

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 41
5427473

BETWEEN

ROGER HEASLIP
Applicant

A N D

HAYWARD COACHLINES
LIMITED
Respondent

Member of Authority: James Crichton

Representatives: Rachel Rolston, Advocate for Applicant
Blake Hayward, Advocate for Respondent

Investigation Meeting: 11 December 2013 at Auckland

Date of Determination: 5 February 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Heaslip) alleges that he was constructively dismissed from his employment by the respondent (Hayward Coachlines). Hayward Coachlines resists that claim.

[2] Mr Heaslip was employed in November 2012 as a coach driver. There was no written employment agreement.

[3] On 25 January 2013, Hayward Coachlines received a complaint about Mr Heaslip's behaviour while driving a company vehicle. The issue was discussed between the parties informally and did not result in disciplinary action.

[4] A further complaint was received about Mr Heaslip on 6 February 2013. This time, the allegation involved allegedly dangerous driving by "tailgating" another vehicle.

[5] Again, Mr Heaslip was counselled rather than disciplined and asked to send a letter of apology to the complainant.

[6] From the beginning of March 2013, Mr Heaslip was employed operating Hayward Coachlines' "Nakedbus" northern service. Mr Heaslip contacted Hayward Coachlines on 3 March 2013 to request a day off and this was arranged for the following day, 4 March 2013, with the intention that Mr Heaslip would recommence duty on 5 March 2013. When Mr Heaslip presented himself for duty again on 5 March 2013, he found he had not been rostered to work for the balance of that week.

[7] On inquiry, Mr Heaslip was told that there had been a series of complaints about his driving and he was asked to see a director of Hayward Coachlines, Mr Blake Hayward.

[8] That meeting took place later that same day. There is dispute between the parties about how much information Mr Heaslip was given at that meeting. Hayward Coachlines says that Mr Heaslip was provided with all the information that Hayward Coachlines had; Mr Heaslip maintains that he was not offered any documentation relating to any complaint and was simply told to attend a formal disciplinary meeting on Friday, 8 March 2013.

[9] That meeting proceeded with Mr Sam Hutchinson, the Operations Manager of Hayward Coachlines. Again there is dispute between the parties about what actually happened. Mr Heaslip says that the meeting was very short, that he was not asked to give an explanation, was not told the extent of the complaints against him, and was simply told that the employer had no choice but to terminate his employment. Conversely, Mr Hutchinson told the Authority that he had gone through each of the complaints with Mr Heaslip and sought his comments on each one. Mr Hutchinson was clear that he provided a copy of each of the complaints, all of which were in writing.

[10] While Mr Heaslip maintained that he was given no opportunity to respond to the allegations, Mr Hutchinson was equally clear that he had asked Mr Heaslip for an explanation that Mr Heaslip had blamed "personal issues" and that Mr Heaslip acknowledged the wrongdoing and took responsibility for it. Mr Hutchinson was also adamant that Mr Heaslip said that he understood that Hayward Coachlines had no option but to dismiss him.

[11] At the conclusion of the meeting, Mr Heaslip was invited to and in fact did sign a document prepared by Hayward Coachlines which appears to record Mr Heaslip's termination and the reasons for it, listing the various complaints received about Mr Heaslip.

[12] Subsequent to the dismissal, Mr Heaslip sent a text message to Mr Hayward appearing to regret the actions which led to his dismissal.

[13] Sometime later, in April 2013, there were two communications from Mr Heaslip to Hayward Coachlines which Mr Heaslip maintains raised a personal grievance.

Issues

[14] The significant issue the Authority needs to investigate and determine is the question whether Mr Heaslip was unjustifiably dismissed or not.

[15] While the statement of problem pleads a constructive dismissal, on the facts that is simply not sustainable; Mr Heaslip was dismissed from his employment for alleged wrongdoing.

