

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2023] NZERA 162
3182819

BETWEEN	PAUL ABIGAIL Applicant
AND	WELLINGTON CITY TRANSPORT LIMITED Respondent

Member of Authority:	Claire English
Representatives:	Kevin O’Sullivan, advocate for the Applicant Andrew Caisley, counsel for the Respondent
Investigation Meeting:	19 December 2022 at Wellington
Submissions received:	19 and 22 December 2022, and 14 January 10 March 2023 from Applicant 19 December 2022 and 24 January and 9 March 2023 from Respondent
Determination:	3 April 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr Abigail, was a bus driver for the respondent (WCT). He was dismissed for failing to report an accident, when his bus connected with a lamp post, and a window on the bus was broken. Mr Abigail says he was not aware that an accident had occurred, and his dismissal was unjustified. He seeks compensation for lost wages, hurt and humiliation, and costs.

[2] WCT says that it is very important that all accidents are reported, as this is a health and safety matter. It says that Mr Abigail was aware of the requirement to report all accidents, and was aware that he had had an accident, and had failed to report the

accident, without having any adequate justification for his failure to do so. WCT's position is that Mr Abigail's dismissal was justified, and that no remedies are properly owed to him.

The Authority's investigation

[3] For the Authority's investigation written witness statements were lodged from Mr Abigail, and from Mr Ken Pearson, Regional Operations Manager of WCT at the relevant time. All witnesses answered questions under affirmation from me and the parties' representatives. The representatives also gave oral and written closing submissions.

[4] 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.

The issues

[5] The issues requiring investigation and determination were:

- (a) Was Mr Abigail's dismissal unjustified?
- (b) If WCT's actions were not justified (in respect of dismissal), what remedies should be awarded, considering:
 - Lost wages (subject to evidence of reasonable endeavours to mitigate loss); and
 - Compensation under s123(1)(c)(i) of the Act?
- (c) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Mr Abigail that contributed to the situation giving rise to his grievance?
- (d) Should either party contribute to the costs of representation of the other party?

Facts

[6] Mr Abigail had worked for WCT for some 20 years, as a bus driver, and in supervisory roles. At the time of his dismissal, he was working as a bus driver.

[7] On Tuesday 5 July 2022, Mr Abigail was driving a bus in Strathmore. While turning a corner, he heard a bang. He stopped the bus, and exited via the rear door in an attempt to see what had caused the noise. He could not see anything wrong, so he continued on with his route.

[8] He finished his shift for the day, and parked the bus outside the workshops, for planned maintenance, as he had been requested to do by the bus dispatcher at the beginning of the day. It was later discovered that a back rear window of the bus was broken/cracked.

[9] Mr Abigail says he was not aware of this at the time, and when he checked the bus after hearing an unexpected noise, he did not see that the window was broken. He notes that this was a relatively small window, which is covered almost completely by the folding doors when those doors are open, as they would have been when he exited the bus to check. He also points out that no passenger mentioned a broken window, and the glass remained in place as it was designed to do.

[10] The matter came to the attention of Mr Ken Pearson, who was then the Regional Operations Manager for WCT. He is now the General Manager. Mr Pearson states that WCT was concerned that its employees were failing to report accidents. He points out that on 2 December 2021, WCT wrote to staff (including Mr Abigail) reminding them of the importance of accident reporting. This letter stated that:

- a. Employees were required to report all accidents, and failure to do so could amount to serious misconduct, and disciplinary action leading to termination of employment.
- b. Employees were required to report all accidents, regardless of severity, including accidents with fixed objects.

[11] Mr Abigail was given a copy of this letter, and signed and returned it.

[12] Mr Pearson wrote to Mr Abigail on 8 July 2022, inviting him to an investigation meeting on the grounds that “The non-reporting of accidents is in direct contrast to the letter that was presented and signed by you on 21 December 2021”.

[13] Mr Abigail and his union representative met with Mr Pearson on 11 July 2021. Mr Abigail stated that he heard a noise, and stopped the bus to inspect it for damage.

[14] Mr Pearson decided that Mr Abigail was aware that there had been a collision, and a disciplinary process was required.

[15] A disciplinary meeting was held with Mr Abigail and his union representative on 11 July 2022, immediately following the investigation meeting. Mr Pearson outlined his view that it was clear that Mr Abigail was aware of the accident because he had heard a bang, and had stopped the bus and inspected it. There was no dispute that Mr Abigail had not reported an accident. Mr Pearson was of the view that Mr Abigail had no proper justification for failing to report the accident.

[16] Mr Pearson formed a preliminary view that Mr Abigail had committed serious misconduct and dismissal was proposed. He put this to Mr Abigail for comment.

[17] It was submitted for Mr Abigail that a final written warning would be an appropriate outcome, as Mr Abigail had taken appropriate steps to investigate the noise he had heard, as well as in consideration of Mr Abigail's considerable length of service.

[18] Mr Pearson explains that he considered this. However, he remained of the view that Mr Abigail had committed serious misconduct, because he was aware of the requirement to report all accidents, and he knew he had had an accident, and he had failed to report that accident without an adequate explanation or justification.

