



Employment Court of New Zealand

You are here: [NZLII](#) >> [Databases](#) >> [Employment Court of New Zealand](#) >> [2015](#) >> [\[2015\] NZEmpC 180](#)

[Database Search](#) | [Name Search](#) | [Recent Decisions](#) | [Noteup](#) | [LawCite](#) | [Download](#) | [Help](#)

Keepa v Go Bus Transport Limited [2015] NZEmpC 180 (12 October 2015)

Last Updated: 19 October 2015

IN THE EMPLOYMENT COURT AUCKLAND

[\[2015\] NZEmpC 180](#)

ARC 59/13

IN THE MATTER OF a challenge to a determination of
the
Employment Relations Authority

BETWEEN GRAHAM KEEPA Plaintiff

AND GO BUS TRANSPORT LIMITED
Defendant

Hearing: 3-4 August 2015
Submissions filed on 18 August, 2 September
and
8 September 2015 (Heard at Tauranga)

Appearances: G McKinstry, advocate for plaintiff
J Lomas and S-J Davies, counsel for defendant

Judgment: 12 October 2015

JUDGMENT OF JUDGE M E PERKINS

Introduction

[1] Mr Graham Keepa was in an employment relationship with Go Bus Transport Ltd (Go Bus) as a bus driver. He was originally employed to work for Go Bus in Christchurch. He then moved to Tauranga and commenced employment with Go Bus there on 7 March 2011.

[2] Mr Keepa's employment with Go Bus was terminated on 23 August 2012. He commenced proceedings in the Employment Relations Authority (the Authority) claiming he was unjustifiably dismissed. In a determination dated 5 July 2013 the

Authority held that Mr Keepa was not dismissed, that he resigned and was bound by

GRAHAM KEEPA v GO BUS TRANSPORT LIMITED NZEmpC AUCKLAND [\[2015\] NZEmpC 180](#) [12 October 2015]

a settlement agreement he entered into with Go Bus on 16 August 2012.¹ He was ordered to make a contribution of \$3,500 towards the defendant's legal costs. Mr Keepa has filed a challenge to the determination. The remedies he seeks are:

- (a) compensation of \$10,000;
- (b) reimbursement for lost wages of \$7,680;
- (c) costs and disbursements including filing fees and travel costs.

[3] Whereas the challenge was filed with the Court on 1 August 2013, there has been some delay in proceeding to a hearing. That has been as a result of Mr Keepa and his wife suffering illness such that they were unable to attend to commitments with Mr Keepa's advocate, nor attend a lengthy Court hearing.

[4] Matters of constructive dismissal, accord and satisfaction, and the Latin maxim *nemo iudex in sua causa*² are included as issues for determination in this judgment.

Pleadings

[5] The final pleadings by each of the parties consists of:

(a) an amended statement of claim filed by Mr Keepa on 23 September 2013;

(b) an amended statement of defence filed on 23 October 2013;

[6] In the statement of claim Mr Keepa elected a challenge against the whole of the determination by way of a hearing *de novo*.

[7] Mr Keepa alleges that the employment ended as a result of the unjustifiable actions of Go Bus:

¹ *Keepa v Go Bus Transport Ltd* [2013] NZERA Auckland 287.

² Meaning “No man shall be a Judge in his own cause”.

(a) acting in breach of the principle *nemo iudex in sua causa* or that no man shall be a judge in his own cause. The way this is pleaded is that the Regional Manager of Go Bus was involved in all the circumstances giving rise to the disciplinary process and then conducted the final meeting and decided and delivered the decision at the disciplinary meeting;

(b) not issuing a lawful instruction to Mr Keepa;

(c) not affording to Mr Keepa the right of support or not proceeding further until support was available;

(d) not advising the consequences of failing to follow the instructions; (e) issuing an instruction which was not necessary;

(f) not acting as a fair and reasonable employer in issuing the instruction, the Regional Manager believing he was being defied when he was not;

(g) The Regional Manager preparing the dismissal letter before the disciplinary meeting, pre-judging and not acting in good faith;

[8] As Mr Keepa resigned, the allegations in the main have to relate to an allegation of a mere prospect of termination of Mr Keepa's employment. However, Mr Keepa alleges that his employment was terminated by Go Bus and this relates to his allegation that he was constructively dismissed. Constructive dismissal is not specifically pleaded but is put forward as a cause in final submissions on behalf of Mr Keepa. Counsel for Go Bus in their final submissions also dealt with the allegation of constructive dismissal along with the issue of whether or not Mr Keepa was dismissed. The pleadings of fact and other pleadings of Mr Keepa are sufficient to include it as a cause.

