

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2012] NZERA Wellington 82
5355889

BETWEEN ISMAACIIL ABDIQADIR
 DACAR
 Applicant

AND CARE PARK NEW ZEALAND
 LIMITED
 Respondent

Member of Authority: G J Wood

Representatives: D Calder, for the Applicant
 G Nelson, for the Respondent

Investigation Meeting: 6 June 2012 at Wellington

Submissions Received: 6 June 2012

Determination: 24 July 2012

DETERMINATION OF THE AUTHORITY

Factual Discussion

[1] The respondent, Care Park New Zealand Limited (Care Park), an international employer of substantial means, operates, amongst other things, a shuttle bus service on behalf of Wellington International Airport Ltd (WIAL) between the airport and the long term carpark. The applicant (Mr Dacar) was employed as a shuttle bus driver between 15 April and 27 July 2011.

[2] On 20 July 2011, Care Park received a complaint via WIAL from a regular customer about the service he had received on Mr Dacar's shuttle bus. The complainant described the service as normally excellent, but that on the previous night it was a *disgrace*.

[3] The customer had three major complaints. The first was a failure to assist customers with their baggage; the second was driving in a 50-60kph zone back to the long term carpark “like he was Peter Brock at Bathurst – no concern for his customers”; and the third that the two Care Park staff in the shuttle had no concern for their customers and spoke the whole trip to each other in Somali. The complainant sought action.

[4] The team leader for Care Park at Wellington Airport spoke to the complainant, who told the supervisor that they gave no assistance to any of the passengers, did not talk to the customers, and that the driver drove too fast. However, the supervisor noted that the supervisor had never witnessed any driving faster than the speed limit and that the customer did not seem really upset, and did not want to cause any issues or trouble.

[5] The New Zealand and New South Wales manager of Care Park, Mr Tony May, then investigated the complaint. He spoke to the complainant and was satisfied that the complaint was a genuine one. He was particularly concerned about the driving standard issue, because of its health and safety implications. Deliberate acts affecting quality, safety or health constitute serious misconduct likely to lead to summary dismissal under the parties’ employment agreement. Furthermore, Care Park’s policy and procedure manual deals with the issue of driving standards in some detail, in particular under para.53 (safe driving practices) it states:

At all times you must drive within the confines of the law. The speed limit for the entire route is 50kph, except at the airport and within the car park, where your speed should not exceed 20kph, and within the shuttle lane where you should never exceed 5kph. ... Driving illegally may result in disciplinary action and/or dismissal in addition to any legal action taken against you by the New Zealand Police ... The shuttle is a very recognisable vehicle, so be extremely careful when driving. We do not want to hear negative feedback about our shuttle drivers!

[6] Mr May therefore determined to carry out a preliminary investigation. He directed the supervisor at Wellington Airport to suspend Mr Dacar on full pay. I accept that Mr Dacar was suspended on 21 July and that at that time he was told of the broad thrust (but not the details) of the complaints. As the reason for suspension was the driving allegation, then it follows that that would have been the main issue raised with Mr Dacar at that time. I also accept, as Mr May had directed the supervisor to do so, that Mr Dacar was told that it was a serious matter, that the meeting that was to follow the next day was a serious meeting and that he could obtain representation if he

wished to. However, he was given no opportunity to comment on whether or not he should be suspended.

[7] Mr Dacar was aware that it was a very serious matter as the supervisor later told him that his job was at risk. Mr Dacar did not, however, obtain any representation.

[8] Mr May did not conduct any further investigations before the meeting, such as speaking to Mr Dacar's friend and colleague who was in the shuttle bus with Mr Dacar at all times, a fact of which Care Park management was aware.

[9] At the meeting, Mr May confirmed with Mr Dacar that he knew what the meeting was about, at least in general terms, and that he had chosen not to have a representative present. I have accepted Mr May's evidence over that of Mr Dacar over what occurred during the meeting, because it is consistent with his notes made near to the time, because of Mr Dacar's ability to answer the questions posed in the disciplinary meeting (which implies he knew what the issues were) and due to inconsistencies in Mr Dacar's evidence about his awareness in advance of the reasons for the meeting with Mr May.

[10] At the meeting, the allegations were specified, namely speeding, not assisting customers and having another person in the shuttle bus (being his friend and colleague). The focus of the meeting was, naturally enough, on the most serious allegation, namely speeding. Mr Dacar was asked at least three times whether he was speeding as the complainant alleged. On each occasion his sole response was that he *"usually did not speed"*, except on the last occasion he said *"usually I don't speed. If I speed I get a ticket"*. The responses were quite unsatisfactory to Mr May, who believed he could no longer trust Mr Dacar.

