IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 204/08
5081432

	BETWEEN	REWA KEREOPA Applicant
	AND	GO BUS TRANSPORT LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Alex Hope for Applicant Simon Menzies for Respondent
Investigation Meeting:	28 May 2008 at Hamilton
Determination:	10 June 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Respondent suspended the Applicant from her job as a bus driver on 12 October 2006 and dismissed her on 1 November 2006. The Applicant says her suspension and dismissal were unjustified. She seeks lost wages, compensation for hurt and humiliation, and her costs.

[2] The Respondent says its actions were justified responses following allegations – which it investigated and concluded were most likely to be true – that the Applicant had smoked marijuana with two passengers while on duty.

[3] The allegations initially came from another bus driver. That driver complained that her son was given marijuana by the Applicant and that her son had smoked marijuana with another teenager and the Applicant, while waiting to travel on the Applicant's bus. The Applicant was suspended on pay while the Respondent investigated the allegations, including interviewing and getting a written statement

from the son of the complainant bus driver. By the time the Respondent held an investigation meeting with the Applicant, some 14 days later, it had reduced the allegations to one of having shared a pipe of marijuana – referred to as a 'cone' – with a customer while on duty. The Respondent dropped the allegation about giving marijuana to the teenager because it accepted that even if such an event had occurred – which was strenuously denied by the Applicant – it was on a day that the Applicant was not on duty.

[4] The Applicant denied smoking or "*sharing a cone*" with anyone while on duty. She described seeing the teenager have a 'cone' at a terminal bus stop while she was waiting to make a return run on her bus route. She said she had given the pipe to the teenager after finding it on the bus. She gave it to him because she knew that he was a marijuana user. She denied getting out of the bus or smoking anything with him and the other teenager. She said the pipe was empty both when she gave it to him and when he gave it back to her while getting on the bus for the return journey.

[5] The Respondent came to the conclusion that the Applicant had shared the 'cone' with the two teenagers and at a subsequent disciplinary meeting she was dismissed for serious misconduct, being consumption of illegal drugs while on duty.

Determination

[6] Through my investigation I have come to the conclusion that the Applicant was not unjustifiably dismissed but she was unjustifiably disadvantaged by the manner of her suspension prior to her dismissal. However no remedies are due to the Applicant because of certain admitted conduct which was blameworthy and contributed to the situation that gave rise to her personal grievance. The reasons for this conclusion are set out in this determination.

The investigation

[7] I have taken into account written witness statements and answers to questions given under oath or affirmation at the investigation meeting from the following people:

(i) The Respondent's Operations Director Darryl Bellamy and its Operations

Manager Paul Bartosh who together conducted the investigation and made the decision to dismiss the Applicant; and

(ii) Campbell Patterson, a 17-year-old sickness beneficiary who gave the Respondent a written statement alleging the Applicant provided him marijuana and smoked marijuana with him; and

(iii) Sandie Nicholson, a former bus driver for the Respondent and the mother of Campbell Patterson; and

(iv) Bob Anderson, an organiser of the National Distribution Union ("NDU") who accompanied the Applicant at two meetings with the Respondent on 26 October and 1 November 2006; and

(v) The Applicant herself.

[8] Mr Bellamy, Mr Bartosh, Ms Nicholson and the Applicant each attended the investigation meeting in person. Both Mr Patterson and Mr Anderson was questioned by way of a telephone conference call. Mr Anderson was unable to attend in person due to union business elsewhere. I had earlier given leave for Mr Patterson's absence. He suffers from multiple sclerosis and his mother, Ms Nicholson, provided a medical certificate from a general practitioner who had examined him and was of the opinion that he was medically unfit to attend the Authority hearing.

[9] At the investigation meeting the representatives had an opportunity to ask additional questions and to make closing submissions on the facts and law.