[9] Mr Keepa also alleges that contemplated warnings resulted from unjustifiable actions by Go Bus. In respect of both the way in which Mr Keepa's employment was

terminated and the notice of the contemplated warnings was given to him there is an overall pleading that Go Bus did not act in good faith.

[10] The defendant's amended statement of defence contains admissions and denials with substantial particulars in reply. The defendant denies Mr Keepa was unjustifiably dismissed or that the contemplated warnings resulted from its unjustifiable actions. A positive defence of accord and satisfaction is pleaded. This relates to an agreement that Mr Keepa would resign from his employment. In closing submissions the defence of estoppel is raised but was not pleaded. Once again, while not specifically pleaded, the breadth of the factual pleadings is such that a submission of estoppel is tenable in conjunction with or as an alternative to the assertion as to accord and satisfaction.

[11] Insofar as the positive pleading by Go Bus as to accord and satisfaction is concerned, Mr Keepa replied in his amended statement of claim:

(a) it is not necessary to consider the effect of the signed documents because the ending of the employment was wholly unjustifiable and because of procedural irregularities and the unfair conduct of Go Bus;

(b) if the documents were to be considered there was no common accord between the parties when the documents were signed for they were mistaken as to their meaning and effect.

Factual outline

[12] Mr Keepa is partially disabled as a result of an accident he suffered to his left hand when he was a teenager. After rehabilitation he took up driving and has had various employment as a forklift driver, driver of heavy machinery, driver of truck and trailer units and driver of passenger service vehicles including taxis and buses.

[13] He was employed by Go Bus as a bus driver in Christchurch for approximately 12 months before taking up the position in Tauranga. After he commenced that employment in Tauranga, performance issues began arising. As a

result of the way Mr Keepa considered Go Bus was treating him in respect of complaints against him, he began to have concerns and

adopted the view that he would not deal with disciplinary meetings of any kind unless he had a third party present.

[14] Matters began to come to a head as a result of the reports of trainer drivers/inspectors who travelled with Mr Keepa on his bus routes. While there were both complimentary and adverse comments in these reports, the latter included comments about Mr Keepa driving without keeping both hands on the steering wheel.

[15] The bundle of documents provided for the hearing contains incident reports and assessments on Mr Keepa dating back to 23 March 2011. This was soon after Mr Keepa commenced driving for Go Bus in Tauranga. The documents include details of assessments where Mr Keepa's driving and dealing with passengers were beyond reproach. Mr Ashley Burton, Regional Manager (Bay of Plenty) for Go Bus, entered favourable comments on Mr Keepa's record on such occasions. There were occasions when complaints were made by members of the public and passengers which, when investigated, were held to be unfair, unreasonable and without substance. On occasions Mr Keepa was directed to undertake training. There were, however, instances when complaints about Mr Keepa or assessments by inspectors, supervisors or trainers were upheld. Between March 2011 and August 2012 quite a number of incidents were recorded. It may well be that the nature of being a bus driver involves frustrating behaviour from passengers and members of the public including other road users. Mr Keepa's recorded incidents may be typical of those received by other drivers of Go Bus. There is no comparative evidence. However, on 2 November 2011, one of the supervisors recorded that he was becoming concerned about Mr Keepa in view of the increasing number of complaints and Mr Keepa's attitude. In the short period leading up to disciplinary action being taken against Mr Keepa, he was again recorded as driving the buses without keeping both hands on the steering wheel. The earlier recorded incidents provide a background and context to the circumstances immediately preceding Mr Keepa's resignation from employment.

[16] The types of complaints and reports being received by Go Bus involving Mr

Keepa over the period of his employment can be categorised as follows: (a) moody and abusive behaviour towards passengers;

(b) failing to follow the timetabled route and missing bus stops;

(c) erratic driving, abusive behaviour towards members of the public; (d) failing to keep both hands on the steering wheel;

(e) arriving late for work;

(f) reporting in sick at the last minute and creating rostering difficulties; [17] There was one incident that occurred in January 2012 involving Mr Keepa's

behaviour towards Mr Burton in a way similar to that which occurred later in August that year when the disciplinary action was taken. On 19 January 2012 a transport inspector's report was received by Go Bus commenting on Mr Keepa's driving. He was well reported on insofar as driving skills were concerned but was noted as being rude and aggressive to some passengers. Mr Burton recorded that he requested Mr Keepa to talk to him about the situation with the intent of providing training. By 21

