedule D to the CEA sets out disciplinary procedures including a non-exhaustive list of what conduct may amount to serious misconduct, guidelines for investigation processes, disciplinary meetings and disciplinary action including dismissal.

[13] Policies have been provided which include use of toilet facilities for drivers whilst on route and how CCTV footage may be used. The CCTV footage guidelines do not appear to form part of the employment agreement. They were within the knowledge of NZ Bus when the disciplinary investigation and decision were undertaken but not Mr Harpham and his Union.

[14] In addition to the above material the Authority has been provided with the relevant extract of NZ Bus' provider contract which, includes the requirement that a minimum of three CCTV cameras are required in each bus, what images are required to be captured including inside the bus at the entrance and where passengers tag-on/tag-off, how the images can be used and how long they are retained. A diagram of the camera locations on the bus Mr Harpham was driving on the relevant day has also been provided. It shows there are three interior facing cameras, facing respectively, the driver area and passenger entrance, the back door and along the bus from the back. Still images of and from the camera locations have been provided as have still images of the incident at issue. The still images are time and date stamped.

[15] Also provided is a route map relevant to the day at issue and locations of toilet options on that route.

Background

16 July 2019- allegation raised

[16] On 16 July 2019 Mr McLeod wrote to Mr Harpham inviting him to a meeting to discuss a proposal to suspend him from work on full pay pending an investigation into events on 5 July. The disciplinary allegation is described as “It appears that you intentionally interfered with, or disabled internal CCTV cameras on bus 4262”. The focus of the allegation, at this stage, is Mr Harpham’s covering of the CCTV cameras. The letter went on to describe the allegation as serious and that it could amount to serious misconduct if proven. The purpose and process of the meeting was outlined, Mr Harpham was invited to bring a representative and in recognition of the stressful nature of the situation contact details of employer provided counselling support were provided.

[17] The stills from the relevant CCTV footage do not appear to have been attached to the letter despite the letter stating this was the case. This omission appears to have been overlooked by both parties for some time and the stills and footage are not discussed between the parties until later in the investigation.

17 July - suspension

[18] The suspension meeting occurred the following day. Mr Harpham attended with his union representative Mr McKean. NZ Bus was represented by Mr McLeod and Gavin Stilwell, a senior operations supervisor. The minutes of the meeting have been provided to the Authority. They show the meeting lasted ten minutes and started with Mr McLeod describing the letter provided the day before and the proposal to suspend because the alleged conduct qualified as a health and safety risk. Mr McKean provided an explanation for the alleged conduct – that Mr Harpham had parked the bus because he needed to urinate urgently, referred to Mr Harpham’s apposite health issues and that he intended to cover the cameras for privacy reasons to urinate into a bottle which other drivers are understood to do. Mr McLeod is minuted as saying because the cameras were covered for some time it needed to be investigated further and suspension was warranted. The suspension decision was challenged to which Mr McLeod replied he was not satisfied there was no risk to passengers or company property.

[19] Mr McKean’s notes taken during the meeting have been provided to the Authority. They record Mr McLeod saying the incident needed to be investigated further to make sure “there is not a sinister situation going on.” In evidence to the Authority Mr McLeod could not recall if he used this phrase during the suspension

meeting and thought it was unlikely. On balance I find it is likely he did use that phrase because it is recorded in contemporaneous notes and he raises his suspicion as to Mr Harpham's motivation for covering the cameras later in the investigation.

[20] During the course of the suspension meeting the allegation focus appears to shift to the length of time the cameras were covered and the reason they were covered for this time. The timings involved were not put to Mr Harpham despite, it is understood, this information being within Mr McLeod's knowledge having reviewed the CCTV footage and reviewed the time and date stamped stills.

[21] On 18 July Mr McLeod wrote to Mr Harpham confirming the decision to suspend him on full pay while the allegation, described as it was in the 16 July letter, was investigated. The letter goes on to record the parties' discussion about suspension and the reason why the decision was made which is recorded as:

It is our view suspension is warranted and will provide us with the opportunity to:

- Investigate the situation further in light of any new information that may come to hand
- Allow us to make a determination about your suitability to continue to remain employed by NZ Bus
- Limit any further risk to all parties involved.