[10] Arising from the evidence and submissions, the following issues are determined here:

(i) whether the absence of an express provision for dismissal for serious misconduct in the Collective Employment Agreement ("the CEA") covering the Applicant prevented the Respondent from justifiably dismissing her in the way that it did; and

(ii) whether the absence of an express provision for suspension, with or without pay, in the CEA prevented the Respondent from justifiably suspending her; and

(iii) whether what the Respondent did in investigating the complaints and dismissing the Applicant met the test of justification under s103A of the Employment Relations Act 2000 ("the Act"); and

(iv) if a personal grievance were found, what remedies would be due to the Applicant, after considering what steps she took to mitigate any loss and whether any remedies should be reduced because of blameworthy conduct by the Applicant that contributed to the situation.

The CEA

[11] The CEA has no express provisions for dismissal for serious misconduct and does not refer to suspension on any basis, that is with or without pay.

[12] Clause 20 bears the heading "Warnings, Offences, Dismissals and Complaints" and reads:

> *(A) Complaints from Public*
>
> *Where complaints from the public are received about a Driver, the worker shall be given a written copy of the complaint. The worker shall give an explanation in response to this complaint in writing within 24 hours after receiving the written complaint. The worker shall have the right to have a copy of the written complaint which has been made against him/her.*
>
> *(B) Warning Procedures*
>
> *Warning procedures will be as follows:*
>
> *i. Verbal warning. The employee will be verbally advised of the problem and asked to rectify it. The warning will be noted on the employer's copy of the complaint form.*
>
> *ii. Written warning. If the problem or related problem persists, the employee will be issued with a written warning. It will highlight what the problem is and ask that the situation be corrected. The consequences, if not corrected, will be dismissal. This written warning is the final warning.*
>
> *iii. Dismissal. Dismissal occurs when the previous warnings have failed to bring about any real long lasting change or improvement in a problem area. When dismissed, the employee will be given the appropriate notice, which the employee may have to work out, or alternatively, the employee will be paid wages in lieu of notice and asked to leave immediately. At the time of dismissal the employee shall be entitled to have a witness present.*

[13] One other point regarding this employment agreement is relevant. It has no "complete agreement" clause.

Ability to dismiss for serious misconduct

[14] Through a detailed analysis of the two parts of clause 20 of the CEA Mr Hope for the Applicant submitted that dismissal for serious misconduct was not open to the Respondent in this case because it had not followed what he described as the "code" set by the terms of the agreement. He said the company must, in all cases of misconduct of any level, follow the CEA requirement to provide a written copy of any complaints to a driver within 24 hours. From the evidence he identified three failures at what he called "the first hurdle":

(i) A complaint made by a bus passenger called James Speake to Mr Bartosh on 12 October was not revealed to the Applicant within 24 hours or at any time during the disciplinary process. Mr Speake was an elderly bus passenger who had become a personal friend of Ms Nicholson and to whom Mr Patterson had also told his story of getting marijuana and a pipe from the Applicant and smoking it with her. Mr Speake spoke to Ms Nicholson and then Mr Bartosh about this story. On 17 October 2006 he signed a statement setting out these details.

(ii) Mr Patterson's statement containing his allegations was not put in writing before the Applicant was suspended on the morning of 12 October 2006 but rather later on that day.

(iii) The Applicant was not shown copies of Mr Patterson's statement and the statement of the other teenager, until the 26 October 'investigation' meeting.

[15] Mr Hope said he was not seeking to argue that there could be no right for the Respondent to dismiss for serious misconduct but if the employment agreement provided for things to be done in a particular way, they should be done that way.

[16] Mr Menzies submitted that the wording of the employment agreement showed no intention to exclude the prospect that the Respondent could dismiss an employee in the event of serious misconduct, even though that concept was not expressly referred to in the agreement.

[17] He submitted that this was supported by evidence from Mr Bellamy and Mr

Anderson, who were, respectively, the Respondent and the NDU negotiators of the current CEA and both agreed that neither party had intended to exclude the prospect of dismissal in the case of serious misconduct.

