

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 631
3154641

BETWEEN GARY GREEN
 Applicant

AND NZ BUS (TAURANGA)
 LIMITED
 First Respondent

Member of Authority: Eleanor Robinson

Representatives: Oliver Christeller, counsel for the Applicant
 Andrew Caisley, advocate/counsel for the Respondent

Investigation Meeting: 2 October 2022 in Tauranga

Submissions and/or further evidence 2 October 2022 from both Applicant and the Respondent

Determination: 29 November 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Gary Green, claims that he was unjustifiably dismissed by the Respondent, NZ Bus (Tauranga) Limited (NZBT).

[2] NZBT denies that Mr Green was unjustifiably dismissed and claims that he was justifiably dismissed after his inappropriate and personally abusive communications with the company's Chief Operating Officer (COO).

The Authority's investigation

[3] During the investigation I received written evidence and heard oral evidence from the Applicant Mr Green and from the Respondent witness, Mr Jay Zmijweski, COO.

[4] I also received oral submissions from counsel for the parties.

[5] 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 of the evidence and submissions received.

Issues

[6] The issue requiring investigation is whether or not Mr Green was unjustifiably dismissed by NZBT.

Background

[7] NZBT runs public transportation services in and around the Bay of Plenty region. It is the main bus company in Tauranga and is responsible for the delivery of public and school bus services around the region.

[8] It is part of the NZ Bus Group of companies. NZ Bus Group also provides public service transport services in Auckland and Wellington.

[9] Mr Green commenced employment with NZBT as an operator/bus driver, in November 2019. He was promoted to the position of Service Delivery Supervisor and employed pursuant to an individual employment agreement dated 2 October 2020.

[10] The Employment Agreement contained the following clauses:

11.1 The employee's employment may be terminated by the employer, without notice or payment in lieu of notice, in cases involving serious misconduct. Serious misconduct Includes, but is not limited to, the following:

- a) If the employee is guilty of any serious misconduct in connection with or affecting the business of the employer including contravention of the employer's internal or external policies or procedures.
- b) ...
- c) Abuse of a member of the public or another employee.
- d)

11.2 If the employer considers that the employee may have committed an act of serious misconduct which warrants further investigation it shall be entitled to suspend the employee on full pay, while an investigation is carried out.

...

29.1 The employer has in place a number of company policies and procedures. ... The employee agrees to follow all policies and procedures that exist at the time of signing this agreement and any amendments and new policies and procedures created from time to time.

[11] Mr Green initialled each page, and signed the Employment Agreement on 6 October 2020 below an acknowledgment statement which read:

36. **Employee acknowledgement**

36.1 The employee acknowledges that:

- a) they have been advised of their right to take independent advice on the terms of this agreement,
- b) they have been provided with a reasonable opportunity to take that advice;
- c) they have read these terms of employment and understand these terms and their implications; and they agree to be bound by these terms of employment and the employer's policies and procedures as implemented by the employer.

[12] Mr Green's position description was attached as Schedule A to the Employment Agreement and had also been initialled on each page by Mr Green. It set out under Position Summary the following:

The Service Delivery Supervisor is responsible for time and attendance (sign on) and coverage of vacant duties as well as operator performance.

The Service Delivery Supervisor is required to take a supportive role in driving improvement across their business unit, performance across the key areas of Punctuality & Reliability, Customer Service, and Health & Safety and cost control. This will include working with peers across NZ Bus.

This position provides essential support to the Service Deliver Manager in meeting organisational objectives.

An important aspect of the role is management of a team of operators, involving effective two-way communication, undertaking staff appraisals, managing performance and leading disciplinary procedures.

Events 17 December 2020

[13] On 17 December 2020 Mr Green was instructed by an email from his direct Manager Ms B, Regional Manager NZBT, to post a notice at his depot advising drivers that NZ Bus intended to change roster patterns. The email had been copied to Mr Zmijewski.

[14] Mr Green said that he had been very worried about the consultation document which proposed changes and a new rotating roster because he believed the proposal would be unpopular with some drivers and make his job more difficult.