[22] The letter instructed Mr Harpham not to attend the workplace during his suspension unless requested to by the investigators, outlined the investigation process, that allegations of serious misconduct could result in disciplinary action including dismissal, that the suspension would remain in place until advised further and referred to the available counselling service.

7 August - formal investigation meeting

[23] The next step in the investigation was NZ Bus sent a letter to Mr Harpham dated 2 August inviting him to "a formal investigation meeting" on 7 August. The letter purports to set out Mr Harpham's initial explanation given at the 17 July meeting including that he had "removed the covers soon after" they had been required as justification for the continued investigation because the information gathered showed this did not appear to be the case – three cameras were covered for 18 minutes and one still covered when he returned to the bus depot. The reported portion of the explanation

is not recorded in the minutes. The letter then sets out the requirement for CCTV cameras to operate in buses for safety and security reasons and that “If considered an intentional act it could constitute a breach of Clause 14.1 of your CEA.”

[24] The letter continues that depending on Mr Harpham’s responses in the formal investigation meeting a formal disciplinary meeting may follow. The letter continues:

Our concerns are potentially serious misconduct and the purpose of the meeting is to investigate the matter further. The Company views this matter very seriously and may decide to take disciplinary action which could result in an outcome up to and including termination of your employment. You will have an opportunity to respond in our meeting to the allegations and to any potential action or outcome that may be proposed.

[25] Mr Harpham is invited to bring a representative to the meeting and the counselling offer is repeated.

[26] It is understood the letter sets out the basis for NZ Bus continuing with the suspension and moving from an initial inquiry stage to a formal investigation. The allegation focus appears at this point to be the length of time the CCTV cameras were covered and whether this was intentional based on the apparent inconsistency in Mr Harpham’s original explanation.

[27] As stated above the suspension meeting minutes do not record Mr Harpham saying he removed the covers soon after they were required. It is unclear on the face of the documents before the Authority what NZ Bus has based this on. The letter does not disclose what information NZ Bus has to say the covers were not removed after they were required or when it received that information. Presumably this information has been taken from the CCTV footage and/or the stills which, at this stage, had not been provided to Mr Harpham.

[28] The minutes of the 7 August meeting have been provided. Mr Harpham attended along with Mr McKean, as his representative, Mr McLeod and Mr Stilwell. The meeting is recorded as lasting 20 minutes. Mr McLeod explained the matters for investigation arose because a passenger alighting from the bus had been injured and when the footage was viewed for that purpose Mr Harpham’s covering and uncovering of the cameras was captured on that footage. Still photographs from the bus CCTV footage were then produced which show Mr Harpham covering three cameras and

uncovering two cameras. Mr McLeod is minuted as saying the reason for the investigation is Mr Harpham's intentional covering of the in bus cameras and that the explanation given at the suspension meeting was he had been "caught short at The Boulevard and to offer some privacy whilst he peed into a container." The minutes then record Mr McKean reinstates the explanation and Mr McLean is recorded as saying "No issues with Jim relieving himself in bus."

[29] The focus of the meeting, as recorded in the minutes, shifts to Mr Harpham's failure to remove the coverings from the CCTV cameras. The minutes record Mr McKean says bus drivers covering cameras to relieve themselves is a practise amongst drivers, that Mr Harpham forgot to remove the covers when he was finished and had not received any training about CCTV cameras on buses. Mr McLeod is recorded as saying the cameras would have been discussed at training, that he accepts no specific training had been provided but Mr Harpham had made the decision to cover them.

[30] The minutes then record Mr Harpham offers an apology – "I just forgot to take the covers off. I made a mistake and apologise for it." To which Mr McLeod is recorded as saying "Raises concerns whether trying to hide something." Mr McKean then says "This was not intentional. Jim is highly apologetic." The minutes also record Mr McLeod saying he would not weigh a final written warning in his deliberations on the allegation of serious misconduct. Mr McLeod then advises he will conclude the meeting and complete the investigation. Mr McKean comments that termination would result in significant hardship for Mr Harpham and his family. Mr Harpham says he is very safety conscious and that this was a simple mistake. The meeting ends with Mr McLeod confirming the suspension remained in place.