[18] I find that dismissal for serious misconduct is not precluded by lack of express reference to it in the CEA. On a plain reading, clause 20 does not distinguish between degrees of misconduct but I consider an objective, reasonable reader would recognise that its two-step process of verbal and written warnings is intended to deal with ordinary issues of misconduct relating to performance or particular complaints that might arise in the usual running of a bus company and likely to be about matters such as buses running late, courtesy in dealing with passengers and so on. It cannot reasonably be read as dealing comprehensively and exclusively with matters of serious misconduct which may include criminal actions such as assault, fraud and drunk driving. To suggest that the Respondent would in all cases be limited to giving a written warning to a driver who deliberately assaulted another driver, stole the fares or was found to be driving drunk ignores the term of trust and confidence implied into every agreement between employer and worker. Breach of that term by an act of serious misconduct may well justify dismissal.

[19] That construction of the CEA is supported by two further points.

[20] Firstly, the CEA does not include a 'complete agreement' term so that other terms may be agreed or operate by way of implication or custom. Mr Bellamy's evidence was that the Respondent dismissed staff for serious misconduct before it entered into the CEA and there was an implied continuation of previous practice. Mr Anderson, in his evidence, did not take issue with the ability of the Respondent to dismiss for serious misconduct. He referred to another instance where a worker was dismissed for dishonesty offences. There was some evidence, arising from notes taken by Mr Bartosh at the 1 November meeting where the Applicant was dismissed, that Mr Anderson had queried the application of the provisions of the CEA to this particular case. However it is clear that he was querying whether the Applicant's alleged conduct fell into the category of misconduct or serious misconduct rather than challenging whether the Respondent could dismiss at all for serious misconduct under its present CEA.

[21] Secondly, the evidence of representatives of the parties to the CEA and actual practice of both the Respondent and NDU, are consistent with the view that neither intended the prospect of dismissal for serious misconduct to be excluded by the terms of the present CEA.

[22] On that view the process required to fairly investigate and decide on a dismissal for serious misconduct is not limited to the particular provisions of the CEA for advising a driver of a complaint. Rather the Respondent must meet the reasonable standards of fairness and justification set by s103A and developed in familiar case law.

Suspension

[23] I reach a similar conclusion regarding the legality of the Respondent suspending the Applicant on pay while it investigated the allegations against her.

[24] Suspension is not forbidden where there is no term allowing for it in the written agreement. Rather, as explained in *Singh v Sherildee Holdings Limited* (EC, AC 53/05, 22 September 2005, Judge Couch) at [91]:

> *In the absence of an express contractual provision authorising suspension, it will only be in unusual cases that it is justifiable. The fact that an employer may have reason to suspect that an employee has engaged in misconduct, or even serious misconduct, does not of itself justify suspension while those concerns are investigated. To justify suspension, an employer must have good reason to believe that the employee's continued presence in the workplace will or may give rise to some other significant issue.*

[25] The "*other significant issue*" in this case was the Respondent's safety concerns arising from the allegations that the Applicant had used marijuana while driving a bus and that she had supplied a passenger with marijuana and the means of using it. While still to be investigated at the time that the suspension was made, those allegations fall within the circumstances of "*imminent danger to the employee or others and an inability to perform safety-sensitive work*" that have been accepted as reasons that may justify suspending without delay: *Graham v Airways Corporation* [2005] 1 ERNZ 587 at [104] (EC).

[26] The issue in the present case is not whether the Respondent had the right to suspend the Applicant but whether the employer's conduct in doing so was fair and reasonable, including whether it should have discussed this with the Applicant before suspending her.

Whether actions justified

Suspension

[27] On the morning of 12 October 2006 when the Applicant was about to start work she was called to Mr Bartosh's office and given a letter advising she was being placed on suspension on full pay. The Applicant did not open the letter immediately but she was told of its contents by Mr Bartosh. She was then told to go home and to – as the Applicant recalls – "*stay close by the phone and contactable while they investigated matters*". The letter stated the allegations as being that the Applicant was seen "*passing small bags of marijuana to a Go Bus customer and that on at least one occasion it is further alleged that you participated in the smoking of a "cone" while on duty*". She was told that her suspension was "*to eliminate any possible risk to the travelling public*".

