

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 186
5374405

BETWEEN BRIAN HANNAH
 Applicant

A N D GO BUS TRANSPORT
 LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Rachel Rolston, Advocate for Applicant
 Simon Menzies, Counsel for Respondent

Investigation Meeting: 10 April 2013 at Hamilton

Date of Determination: 13 May 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Hannah) alleges that he was unjustifiably dismissed from his employment by the respondent (Go Bus).

[2] Mr Hannah was employed under an executed collective employment agreement as an urban bus driver in Tauranga City.

[3] On 20 December 2011, Mr Hannah was about to depart the Tauranga bus terminal on a scheduled bus run when another employee of Go Bus boarded the bus.

[4] This employee was Mr Russell McPike who was a driver trainer for Go Bus. There was a discussion between the two employees about Mr Hannah completing Go Bus' required documentation. Mr Hannah says a consequence of the discussion was that he was late departing his scheduled service.

[5] At the end of the working day, Mr Hannah found a report from Mr McPike at the depot with an annotation on it requiring him to discuss it with the Operations Manager.

[6] On 21 December 2011, Mr Hannah arrived at the depot early in order to have that discussion with the Operations Manager (Mr Burton).

[7] On the way into the Operations Manager's office, Mr Hannah saw Mr McPike sitting in his car. There was an altercation. Mr Hannah pointed at Mr McPike, Mr McPike wound down the window of his car and then it is alleged that there was some contact between the two men of a "pushing and shoving" nature. The exchange ended with Mr McPike calling Mr Hannah a name.

[8] In effect, both men complained about the other.

[9] Mr Hannah was already on a final written warning. There was an initial disciplinary meeting on 5 January 2012, about Mr Hannah's involvement in the 21 December 2011 episode with Mr McPike. A second disciplinary meeting was held on 20 January 2012 at which the employer proposed a series of conditions under which Mr Hannah could return to work.

[10] Those conditions were all accepted by Mr Hannah save for the final one which required that he apologise to Mr McPike for initiating the 21 December 2011 incident.

[11] There was then a lengthy delay in concluding matters because of health issues affecting Mr Hannah.

[12] A final disciplinary meeting took place on 14 March 2012 at which Go Bus decided to dismiss Mr Hannah from his employment on the footing that, in the absence of his agreement on all the points proposed in the meeting of 20 January 2012, Go Bus were determined to dismiss Mr Hannah on notice.

Issues

[13] The only issue for determination by the Authority in the present case is whether it was available to a good and fair employer to dismiss in the circumstances in which Go Bus dismissed Mr Hannah.

Was Mr Hannah unjustifiably dismissed?

[14] The Authority has reached the conclusion that Go Bus could have reached the decision to dismiss Mr Hannah on notice, in the circumstances of the present case and accordingly Mr Hannah's claim must fail. The reasons for that conclusion follow. There is a sense in which the issue for determination by the Authority is even narrower than the question the Authority postulated above. In a very real sense, if Mr Hannah had accepted all the conditions put to him for a return to work, at the disciplinary meeting with the employer on 20 January 2012, Go Bus would have welcomed him back and the present proceeding would not have been on foot. However, the Authority prefers to approach the matter in the round and look at the whole context of the complaint made by Go Bus about Mr Hannah's behaviour, its subsequent investigation of that incident, its consideration of Mr Hannah's responses and its final disposition of the matter.

[15] It is useful for the Authority to follow the practise adopted by the representatives in assessing the employer's behaviour with regard to the factors identified in section 103A(3) of the Employment Relations Act 2000 ("the Act"). On that basis, the first issue the Authority must consider is whether there was a sufficient investigation, given the company's resources. The first point to make is that it is accepted that Go Bus is a significant employer with a relatively large number of employees. As a consequence, it has adequate human resources experience and expertise available to it.

[16] That said, was the investigation sufficient? Mr Burton, Go Bus' Operations Manager for Tauranga, expressed the matter this way, when he said he got *two versions of the events of 21 December 2011. I decided I preferred Russell's (Mr McPike's). There was no other evidence available. What else could I do? Is there any further investigation I could undertake?*

[17] Mr Burton makes a good and fair point. This is not a situation where the employer is confronted with two separate versions of events and is able to differentiate between the two by conducting further enquiries as the Court found was appropriate in *Timu v Waitemata District Health Board*, AC34/07 per Judge Couch. In *Timu*, where there were two conflicting accounts of the alleged wrongdoing, His Honour found that Waitemata District Health Board ought to have conducted further

enquiries to assist it in reaching the conclusion that it preferred one or other of the versions of the events complained of.

[18] The difference in the present case is that unlike *Timu*, there are, in the Authority's clear view, no other enquiries that Go Bus could make. Mr Burton was clear that there were no other witnesses to the incident complained of, and he checked, and given that there was no other evidence available, all he could do was make a determination about which version of events he preferred. Again, referring to Mr Burton's clear oral evidence he told the Authority in answer to a direct question that the two versions of the events were *so different that one had to be right and one had to be wrong*.