9 August – investigation report

[31] Mr McLeod sent Mr McKean and Mr Harpham his written investigation report on 9 August. The letter summarises the meetings to date and sets out his conclusions that:

- though feasible it was unlikely Mr Harpham would "simply forget" to remove the covers from the cameras after they were required because he was prepared and methodical in covering the cameras having brought the means

of cover with him and it is unlikely Mr Harpham would forget to remove the covers from two of the three cameras;

- the action in covering the cameras was deliberate and unlikely to be an isolated incident because Mr Harpham was methodical in covering the cameras and had the means to cover them with him;
- covering cameras is concerning because it is conduct which demonstrates a willingness to deliberately compromise health and safety and security equipment on the bus for himself and passengers; and
- Mr McLeod held a concern Mr Harpham may have covered the cameras “to conceal undesirable/unacceptable behaviour or conduct, or remove the opportunity to review behaviours or conduct”.

[32] Significant elements of the conclusions reached were not put to Mr Harpham to comment on prior to, what are accepted to be, preliminary conclusions being reached. The elements are:

- he was prepared and methodical in his covering of the cameras;
- unlikely to be an isolated event;
- demonstrated a willingness to compromise health and safety and security equipment; and
- concealing undesirable/unacceptable behaviour.

[33] The report concludes Mr McLeod had grounds to move to a disciplinary meeting:

...for Serious Misconduct for intentionally compromising his Health and Safety, and Security and that of his passengers by covering the CCTV cameras. Operator Harpham’s actions also bring into question whether the act was to conceal undesirable behaviour/unacceptable behaviour or conduct, or remove the opportunity to review behaviours or conduct using the CCTV footage from his bus, which would also constitute Serious Misconduct.

[34] From this conclusion it is fair to say Mr Harpham was facing allegations of serious misconduct based on conclusions that:

- in covering the CCTV cameras Mr Harpham intentionally compromised the health and safety and security of himself and passengers; and

- he may have covered the CCTV cameras to conceal undesirable or unacceptable behaviour or conduct, or to remove the possibility of review of such behaviour or conduct by way of CCTV footage.

[35] On 12 August Mr McKean emailed Mr McLeod acknowledging receipt of the 7 August report and repeating why Mr Harpham needed to take a toilet stop, that that same day he had demonstrated professionalism in respect of the injured passenger which should factor in consideration of the disciplinary investigation. Mr McKean refuted Mr Harpham was methodical and prepared because he used wet wipes from the rubbish bin to cover the cameras. He asked what the “undesirable/unacceptable behaviour or conduct” was that Mr McLeod referred to in the report and the evidence in support. The letter ends:

The Union has concerns that any claims of this nature must be able to be substantiated, as there is very real possibility that this could cause reputational damage to Jim.

If they are not substantiated then they must be withdrawn to protect Jim from hearsay and innuendo.

[36] Mr McLeod responded the following day by email including the review of the incident with the passenger had revealed Mr Harpham had covered the cameras, his actions in respect of the passenger are not at issue, it was Mr Harpham’s action in covering the camera that was at issue, he would like Mr Harpham to show him how he could cover the cameras with wet wipes and the “undesirable/unacceptable behaviour” could be discussed at the disciplinary meeting.

Disciplinary meeting – 19 August

[37] By letter dated 15 August Mr Harpham was invited to a disciplinary meeting to discuss the allegation he deliberately “disabled or interfered with CCTV cameras in bus 4262 on the 5th July 2019. In so doing it you have potentially breached clause 14.1 of your CEA...It also raised concerns that you covered the cameras to conceal undesirable/unacceptable behaviour or conduct, or remove the opportunity to review behaviours or conduct using the CCTV footage from your bus.” The letter sets out the details of the disciplinary meeting to which he was invited, that the action may fall within the definition of serious misconduct contained in the CEA and that an outcome of the meeting could include dismissal. The letter ends by reminding Mr Harpham he

may be represented in the meeting, that he may seek advice and refers him to the counselling services available.

[38] It is understood the disciplinary meeting was intended to be the final stage in the investigation process – Mr Harpham would have an opportunity to offer any further comment or explanation including on penalty and NZ Bus would make a final decision.