February 2012 when Mr Keepa had received the report he took exception to it. He telephoned during the course of his duties that day to advise that he had had enough and needed to get off the bus as a result of being abused by a passenger. He was able to be relieved at 4.30 pm. He then had a discussion with Mr Burton at 5 pm that day. Company records show that Mr Keepa was upset and unable to complete the discussion which was adjourned until the following day's shift. The final comment is that the matter was closed. However, in his evidence, Mr Burton recorded that at about 5 pm on 21 February 2012, Mr Keepa walked past his office and started a discussion with him about the inspector's report. Mr Burton stated that Mr Keepa was clearly upset and agitated but that did not seem to be directed at him. At that stage Mr Burton considered the discussion to be non-confrontational and purely about organising some training for Mr Keepa. However, nothing firm was arranged

at that discussion and Mr Keepa was released from his shift and went home. There was an agreement that Mr Keepa would meet with Mr Burton at 11 am the following morning to continue the discussion. Mr Keepa was rostered on for duty for the next two days. While he came into work the next day on 22 February 2012, he failed to attend any meeting with Mr Burton and did not turn up for work at all the following day, 23 February 2012. Mr Burton made a diary entry that he was intending for Mr Keepa to have training with the driver trainer. However, there was no record as to whether that was completed.

[18] Apart from concerns about Mr Keepa not keeping both hands on the steering wheel, his driving was not generally regarded as being a danger to other road users. A small number of the reported incidents involved accidents or damage where Mr Keepa was clearly not at fault. As stated earlier, he was favourably commented upon by inspectors and assessors and when that occurred Mr Burton was meticulous about recording compliments in Mr Keepa's records. It would be true to say, however, that following the supervisor's comment in November 2011, the justified complaints and unfavourable comments were becoming more prevalent leading to the incidents that brought matters to a head in August 2012.

[19] The final disciplinary meeting which took place in August 2012 was preceded by two incidents involving confrontation between Mr Keepa and Mr Burton. The first of these occurred on 18 May 2012. Mr Burton stated in evidence that unfortunately there was no record of what follow up had taken place in relation to the interrupted meeting on 21 February 2012 when Mr Keepa was agitated about the inspector's assessment. During May Mr Burton had coincidentally observed Mr Keepa's bus driving while Mr Burton was driving around Tauranga on other business. He observed Mr Keepa on three separate occasions driving with only one hand on the wheel. As a result of these observations, Mr Burton had conversations with Mr Keepa and endeavoured in as diplomatic a fashion as possible to remind Mr Keepa that it was necessary for him to drive with two hands on the wheel. Mr Burton had decided to remind Mr Keepa on a daily basis and appears to have done so. There were no adverse reactions from Mr Keepa on this. However, on 18 May

2012, Mr Burton reminded Mr Keepa in a polite manner about keeping two hands on the wheel. Mr Keepa immediately became aggressive and accused Mr Burton of

picking on him and indicated that he was angry. He left Mr Burton's office in this state and slammed the outside door. Mr Burton followed Mr Keepa because he was not happy about this conversation and wished to arrange another time to continue further training with Mr Keepa. Mr Keepa walked down the yard towards the bus that he was to drive. He was about 15 to 20 metres ahead of Mr Burton so that Mr Burton had to raise his voice as he tried to continue speaking to him. Mr Keepa initially refused to respond to Mr Burton. When he was asked where he was going Mr Keepa responded that he was about to do his shift. He then responded by calling Mr Burton an "asshole" and saying that he did not wish to talk about it. Mr Burton noticed that he was very agitated and angry. Mr Keepa was indeed so angry that Mr Burton formed the view that he was unfit to drive the bus due to the behaviour he was presenting. He was concerned that this anger could potentially put the passengers and public at risk. As a result Mr Burton told Mr Keepa that it was his view that the latter was unfit to commence his shift and he was sent home for the day on pay. Following this, Mr Keepa was off work for two days and Mr Burton was due to go on leave for five weeks. He was concerned about Mr Keepa's behaviour and in a report given to the covering manager, Mr Burton indicated his concern and that Mr Keepa had been advised to spend time with a driver trainer.

