

NOTE: This determination includes an order at paragraph [16] prohibiting publication of some evidence

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 563
3241021

BETWEEN	FERETI FUIMAONO Applicant
AND	RITCHIES MURPHY TRANSPORT SOLUTIONS LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Epenesa Sooula and Atinae Vaai, counsel for the Applicant Anthony Drake and Rosie Judd, counsel for the Respondent
Investigation Meeting:	1 February, 20 June and 21 June 2024 in Auckland
Determination:	20 September 2024

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Ritchies Murphy Transport Solutions Limited (the company) dismissed Fereti Fuimaono from his job as a bus driver in October 2022. He was dismissed for serious misconduct after the operations manager at the company's Takanini depot, Kamaldeep Singh, investigated an incident on a bus Mr Fuimaono was driving on Saturday, 17 September 2022.

[2] Recordings made through the closed-circuit camera system on board the bus provided pictures and sound of the incident of concern. It began when the bus Mr

Fuimaono was driving was stopped near the Manukau bus transfer station around 8.20pm. A distressed young man got on the bus complaining that a group of people also boarding the bus had stolen his mobile phone. One of those people threw the distressed man off the bus onto the footpath. In the following four or so minutes the man got back on the bus several times trying to stop its departure, pleading with Mr Fuimaono to stop the bus and repeatedly saying “they stole my phone”. He was thrown out the bus entrance a further four times by men and women in the group, some of whom punched and kicked the man.

[3] In one instance of the distressed man getting back on the bus, Mr Fuimaono stood up from his driving seat and attempted to usher the man off the bus. When the man would not move, Mr Fuimaono wrapped his arms around the man and moved him to the door where the man then fell onto the pavement. As he was moved, the man could be heard on the audio track of the on-board camera recording asking Mr Fuimaono to “please call the Police”.

[4] The departure of the bus was further delayed by the man standing in front of the vehicle. Two men from the group who had previously hit him then went out of the front door of the bus. A few seconds later one of the men who got off the bus could be seen pulling the distressed man on to the pavement. One of the group held the distressed man down until Mr Fuimaono signalled that he was about to drive the bus away and that group member got back on the bus.

[5] As Mr Fuimaono then began to close the doors and drive off, the distressed man made another attempt to board the bus, clinging to the partly open doors. Mr Fuimaono continued to close the door and drive the bus forward, looking towards the man as he accelerated the bus. The man appeared to be pulled along as he held on to the door but then lost his grip, falling to the road. The bus then jerked to a halt. The recording from another camera, which looked along the lefthand (pavement) side of the vehicle, showed legs and trainers sticking out from under the bus. The body of the man could not be seen because it was under the bus.

[6] Another man standing on the footpath, who appeared to be known to the group on the bus, made hand signals indicating Mr Fuimaono should reverse the bus. That man could then be seen in the camera footage pulling the prone man’s body away from the bus to the side of the road closer to the footpath. The prone man appeared to be

unconscious. Mr Fuimaono opened the bus doors, looked at the prone man for several seconds, closed the doors and drove off.

[7] Mr Fuimaono did not report the incident to his bus depot call centre, seek Police assistance, get off the bus to check the condition of the prone man or call for an ambulance.

[8] Shortly before he had closed the doors and driven off from the bus stop Mr Fuimaono had picked up the corded handset of his radio telephone (RT) device and spoke briefly. Mr Fuimaono later said he was trying to contact the company dispatch office but received no response to his call. He made no further attempts to call. After the man was pulled from under the bus and Mr Fuimaono had looked at the prone man through the open doors, he replaced the RT handset on its holder as he drove on.

[9] Near the end of his route, later that evening, Mr Fuimaono was contacted and interviewed by the Police. The distressed man was reportedly in hospital with injuries which the Police believed were stab wounds.

[10] In a subsequent investigation the company concluded Mr Fuimaono failed to follow proper procedures for reporting violent incidents on its buses and for stopping to render assistance to a person who may have been run over by his bus.