[39] The disciplinary meeting minutes have been provided. The attendees are the same as the previous meeting and lasted 30 minutes ending at 10.35am. As requested Mr Harpham demonstrated how he covered the cameras with wet wipes. It was then put to Mr Harpham that he appeared prepared and methodical and may have used socks to cover the cameras. Mr Harpham denied this and repeated he had used wet wipes retrieved from the rubbish bin. There is then a discussion about why Mr Harpham removed the covers from two of the three cameras but “chose to leave this one in place”. Mr McKean restates Mr Harpham’s explanation including that he had forgotten to remove the third cover and that he was on a rest break.

[40] Mr McLeod then restates his concerns – that Mr Harpham covered three cameras, that he said he used wet wipes found in the bin but the images from the CCTV look more like socks were used, suggesting he came prepared to cover the cameras and it is therefore likely this has happened before. With respect to forgetting to remove the third covering Mr McLeod identified the covered camera as the one at the rear of the bus and then described an incident earlier that year where CCTV footage from that rear camera had been used to clarify a disagreement with NZ Bus and Mr Harpham about damage to the rear window. Mr McKean objected to this issue being introduced and Mr McLeod agreed to remove it from this discussion. The meeting ended with disagreement about what Mr Harpham used to cover the cameras and that NZ Bus would provide the CCTV footage to Mr Harpham so he could view it and then reconvene.

Dismissal meeting – 23 August

[41] The meeting convened at 2pm for 40 minutes at the end of which Mr Harpham was dismissed. The minutes have been provided. The attendees were the same except Mike Doyle replaced Mr Stillwell. Mr McLeod outlined the concerns that Mr Harpham

was “tampering with the cameras on the bus, being an important health and safety device on the bus and potentially not being up front about his reasons for this.” The explanation was restated and Mr McKean asked for more information to understand the undesirable behaviour concern. Mr McLeod said he remained unclear as to Mr Harpham’s motivation for covering the cameras and for them remaining covered and the question remained whether the camera was covered for some other purpose.

[42] The CCTV footage was then viewed. The meeting then focused on whether it is socks or wet wipes that were used after which Mr McLeod expressed a view it was socks the use of which was premeditated. Mr Harpham said the wet wipes used were not the ones he usually used for that purpose which would come from his bag. The meeting broke and on reconvening Mr McKean stated why dismissal would be unjustified – the issue is failing to uncover one camera, the cameras were covered for privacy and the method of cover is immaterial, Mr Harpham forgot to uncover one camera while NZ Bus says it is comfortable with cameras being covered for personal privacy and two of the three coverings were removed, that the consequences of dismissal, including on Mr Harpham’s family had not been given full consideration and outweigh the consequences, that a first warning would be more justifiable, Mr Harpham had shown remorse, he wished to keep his job and asked for the decision to be reconsidered.

[43] A further break was taken. On reconvening the decision to dismiss was confirmed.

[44] On 26 August NZ Bus wrote to Ms Harpham confirming his dismissal for serious misconduct for dishonesty and a negligent or deliberate act which may affect public safety.¹ The letter narrates the reason for the disciplinary investigation was the serious concerns NZ Bus had about Mr Harpham covering the cameras, that during the investigation process NZ Bus formed the view it was unlikely Mr Harpham simply forgot to remove the coverings after taking a comfort stop and it was most likely he used socks (or something similar) and not wet wipes retrieved from the bin which

¹ Schedule D of the CEA defines serious misconduct including (f) dishonesty and (j) a negligent or deliberate act which may affect public safety, such as leaving a bus unattended in an unsafe condition, or interfering with safety devices fitted to buses in order to defeat their purpose.

indicated Mr Harpham was methodical and prepared and given this was unlikely to be an isolated incident. The letter goes on to state:

This finding also demonstrates a level of dishonesty by you during the investigation/disciplinary process.

[45] The letter confirms the serious misconduct allegations are upheld for dishonesty and a negligent or deliberate act that may affect public safety.²

[46] On 11 September Mr Harpham's union wrote to NZ Bus raising a personal grievance for unjustified dismissal. By way of letter dated 8 November NZ Bus responded including:

The decision to end the employment relationship with Mr Harpham was based on the following factors:

- for whatever reason, Mr Harpham had covered the cameras on the bus. Even if the company accepted that Mr Harpham had to relieve himself, this was not acceptable conduct, and further, Mr Harpham failed to uncover the cameras. The cameras are installed for health and safety reasons to protect the vulnerability of passengers;
- In doing so, it had led to the company being unable to investigate an injury sustained by an elderly female passenger; and
- that throughout the process Mr Harpham had been untruthful regarding why the cameras had been covered.