[16] There are two disciplinary meetings involved and the evidence proffered by the parties in respect of the way in which those meetings were conducted is entirely different. It follows that issues of credibility are part of the matrix that the Authority must consider.

[17] However, a preliminary issue is whether the grievance was ever appropriately raised with the employer.

[18] Finally, there are two smaller matters the Authority needs to consider. The first is whether the subsequent use by Hayward Coachlines of Mr Heaslip's services after the dismissal has any significance and the second is whether the reference to a staff member being "*let go*" in some of the material raising the complaints, has any significance.

Was a personal grievance ever raised?

[19] Although not pleaded by Hayward Coachlines or indeed commented on for Mr Heaslip, there is an argument for the view that a personal grievance was never

raised. All the correspondence says is that there is a problem; nowhere is the expressions personal grievance used and more importantly, there is no absolutely particularity about what Mr Heaslip sought, to put matters right.

[20] Hayward Coachlines could be justifiably puzzled about just what it was it was confronting. The nature of the complaint is far from clear. All that the employer is told is that there is a problem with the process but not what that problem is.

[21] The leading case on this aspect is still *Creedy v. Commissioner of Police* [2006] 1 ERNZ 517 where His Honour Chief Judge Colgan said:

It is the notion of the employee wanting the employer to address the grievance that means that it should be specified sufficiently to enable the employer to address it. So it is insufficient, and therefore not a raising of the grievance, for an employee to advise an employer that the employee simply considers that he or she has a personal grievance or even by specifying the statutory type of personal grievance as, for example, unjustified disadvantage in employment. ... An employer must be given sufficient information to address the grievance, that is to respond to it on its merits and with a view to resolving it soon and informally, at least in the first instance.

[22] In the present case, it is difficult to see how Hayward Coachlines would have been in any position to address Mr Heaslip's complaint because there is simply not sufficient particularity about his complaint to enable the matter to be resolved speedily and at "first instance".

[23] While Hayward Coachlines did not explicitly use the fact that the personal grievance had not been properly raised as a shield, it is nonetheless true that the evidence was plain enough that Hayward Coachlines was confused about exactly what the problem was. On the facts, as the Authority has heard them, that is not surprising because there was simply no detail about the complaint other than the suggestion that it was about the employer's process. No doubt, if Hayward Coachlines had sought legal advice, it would have been encouraged to raise the failure to notify the grievance as a shield, and at the very least require Mr Heaslip to make application to raise his grievance out of time.

[24] It is a moot point as to whether such an application, if made, would have been granted but in the particular circumstances of this case, the Authority has concluded that the proper course is to consider the totality of the evidence, including the plain failure just identified to properly raise the grievance in accordance with the law, and

then reach a determination on the totality of the evidence rather than make a finding that because of the failure to raise the grievance within time, the matter simply cannot proceed. What is apparent is that until the statement of problem was filed and served on 10 October 2013 (well outside the justiciable period), Hayward Coachlines would have been in no clearer position about exactly what Mr Heaslip's objection to its process was.

Was Mr Heaslip unjustifiably dismissed?

[25] The argument for Hayward Coachlines is simply that, faced with a parade of very serious complaints about inappropriate treatment of passengers and dangerous and/or reckless driving of one of their vehicles, it had no alternative but to terminate Mr Heaslip's employment.

[26] Conversely, Mr Heaslip says that he was not given a proper opportunity to respond to the allegations made against him, that he denies the truth of those allegations, that the employer did not undertake a proper investigation to satisfy itself if the complaints were truthful or not and that, accordingly, he has been treated unfairly.

[27] But there are some difficulties with Mr Heaslip's position. The first is that the Authority is satisfied that what Mr Heaslip told the employer at the time the events complained of is different from the evidence that Mr Heaslip gave to the Authority. Mr Heaslip told the Authority that he did not accept the truth of the allegations made against him but that he had been given no opportunity whatever to provide any explanation and was simply told in the second meeting on 8 March 2013 that he was dismissed because of the complaints.