[11] Mr Fuimaono raised a personal grievance. He said the company had not fairly investigated the incident and had not honoured what he said was an arrangement that, if he resigned, he would get his job back in two months' time once any publicity about the incident had died down.

[12] The company's reply to Mr Fuimaono's application said it had followed a fair process in deciding his actions were serious misconduct. It acknowledged Mr Fuimaono had provided a handwritten letter of resignation, dated 20 September, but denied seeking his resignation or making any agreement allowing for his reemployment after two months. Instead, the company had gone ahead with its disciplinary investigation, including a meeting held on 29 September, which ended with Mr Singh advising Mr Fuimaono of a preliminary decision that he be dismissed.

The Authority's investigation

[13] The following people lodged written witness statements and attended the Authority investigation meeting, held over three days, to answer questions under oath or affirmation from me and the parties' representatives: Mr Fuimaono, his wife Apa'ula Goetz, Mr Singh, the company's former health and safety manager Kurtiss Pihema and the company's human resources advisor Natasha Boddington.

[14] The investigation meeting ended with the representatives making detailed submissions about the facts and issues for determination.

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

Order prohibiting publication of certain evidence

[16] The evidence for this investigation included information about a call code the company's bus drivers use on their onboard RT to call for immediate Police assistance. Using the code means anyone hearing the call will not know Police help is being sought. It is not in the public interest, on the grounds of driver and public safety, for that call code to be widely known. Accordingly, publication of the words used for that call code is prohibited in relation to this matter.¹

The issues

[17] The principal issue for investigation was whether the company did what a fair and reasonable employer could have done in conducting its disciplinary process and making its decision to dismiss Mr Fuimaono. For reasons explained in the remainder of this determination, the answer to that question is yes, so it was not necessary to consider the issues that would arise if he was found to have a personal grievance.

The test of justification is to be applied to the company's actions

[18] To justify its actions and how it acted, in investigating its concerns about the 17 September events and deciding to dismiss Mr Fuimaono, the company must have met

¹ Employment Relations Act 2000, Schedule 2 clause 10(1).

the objective standard of what a fair and reasonable employer could have done in all the circumstances at the time.²

[19] In applying this test of justification four factors are considered:³

- (a) whether, having regard to the resources available to the company, the company sufficiently investigated the allegations against Mr Fuimaono before dismissing him; and
- (b) whether the company raised the concerns it had with Mr Fuimaono before dismissing him; and
- (c) whether the company gave Mr Fuimaono a reasonable opportunity to respond to its concerns before dismissing him; and
- (d) whether the company genuinely considered Mr Fuimaono's explanation in relation to the allegations before dismissing him.

[20] Any other appropriate factors may also be considered.⁴

[21] Defects in the process followed by the company are not to be taken as making a dismissal unjustified if any such defects were minor and had not resulted in Mr Fuimaono being treated unfairly.⁵

The company's investigation and its outcome

[22] Late in the evening of 17 September, after being interviewed by Police about the incident, Mr Fuimaono spoke with the on-duty supervisor at the depot. The supervisor wrote down Mr Fuimaono's account of the incident at the Manukau bus exchange stop. Mr Fuimaono signed this incident report form. His recorded account referred to "a scuffle on board" between a "drunk guy" and a "group" and Mr Fuimaono saying he did not think there was a stabbing during the fighting. His account did not refer to the young man holding on to the bus doors while the bus was moving or falling under the bus.

[23] Early in the following week the company provided the Police, at its request, with a copy of the onboard camera footage; Mr Pihema spoke to Mr Fuimaono and asked him to take the rest of the week off while the incident was investigated; and Mr

² Employment Relations Act 2000, s 103A(2)

³ Employment Relations Act 2000, s 103A(3)

⁴ Section 103A(4).

⁵ Section 103A(5).

Fuimaono viewed the video footage and handed in a letter of resignation, dated 20 September 2022, at the depot office.

[24] In his evidence for the Authority investigation Mr Fuimaono said he wrote the letter at the suggestion of a supervisor who told him he would be re-employed after two months once any negative media publicity about the incident had died down.