Overall, the company concluded that the trust and confidence in the employment relationship had been destroyed by Mr Harpham's actions.

Discussion

[47] As set out at [9] above s 103A(3) of the Act sets out the four factors which the Authority is required to consider in assessing whether NZ Bus' decision to dismiss Mr Harpham was one a fair and reasonable employer could have made in all the circumstances at the time of the dismissal:

- were the allegations against Mr Harpham sufficiently investigated;
- were the concerns raised with him before the decision to dismiss was made;
- did he have a reasonable opportunity to respond to those concerns; and
- was his explanation considered genuinely by NZ Bus before the decision to dismiss was made?

² CEA schedule D (f) and (j).

[48] Minor defects in the process which do not result in unfairness to the employee are not grounds to determine a dismissal is unjustified.³

[49] This is not the case in this matter – the defects in the process were serious and compounding because the allegations and the factual basis of the allegations were shifting and unclear. This deprived Mr Harpham a fair opportunity to understand and comment on what the allegations were that he was facing and the factual basis of those allegations:

- Throughout the investigation NZ Bus failed to clearly state at what point Mr Harpham’s conduct and what aspect of his conduct were a concern - it remains unclear if it is the act of covering the cameras and/or failing to uncover the cameras after a reasonable period of time that is the concern. This failure of clarity is compounded by NZ Bus making it clear from the start of the investigation that a driver urinating in a bottle on a bus was not a concern. It follows securing a degree of privacy for that purpose could not be grounds for serious misconduct. How a driver securing that privacy in the circumstances are matters which could reasonably be expected to have been considered during the investigation and disciplinary process;
- From the outset of the investigation NZ Bus held a view Mr Harpham had covered the cameras for a “sinister” purpose and this view developed through the investigation into “concealing undesirable/unacceptable behaviour”. This was a serious allegation for which no supporting evidence was provided although requested and which appears to have been abandoned by the decision stage. It is difficult not to conclude this view of Mr Harpham did not have a secure factual basis but has nonetheless tainted the investigation;
- The undesirable/unacceptable behaviour basis of the dishonesty allegation appears to have been abandoned and replaced with the wet wipe/sock issue which first arose in the 19 August meeting and is the basis for a dishonesty finding in the dismissal letter dated 26 August. This replacement occurred without a fair explanation and without a fair opportunity for Mr Harpham to

³ Employment Relations Act 2000, section 103A(5).

consider and respond. Again, the allegation was serious but was not fairly put to Mr Harpham to consider and respond;

- Information was in the contemplation of the decision-maker which was not put to Mr Harpham or was put to him late in the investigation process. For example, it is clear Mr McLeod had viewed the stills of the CCTV footage and the footage itself early on in the investigation but the stills were not provided to Mr Harpham until the 7 August disciplinary meeting and the CCTV footage was not viewed until the final meeting. I am satisfied details of the length of time the cameras were covered, how and what cameras were covered and uncovered was in the mind of the decision-maker but was not fairly put to Mr Harpham to consider and respond;
- Key elements of Mr Harpham's explanation were not fairly investigated or considered. Part of his explanation was he covered the cameras to provide some privacy while he relieved himself on the bus and that other drivers were doing this. Mr McLeod did not tell Mr Harpham if he investigated whether this was indeed something other drivers did and does not reveal clearly any consideration of the explanation that covering the cameras was to gain privacy. Because Mr McLeod said relatively early in the investigation that Mr Harpham relieving himself on the bus was not an issue and had not, to the knowledge of Mr Harpham, investigated the elements of the explanation set out above Mr Harpham could reasonably have formed the view this element of his explanation was accepted. Indeed that this is the case is reflected in the investigation documentation when the focus of the investigation appears to shift to the failure to uncover one of the three cameras. It follows then that the allegation must have shifted not to covering the cameras for the purpose of gaining privacy to urinate but failing to uncover all the cameras after the required period of time for that purpose. This was never made clear to Mr Harpham and deprived him the opportunity to respond to this concern;
- I am not satisfied Mr Harpham's explanation that he forgot to uncover the camera/s was fairly considered. Given Mr Harpham uncovered two of the three cameras forgetting is a plausible explanation which is recognised by Mr McLeod in the conclusion report dated 9 August. However, Mr McLeod discounts the plausibility of the explanation on two counts - one, Mr Harpham was methodical in and prepared for covering the cameras