[20] On 24 July and 6 August 2012 there were further assessments by the driver trainer/assessor. The first assessment highlighted unacceptable behaviour towards passengers and a failure in driving standards. While Mr Keepa's behaviour towards passengers and driving was commented upon favourably in the second assessment, it was noted on this occasion that Mr Keepa was not keeping both hands on the steering wheel and was not indicating at roundabouts. Mr Burton wrote on the reports that this was not acceptable. He indicated that training would be required and also noted that future incidents of this kind may result in disciplinary procedures being taken. Mr Burton recorded in his evidence that he was disappointed to see from the assessments that Mr Keepa was again driving without keeping both hands on the wheel. He regarded this as not meeting the required standard which had previously been raised with Mr Keepa. Mr Burton decided that training would be provided although Mr Keepa had previously demonstrated that he was capable of driving to the required standards. It was for this reason that Mr Burton noted on the

reports that disciplinary action would be taken in respect of any future incidents and cautioned Mr Keepa accordingly.

[21] On 13 August 2012 Mr Keepa was handed findings of the inspector and driver/trainer assessments of 24 July 2012 and 6 August 2012. Mr Burton's feedback and cautions on both reports were also provided in the form of handwritten notes.

[22] Mr Keepa had been handed the assessments in the Operations Room by one of the supervisors. He then went to Mr Burton's office in an agitated state and took issue with the assessments and the comments. There followed a discussion in which Mr Burton reiterated the previous attempts to have Mr Keepa drive with two hands. Mr Keepa stood up and started to walk away before the conversation was completed. He indicated that he did not wish to talk about it without having someone present, although Mr Burton rightly pointed out that it was not a disciplinary meeting, and in any event Mr Keepa had not been summoned to Mr Burton's office as Mr Keepa went there voluntarily. Mr Burton saw this as an opportunity to try and resolve the problem and asked Mr Keepa to come back in his office so that it could be sorted out. Mr Keepa, however, continued to walk towards the door and then walked away.

[23] Mr Burton stated in his evidence that he felt frustrated at this stage about attempts to change Mr Keepa's driving behaviour, which had failed. He felt that Mr Keepa showed no commitment to achieving the standards required. Mr Keepa's failure or refusal to engage in discussions about the problems was of further concern. After considering the matter for several hours, Mr Burton wrote to Mr Keepa requesting for the first time that he attend a disciplinary meeting to respond to the allegations which were as follows:

(a) Failure to comply with Safe Driving Policy by driving with only one hand on the steering wheel;

(b) Failure to comply with the Code of Conduct Policy through indifferent performance in response to attempts to offer and conduct training;

(c) Failure to comply with the Code of Conduct Policy by failing to carry out lawful instructions of a manager.

[24] These allegations of misconduct were set out in a letter of 13 August to Mr Keepa. The allegations of refusal to respond to attempts to offer and conduct training and failure to carry out lawful instructions related to the incidents on 18

May 2012 and 13 August 2012 when Mr Keepa simply failed to engage with Mr Burton in his attempts to discuss matters. The failure to carry out the lawful instructions of the manager, which was the direction on 13 August 2012 (to remain in Mr Burton's office to discuss matters) was itemised as serious misconduct. The letter indicated the date of a disciplinary meeting to take place on Thursday, 16 August at 9 am. It also indicated that Mr Keepa was welcome to have a support person or representative present at the meeting and indeed encouraged him to do so.

[25] When the disciplinary meeting took place, Mr Keepa had present with him Mr Bruce Graham, an experienced union delegate. Mr Graham and Mr Keepa have a different recollection from Mr Burton of how this meeting proceeded. I prefer Mr Burton's account which is more consistent with the contemporary documents. Mr Burton read out the allegations to Mr Keepa and invited him to provide a response. Mr Keepa apologised for walking away on both the occasions mentioned, although Mr Burton's impression was that the apology was begrudging. At no time did Mr Keepa deny the allegations. Mr Graham inquired as to whether customer service training was provided but as Mr Burton indicated in his evidence, this appeared to miss the point that the allegations at this stage were not about relations with customers but the standard of Mr Keepa's driving and in particular his persistent refusal to carry out instructions to keep both hands on the steering wheel. Once Mr Keepa had completed his responses, Mr Burton adjourned to consider the matter. When he returned he indicated to Mr Keepa and Mr Graham that he was proposing to deal with the first two allegations by way of warnings but termination of employment was in contemplation for the insubordination. The actions which the company was

considering taking at that point were still subject to receiving further representations from Mr Keepa and were set out in what Mr Burton referred to as a meeting agenda. This was read out to Mr Keepa.