[15] He placed the notice on the staff notice board and emailed Ms B to confirm he had done so, including Mr Zmijewski on the response. In the email dated 17 December 2020 he stated:

The notice has been posted. I'll provide proper feedback in due course, but I have to say, this is the worst idea since the Hitlers decided to get jiggy and have a baby boy called Adolf. If the goal is to completely shut down Papamoa, this is the way to do it. I've already had to plead with 1 driver not to quit today, just based on what's currently lined up for him in the School Holiday rosters. He simply can't rotate or work late, end

of. If this proposal goes ahead, he'd be gone, as would many, many more. You fit your work around your life, not the other way around.

[16] Mr Zmijewski said he was disappointed when he received the email because he considered it to be unprofessional and irresponsible. He expected Mr Green as an employee in a supervisory position to have adhered to professional standards of behaviour.

[17] He considered Mr Green's comment regarding the Hitler family to have trivialised a very important and deeply tragic period of recent history and to be offensive.

[18] Mr Zmijewski responded to Mr Green by email that same day, 17 December 2020, stating:

After meeting you the other day, I must say I'm very disappointed with your email below.

Describing the proposal, I have put forward on behalf of the company as "the worst idea since the Hitlers decided to get jiggy and have a baby boy called Adolf" is inappropriate, unprofessional and offensive.

I can assure you that any proposal you may put forward would never be met with such a response from me, regardless of what I thought about your proposal. I would not expect anyone within the organisation to respond in this manner.

Please adhere to NZ Bus values by ensuring your correspondence is at all times professional, courteous and respectful in future.

I will be asking [Ms B] to meet with you and discuss this matter further as I need to be confident that you can meet the standard required of an NZ Bus employee and Supervisor moving forward.

I am also happy to discuss this matter with you personally if you wish to call.

[19] His expectation had been that Mr Green would appreciate the inappropriateness of his comments, and that would be the end of the matter.

[20] Mr Green said he had considered Mr Zmijewski's response to have been 'over the top'. He said that while he would have accepted Mr Zmijewski telling him the comment he had made was not appropriate, he did not consider it significant enough to escalate it to a meeting with his manager.

Email 21 December 2020

[21] Mr Green responded to the email from Mr Zmijewski on 21 December 2020. He said he had waited four days before responding to Mr Zmijewski's email because he wanted to make a considered response.

[22] In his email response to Mr Zmijewski, Mr Green commented that the remark about the Hitlers had been intended as a joke, it was not a personal attack on Mr Zmijweski and he was sorry if Mr Zmijewski had felt personally offended. He stated “I’m sorry if you felt personally offended, but I reiterate that it wasn’t a targeted comment, and I suspect you took umbrage because this is your idea?”

[23] In regard to the meeting with his manager to discuss the expected standards of him as an employee and as a supervisor Mr Green stated:

Now THAT is offensive. Unwarranted, undeserved, personally insulting and frankly, abuse of your position as COO. How am I supposed to respond to that? It is management bullying Jay, pure and simple in a position of authority, you stand tall by strengthening the support of the people underneath you, not by knocking them down.

[24] Mr Zmijewski said he was personally as assisted by other management members offended and dismayed by the response because it indicated that Mr Green was utterly unrepentant. He accepted that there was a form of apology, but no acknowledgment by Mr Green that the comment had been inappropriate. He said in fact Mr Green appeared so convinced that his comment was acceptable and appropriate that he had accused him (Mr Zmijewski) of bullying.

[25] He appointed Ms B to deal with the disciplinary process with Mr Green, and for them to report to him on the process progress and said he had been the decision-maker.

Disciplinary Process

[26] Mr Green said that on 22 December 2020 Ms B and another manager arrived at the Papamoa depot and asked to meet with him. During the meeting, they discussed the emails and told him that he was being suspended immediately.

Suspension Process

[27] On that same day, 22 December 2020, Ms B confirmed in a letter to Mr Green that NZBT was proposing to suspend him on full pay whilst an investigation was conducted into: “an allegation that you have failed to align with our company values. ... The company considers both emails to include inappropriate and offensive language that is not in line with our company values – especially those of respect.”

[28] The letter continued with an invitation to Mr Green to send any feedback to the suspension proposal over the following 24 hours, and assured him that no decision would be made about whether or not suspension would be appropriate until after his feedback was received.