suggesting this was not the first time he had done this and two, the deliberate nature of the covering suggests Mr Harpham was concealing “undesirable/unacceptable behaviour”.⁴ The first appears to be based on an assumption that in the past Mr Harpham had uncovered all cameras previously after covering them to relieve himself on the bus. This was never put to Mr Harpham. The second leg of the forgetting explanation was abandoned by NZ Bus without explanation but the effect of this on the finding of serious misconduct does not seem to have been considered.

[50] The investigation process was flawed, the flaws were not minor and for these reasons NZ Bus’ decision to dismiss Mr Harpham was not one a fair and reasonable employer could have made in all the circumstances at the time of dismissal.

Remedies

[51] Mr Harpham has established a personal grievance. He is entitled to a consideration of the remedies sought.

Reinstatement

[52] Reinstatement is the primary remedy in proceedings for unjustified dismissal.⁵ It must be awarded unless it is not practicable or it is unreasonable to do so.⁶ The onus is on the employer to establish that reinstatement is not practicable.⁷

[53] Mr Harpham submits there was no evidence provided by NZ Bus that addressed reinstatement or provides any reason why reinstatement would not be practicable or reasonable. Mr Harpham says his age and family circumstances emphasise the importance of reinstatement to him, that he has tried to find other work since his dismissal without success and holds a view he will never work again unless he is reinstated.

⁴ Refer 9 August investigation report.

⁵ Employment Relations Act 2000, section 123(1).

⁶ Employment Relations Act 2000, section 125(2).

⁷ *New Zealand Education Institute v Board of Trustees of Auckland Normal Intermediate School* [1994] 2 ERNZ 414 (CA) at 416 – 417.

[54] NZ Bus submits reinstatement would be neither reasonable nor practical because there has been an irreversible breakdown in trust and confidence between the parties and it is unlikely the parties can maintain a productive and constructive employment relationship. It submits it is clear beyond doubt Mr Harpham did not tell the truth during the investigation process; he changed his story several times and until the end would not admit he had used socks he brought from home to cover the cameras. NZ Bus says at the investigation meeting he did not tell the truth. This is a reference to Mr Harpham's evidence given at the investigation meeting that he had walked around the block during the period the bus was stopped.

[55] As stated above the considerations are practicability and reasonableness. NZ Bus has been on notice since the outset of Mr Harpham's claim of his desire to return to its employment and he has not delayed pursuing his claim. The findings of serious misconduct against Mr Harpham and the decision to dismiss him based on those findings, including that he had been dishonest, have been found not to be one that could not be open to a reasonable employer. The issues raised concerning Mr Harpham's conduct during the disciplinary investigation and the Authority's investigation are discussed in the contribution assessment below. In short, I am not satisfied Mr Harpham has contributed to the circumstances which gave rise to his grievance in a blameworthy manner.

[56] If NZ Bus has no concerns with bus drivers urinating on the bus, as appears to be the case from the disciplinary investigation, then it should engage with drivers as to how such a practise can be carried out in a way which maintains the privacy of the driver and maintains health and safety and security obligations including the CCTV cameras. There was no evidence produced that such a process has been undertaken during Mr Harpham's employment or subsequent to it ending although I note the evidence that a health and safety committee is now in place which may be an appropriate vehicle.

[57] Mr Harpham is to be reinstated into a position no less advantageous to that he held at date of dismissal. Two conditions apply:

- (i) Reinstatement is to take place within 21 days of the date of determination to allow New Zealand Bus Tauranga Limited to carry out

any necessary reorganisation to make a position available for Mr Harpham; and

- (ii) Mr Harpham must cooperate fully in any retraining required by New Zealand Bus Tauranga Limited to meet changed working conditions.

Reimbursement

[58] Mr Harpham seeks reimbursement of earnings lost as a result of his dismissal pursuant to section 123(1)(b) and 128 of the Act. The period of claim is six months running from the date of dismissal being 9 December 2019.

