

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2021] NZERA 171
3062013

BETWEEN	IRENA DONNATA ADELLE PROCTOR Applicant
AND	TRANZIT COACHLINES MANAWATU LIMITED Respondent

Member of Authority:	Trish MacKinnon
Representatives:	Michael Fennessy, counsel for the Applicant Mike Gould, counsel for the Respondent
Investigation Meeting:	10 September 2020 at Palmerston North
Submissions Received:	On the day orally from the Applicant On the day orally and in writing from the Respondent
Date of Determination:	28 April 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Irena Proctor was employed as a bus driver by Transit Coachlines Manawatu Limited (Transit) from 20 February 2017 to 7 September 2018 when she was dismissed. Ms Proctor claims her dismissal was unjustifiable and/or that she suffered unjustifiable disadvantage in her employment with Transit. Ms Proctor seeks lost wages, compensation and costs.

[2] Transit asserts Ms Proctor's actions brought the company into disrepute and her dismissal was justifiable, being within the range of actions available to an employer in all the circumstances.

[3] This determination has been issued outside the timeframe set out at s 174C(3) of the Employment Relations Act 2000 (the Act) in circumstances the Chief of the Authority has decided, as he is permitted by s 174C(4) to do, are exceptional.

Background

[4] On 29 August 2018 Ms Proctor received a letter from Stephen Du Plessis, the Urban Services Manager for Tranzit, outlining a complaint he had received regarding her behaviour on 28 August 2018. Mr Du Plessis informed Ms Proctor the complaint concerned “very rude” behaviour by a driver to passengers on a specified bus route that day. He advised he had downloaded and viewed the audio/camera footage for the passenger service in question, a copy of which was available for Ms Proctor to view.

[5] Mr Du Plessis noted in the letter that, while he had not come to any conclusion, actions causing offence and actions bringing the company or staff into disrepute, were deemed serious misconduct that could result in termination of employment. He informed Ms Proctor he wished to meet with her on 4 September 2018 at 11am to discuss the matter and he recommended she bring a support person to the meeting.

[6] Ms Proctor met Mr Du Plessis, who was accompanied by Marilyn Watkins, the Human Resources (HR) Manager for Tranzit, on 4 September. Ms Proctor elected not to bring a support person and rejected the employer's offer to postpone the meeting so she could arrange one. In the course of the meeting Ms Proctor confirmed she understood the serious nature of the meeting. She said she had viewed the camera footage and was not happy with what she had seen.

[7] Ms Proctor informed her employer she had been frustrated and angry that day when she started driving duties because of work issues and said she felt no-one listened to her. She acknowledged that when she felt frustrated she took that out on others. Before she started work on 28 August 2018 Mr Du Plessis had spoken briefly to her about two matters, one of which was the possibility Ms Proctor might not be able to take the leave she had requested that weekend. The leave was important to her as it was for a significant family event. The other matter concerned a complaint Mr Du Plessis had received regarding an incident with another driver.

[8] In the course of the meeting of 4 September 2018, Ms Proctor apologised for her behaviour on 28 August, acknowledging she should not have behaved that way and assuring her employer it would not happen again. Ms Watkins recorded in the notes she took during the 65 minute meeting that, when asked “what could we put in place to ensure it didn’t happen again, (Ms Proctor) had no suggestions.”

[9] The notes also recorded that Ms Watkins explained the employer had a very serious decision to make; that Tranzit needed to ensure the safety of its staff and passengers; and she and Mr Du Plessis would consider the information overnight. Ms Proctor was given until 9 o'clock the following morning to make further representations. Ms Watkin's notes recorded the options were:

"...1 – proposed termination, she has the right to make representation to us for consideration, option 2 – removed from urban work, no guaranteed hours and final warning, option 3 – final warning."

[10] The notes further record Ms Proctor was given the opportunity to come back to Ms Watkins or Mr Du Plessis about "what she was going to do to help herself with this anger problem i.e. attend an anger management course". The 9am deadline the following day applied to this, and to coming back "with reasons as to why her employment should not be terminated".

[11] Ms Proctor made no response by 9am the following day. She received a letter later that day from Mr Du Plessis advising his provisional decision was to terminate her employment with Tranzit. Mr Du Plessis referred to Ms Proctor's actions on 28 August 2018 having brought the company into disrepute.

[12] The letter referred to the meeting on 4 September in which Ms Proctor had acknowledged viewing the footage which showed her acting in the following manner towards passengers:

- Inappropriate touching of a passenger (grabbing a passenger's arm as he walked past you)
- Harassment, using abusive or offence (sic) language to a customer
- Actions bringing the company or staff into disrepute

[13] Mr Du Plessis said Ms Proctor had the opportunity to provide any further information she wished her employer to consider before it made a final decision on the matter. She was given until 4pm on Thursday 6 September 2018 to do so "...in writing or by telephoning me".