[19] Mr Pearson further considered that dismissal was required, because Mr Abigail had already failed to heed the earlier letter requiring him to report all accidents, and because of "it was important to uphold the simplicity and clarity of the rule that all accidents must be reported¹". He also said that "If I didn't uphold the requirement with respect to him and [sic] would have difficulty upholding the standard with respect to everyone else²."

[20] He wrote to Mr Abigail confirming his dismissal on 14 July 2022, "due to the fact where you were involved in and failed to report a Motor Vehicle Accident at the

¹ Mr Pearson's witness statement at paragraph 7.20.

² Mr Pearson's witness statement at paragraph 7.17.

date / time the accident occurred, which was deemed as serious misconduct...”, and “we could not find any reason to mitigate the initial outcome of dismissal”.

[21] Mr Abigail was dismissed with immediate effect as of 14 July 2022.

[22] Mr Abigail gave evidence that on being dismissed, he felt “gutted”, and that his word was not good enough. He says he does not know what else he could have done in this situation.

[23] Specifically, Mr Abigail explained that he was fully aware of the letter of 21 December 2021 setting out the required procedure in the case of an accident. He recalled signing it and accepted its terms. He explained that he had always taken health and safety and the associated reporting requirements, seriously. In the past, he had had two small accidents while driving a bus, and he had reported them promptly, and been supported by the company in resolving them. He said he had always encouraged other staff members to be proactive in reporting, and pointed out what in his view was the irony of this situation, in that if he had reported, he would not have been dismissed. However, he explained that – at the time – he did not believe he had had an accident, and was not aware that any reporting obligation had been triggered.

[24] Mr Pearson’s view on this was that Mr Abigail “must have” been aware an accident occurred which needed to be reported, because Mr Abigail heard an unexpected noise and got out of the bus to check for damage. In Mr Pearson’s view, this was sufficient to count as an “accident” as defined in the 21 December 2021 letter, and to trigger reporting requirements on the part of Mr Abigail.

Findings - dismissal

[25] When considering whether Mr Abigail’s dismissal was unjustified, I must determine whether the dismissal, and how WCT acted, were what a fair and reasonable employer could have done in all the circumstances at the time. In doing so, I must consider whether:

- a. having regard to the resources available to it, WCT sufficiently investigated the allegations against Mr Abigail; and
- b. WCT raised the concerns it had with Mr Abigail before dismissing or him; and

- c. WCT gave Mr Abigail a reasonable opportunity to respond to the concerns before dismissing him; and
- d. WTC genuinely considered Mr Abigail's explanation (if any).

[26] In addition I may consider any other factors as appropriate.

[27] Mr Pearson made his concerns, and the reasons for his decision-making, clear. He relied on the letter sent to Mr Abigail dated 2 December 2021, requiring Mr Abigail to report all accidents. Mr Pearson's view was that Mr Abigail had had an accident, and had failed to report it. Mr Abigail's explanation that he had checked the bus after hearing a noise but had seen nothing, was not considered by Mr Pearson to explain or excuse Mr Abigail's actions in not reporting an accident. Instead, Mr Pearson viewed this as an admission by Mr Abigail that Mr Abigail was aware that he had had an accident, but had decided not to report it on the grounds that it was not sufficiently serious.

[28] Mr Pearson set out these views in his initial letter inviting Mr Abigail to an investigation meeting, where he raised his concern that "the non-reporting of accidents is in direct contrast to the letter that was presented and signed by you on 21 December 2021³".

[29] The investigation meeting was held on 11 July, and was promptly followed, with no lapse of time, by a disciplinary meeting. Despite Mr Abigail's attempt to explain his position, which he said he felt at time was not properly understood, Mr Pearson remained of the view that Mr Abigail had knowingly decided not to report an accident.

[30] Having reached this conclusion, which was essentially that Mr Abigail had decided to ignore the instructions given to him in the letter of 2 December, Mr Pearson then came to the view that a written warning would be ineffective, as it would simply be another letter setting out WCT's expectations, which Mr Abigail had already shown himself ready to ignore.

[31] Mr Pearson then decided to dismiss Mr Abigail instead. In reaching this conclusion, he perpetuated the assumption set out in his very first letter to Mr Abigail,

³ The letter was dated 2 December 2021, and signed by Mr Abigail on 21 December 2021.

that Mr Abigail had had an accident and had deliberately failed to report it. Mr Abigail's position was fundamentally different from this. He was aware of the need to report accidents, but did not appreciate he had been in an accident. Therefore, he had attempted to explain to Mr Pearson that he was not aware that the reporting requirement had been triggered. This was not accepted as being truthful or correct by Mr Pearson.

[32] The views of the parties on this issue are diametrically opposed. Both Mr Abigail and Mr Pearson recognised this during the Investigation Meeting.

[33] Mr Abigail acknowledged hearing an unusual noise (but maintains he did not see any visible damage on the bus). Mr Pearson said, in response to questioning, that the noise was enough to trigger Mr Abigail to call in and ask for directions. Mr Pearson also said Mr Abigail "must have known" he had an accident because he "heard the noise".