[26] The proposal to issue warnings when the company was also considering termination of employment might seem somewhat unusual. However, Mr Burton explained this in his evidence by saying that he intended to provide proper procedure

to Mr Keepa and that the decisions to issue warnings or to terminate employment had not been finally reached at that stage. Mr Burton wished to receive further submissions in response from Mr Keepa and Mr Graham. Mr Burton indicated it could well be that he could be dissuaded from terminating Mr Keepa's employment, in which case he might still wish to record the warnings.

[27] In response to this notification from Mr Burton, Mr Keepa and Mr Graham sought an adjournment and then returned with a proposal that Mr Keepa be allowed to resign rather than have his employment terminated. There was no attempt to dissuade Mr Burton from either issuing the warnings or carrying out the termination of employment as Mr Burton clearly expected would have been the case. In the absence of any further representations from Mr Keepa or Mr Graham on his behalf, Mr Burton was somewhat reluctant to consider accepting a resignation instead of pursuing the stated intention to issue warnings or terminate employment. He agreed to discuss the matter with a senior manager. He spoke to Mr Darryl Bellamy, Operations Director (North) for Go Bus. Following this Mr Burton returned and indicated that the company would agree to accept a resignation so long as this method of resolving what was clearly at that stage a serious employment relations dispute was recorded in writing along with a written record of the resignation signed by Mr Keepa. It is obvious at that point that Mr Keepa preferred to have records show that he resigned rather than being dismissed so as not to prejudice future employment prospects and indeed this purpose was stated by both Mr Graham and Mr Keepa in their evidence.

[28] Formal documents were prepared recording the method by which the employment relations dispute was to be resolved and Mr Keepa also signed a letter of resignation. There was some dispute in the evidence as to how these documents were engrossed and how and by whom Ms Hannah Abbot, the Sales and Administration Assistant at Go Bus Tauranga, was directed to prepare the documents. Mr Keepa now relies upon being in a confused state as to exactly what was going on as his way of explaining why he signed these documents. I do not accept his evidence in that regard. Mr Burton had carefully carried out a formal procedure in which the issues facing Mr Keepa were clearly placed before him. Mr Keepa was represented by an experienced union delegate. Once the agreement was

reached allowing Mr Keepa to resign the position was clear. It was not necessarily inevitable that he would have his employment terminated but to dissuade Mr Burton from that action Mr Keepa and Mr Graham would have needed to make further representations and pleas to Mr Burton. No doubt in view of all of the circumstances, Mr Keepa would have needed to acknowledge in fairly clear terms that he intended to take steps to improve his performance and then take on board and comply with what the company was requiring of him. No attempts whatsoever were made in that way to persuade Mr Burton. Mr Keepa at that point would have been well aware that if he was not going to dissuade Mr Burton from dismissing him then for future prospects the alternative proposal of allowing him to resign was very much in his interests. Those were not complicated issues to grapple with. As to who directed or arranged for the formalities to be completed, that is a somewhat collateral question once the agreement was reached following the discussions between them.

The nemo iudex in sua causa submission

[29] Mr McKinstry, Mr Keepa's advocate, made the submission on behalf of Mr Keepa that Mr Burton should have stood aside from the disciplinary process and not made any decision in respect of Mr Keepa. This submission was made on the basis that Mr Burton was so involved in the circumstances leading to the disciplinary meeting that he was partial. In addition, Mr Burton was a witness to events which led to the altercation between himself and Mr Keepa including earlier observations he made of Mr Keepa's driving. The altercation led to the allegation of serious misconduct by way of Mr Keepa's insubordination. By putting himself in the position of inquirer and decision maker, Mr Burton therefore offended against the

principle nemo iudex in sua causa.³ This in turn, Mr McKinstry submitted, meant

that the decisions following the commencement of the final disciplinary meeting were invalid.

[30] Mr McKinstry relied primarily upon *Saxmere Company Ltd v Wool Board*

Disestablishment Ltd.⁴ In addition he relied upon several decisions of this Court

³ See above n 2.