[11] Even after the investigation meeting there was a great deal of confusion about why Mr Dacar was dismissed. At the Authority's investigation meeting Mr May was clear that if Mr Dacar had unequivocally denied the speeding allegation, then Mr May would have had to go on and had a full investigation. Alternatively if he had accepted the allegation, then Mr May would have given him a final warning (together with counselling) because of his admitted speeding.

[12] When asked by Mr Dacar's lawyer a week later why Mr Dacar had been dismissed, Mr Nelson responded on behalf of Care Park stating:

Mr May decided that he preferred the customer's contention that your client had been speeding like "Peter Brock at Bathurst" to your client's version of events. Accordingly, he terminated your client's employment.

[13] In a subsequent letter dated 1 August 2011, following the raising of a grievance, Mr Nelson stated:

... at that meeting he would neither confirm nor deny that he was speeding on the date specified. The clear inference from that response was that he had in fact been speeding at the time. Given that this is a health and safety matter, particularly where the welfare of the general public is concerned, then my client had no option other than to terminate your client.

[14] This was accompanied by a letter from Mr May dated the same date stating:

The result of this meeting was that Care Park New Zealand terminated your employment for gross misconduct and in particular driving a van in an unsafe manner.

[15] However, at the time, and without any specific warning to Mr Dacar that he was worried about his answers giving rise to trust and confidence issues, Mr May decided to dismiss him, because he no longer had any trust and confidence in him as he had not get a clear answer from him. Mr Dacar was therefore summarily dismissed.

[16] The parties have attended mediation but have been unable to resolve matters. It therefore falls to the Authority to make a determination.

The law

[17] This case is to be decided under the new s103A. In *Angus and McKean v. Ports of Auckland* [2011] NZEMPC 160 the full Court dealt with the issue of the application of this section. It held that, at 57 ff:

57. *The Authority or the Court must first determine, as matters of fact, what the employer did leading to the employer's dismissal or disadvantage of the employee, and how the employer did it. This may include findings about what occurred which brought about the employer's acts or omissions that led to the dismissal or disadvantage, if the facts about material events are disputed.*

58. *Next, relying upon evidence, relevant legal provisions, relevant documents or instruments and upon their specialist knowledge of employment relations, the Authority and the Court must determine what a fair and reasonable employer could have done, and how a fair and reasonable employer could have done it, in all the relevant circumstances at the time at which the dismissal or disadvantage occurred. These relevant circumstances will include those of the employer, of the employee, the nature of the employer's enterprise or the work, and any other circumstances that may be relevant to the determination of what a fair and reasonable employer could have done and how a fair and reasonable employer could have done it. Subsections (3),(4) and (5) must be applied to this exercise.*
59. *Finally, in determining justification under the new s103A, the Authority or the Court must determine whether what the employer did and how the employer did it, were what that notional fair and reasonable employer in the circumstances could have done, bearing in mind that there may be more than one justifiable process and/or outcome. The Court or Authority must do so objectively, that is ensuring that they do not substitute their own decisions for those of the fair and reasonable employer in all the circumstances.*

[18] Those subsections (3), (4) and (5) referred to above state as follows:

3. *In applying the test in subsection (2), the Authority or the court must consider –*
- (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.*
4. *In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.*
5. *The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were –*
- (a) *minor; and*
 - (b) *did not result in the employee being treated unfairly.*

[19] The standard of proof involving cases of alleged serious misconduct and/or loss of trust and confidence must be consistent with the gravity of the allegations. Thus the degree of the evidence required to support an allegation will be influenced by the potential consequences to all concerned should the allegation be proved, and that is why the civil standard of proof is flexible (*Managh t/a Managh & Associates & Café Down Under Ltd v. Wallington* [1998] 2 ERNZ 337 (CA)).

[20] *Singh v. Sherildee Holdings Ltd t/a New World Opotiki* unreported, Couch J, AC 53/05, 22 September 2005, sets out the general rules on suspension, which are, however, not immutable, at para.[93]:

Just as in the case of dismissal, a decision to suspend an employee will normally only be justifiable if it is made as a result of a fair process. The minimum requirement for a fair process is that the employee be told that suspension is being considered and the reasons why, and then given a proper opportunity to be heard on that issue before a decision is made.