[25] Company representatives had not accepted Mr Fuimaono handing in a resignation letter ended the matter. Instead, they resolved to continue with an investigation, advising him that employee assistance programme support was available and that he was to remain off work on full pay while the incident was investigated. A term of Mr Fuimaono's individual employment agreement allowed for suspension in such circumstances. His later personal grievance application made no challenge to his paid suspension during this period.

[26] On 27 September 2022 the company sent Mr Fuimaono a letter calling him to a disciplinary meeting. The letter referred to a "dispute between passengers" where a passenger who had been assaulted "attempted to get back on the bus while it was moving" but "slipped from the bus entrance and was subsequently injured, perhaps because he was run over by the bus". It summarised the company's concerns in this way:

While we appreciate the dispute between the passengers placed you in a frightening and difficult position, we are concerned that:

- You did not notify the depot or dispatch team about the altercation until the Police stopped the bus in Papakura;
- You did not call the Police at any stage; and
- You did not render assistance to the passenger after he may have been run over by the bus.

[27] The letter advised Mr Fuimaono of his right to have a support person or representative at the meeting but he attended the meeting, held on 29 September, without one. He had also attended an earlier disciplinary meeting, on 27 June 2022, without a representative or support person. The earlier meeting concerned an incident where Mr Fuimaono failed to give way at a roundabout resulting in a collision causing damage to a car and injuries to its passengers. He had received a final written warning in that disciplinary process.

[28] At the 29 September disciplinary meeting Mr Fuimaono again saw the onboard camera footage of the 17 September incident. Handwritten notes Mr Singh said he took

during the meeting recorded Mr Fuimaono saying he realised he had not done his best to deal with the situation. A supervisor who attended the meeting later prepared a summary for a disciplinary “minutes” form used by the company. The form included this summary of answers said to have been given by Mr Fuimaono in the meeting: “

... I just let that happen, leaving the injured passenger on road after dragged by bus door, person was injured and I did not pay any attention and moved away from the area. I did do my other jobs very well but this event went fearful and couldn't help. I did help other people on other events.

...

I take blame and guilty because I let this happen didn't call for any help. I thought it is ok to carry on as it is minor event. I am happy whatever company decides.

[29] Mr Singh's own notes do not record Mr Fuimaono's words in that much detail. Mr Singh did approve the summary prepared by the supervisor a few days later. The supervisor's own notes, if any were taken, were not part of the evidence in the Authority investigation.

[30] Mr Singh adjourned the meeting to consider Mr Fuimaono's explanation. In his evidence to the Authority investigation Mr Singh said he concluded Mr Fuimaono had given no reasonable explanation for not calling the depot, for not calling for Police assistance during the incident, for not stopping the bus to check whether the distressed man who was pulled out from under the bus had been injured and for not reporting the full details of what had happened when he spoke to a supervisor on returning to the depot that night.

[31] Mr Singh said he knew Mr Fuimaono knew how to report a passenger safety incident as he had done so as recently as 14 September. On that occasion Mr Fuimaono had contacted the depot to report that a woman had come on to his bus crying and saying someone was following her. The depot control centre had then called for Police assistance.

[32] When Mr Singh returned to the disciplinary meeting he told Mr Fuimaono of his preliminary decision to dismiss him, with one week's notice. He said Mr Fuimaono had responded that he would be happy with whatever the company decided. Mr Singh told Mr Fuimaono that the final decision would be confirmed in writing.

[33] Mr Singh said he rang Mr Fuimaono on 1 October to confirm his final decision. He said he recalled doing so that morning as he was about to depart work on leave to

travel to India. A letter of dismissal, dated 7 October 2022, was drafted with the assistance of Ms Boddington, after Mr Singh had gone on leave, and signed with his electronic signature. Ms Boddington said she had posted the letter on 7 October but Mr Fuimaono denied ever receiving written notice of his dismissal.