[34] After having spoken with Mr Abigail, I accept that he did not know that he had been in an accident. He maintained his stance, under repeated and aggressive questioning. In doing so, he properly acknowledged his reporting responsibilities to WTC, and pointed out that he had actively reported in the past.

[35] WTC's policy does not go so far as to say that drivers such as Mr Abigail must report all unusual incidents, such as the noise which Mr Abigail heard, as Mr Pearson now suggests. The letter of 21 December 2021 says Mr Abigail was "required to report all accidents, regardless of severity, including accidents with fixed objects⁴".

[36] It does not require the reporting of noises, or unexpected incidents, which is effectively what occurred here as far as Mr Abigail was aware.

[37] In addition, my view is that Mr Abigail's dismissal was motivated in substantial part by Mr Pearson's determination to apply the new accident reporting policy strictly, and a concern that any decision by him short of dismissal would be perceived to indicate or inadvertently create a "loophole" in the policy, which would have the impact of undermining the impact of the policy when applied to other drivers in the future. Mr Pearson also made it clear when giving evidence that he did not take into account Mr

⁴ Underlining present in the original document.

Abigail's extensive past service of some 20 years, or his previous track record of actively reporting accidents in line with policy as mitigating factors.

[38] WTC did not properly consider Mr Abigail's explanation, nor did it consider the logical limitations of its own policy.

[39] Accordingly, I find that Mr Abigail's dismissal was unjustified.

Remedies – lost wages, and compensation for hurt and humiliation

[40] Mr Abigail was dismissed with immediate effect on 14 July 2022. His evidence is that actively looked for driving work, repeatedly making himself available to other potential employers until he was offered employment. He started a new job on 27 October 2022, some 15 weeks later. He claims the sum of \$18,000 gross as lost wages. Section 128 of the Act provides that where an employee has a personal grievance, and has lost remuneration as a result, the Authority must order the employer to pay the lesser of the sum lost, or to three month's time ordinary remuneration. The Authority may order a greater sum be paid, at its discretion.

[41] Mr Abigail's weekly wage varied depending on the shifts he performed. I was provided with payslips showing that his pay, over his last three weeks of his usual work, varied as follows: \$1,390.47 gross, \$1,704.44 gross, and \$1,252.34 gross. Mr Abigale stated that his normal pay varied between \$1,200 and \$1,700 per week gross, which is borne out by the payslips. Accordingly, I find that Mr Abigale's average weekly wage at the time his employment ended was \$1,449.08 gross⁵. I note that I have not included Mr Abigale's two final pay slips when calculating this average, as one shows a much lower rate of pay as Mr Abigail was not at work for his normal hours, and one shows the payment of his leave entitlements resulting in a higher sum, and my view is that neither of these final payslips is an accurate reflection of what Mr Abigal would expect to earn in a normal week of work.

[42] Using the average figure of \$1,449.08 gross, three months' ordinary time remuneration is therefore \$18,838.04 gross⁶.

⁵ Being \$1,390.47 gross, plus \$1,704.44 gross, plus \$1,252.34 gross, divided by three.

⁶ Calculated at \$1,449.08 per week, times 13 weeks.

[43] Mr Abigail lost wages as a result of his unjustified dismissal. He is entitled to receive three month's remuneration in respect of that loss. I am also minded to award Mr Abigail the additional 2 weeks wages that he has claimed. It is his actual loss, and is minimally in excess of the usual 3-month guideline.

[44] I order the sum of \$21,736.20 gross to be paid to Mr Abigail as lost remuneration⁷.

[45] Mr Abigail has also claimed the sum of \$10,000 as compensation for hurt and humiliation. He gave evidence that he felt taken by surprise, and was "gutted" not to be believed, especially after so many years of service. He found this hurtful. He was also taken by surprise by the suddenness of the dismissal on a summary basis.

[46] I accept that Mr Abigail suffered hurt and humiliation as a result of his dismissal, although the impacts on him were not as severe as they could have been. I also take into account the impact of being subject to summary dismissal after 20 years of service. An award of \$8,000 is appropriate.

[47] WCT have submitted that contributory conduct, sufficient to reduce any award, exists, as it was Mr Abigail's "own decision not to report the accident". However, I have found that this was not in fact the case. I can find no reason to reduce this amount, and orders are made accordingly.

Orders

[48] Wellington City Transport Limited is to pay to Mr Abigail within 28 days of the date of this determination:

- a. The sum of \$21,736.20 gross, as lost remuneration;
- b. The sum of \$8,000 without deduction as compensation for hurt and humiliation.

Costs

[49] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

⁷ Being the weekly sum of \$1,449.08 gross, multiplied by the 15 weeks Mr Abigail was out of work.

[50] If they are not able to do so and an Authority determination on costs is needed the applicant may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum the respondent would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[51] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁸

Claire English
Member of the Employment Relations Authority

⁸ Please note the Authority's Practice Note on costs, effective from 2 May, available at <https://www.era.govt.nz/assets/Uploads/practice-note-2>