[28] But Hayward Coachlines is very clear that Mr Heaslip accepted wrongdoing when the second meeting took place on 8 March 2013, accepted that he had done what he was accused of doing, said only that the explanation for his wrongdoing was some personal issues which he was dealing with, and accepted that dismissal was the only appropriate response.

[29] If, as in this case, the Authority prefers the recollection of the employer's witnesses to that of Mr Heaslip, then it is difficult to see why, on the basis of the written complaints received about Mr Heaslip's behaviour, the employer was under any obligation to take any further steps. After all, it had an admission from

Mr Heaslip, an acceptance that the complaints were truthful and an acknowledgment that there had been wrongdoing which must sound in a dismissal. In those circumstances, it is difficult to see what investigation the employer could possibly have been required to undertake, given that it effectively had a full admission from the affected employee.

[30] The position would be otherwise of course if Mr Heaslip had persuaded the Authority that the observations he made in his evidence at the investigation meeting were to be preferred over the recollections of the relevant witness for Hayward Coachlines, Mr Hutchinson. If the Authority had been persuaded that Mr Heaslip had not accepted liability for the matters complained of at the time they were raised with him by the employer, then of course the employer would have been under an absolute legal obligation to undertake further inquiries because it would have been presented with, effectively, two separate versions of the events in question.

[31] But the Authority is satisfied that that is not the position and that Mr Heaslip's recollection of what he said at the time is mistaken.

[32] While Mr Hutchinson gave his evidence by telephone and was not involved in the Authority's investigation meeting, the Authority has formed the view that Mr Hutchinson was a truthful and accurate witness and that he had no reason to make up his version of the final interview on 8 March 2013.

[33] The principal reason that the Authority has reached that conclusion is simply because Mr Hutchinson's evidence and the little things that he remembered about the interview, had the ring of truth about them.

[34] But there is another reason as well for the Authority concluding that Mr Hutchinson's evidence is able to be relied upon. It is simply that Mr Hutchinson is no longer employed by Hayward Coachlines. Notwithstanding that, Mr Hutchinson was able to be tracked down by Mr Hayward, was happy to talk to the Authority about his recollections of that interview and was altogether cooperative. And there was no reason for him to make up a convincing tale about his interview with Mr Heaslip, given that he is no longer employed by Hayward Coachlines. In the Authority's judgment, Mr Hutchinson is in a perfect position to tell the unvarnished truth about what happened and the Authority is persuaded that is precisely what he did.

[35] On that basis then and for the avoidance of doubt the Authority found Mr Hutchinson's evidence persuasive and did not feel able to rely on the evidence advanced by Mr Heaslip.

[36] Not only is Mr Hutchinson's evidence of the final meeting more persuasive in the Authority's judgment, looking at it in isolation, but Mr Heaslip's own evidence is inconsistent with the evidence of Mr Hayward about the first meeting and equally importantly, Mr Heaslip's evidence is also inconsistent with his signature appearing on the bottom of the form scheduling the wrongdoing and identifying that dismissal is the outcome as well as being inconsistent with the text message sent by Mr Heaslip to Mr Hayward after the dismissal.

[37] In the Authority's view, neither the signature on the Hayward Coachlines form or the text message make any sense when set against Mr Heaslip's evidence that he was contesting the employer's process. Rather, those two aspects are more consistent with the evidence for the employer.

[38] So in relation then to the allegations that arrived in the employer's hands by email, the Authority's considered view is that each of those allegations was put to Mr Heaslip, that he accepted the truth of them, and that he acknowledged that a consequence of his wrongdoing was that dismissal was inevitable.

[39] The factual position is that at the time of the initial meeting with Mr Hayward on 5 March 2013, three written complaints had been received. Mr Hayward is adamant that those three complaints were printed off and given to Mr Heaslip to review at the meeting on 5 March 2013, that he did read them but that he did not take them with him when he left the interview.