[14] Ms Proctor texted Mr Du Plessis on Thursday 6 September, at approximately 1pm, apologising again for her behaviour towards the passengers on the bus trip in question. She acknowledged her behaviour had been "totally out of line" and that, if she were to continue driving, it would never happen again. She said if she had one last chance to keep her job she would propose to do an anger management course to help her identify and control her triggers and frustrations.

[15] On 7 September 2018 Mr Du Plessis wrote to Ms Proctor advising her that, after taking into account all information discussed at the 4 September meeting, and her response to his proposal, he was now confirming the provisional decision to terminate her employment from that day.

Issues

[16] The issues the Authority must determine are:

- (a) Whether Ms Proctor was unjustifiably dismissed; and/or
- (b) Whether Ms Proctor was unjustifiably disadvantaged by actions of her employer.

[17] If (a) and/or (b) is answered in the affirmative, consideration will be given to the remedies that are appropriate and to any contribution Ms Proctor may have made to the situation that led to her personal grievance.

Was Ms Proctor unjustifiably dismissed and/or unjustifiably disadvantaged?

[18] Ms Proctor's application to the Authority did not specify a particular action by Transit that disadvantaged her in her employment. In oral closing submissions, Ms Proctor's counsel, Mr Fennessy referred to her being disadvantaged by Transit's failure to accord her a fair and proper procedure when it dismissed her. I will consider the claim in that context.

[19] The question of whether a dismissal or other action by an employer is justifiable is to be determined on an objective basis by applying the test specified in the Employment Relations Act 2000 (the Act) at s 103A. The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could do in all the circumstances at the time the dismissal or action occurred.

[20] The Act requires that, in applying the test, the Authority must consider four factors in addition to any others it thinks appropriate. The factors are:

- (a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and
- (b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and
- (c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and
- (d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

[21] In Mr Fennessy's submission, Ms Proctor's dismissal was unjustifiable both procedurally and substantively. He acknowledged she had accepted her conduct on the bus on 28 August 2018 was "out of line" and was not what an employer expects of an employee. He described her as having a "bad day" on the day in question but said Ms Proctor had not sworn during the bus trip; that only one person had complained. He also said that some passengers had giggled and laughed it off, an assertion which had not been part of Ms Proctor's written or oral evidence.

[22] Counsel emphasised how upset Ms Proctor had been that morning after her brief conversation with her manager and said she had asked Mr Du Plessis if she could go home and not drive that day. When cross-examined on this, Mr Du Plessis had no recollection of Ms Proctor being upset or making that request and Ms Watkins' notes of the meeting of 4 September 2018 did not record Ms Proctor raising it as a factor. Mr Fennessy cast doubt on the limit to which those unsigned notes could be relied upon as Ms Proctor had not been given a copy of them at the time.

[23] Mr Fennessy also submitted Ms Proctor's dismissal could not be justified in light of her willingness to undertake anger management. He further submitted that the lack of opportunity for Ms Proctor to make submissions in person on the proposed penalty of dismissal undermined

the procedural fairness of the employer's decision to dismiss her. A decision "on the papers" meant Ms Proctor did not get a fair hearing on the matter in his submission.

[24] Counsel for Tranzit, Mr Gould, submitted the employer had proper and substantive grounds for terminating Ms Proctor's employment. Her verbal abuse and actions towards passengers on 28 August 2018 brought the bus company into disrepute, and were actions that were listed as serious misconduct in Ms Proctor's employment agreement.

[25] Mr Gould emphasised that the test of justification entailed an assessment of whether the termination of Ms Proctor's employment was the action a fair and reasonable employer "could" have taken. Referring to the full Court judgment in *Angus v Ports of Auckland Ltd (No 2)*¹, counsel noted the court had held the amendment to s 103A of the Act, in which "would" had been replaced by "could", introduced a new test that allowed for more than one possible justifiable outcome and more than one possible justifiable methodology.

[26] In counsel for Tranzit's submission, the termination of Ms Proctor's employment was an action that a fair and reasonable employer could have done in the circumstances at the time. Counsel reminded the Authority of the principle that it is not the court or Authority's prerogative to substitute its view of the appropriate reaction for that of the employer, as the court made clear in *Gazeley v Oceania Group (New Zealand) Limited*.²

[27] With regard to the four factors specified in s 103A(3), Mr Gould submitted Tranzit had complied with those obligations in the way in which it dealt with Ms Proctor's behaviour. I accept those submissions by and large with one exception that I will return to shortly.

[28] The camera evidence from inside the bus on the passenger service that was the subject of the complaint confined the investigation the employer was required to undertake into the incident. Mr Du Plessis' letter informing Ms Proctor of the complaint gave her access to the audio/video footage so she knew precisely what the complaint concerned.