[19] What Mr Burton did, when confronted with that stark choice, was evaluate the relative work history of both men. On the one hand he had Mr Hannah who was already on a final written warning for not dissimilar aggressive behaviour and who, to Mr Burton's certain knowledge had had various other scrapes during the employment, and on the other he had Mr McPike whose record, save for his offensive utterance at the end of the altercation on 21 December 2011, was unblemished.

[20] Accordingly, Mr Burton concluded that Mr Hannah had *initiated the incident* and the events complained of followed from there.

[21] It is absolutely central to Mr Burton's analysis of the incident that his central finding was that Mr Hannah had started the altercation. When pressed about this at the investigation meeting, Mr Burton accepted that the initiation of the incident was by Mr Hannah wagging his finger at Mr McPike. The advocate for Mr Hannah tried to encourage Mr Burton to more broadly focus on the nature of the alleged physical exchanges between Mr McPike and Mr Hannah once they engaged with each other but Mr Burton was not to be moved from his conclusion that nothing would have happened if Mr Hannah had not chosen to engage.

[22] In that regard, Mr Burton drew a parallel with earlier behaviour of Mr Hannah where he had chosen to engage with another party rather than leaving the matter.

[23] The Authority is satisfied with the investigation conducted by Go Bus and thinks it was available to Go Bus to conclude on balance a preference for Mr McPike's version of events to the view advanced by Mr Hannah, that conclusion being informed in particular by Mr Hannah's unfortunate history of *incidents* and the

absence of any such incidents with Mr McPike. In the end, it is not for the Authority to second guess the employer's investigation. The Authority can only look at the outcome and on the basis of the evidence available to it, the Authority concludes that a fair and reasonable employer could properly have concluded that Mr McPike's recollection of the events in question was to be preferred over Mr Hannah's. Further, and finally, the Authority is satisfied that in placing his emphasis firmly on identifying who had initiated the altercation, Mr Burton struck the right note because as he himself said in his evidence, if Mr Hannah had not engaged with Mr McPike, there would have been no altercation at all. And it was precisely Go Bus' criticism of Mr Hannah's judgment in making those sorts of calls which had resulted in earlier engagements between employer and employee during Mr Hannah's employment.

[24] The Authority must now consider whether Go Bus raised its concerns appropriately with Mr Hannah before it dismissed him. The Authority does not discern any complaint about the written material provided by Go Bus to Mr Hannah but does refer to concerns expressed on Mr Hannah's behalf about the point the Authority has just emphasised around the comparative work histories of the two protagonists.

[25] It is argued for Mr Hannah that he did not understand what the phrase "*comparative work histories*" meant and thought that it related to length of service. Of course, what Mr Burton was alluding to was the stark difference in the behaviour of the two men; one with an unblemished work record and the other, with a final written warning and a number of other engagements of a disciplinary or quasi disciplinary nature.

[26] The Authority makes two observations about this complaint. The first is that the correspondence from Go Bus to Mr Hannah on 29 December 2011, when the allegation was first put to Mr Hannah, could not be clearer that what the company was concerned about was aggressive physical behaviour. That view is reiterated in the preliminary decision which was conveyed by letter dated 17 January 2012 wherein the proposed conditions to enable Mr Hannah to continue in the employment were set out by Go Bus, for the first time.

[27] The second point the Authority would make about this concern is that at the relevant time, Mr Hannah had experienced Union representation and it seems inconceivable that if there was any misunderstanding about his position, the Union

would not have assisted him to understand what was meant. Certainly, Go Bus' evidence is redolent with an emphasis on the effectiveness of the Union officials acting for Mr Hannah and it seems inconceivable to the Authority that if Mr Hannah was puzzled by the particular expression, which it is now claimed he did not understand, he would not have sought advice at the time.

[28] Next, and in a similar context, the advocate for Mr Hannah argues that the emphasis which Mr Burton placed on Mr Hannah initiating the exchange with Mr McPike, was not appropriately identified to him during the disciplinary process. In other words, it is said that Mr Hannah did not get a proper opportunity to respond to the suggestion that he had started things with Mr McPike. To being with, the Authority notes that Mr Hannah never denied that he wagged his finger at Mr McPike. What he denies is that that somehow started the chain of events which ended up getting him in trouble. He argues that things *started* later on and that is what the company should focus on. But it was clear in the company's analysis as early as the 20 January 2012 meeting that Go Bus had reached a provisional conclusion that Mr Hannah had started the altercation. In the letter of 17 January 2012, wherein Go Bus set out its provisional conclusions, it states:

The company believes significant factors in supporting this decision (not to accept Mr Hannah's version of events) are the belief you initiated the incident ...

[29] Again, the Authority is satisfied that, on the balance of probabilities, Mr Hannah was given a clear analysis of what Go Bus' concerns were and that those provisional conclusions reached by Go Bus and communicated via its letter of 17 January 2012 are explicit enough about the importance of the initiation of the event to enable Mr Hannah to properly consider that matter and respond, if he thought fit. Moreover, the fact that Mr Hannah never denied starting the engagement with Mr McPike but somehow wants to argue that the initiation happened later, is a factor that Go Bus could properly weigh as supporting Mr McPike's view of events. After all, a balanced view of any physical or quasi physical altercation is likely to conclude that the easiest way of preventing any such engagement is to never have it start at all; conversely, such exchanges are more difficult for any person to extract themselves from once there has been some engagement the one with the other.