[40] Conversely, Mr Heaslip maintains that he was provided with a copy of only one complaint (a complaint involving an allegation that he had refused to allow a young woman to go to the toilet which resulted in her having to urinate on the bus). Mr Heaslip says he was provided with a copy of that complaint but of no other complaint and that although he was told he could take the copy with him, he did not do so.

[41] The Authority prefers Mr Hayward's recollection of these events. In any event, by the Friday of that week, 8 March 2013, there had been two further

complaints from customers and a letter of complaint from Police concerning Mr Heaslip.

[42] In addition, Hayward Coachlines' own internal evidence from the GPS system on its coaches was that while Mr Heaslip was driving there were a total of 400 "speeding events". Submissions for Mr Heaslip maintain that the subject coach had a governor on it to control speed; that is quite wrong. The evidence is the reverse of the submission.

[43] It is apparent on the straightforward evidence of Mr Hayward and Mr Hutchinson that the 400 speeding events and the letter from Police were never put to Mr Heaslip. Of course, they should have been. There is no proper basis on which an employer, knowing something adverse about the employee's behaviour, does not put that information in front of the employee and seek a response.

[44] Clearly, this material is relied upon in the statement in reply where it is used in part to justify the dismissal. But it is equally clear that Mr Hayward did not have that material at the first meeting (the meeting that he presided over on 5 March 2013), and it is equally plain from the very straightforward evidence of Mr Hutchinson concerning the 8 March 2013 meeting that he presided over that he (Mr Hutchinson) did not know about the speeding issues at all and does not appear to have dealt with the letter from Police either.

[45] As Mr Hutchinson was the decision-maker and made the decision on behalf of Hayward Coachlines to dismiss, it seems to the Authority the only matters that the Authority can properly take into account are the matters which Mr Hutchinson knew about and factored into both the disciplinary meeting that he presided over for the employer and the decision to dismiss which emanated from that meeting.

[46] On that basis then, whatever Hayward Coachlines is saying now about the basis for the dismissal, the only issues that appear to have been known to the decision-maker were the five email complaints from passengers, all of which the Authority is satisfied were put to Mr Heaslip and all of which he accepted as proved at the time, contrary to what he told the Authority later on.

[47] The nature of the five email complaints include allegations of some reasonable seriousness and taken together, it is difficult to see how a road transport operator running public transport services and faced with the admissions that the Authority is

satisfied Mr Heaslip made at the time, could not properly conclude that dismissal was the only appropriate outcome.

[48] Indeed, if the Authority applies the test required by the law, it seems apparent that a good and fair employer, presented with admissions by the subject staff member, could conclude that dismissal was the only viable outcome.

The other issues

[49] The first matter the Authority wishes to deal with in this section is the allegation that Hayward Coachlines behaved improperly in providing work to Mr Heaslip after the dismissal. The suggestion is that, if Hayward Coachlines was genuine in its concern about Mr Heaslip's behaviour, it would not have offered him further work after dismissal. There is merit in that argument. It is difficult to understand why Mr Heaslip would be an inappropriate person to be placed in charge of one of Hayward Coachlines' buses on 8 March 2013 but on 10 March 2013 and again on 15 and 16 March 2013 was apparently an appropriate person to be placed in charge of one of Hayward Coachlines' vehicles.

[50] Presumably, the employer made the judgment that the particular nature of the tasks required of Mr Heaslip on these two subsequent occasions were not ones that were likely to create difficulty. Certainly, the second of them involved the repositioning of a coach from the South Island to Hayward Coachlines' base in Auckland and that arguably is less controversial than the other utilisation of Mr Heaslip, where he was required to undertake the transport of a group of elderly patrons.

[51] The only possible explanation for Hayward Coachlines' behaviour is that it felt sorry for Mr Heaslip post-dismissal and determined to give him two discrete jobs to assist him financially. It is apparent to the Authority that the parties were on good terms during this period (which gives the lie to Mr Heaslip's subsequent claim that he did not accept the criticisms of his performance during Hayward Coachlines' disciplinary process).