[34] Mr Fuimaono said he had only learned that his employment had been terminated from seeing the pay slip for his final pay. During his employment at the company Mr Fuimaono had his pay slips sent to the email address of his wife, Ms Goetz. When she received a pay slip dated 9 October 2022, she drew his attention to a note on it which read “Termination – last day 6/10.22”.

[35] Ms Goetz, in her evidence to the Authority investigation, said she had met Mr Singh when she had picked up Mr Fuimaono from the depot after he was suspended from work on 20 September. She said Mr Singh told her Mr Fuimaono was “going to rest for two months” but he would still be paid while the incident was investigated. Mr Singh agreed he had spoken to Ms Goetz at that time but said he had told her that Mr Fuimaono would be off work for two days, not two months, until a letter was sent about an investigation of the incident and that he said Mr Fuimaono would be paid while on suspension during that investigation. He denied saying Mr Fuimaono could return to work in two months. He said he could not have made that comment because the investigation was yet to be held and no decision about its outcome had been made.

[36] After seeing the payslip dated 9 October Mr Fuimaono made no attempt to contact Mr Singh or anyone else at the company about the reference in it to the termination of his employment. He denied getting a phone call from Mr Singh on 1 October about his dismissal. Mr Fuimaono also said he never received the company’s letter of 7 October confirming he had been dismissed for serious misconduct.

[37] In early December Mr Fuimaono went to the company’s Takanini depot and spoke to Mr Singh. He asked about returning to work. Mr Singh told him to fill out an application form. He filled out the form and left it at the office. Mr Fuimaono said he learnt that he would not be re-employed same days later after going to the depot and again speaking to Mr Singh.

[38] Asked during the Authority investigation Mr Singh accepted he told Mr Fuimaono to fill out an application form but said he did so because the company had an open policy allowing anyone to apply for work and he had not wanted to embarrass or

be rude to Mr Fuimaono by telling him directly that he would not be re-employed. Mr Singh also accepted that he knew, when he told Mr Fuimaono to fill out a form, that there was no prospect that Mr Fuimaono would be re-employed by the company.

A reasonable conclusion of serious misconduct

[39] The video recordings provided compelling evidence that the company had a reasonable basis for concluding Mr Fuimaono's actions or inactions on the night of 17 September 2022 amounted to serious misconduct.

[40] As confirmed by that footage, Mr Fuimaono had not notified the company's dispatch centre about an incident where passenger violence was delaying departure of the bus. He did not use the company's emergency call code or call 111 in a situation where a person trying to board the bus, albeit with the purpose of delaying its departure, was repeatedly punched, kicked and pushed to the ground by the group of other passengers.

[41] The video recording shows Mr Fuimaono picking up the RT handset around four minutes after this incident began. He said his attempt to call dispatch at that time was not answered. He made no further attempts in the following minutes, including after he had stopped the bus and the man's body was pulled out from under it.

[42] Mr Singh, in his evidence, observed that while making the one call Mr Fuimaono could be seen attempting on his RT, Mr Fuimaono had not operated the handset switch correctly, which may have explained why he received no response.

[43] Although Mr Fuimaono said he was not adequately trained in or aware of how to make the emergency code call, it was unlikely that he had not learned of that procedure during his several years of service with the company. He had successfully communicated a need for Police assistance, in less obviously serious circumstances, while on duty in the previous fortnight.

[44] The video evidence also showed Mr Fuimaono continuing to drive the bus forward while the distressed man had his hands gripped in the closed door, being briefly dragged and then falling as the bus gathered momentum.

[45] In his oral evidence Mr Fuimaono accepted he thought there was “something under the bus” when the bystander gestured to him to back up the bus but said he “wasn’t sure if it was the man or what”.

[46] He accepted he had a full view, through the open front doors of the bus, of the man lying on the roadside when pulled out by the bystander.

[47] He also accepted that, from his experience as a bus driver, he knew he was supposed to stop, see if the person was safe and report the accident to the Police. At the time Mr Fuimaono had worked for around seven years as a bus driver, including the three years he had worked for the company and an earlier four-year stint with another bus operator.