⁴ *Saxmere Company Ltd v Wool Board Disestablishment Ltd* [2009] NZSC 72.

including *Allen v C3 Ltd*⁵ and *Walker v Firth Industries*.⁶ *Saxmere* affirms the test for apparent bias established in New Zealand in *Muir v Commissioner of Inland Revenue*.⁷ This is that a judge is disqualified "if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide."⁸ *Saxmere* is concerned purely with the integrity of the judicial system as is evident in the same paragraph, where Blanchard J explains: "Unless the judicial system is seen as independent and impartial the public will not have confidence in it and the judiciary who serve it." Mr McKinstry submitted that the principles established in *Saxmere* apply equally to an employer's decision-making official as to a judicial officer. In addition he submitted that by application of the principles in *Saxmere* all that is required to be proved is the possibility of bias rather than actual bias.

[31] The submission made by Mr McKinstry is wrong in contending on the basis of *Saxmere* that the “Supreme Court has therefore established the basis for examining the role of the judicial officer or as the plaintiff submits, decision making official in broad terms related to the requirement for natural justice”. An employer carrying out a disciplinary function is not acting judicially and the principles in *Saxmere* specifically dealing with judicial bias do not apply. It has been well established in decisions such as that of the Court of Appeal in *Board of Trustees of*

*Marlborough Girls College v Sutherland*⁹ and the High Court in *Peters v Collinge*¹⁰

that the high standards applying to judicial officers do not apply to an employer carrying out a disciplinary function. As stated by the Court of Appeal in *Sutherland*:

[24] This case highlights the problems of applying statements of the principle of bias developed in relation to Courts, tribunals and other bodies which operate independently of the parties. An employer exercising the kind of powers provided for in the collective employment contract inevitably has a real interest in the issues and the members of the governing board of a school similarly are very likely to bring into their consideration and decisions those interests. ...

⁵ *Allen v C3 Ltd* [2012] NZEmpC 124, [2012] ERNZ 478.

⁶ *Walker v Firth Industries* [2014] NZEmpC 60, (2014) 11 NZELR 779.

⁷ *Muir v Commissioner of inland Revenue* [2007] NZCA 334; [2007] 3 NZLR 495(CA).

⁸ *Saxmere* at [3].

⁹ *Board of Trustees of Marlborough Girls College v Sutherland* [1999] NZCA 315; [1999] 2 ERNZ 611.

¹⁰ *Peters v Collinge* [1993] 2 NZLR 554.

[32] In *Peters* Fisher J stated:¹¹

If natural justice does apply it is important to recognise that it can operate at many different levels: ... They range from the exacting standards expected of a Court to the relatively rudimentary standard expected of an employer. No-one would expect an employer contemplating a dismissal to approach his or her task with a mind untainted by preconceptions.

[33] As was pointedly stated in *G v Watson*:¹²

In deciding whether to dismiss an employee an employer was inevitably in the position of being a Judge in his own cause and therefore “bias” was inherently present. Apart from such procedural fairness requirements as might flow from the employment legislation, there was no common law requirement to accord an employee any hearing, let alone a “fair” hearing.

[34] Indeed, taking up the last sentence in that paragraph, I note that the decisions of *Allen* and *Walker* highlight the distinction between the way in which bias on the part of a judicial officer has been dealt with in *Saxmere* and the way in which the Employment Court treats evidence of bias on the part of the employer decision-maker. As will be seen from an analysis of the decisions in both *Allen* and *Walker*, the actions of the employer will be tested against the requirements under s 103A of the Employment Relations Act. In both of those cases, the employer decision-maker had placed themselves in such a position of bias towards the employee that the disciplinary actions taken were regarded as not being what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred. In addition, acting from a position of bias in that way would offend against the wide principles of procedural fairness also required under s 103A of the Act.

[35] The issue to be decided in the present case therefore is not whether Mr Burton breached the principle of *nemo iudex in sua causa*, in the way as elaborated in *Saxmere* and as submitted by Mr McKinstry, but rather whether his involvement in the dispute with Mr Keepa and his partiality reached such a stage that he should have stood aside to comply with the requirements of s 103A of the Act. I do not consider that Mr Burton had placed himself in such a position. Over a lengthy

period he had been particularly patient with Mr Keepa. This was in the face of

¹¹ At 566.