[59] After reviewing the evidence of loss and Mr Harpham's attempts to secure another job the Authority is satisfied Mr Harpham is entitled to an award of three months lost remuneration to be calculated at his rate of pay at date of dismissal. It is not appropriate to award more than three months lost remuneration. The likely impact of COVID-19 on Mr Harpham's ability to secure employment beyond the three month period is not a matter to be visited on NZ Bus. The discretion to award more than three months lost earnings will not be exercised in Mr Harpham's favour.

Compensation

[60] In his evidence Mr Harpham said after his dismissal he was very low, lost sleep and stopped eating properly. He said he had felt down in his life before but this was very different and he lost motivation and was depressed. He said he was too embarrassed to tell people he had been dismissed and worried about people asking him about his situation which made him anxious and caused him to withdraw from his usual socialising. He said he has become grouchy and argumentative with family and friends and fears this has damaged long standing relationships. He said losing his job has hurt his sense of purpose and place in the world and he now feels like an old man. He said he is worried about his financial position, that he and his wife had planned an overseas trip which now they cannot do.

[61] Mrs Harpham said Mr Harpham loved his job with NZ Bus and was very distressed when he lost it. She gave evidence of the negative changes she has observed in him since his dismissal and the social and financial difficulties the job loss has caused the family.

[62] It is accepted the impact of his dismissal has had a profound and negative impact on Mr Harpham. The Authority is satisfied he experienced harm under each of the heads in section 123(1)(c)(i). He is entitled to an award to compensate the humiliation, loss of dignity and injury to feelings consequent to his dismissal of \$16,000.00.

If any remedy is awarded, should it be reduced (under s 124 of the Act) for blameworthy conduct by Mr Harpham that contributed to the situation giving rise to his grievance?

[63] The aspects of Mr Harpham's conduct which could amount to a possible consideration under s 124 are his action in covering and uncovering the cameras and his conduct during the disciplinary investigation which the NZ Bus has characterised as dishonest.

[64] There is no dispute Mr Harpham covered the cameras and then did not uncover them all. The Authority does not condone or approve that action. The question is whether it is blameworthy conduct which contributed towards the situation that gave rise to the personal grievance.

[65] The investigation process was significantly flawed including a lack of clarity around what aspect of the camera covering was a concern and whether Mr Harpham had a fair opportunity to consider and respond to the dishonesty allegation. It is clear to the Authority those flaws have impacted on Mr Harpham's ability to participate in the investigation and disciplinary process. When it was put to Mr Harpham that his conduct in the disciplinary investigation could be characterised as uncooperative or obtuse he responded that it was not his process. There is force in that response – NZ Bus raised serious allegations against Mr Harpham which were tainted from the outset by an undisclosed concern that he had covered the cameras for a “sinister situation” and then proceeded in an unclear and, I have found, unfair manner. It was not Mr Harpham's obligation to cure those flaws and given the serious and personal nature of the allegations he was entitled to understand clearly what it was NZ Bus was alleging and the basis of those allegations. Having reflected on these matters I have formed the view it is likely apparent obtuseness on Mr Harpham's part reflects the unclear and unfair nature of NZ Bus' investigation.

[67] Given this there is no reasonable basis to say Mr Harpham contributed to the situation giving rise to his personal grievance.

Summary of Orders

[68] New Zealand Bus Tauranga Limited unjustifiably dismissed Mr Harpham. The following orders are made:

- a) New Zealand Bus Tauranga Limited is ordered to reinstate Mr Harpham in accordance with conditions set out in paragraph [57] above;
- b) Within 14 days of the date of determination New Zealand Steel Limited is to make the following payments to Mr Harpham:
 - i) \$16,000.00 for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000;
 - ii) three months lost remuneration pursuant to section 123(1)(b) and s 128 of the Employment Relations Act 2000;
 - iii) holiday pay for the period of the three months lost remuneration pursuant to s 123(1)(b) of the Employment Relations Act 2000.

Costs

[69] Costs are reserved. The parties are encouraged to resolve this issue between them. If this is not possible, Mr Harpham is to file and serve any costs memorandum within 14 days of the date of determination and New Zealand Bus Tauranga Limited may file and serve any reply memorandum within a further 7 days.

Marija Urlich
Member of the Employment Relations Authority