[52] It is also apparent that the purported raising of the personal grievance did not happen until April 2013, sometime after these two discrete assignments were given to Mr Heaslip.

[53] The Authority is not persuaded it can take this matter any further. It agrees that the fact that Hayward Coachlines found Mr Heaslip's performance to be so inadequate as to require a summary dismissal on 8 March makes it somewhat extraordinary that on 10 March and again on 15 and 16 March, Hayward Coachlines should offer Mr Heaslip work, but the only conclusion available, as the Authority has noted, is that the employer felt sorry for Mr Heaslip because he was out of work and therefore short of money.

[54] The other issue the Authority wishes to deal with at this point is the contention that Hayward Coachlines had pre-determined Mr Heaslip's dismissal. This is supposed to be suggested by some of the email traffic the employer relied on in dismissing Mr Heaslip. There are two examples of this; an email dated 7 March 2103 from Nakedbus customer service in which Mr Blake Hayward is asked "*can you confirm if this is the driver you have let go?*". Again, in an email of 4 March 2013 from the same source and to the same recipient, there is the question "*is this the driver that you are in the process of letting go?*".

[55] Of course, both of these emails predate the dismissal, although even the earlier one only predates it by a few days. Nonetheless, it is right for Mr Heaslip to point out that these emails suggest that Hayward Coachlines had already told Nakedbus (to whom it was contracted) that Mr Heaslip was to be dismissed.

[56] The Authority is not disposed to put a great deal of weight on these emails. They are not written by the employer but rather to the employer by a third party not involved in the employment relationship. They may simply reflect a loose use of language. It may be that Mr Hayward simply referred to the company undertaking a disciplinary investigation or something of that sort.

[57] The Authority's focus must be not on what third parties might say but on what the employer actually did and the Authority has already dealt with that appropriately in the previous section.

Determination

[58] The Authority has not been persuaded that Mr Heaslip has a viable personal grievance. The Authority prefers the evidence advanced for Hayward Coachlines and particularly the evidence of Mr Hutchinson about the second disciplinary meeting and the decision to dismiss that resulted from that meeting.

[59] In the Authority's considered view, a good and fair employer, faced with frank admissions of wrongdoing in relation to each of the allegations made by a series of complainants, could decide to dismiss the subject employee and on that footing, Mr Heaslip's claim must fail.

[60] Of course, those conclusions rely on the personal grievance having been properly raised and the Authority's finding is that there was no proper raising of the personal grievance either. Mr Heaslip simply did not provide Hayward Coachlines with sufficient information to enable the matter to be dealt with at first instance and had he done so, it is entirely possible that these proceedings would have been unnecessary and the matter might have been able to be resolved between the parties by agreement. Certainly, up to the point at which Mr Heaslip purported to raise his personal grievance, notwithstanding the dismissal, the parties had a good relationship and on that footing, there would have been every chance that, with a proper raising of the grievance, the matter could have been resolved by agreement.

[61] Looked at in the round then, this matter must fail for Mr Heaslip not only because the Authority has not been persuaded by his evidence, preferring the evidence of the employer as to what happened during the disciplinary process, but also because the Authority has not been persuaded that Mr Heaslip ever properly raised his grievance.

Costs

[62] Hayward Coachlines did not apparently obtain legal advice in dealing with this matter in the Authority and on that footing, as the successful party, there is no ability for it to claim costs. However, if the Authority is mistaken in that view and if Hayward Coachlines did obtain legal advice, then it should seek to obtain a contribution to those legal costs from Mr Heaslip and failing that, can make an application to the Authority to have costs fixed.

[63] Should such an application be made to the Authority, Mr Heaslip is file his submissions in response to the costs application, within 14 days of his receipt of it.

James Crichton
Member of the Employment Relations Authority