¹² *G v Watson* [2014] CSIH 81(Scottish Session) at [16].

adverse comments contained in the inspector’s assessments, Mr Keepa’s belligerence towards Mr Burton on a previous occasion and the fact that he himself had noticed Mr Keepa on three occasions driving without both hands on the steering wheel. Throughout he adopted a good-humoured way of reminding Mr Keepa of that requirement even if it was persistent. In addition to that, the very way that Mr Burton conducted the disciplinary process itself shows that he was particularly careful to ensure that Mr Keepa was accorded fairness. There was no need for Mr Burton to have given Mr Keepa the opportunity to make further final submissions and pleas following the decision being reached that warnings or dismissal were in contemplation. By that stage he had already allowed Mr Keepa, through his union representative, to respond to the allegations, the most serious of which was in fact admitted by Mr Keepa and for which he apologised. For these reasons I do not consider that Mr Burton’s actions in conducting the disciplinary process himself and reaching the decisions he did offended against the requirements of s 103A of the Act.

Conclusions on the disciplinary process

[36] As already indicated, these actions of Go Bus need to be considered against the requirements of [s 103A\(2\)](#) of the [Employment Relations Act 2000](#) (the Act):

(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.

[37] The decision to consider terminating Mr Keepa's employment was based on an allegation of serious misconduct. Mr Keepa's individual employment agreement provides that Mr Keepa's employment may be terminated without notice in the event of serious misconduct. Serious misconduct is stated to include but not be limited to the examples set out in Go Bus' Employee Handbook (the Handbook). The Handbook is also incorporated into the collective agreement between Go Bus and the National Distribution Union (the NDU). The definition or example of serious misconduct contained in the Handbook insofar as it is relevant to this case is as follows:

5.3 Refusal or failure to undertake the duties of a position held, or carry out the lawful instruction(s) of a manager or supervisor. This includes failure to carry out operative company policies or

procedures and leaving the work premise during work hours without authorisation. It is every employee's duty to be fully acquainted with the relevant company policies or procedures that pertain to that employee's work.

[38] Go Bus relied upon Mr Keepa's behaviour as constituting refusal or failure to carry out the lawful instructions of a manager or supervisor. Mr Keepa's refusal in this case to remain in discussions with Mr Burton when requested was insubordination and could be categorised as serious misconduct. The issue arises as to whether it was of such a serious nature as to warrant the contemplation of termination of employment. In making that decision, the company would also need to take into account all of the circumstances including previous behaviour of Mr Keepa. Mr Keepa was the one who initiated the meeting to discuss his unfavourable assessments over which he was angry. He must have perceived sometime during the meeting that he was likely to be subject to discipline because he considered he was entitled to have a representative present and this was in fact raised at the meeting. This appears to have been one of the reasons why he claims to have left the meeting. However, Mr Burton clearly indicated to him that it was not a disciplinary meeting and that he simply wanted to use the opportunity to resolve what was by then a serious problem for Go Bus.

[39] Mr Keepa's act of leaving the meeting in the face of Mr Burton's request to remain led to dismissal as a contemplated action. This could not be regarded as too harsh in the circumstances. Mr Keepa acknowledged that he was wrong at the disciplinary meeting and apologised. Notifying contemplated termination of employment in the context of the previous actions of Mr Keepa would appropriately be regarded as an action which a fair and reasonable employer could take in all the circumstances.

[40] It needs to be kept in mind that the employer in this case took no final step to terminate Mr Keepa's employment or issue the warnings, because in order to provide an abundantly fair process Mr Burton was not prepared to take any final step until Mr Keepa had the opportunity to make further representations. Mr Keepa's breach of directions, on more than one occasion, to drive with both hands on the steering wheel was not regarded as serious misconduct by Mr Burton even though it could

have been, because the non-exclusive nature of the definition in the Handbook could easily have led to it being categorised as such. It involved issues of safety. Mr Burton's decision to contemplate it as grounds for a warning only was lenient.

[41] The fact is that once Mr Burton had conscientiously followed the disciplinary process in what I regard as an appropriate way, Mr Keepa resigned. He recorded this in writing. His actions in doing so and the acceptance of that resignation by Go Bus meant that it did not need to go through with a decision to dismiss or, if in the end it decided that Mr Keepa could remain in employment, to issue the warnings. Mr Burton had proceeded in his dealings with this matter in a way which was beyond reproach. He had patiently worked through the problem of Mr Keepa's driving, sometimes in trying circumstances. In the face of the assessments, Go Bus as an operator of a public passenger transport service would have been remiss in not requiring Mr Keepa to improve his driving standards. The final act of insubordination brought matters to a head. A disciplinary process was appropriately put in place. Mr Burton was meticulous in notifying the allegations, allowing Mr Keepa to be represented and fully working through matters at the meeting. The process was conducted in a cautious manner. Probably Mr Burton was over-cautious in allowing further representations at the final stage. However, Mr Keepa cannot complain about that, even though it was probably unnecessary. Mr Keepa was informed in writing prior to the meeting that one of the possible outcomes was dismissal. If that wasn't clear to him it is certain that Mr Graham, as his representative and an experienced union delegate, would have made it clear to him. There can be no criticism of the process Mr Burton adopted.