[29] Mr Green provided feedback to the suspension proposal by email to Ms B dated 22 December 2020. In the email he stated:

I'm deeply sorry that this has happened and would like to apologise unreservedly to Jay. Clearly, he feels strongly that I've acted disrespectfully and unprofessionally. This was never my intention, and I'm absolutely horrified that this has escalated to the point where I'm suspended from work." ...

Do I regret what happened? Totally. Was I being deliberately disrespectful or unprofessional? Absolutely not. Will I make the same mistake again? Not in this lifetime.

[30] Ms B responded by letter dated 23 December 2020 thanking Mr Green for his feedback, and confirming that the suspension would proceed while an investigation was conducted.

Meeting 12 January 2021

[31] Following a delay occasioned by the Christmas and New Year break, a meeting was held by Ms B and Mr Green and a First Union representative on 12 January 2021. During the meeting Mr Green said he explained his position and apologized again, stating that he had made an error of judgment.

[32] He requested copies of the relevant policies defining serious misconduct and how it would be addressed.

[33] In a response email dated 22 January 2021 Ms B advised: " you should refer to your contract which sets out a serious misconduct clause and potential outcomes.

[34] The First Union representative emailed Ms B on 2 February 2021 requesting a copy of Mr Green's employment agreement, any policies and procedures used in relation to the outcome. In response a copy of the Employment Agreement was provided, but not any policy or procedures.

[35] On 5 February 2021, again following delays caused by the unavailability of the First Union representative, Ms B wrote to Mr Green. The letter stated:

.. The company considers both emails to include inappropriate and offensive language that is not in line with our company values – especially those of respect. The allegations are serious and, if proven true, could constitute serious misconduct.

The facts established are:

- The content of the emails does fall under the Company's definition of serious misconduct.
- The Company considers the content of the emails to fall under the category of personal abuse – offensive language and abuse.

[36] The letter proposed a meeting to be held on 9 February 2021, invited Mr Green to bring a support person, and advised of the potential disciplinary outcomes should serious misconduct be established.

Disciplinary Meeting 9 February 2021

[37] The disciplinary meeting was held on 9 February 2021 attended by Ms B and another manager, and by Mr Green and the First Union representative.

[38] Mr Green said that during the meeting he and his representative had asked what the abuse referred to in the letter dated 5 February 2021 was, and they were advised that it was three things, : the Hitler comment, the abuse of position of COO comment, and the comment regarding management bullying.

[39] Mr Green's representative made it clear that the comments were an error of judgment on the part of Mr Green and would not be repeated. Further that Mr Green had not intended to offend anyone and he apologised again for any offense which had occurred.

[40] After an adjournment Mr Green was advised that NZBT was proposing dismissal. This was confirmed in a letter dated 9 February 2021 which stated its conclusion that:

... The company considers both emails to include inappropriate and offensive language that is not in line with our company values — especially those of respect.

The facts established by the investigators are as follows:

- The content of the emails does fall under the Company's definition of serious misconduct
- v The Company considers the content of the emails to fall under the category of personal abuse — offensive language and abuse
- The content of the emails goes against our company vision and values of respect (our values underpin everything we do)
- The content of the emails goes against our Code of Conduct where we consider being respectful as the standard to agree and uphold each day at work

[41] The letter set out that Mr Green would have three days in which to provide any feedback or comments.

[42] The First Union representative responded on 12 February 2021 by requesting that NZBT reconsider its decision to terminate Mr Green's employment and suggesting as an alternative:

...

5. A first written warning.
6. A letter of apology to Toni and Jay.
7. A training course on business writing.

8. A three month performance improvement program with monthly assessments on the standards of his written communications.

[43] In 18 February 2021 Ms B wrote to Mr Green confirming the termination of his employment was based upon: “the issue being one of serious misconduct and based on our concern that we may not be able to trust you to carry out your role properly.”

Was Mr Green unjustifiably dismissed by NZ Bus (Tauranga) Limited?

[44] Mr Green was dismissed for serious misconduct on 18 February 2021.

[45] Justification for dismissal is stated in the Employment Relations Act 2000 (the Act), which at s 103A sets out the Test of justification as being:

- (1) For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).
- (2) The test is whether the employer’s actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.
- (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.

[46] The Test of justification requires that the employer acted in a manner that was substantively and procedurally fair. An employer must establish that the dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

[47] Mr Green was a Service Delivery Supervisor which was a senior position within NZ Bus (Tauranga) Limited with leadership responsibilities as confirmed in the position description. As such I find that NZBT was entitled to expect him to behave in a professional manner.