[29] The letter inviting her to a meeting with her employer to discuss the matter clearly advised her that, while Mr Du Plessis had not come to any conclusions, actions causing offence and actions that brought the company or staff into disrepute were deemed serious misconduct

¹ [2011] ERNZ 466.

² [2013] NZEmpC 234 at [49].

that could result in termination of employment. He recommended she bring a support person to the meeting with her.

[30] There was sufficient time between the letter and the date of the meeting for Ms Proctor to consider her response and to organise a support person or representation if she had chosen to do so. At the beginning of the meeting of 4 September 2018, Ms Watkins' notes record that she reiterated to Ms Proctor the serious nature of the meeting and that it could result in the termination of her employment. Ms Proctor confirmed she understood that and also that she was happy to continue without a support person.

[31] I am satisfied Tranzit considered Ms Proctor's responses properly. As noted earlier, Ms Proctor was initially given until 9am on the morning after the meeting to provide any information or make any representations. She chose not to do so. After advising her in writing that his provisional decision was to terminate her employment, Mr Du Plessis again provided Ms Proctor with the opportunity to provide further information and/or make representations by 4pm the following day either in writing or by telephone.

[32] Ms Proctor provided comments by way of a short and succinct text message and I am satisfied from the evidence of Mr Du Plessis and Ms Watkins that they discussed her response. I find no basis for the submission on behalf of Ms Proctor that she was disadvantaged by not being offered the opportunity to make her representations in person.

[33] Returning to the Tranzit submission that I do not accept, I agree with Mr Fennessy that Tranzit erred procedurally in not providing Ms Proctor, until much later, a copy of the notes Ms Watkins took during the 4 September 2018 meeting. Mr Du Plessis' response under cross-examination was that Ms Proctor did not request a copy. I find that unsatisfactory.

[34] Nevertheless, while Ms Proctor should have received a copy of the notes at the time, I do not discern any disadvantage to her from the omission to provide them until later. Nor do I find it plausible that the outcome of the process would have been any different if the notes had been provided at, or shortly after, the meeting. Ms Watkins was a credible and methodical witness and I accept the notes she took during the meeting are likely to be an accurate reflection of what occurred. I find Tranzit's failure to provide the meeting notes at the time to be a minor procedural defect that did not result in Ms Proctor being treated unfairly.

[35] I do not accept Mr Fennessy's submission that the willingness Ms Proctor expressed in her text of 6 September 2018 to attend anger management rendered Tranzit's decision to terminate her employment unjustifiable. It was a factor Mr Du Plessis, in consultation with Ms Watkins considered, but not the only relevant one. They were entitled to consider other factors, including the conduct towards passengers on 28 August 2018, clearly shown in the bus camera footage, which Ms Proctor acknowledged as being totally out of line. In her oral evidence to the Authority Ms Proctor's language was stronger and she said she was "disgusted" by her own behaviour that day.

[36] The conduct was contrary to Tranzit's House Rules, and was covered by at least one of the examples in the section of the rules dealing with "Serious Misconduct" that would "normally result in immediate dismissal".³ Ms Proctor's individual employment agreement incorporated the House Rules by reference to them in its Dismissal for Cause provisions.

[37] In her written and oral evidence Ms Proctor said she had been feeling since 2017 that she was not being listened to by her employer when she raised concerns and this led to a growing sense of frustration. I have considered the particular incidents she referred to where she felt she had been unfairly treated in relation to one other employee in particular.

[38] The evidence given by Ms Proctor and Tranzit relating to those incidents, however, did not support Ms Proctor's view that the employer habitually ignored her perspective and always preferred the other employee's account of events. The evidence indicated that Tranzit had taken an even-handed approach in the manner it dealt with incidents.

[39] It was clear from the camera footage taken in the bus Ms Proctor was driving on the morning of 28 August 2018 that she had been unable to control the frustration she felt from her brief discussion with Mr Du Plessis that morning. She took that frustration out on some of the passengers in the bus in a manner she rightly acknowledged was unacceptable. In her view, however, her employer should have given her the opportunity to attend anger management and allowed her to continue in her employment.

[40] I agree that option was open to the employer. Tranzit could have issued Ms Proctor a warning and allowed her employment to continue on the understanding that she would attend anger management training. It was not obliged to do so, however, and I find in all the

³ Actions bringing the company or staff into disrepute.

circumstances at the time it was justified in electing to terminate Ms Proctor's employment for serious misconduct.

[41] Ms Proctor's claims to have been unjustifiably dismissed and/or disadvantaged in her employment by an unjustifiable action of her employer fail.

Costs

[42] I reserve the issue of costs.

Trish MacKinnon
Member of the Employment Relations Authority