[42] The resignation procured for Mr Keepa the result that Go Bus would withhold its final decision potentially terminating his employment. If that had in fact been executed it would in all the circumstances have been justifiable. However, Mr Keepa's action in pursuing a personal grievance means Go Bus accepting the resignation resulted in it effectively acting to its disadvantage. This gives rise to a clear estoppel in Mr Keepa now seeking remedies in the way he has.

Accord and satisfaction

[43] There were considerable submissions in respect of the pleaded defence of accord and satisfaction. The primary submission which Mr McKinstry made on behalf of Mr Keepa was that the defendant was not entitled to rely upon the recorded settlement and the resignation by virtue of the fact that Mr Burton should have disqualified himself on the basis of the *nemo iudex in sua causa* principle. He also submitted that in any event the recorded settlement did not meet the requirements of or constitute an accord and satisfaction. However, I do not accept those submissions. While there was no monetary consideration for the agreement, there were certainly elements of the settlement to the advantage of both parties which could easily be regarded as forming consideration. Mr Keepa gained a significant advantage from being allowed to resign rather than being dismissed insofar as any future employment prospects were concerned. The advantage to Go Bus from the settlement was that it would see an end of the matter and not be facing any further

action; although that, as has transpired, was a vain hope. Certainly there was a dispute between the parties and at that stage in the disciplinary process it could not be argued otherwise. However, even if there was an accord and satisfaction the defendant does not need to rely upon that as a defence. In my view the settlement document simply recorded the agreement that had been reached orally between the parties and the material document was the written resignation which Mr Keepa signed and gave to Mr Burton. It would be unconscionable if, having acted in that way, Mr Keepa could renege on what was agreed and obtain remedies against Go Bus in circumstances where they had justifiable grounds for terminating Mr Keepa's employment if matters had developed that far.

Constructive dismissal

[44] There is also the argument that Mr Keepa was constructively dismissed. This is in reliance by Mr Keepa on one of the circumstances, which the Court has held in the past to constitute constructive dismissal, where an employer effectively gives the employee an ultimatum of either resigning or being dismissed or indulges in

behaviour designed to coerce a resignation. That is, however, not the circumstance that arose in this case. If Mr Keepa had chosen at the final stage to make further representations (as offered by Mr Burton) and they were regarded as inadequate he would still have been dismissed. This is not a case where the resignation was an option advanced or coerced by the company. It was a proposal emanating from Mr Keepa, the employee, so that he would obtain a material advantage. There can be no suggestion in this case that Go Bus gave Mr Keepa an ultimatum of either resigning

or being dismissed. Nor could such a circumstance be implied from what occurred.¹³

He was not constructively dismissed. Nor was there any unjustifiable action by Go

Bus to Mr Keepa's disadvantage.

Disposition

[45] In view of all of the circumstances which prevail in this case, I agree with the determination of the Authority in dismissing Mr Keepa's grievances on the basis that there was no dismissal or termination of his employment and he resigned. The matter has been unduly complicated by the raising of issues such as the *nemo iudex in sua causa* principle, accord and satisfaction and arguments as to constructive dismissal, but the position is in reality straightforward. For the reasons already set out Mr Keepa's challenge is dismissed.

Costs

[46] Insofar as costs are concerned, I note that Mr Keepa has already been ordered to make a contribution of \$3,500 towards Go Bus' legal costs in defending the proceedings in the Authority. That order for costs is confirmed and Mr Keepa is required to reimburse Go Bus to that extent. Insofar as costs on the challenge are concerned, the issue of costs will be reserved. Go Bus shall have 14 days in which to file a memorandum as to costs. Mr Keepa will then have a further period of 14

days in which to file a memorandum in answer. I will allow a further seven days

13 An example of a similar case to the present is *Cable Talk Astute Network Services Ltd v*

Cunningham [2004] NZEmpC 43; [2004] 1 ERNZ 506.

following that for Go Bus to file any memorandum in reply should it choose to do so. The matter of costs in respect of the challenge will then be considered on the documents filed.

M E Perkins

Judge

Judgment signed at 4 pm on 12 October 2015