[48] As submitted by the company, this was not a situation where any special or extra rule applied to a bus driver. Mr Fuimaono had the ordinary obligations of any driver of a vehicle on the road who is involved, directly or indirectly, in an accident while driving.⁶ While Mr Fuimaono did stop the bus briefly and look from his driver’s seat at the prone man lying on the road, he did nothing more to find out if the man was injured or needed any help.

[49] As also submitted by the company, this was not a situation where mitigating circumstances might have rendered Mr Fuimaono less culpable for how he conducted himself in carrying out his duties as a bus driver that evening. He was not being called to account for failing to intervene in a violent situation or for a situation where he himself was subject to physical or verbal threats from the perpetrators.

[50] As emerged in his oral evidence, Mr Fuimaono remembered the distressed man as someone who had been a passenger several times on his bus but did not know any of the group who assaulted the man repeatedly over a period of around four minutes before it left the bus stop. Mr Fuimaono accepted, however, that he did not feel afraid of anyone in that group. No threat or aggressive behaviour was directed towards him during that time. Rather, as members of that group got on and off the bus to push or punch the distressed man, the video recording shows them exchanging smiles and nods of the head with Mr Fuimaono.

⁶ Land Transport Act 1998 ss 22, 35 and 36.8

[51] This was also not a situation where a driver was dealing with a difficult or potentially dangerous situation at an isolated suburban bus stop.

[52] As Mr Fuimaono accepted in answering questions at the Authority investigation meeting, the bus stop was on a street next to the Manukau bus exchange which had security staff who could have helped if he drove the bus into that area. The stop was also one block away from the Counties Manukau Police Station, if Police assistance had been called for.

[53] Ultimately, the evidence that Mr Fuimaono had not fully disclosed relevant details of the event to this company, at least prior to the disciplinary meeting, was a circumstance that a fair employer could reasonably have concluded damaged its trust and confidence in Mr Fuimaono as an employee. As submitted by the company, of particular relevance and concern was that he had not reported that he had to stop and reverse the bus, so the prone man could be pulled from underneath it, and had then driven off, leaving that man lying on the road.

[54] On the information available to him, from the video recordings and Mr Fuimaono's description of what happened, Mr Singh's conclusion that Mr Fuimaono had committed serious misconduct and should be dismissed for it, was within the range of responses open to a fair and reasonable employer.

A fair process followed in reaching decision to dismiss

[55] In reaching its conclusion about serious misconduct and acting on it, the company also had to meet the requirements of procedural fairness set by s 103A(3) of the Act. It did so. Mr Fuimaono was given adequate notice of the disciplinary process, time to prepare to take part in it and, although he did not use it, the opportunity to get representation and support for taking part.

[56] The letter provided to him in advance of the disciplinary meeting clearly set out the concerns that needed to be addressed. The subsequent process and decision made remained focussed on those concerns.

[57] There was no relevant information, as disclosed in the full range of evidence available to the Authority investigation, held by the company that was not provided to Mr Fuimaono. He had the opportunity to view and explain what could be seen of the event from the video recordings.

[58] While Mr Fuimaono did not agree with the assessment Mr Singh made of the information and circumstances, Mr Singh's evidence established he genuinely considered the explanations given by Mr Fuimaono. Questions put to him during the Authority investigation disclosed no significant defects in the assessment Mr Singh made of Mr Fuimaono's conduct measured against the reasonable expectations held by the company of how Mr Fuimaono would carry out his work, including observing fundamental road rules and reporting serious incidents.

[59] In reaching that conclusion about the fairness of the process followed, three criticisms made by Mr Fuimaono also needed to be addressed.

[60] Firstly, Mr Fuimaono said the company had failed to notify him of the outcome of the disciplinary process. He denied Mr Singh spoke with him by telephone on 1 October and claimed the company never sent him the letter of dismissal, dated 7 October, because he said he never received it. On the balance of probabilities, the evidence of the company witnesses responding to those allegations is preferred.