[30] The next issue is whether Mr Hannah was given a reasonable opportunity to respond to the company's concerns. Given the extended timeframe, and the various indulgences that Mr Hannah was given because of his personal circumstances, from the end of January on through until the middle of March, it is difficult to be critical of Go Bus' attitude in giving Mr Hannah a reasonable opportunity to be heard. The process was measured and reflective. There was an initial engagement in the nature of a fact finding meeting and as a consequence of that Go Bus issued a provisional conclusion via its letter of 17 January 2012. That letter set out a proposed way forward which did not involve Mr Hannah being dismissed from his employment.

[31] The meeting on 20 January 2012 resulted in an acceptance by Mr Hannah of all but one of the conditions that Go Bus stipulated and the various efforts made by Mr Hannah's Union advisers at and around that meeting are much in evidence in the material before the Authority.

[32] Then it is fully six weeks before there is a final engagement between the parties and even at that late stage, if Mr Hannah had thought better of his earlier refusal to accept the final condition sought by Go Bus, he would have been back on-the-job and these proceedings would have been aborted.

[33] The only substantive criticism from Mr Hannah is that the company's general manager was not available to him during the disciplinary process and yet it is alleged that he was part of the decision making matrix. That is not accepted by Go Bus and the Authority does not accept it either. The evidence is as plain as can be that Mr Burton, the operations manager, had the power to *hire and fire* and that in respect of Mr Hannah he used it. It was Mr Burton's decision and Mr Burton was the only person that Mr Hannah needed to engage with.

[34] Finally, the Authority must consider whether Go Bus genuinely considered Mr Hannah's explanations. First, it is important to note that Mr Hannah maintained throughout that he was not the aggressor in the altercation of Mr McPike, that Mr McPike had assaulted him, and that therefore any suggestion that he (Mr Hannah) ought to apologise to Mr McPike was putting the boot on the wrong foot. Mr Hannah had made that point throughout the proceedings and he reiterated it in his oral evidence to the Authority. In that oral evidence he agreed with the Authority that if he had apologised to Mr McPike he would still have his job. But his view of the matter, as he expressed it to the Authority, was:

There was an assault on me. Why should I apologise to the person who assaulted me?

[35] That of course was the view that he had expressed to Mr Burton, but it was a view which Mr Burton did not accept preferring instead the evidence of Mr McPike and preferring to conclude that nothing at all would have happened if Mr Hannah had had the good sense not to engage with Mr McPike in the first place.

[36] In the Authority's view, the approach adopted by Mr Burton for Go Bus was a measured and sensitive one. He conducted a proper investigation, identified his concerns clearly and expressed them succinctly to Mr Hannah, sought Mr Hannah's explanations, preferred alternative explanations, but then reached a conclusion which would have enabled Mr Hannah to remain in the employment. Because Mr Hannah maintained that he had been the victim of an assault rather than the aggressor, he refused to apologise and accordingly, the dismissal was effected.

[37] The reasoning adopted by Mr Burton in making that decision is set out in the clearest terms in the evidence that he put before the Authority. He said at various points in his evidence that, given Mr Hannah's history, he *needed to be convinced that anything less than a dismissal would result in a behaviour change*. And again, *it was crucial for Brian (Mr Hannah) to acknowledge his role in initiating incidents and make a commitment that to the best of his ability he would refrain from doing so*.

[38] So the essence of Mr Burton's conclusion is that the apology which Mr Hannah refused to give was a critical part of the package that he had brought together to try to ensure that Mr Hannah could remain on-the-job. He wanted to emphasise to Mr Hannah that he needed to stop getting into scrapes. An apology for starting something with Mr McPike was the company's way of trying to make that point, and without it, Mr Burton was satisfied that Mr Hannah would not change and that there would continue to be difficulties in managing him going on into the future.

[39] Mr Burton reasoned that Mr Hannah was already *sitting on a final warning for aggressive behaviour* and that final warning of itself entitled him to contemplate dismissal for a repeat offence.

[40] That final written warning, coupled with the conclusion that Mr Hannah had not got the message that his behaviour needed to change, brought Mr Burton to what we might call a tipping point, because it was evidence for the view that Mr Hannah's

behaviour would not change. The Authority is satisfied that Mr Burton's reasoning is reasoning that a fair and just employer could undertake in these circumstances and the conclusion reached of a dismissal on notice is also a conclusion that a fair and reasonable employer could reach in the particular circumstances of this case.

[41] For the avoidance of doubt, the Authority also indicates that it is satisfied that Go Bus fulfilled its obligations as a good and fair employer informed by the good faith principle in s.4 of the Act and similarly complied with its contractual obligations under the terms of the operative employment agreement and the house rules that applied.

Determination

[42] The Authority has not been persuaded that Mr Hannah has a viable personal grievance for unjustified dismissal and his claim accordingly fails.

Costs

[43] Costs are reserved.

James Crichton
Member of the Employment Relations Authority