Determination

[21] This case is one of those standard cases where consultation should have been undertaken by Care Park before disadvantaging Mr Dacar by suspending him. There was nothing that urgent in the need for suspension that a short conversation could not have been held whereby the suspension was proposed and Mr Dacar given a short opportunity to make submissions on whether suspension was appropriate. Rather, it was a unilateral act by Care Park without meeting any of the tests set out in s.103A of the Act. The suspension was therefore unjustified.

[22] I accept, however, that Mr May genuinely accepted that the complaint had substance and therefore he had no option but to investigate it. Having received an equivocal response from Mr Dacar, it was then up to Mr May to determine how to progress matters. He could have taken the equivocal response as a denial, and then carried on to complete a full investigation into the main issue, namely speeding. Alternatively, he could have taken Mr Dacar's equivocal statements as an acceptance that he had been speeding. In that case, it is clear from Mr May's evidence that the result would not have been dismissal, but a final warning and counselling.

[23] It was therefore clearly unfair, having failed to advise Mr Dacar that dismissal was being considered because of his equivocal statements, to proceed directly to dismissal. Care Park's actions were in breach of all the sub-parts of s.103A(3).

[24] The major issue for assessment by the Authority is not so much the process as the substance of the decision as to whether a fair and reasonable employer could have reached a decision to dismiss Mr Dacar. Given Mr May's evidence that if the speeding had been admitted to then a final warning would follow it is difficult to see how, without further investigation at least, dismissal was open to a fair and reasonable employer in Mr May's circumstances at the time. This is particularly so because Mr May failed to conduct a full investigation. He did not speak to Mr Dacar's friend and colleague who was in the shuttle bus with him at the time, whose evidence was that Mr Dacar was not speeding. Furthermore, Mr Dacar's supervisor had written to Mr May stating that he had never observed Mr Dacar speeding.

[25] Given the serious consequences to Mr Dacar of dismissal, I conclude that no fair and reasonable employer could have concluded, given the completely different versions of events available to Mr May, that Mr Dacar was guilty of speeding, which in any event could only have led to him receiving a final warning.

[26] I therefore determine that the dismissal was unjustified for substantive grounds and not just for any defects in the process.

Remedies

[27] Mr Dacar seeks lost wages for 45 weeks to the date of the investigation meeting, as he has remained unemployed throughout.

[28] I accept that Mr Dacar has mitigated his loss even though he has only formally applied for seven jobs, because he enrolled with Work & Income New Zealand and numerous temporary work agencies. However, given the short length of Mr Dacar's employment (only just over three months), there is no reason to exercise my discretion to award more than three months' lost remuneration, because there was no guarantee that Mr Dacar's employment would have continued longer than that period. Given his average weekly earnings of \$532.80, that amounts to \$6,926.40.

[29] Mr Dacar seeks \$7,000 in compensation being for unjustified dismissal, unjustified suspension and breach of Care Park's obligation to act in good faith. I

consider this is a claim for a global sum of \$7,000 in compensation. There was no evidence of the effect of the suspension on Mr Dacar. However, he gave uncontested evidence of the need to send money back to Somalia to look after his daughter, which he has no longer been able to do. He also stated that he has struggled financially on a personal level, especially to pay child support for two other children of his. He also notes that the whole situation has been extremely stressful for him.

[30] In all the circumstances, I consider that compensation in the sum of \$5,000 is appropriate.

[31] The Authority must reduce any award payable to Mr Dacar if there have been any actions on his behalf contributing to the employment relationship problem that are blameworthy. In this case, given the seriousness of the major complaint of speeding, I am unable to conclude that Mr Dacar was in fact speeding - otherwise a deduction for contributory fault would have followed. Mr May relied on a complainant who for good commercial reasons Care Park did not call to give evidence. The only direct evidence was from Mr Dacar and his friend and colleague who both denied that Mr Dacar had been speeding on that occasion. In all the circumstances, I can not, on the grounds of probabilities, conclude otherwise.

[32] The only other matter for which contributory actions could lead to a diminution in Mr Dacar's remedies was his failure to give an equivocal response to Mr May about whether he had been speeding that evening. However, given that English is Mr Dacar's second language and that it was Care Park which was running the investigation and not Mr Dacar, I conclude that this was not behaviour worthy of any reduction.

[33] I therefore order the respondent, Care Park New Zealand Limited, to pay to the applicant, Mr Ismaaciil Dacar, the sum of \$5,000 in compensation under s.123(1)(c)(i) of the Act and \$6,926.40 gross in lost remuneration.

Costs

[34] Costs are reserved.

G J Wood
Member of the Employment Relations Authority