[61] Mr Singh's evidence that he spoke by telephone with Mr Fuimaono on 1 October is more credible because he refers to having done so in an internal company email, he sent on 4 October to Ms Boddington and to the supervisor who was drafting meeting notes. At that time there was no contest over whether Mr Singh had phoned Mr Fuimaono on 1 October and no reason to say it had happened if it had not.

[62] Ms Boddington also gave credible evidence about the preparation and posting of the letter of dismissal on 7 October. The company relied on the fact that it was sent by post to Mr Fuimaono at his home address, where he had received other letters from the company before. While the company has, since then, changed its process for such correspondence to using delivery by courier, requiring a signature from the recipient, this does not mean its 7 October letter did not reach Mr Fuimaono's address by ordinary postal delivery at that time.

[63] Secondly, Mr Fuimaono alleged the company had reneged on an undertaking that he would be free to return to work after two months.

[64] Again, the evidence of the company witnesses was more credible than the account given by Mr Fuimaono and Ms Goetz about their understanding of what they were told during the investigation process.

[65] While it is possible a supervisor did suggest to Mr Fuimaono that he should resign and could return to work later, there was no evidence that such a proposition was endorsed by a representative of the company authorised to make such a commitment. Rather, internal email correspondence suggests the opposite when managers were told Mr Fuimaono had provided a letter of resignation on 20 September. An email from the company's South Auckland general manager copied to Mr Singh, Mr Pihema and others notes that the resignation was not accepted and the investigation was to continue.

[66] Assessed objectively, it must also have been clear to Mr Fuimaono that his resignation, based on what he believed was a 'deal' that he would be re-employed later, had not been accepted. His handwritten letter, dated 20 September, said his resignation was "effective from today 20:9:22". His attendance and participation in the disciplinary meeting on 27 September suggests he understood he was still employed at that time and there was no 'deal' that he could simply resign and return to his job two months later.

[67] It was also more likely than not that Ms Goetz was incorrect in her allegation that Mr Singh had told her on 20 September that Mr Fuimaono was on a paid period of two months rest while the matter was under investigation. It was more likely that, with the passage of time, she conflated what Mr Singh said about a paid period of suspension during the investigation with what Mr Fuimaono told her of having talked to a supervisor about the notion he could resign and come back to work later. On either account, it was clear from the company's actions in carrying out its disciplinary investigation that no such arrangement had been suggested or authorised on its behalf.

[68] Thirdly, Mr Fuimaono said he was unfairly treated when he went to the depot office in December 2022 in the belief that he would be able to return to work. Rather than being told bluntly that he would not be re-employed, Mr Singh got him to fill in and leave an application form. As noted earlier in this determination, Mr Singh accepted he did so knowing there was no prospect Mr Fuimaono would be offered his job back. While Mr Singh may genuinely have wished to spare Mr Fuimaono embarrassment by telling him directly, his conduct was misleading. It was, however, something done outside an existing employment relationship and was not subject to the

good faith obligations of openness and honesty that would otherwise apply. It was not action by an employer that amounted to a defect in a disciplinary process that was sufficient for the earlier process and its outcome to be found to be unjustified.

Outcome

[69] For the reasons given in this determination, Mr Fuimaono's personal grievance application is declined. The decision of the company to dismiss him for serious misconduct, and how that decision was reached, was what a fair and reasonable employer could have done in all the circumstances at the time.

Costs

[70] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, the company may lodge, and then should serve, a memorandum on costs within 28 days of the date of issue of this determination. From the date of service of that memorandum Mr Fuimaono would then have 14 days to lodge any reply memorandum. If requested by the parties, an extension of time to resolve costs between themselves may be granted.

[71] 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.⁷

[72] As an initial indication, the parties could expect any award made on the daily tariff basis would be calculated for two days, not the three days over which the investigation meeting was held. The first day (1 February) adjourned mid-afternoon over some difficulties with interpreter assistance, for which the parties were not responsible, and the third day (21 June) finished in the early afternoon.

Robin Arthur
Member of the Employment Relations Authority

⁷ See www.era.govt.nz/determinations/awarding-costs-remedies.