[48] The first email dated 17 December 2020 made a comparison between the conception of Adolf Hitler and the proposal by NZBT. Although I accept that Mr Green intended it to be humorous, Mr Zmijewski considered it could be offensive to a number of people in the workplace. I note that Mr Zmijewski state that he found the email comment of 17 December 2020 to be: “inappropriate, unprofessional and offensive”.

[49] I find Mr Zmijewski’s response to the email in which he also advised Mr Green that he wished Mr Green’s manager to meet with him to discuss the company expectations, to be a reasonable response that a fair and reasonable employer could make in light of the responsibility to maintain a workplace in which all employees were entitled to be treated with respect.

[50] It was open to Mr Green to have accepted that his comment was inappropriate and unprofessional, especially from someone in a leadership position, to have apologised for the comment at that early stage, and had he done so, I consider that the matter would have been at an end, indeed that was Mr Zmijewski’s evidence.

[51] However Mr Green responded by offering an apology to Mr Zmijewski: “if you felt personally offended” and inferred that if he did so, it was because the proposed roster changes had been his idea (“I suspect you took umbrage because this was your idea”...).

[52] As such I consider that Mr Green had not understood that the comment he had made in the email dated 17 December 2020 was considered by NZBT to have been inappropriate and unprofessional from someone in a leadership position, and rather than being personally offensive to Mr Zmijewski, that it might be offensive to the wider workforce.

[53] Mr Green’s evidence was that he felt aggrieved by the reference to his manager being asked to speak to him about maintaining company standards. He responded by accusing Mr Zmijewski of managerial bullying, of making a suggestion that was “offensive, unwarranted, undeserved, personally insulting and frankly abusive of your position as COO”.

[54] I find that the fair and reasonable employer in receipt of this second email, which made after Mr Green had ample time to consider his response, and any implications of it, could have regarded the behaviour of Mr Green to have lacked respect, and been serious enough to commence a disciplinary process.

[55] Following the disciplinary process NZBT found that the content of the emails sent by Mr Green constituted serious misconduct as defined in the Employment Agreement which set out that that: “Abuse of a member of the public or another employee” was serious misconduct.

[56] It was submitted on behalf of Mr Green that Mr Zmijewski was not an employee since he was not employed by NZBT but by NZ Bus Group, which is the holding company of NZBT. It is further submitted that he was not a member of the public because of his close relationship to NZBT.

[57] I note that Mr Zmijewski as COO of the NZ Bus Group of companies had managerial responsibilities which encompassed NZBT, in that sense he could be considered by extension as an employee of the Group which also employed Mr Green.

[58] However if I were to accept it was technically correct, and Mr Zmijewski is not an employee of NZBT, then by default he must fall into the classification of a member of the public.

[59] Considering whether the email comments constituted abuse, I find that while the first email was not personally abusive of Mr Zmijewski, the comments in the second email could be considered abuse of him noting the ‘taking umbrage’ comment and the accusation that Mr Zmijewski was abusing his position as COO and of managerial bullying.

[60] I find that this would accord with the definition of serious misconduct as abuse of another employee or a member of the public.

[61] It is also submitted that Mr Zmijewski was not only complainant but decision-maker and this renders the decision to dismiss unjustifiable.

[62] I observe that the emails were not exclusively sent to Mr Zmijewski but also to Ms B, Regional Manager for NZBT, a fact she refers to in her letter to Mr Green dated 22 December 2022.

[63] It would be inappropriate for a complainant to conduct the disciplinary process, although this may be unavoidable in a smaller company. However in this case it was Ms B, who acted throughout as the investigator and was a principal in the disciplinary process, accompanied at stages by other members of the management team.

[64] It was Ms B who:

- conducted the suspension interview with Mr Green;

- signed the suspension proposal and suspension confirmation letters dated 22 and 23 December 2020;
- conducted the meeting held on 12 January 2021;
- conducted the disciplinary meeting held on 9 February 2021;
- signed the letter proposing termination of employment dated 9 February 2021; and
- signed the letter confirming termination of employment on 18 February 2021.

[65] Examining the letters sent to Mr Green and signed by Ms B, I note the references to decisions and processes made or carried out by managerial representatives other than Mr Zmijewski:

- letter dated 22 December 2020: “the organisation is proposing ...” ;
- letter dated 23 December: “I am confirming the organisation has made the decision to suspend you;
- letter dated 5 February 2021: “I have investigated this matter ... The facts established by the investigators are.... The results of the investigation have called into question your actions and we have concerns that we may not be able to trust you to carry out your role properly.”
- letter dated 9 February 2021: “ the company considers both emails contain inappropriate and offensive language that is not in line with our company values ...”... we have come to a decision to terminate your employment.”
- email 18 February 2021: “...the Company has made the decision to proceed with termination of your employment.”; and
- letter dated 18 February 2021: ... the Company has come to the decision to terminate your employment, effective immediately.”

[66] Whilst Ms B and the other managers involved reported to Mr Zmijewski, there is no evidence that he solely made the decision to dismiss Mr Green rather than the decision was made in conjunction with the management team and based upon their findings and reasoning.

[67] In support of that conclusion, I observe that it was Ms B who investigated the matter as set out in the letter dated 5 February and Ms B who outlined the facts established in the investigation and the concern that as a result NZBT might not be able to trust Mr Green to carry out his role properly.

[68] I find substantive justification for the decision to dismiss Mr Green.

[69] In respect of procedural fairness, this required that Mr Green was:

- a) informed of the allegations against him;
- b) given the right to have a support person or representative at the meeting;
- c) advised of the possible outcomes should the allegations be upheld including the possible termination of his employment;
- d) provided with the relevant information; and
- e) provided with the opportunity to provide an explanation which would be considered before a decision was made.

[70] I find that the facts of the matter were clear and not disputed. Mr Green was made aware of the concerns of NZBT in the letter dated 22 December 2020 at the outset of the process.

[71] Mr Green was supported by a union representative at the meetings held with NZBT and had the opportunity present his explanation before NZBT reached a decision.

[72] I find that the process in respect of Mr Green was procedurally fair.

[73] I observe that Mr Green made unreserved apologies for his behaviour in the email sent to Ms B on 22 December 2020, and again in the meeting held on 9 February 2021. First Union proposed an apology in writing by Mr Green to be provided to Ms B and Mr Zmijewski.

[74] In considering the explanation provided by Mr Green and his representative, Mr Zmijewski said his understanding from the reports made to him by Ms B and the other managers who had been involved in the process, was that NZBT considered the apologies had been made late in the process; in particular after Mr Green had had time to consider his response this followed Mr Zmijewski stating he regarded the comment in the email of 17 December 2020 to be inappropriate and offensive, and significantly after Mr Green he had sent the further comments in the email dated 21 December 2020.

[75] They were also regarded as being made only after Mr Green was made aware of the potential consequences of his actions, and that neither email communication had demonstrated the company value of respect in the workplace.

[76] More importantly, it was perceived that Mr Green had no real insight into the inappropriateness of his comments, and that NZBT had no trust and confidence in his ability to uphold the company value of respect in the workplace.

[77] The Court of Appeal in *Cowan v IDEA Services Ltd* stated that it is not for the Authority to substitute its decision for that of the employer, rather its role is to determine if what occurred was a response open to a fair and reasonable employer in all the circumstances at the appropriate time:

It is not for the court to substitute its decision for what a fair and reasonable employer could have done in the circumstances and how such an employer could have done it. In *Angus v Ports of Auckland Ltd*, it was emphasised there may be a range of responses open to a fair and reasonable employer, and that the Court's task is to examine objectively the employer's decision-making process and determine whether what the employer did, and how it was done, were what a fair and reasonable employer could have done.¹

[78] Although the decision to dismiss Mr Green in light of his later repeated apologies might be seen as severe, I find that NZBT acted as a fair and reasonable employer could have acted in all the circumstances at the relevant time.

[79] I determine that Mr Green was not unjustifiably dismissed by NZBT.

Costs

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

[81] If they are not able to do so and an Authority determination on costs is needed the Respondent 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 Applicant 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.

[82] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[83] 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.²

Eleanor Robinson
Member of the Employment Relations Authority

¹ *Cowan v IDEA services Ltd* [2019] NZEmpC 172 at [81]

² *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].