[28] I accept that, if substantiated, the allegations against the Applicant raised safety sensitive issues about her continuing to drive a bus and dealing with the public. For that reason, her immediate suspension on pay was something I accept that a fair and reasonable employer would do in all the circumstances at the time, and was justified.

[29] However there were unnecessary errors in how the Respondent carried out the suspension that amounted to unjustified actions. The Applicant was accompanied in her meeting by a union delegate who was another working bus driver due to leave shortly to start her shift. The brevity and pressure of the meeting time resulted in there being no proper discussion with the Applicant about the circumstances of her suspension, no estimate of how long it might be before a further meeting would be held to discuss the allegations, and no explanation of how or what information would be provided in order for her to prepare for a meeting to hear the results of the Respondent's investigation. While an immediate suspension was reasonable, how it

was done was not and this amounted to an unjustified disadvantage of the Applicant. It was not until 20 October that the Applicant received a further letter refining the Respondent's allegation to one – that of sharing a 'cone' with a customer – and she was asked to respond by 24 October. She was not provided with any background information about the allegations or who had made them but was asked to respond to the allegation. Her response on 24 October, quite fairly, asked for "*all relevant materials pertaining to the accusations made against me*" and requested reinstatement. It was only then that a meeting was held with her.

Dismissal

[30] No objection is taken to the fairness of arrangements for the Respondent's meetings held with the Applicant on 26 October and 1 November. She had adequate notice and was accompanied to both by Mr Anderson, an experienced NDU organiser.

[31] During the 26 October meeting the Applicant denied sharing a 'cone' with anyone while on duty but did admit giving Mr Patterson a pipe or 'cone' to use. She explained that she had found the pipe on a bus seat after an earlier run that day. She also said that Mr Patterson had given her the pipe back after using it.

[32] Following that meeting the Respondent advised the Applicant by letter of 31 October that it had concluded she had smoked marijuana with two passengers as well as providing the pipe. She was required to attend a disciplinary meeting and was advised that the meeting could result in her dismissal.

[33] At the disciplinary meeting on 1 November the allegations and the Applicant's responses were again discussed. After an adjournment Mr Bellamy advised the Applicant that she was to be dismissed for serious misconduct.

[34] The assessment to be made of whether the Respondent's actions and how it acted were justified as required by s103A of the Act was explained in *Air New Zealand Limited v Hudson* [2006] 1 ERNZ 415, 442 at [144] (EC):

> *The question is how would a fair and reasonable employer have acted in all the circumstances of this case. An employer does not have to prove that the incident which it characterised as serious misconduct*

> *happened. It must, however, show that it carried out a full and fair investigation which disclosed conduct which a fair and reasonable employer would regard as serious misconduct. The employer is not required to conduct a trial or even a judicial process but there are some fundamental requirements of natural justice which are appropriate and which, in this case, are reinforced by the company's policies. As part of a full and fair investigation, natural justice requires that an employee is given a proper opportunity to comment on the allegations made against her.*

[35] A dismissal is justified if such an investigation results in the employer having reasonable grounds for believing, and honestly believing, that there has been misconduct of sufficient gravity to warrant dismissal: *Man o'War Farm Limited v Bree* [2003] 1 ERNZ 83 at [30]. To warrant dismissal the misbehaviour "*must go to the heart or root of the contract between them or be such that it constitutes a serious breach of the employment agreement*": *North Island Wholesale Groceries Limited v Hewin* [1992] 2 NZILR 176.

[36] In this case the key elements of the Respondent's investigation were its meetings with the Applicant and a meeting that Mr Bellamy and Mr Bartosh held with Mr Patterson at his mother's home. Mr Bellamy's evidence was that he spent some time with Mr Patterson on the evening of 12 October going over the alleged events and was convinced by Mr Patterson's description and demeanour that what he said was more likely than not to be true. He was not dissuaded from that view by the Applicant's denial. The Applicant admitted her role in providing the pipe by which the marijuana was smoked and had no other issues around the time, place and people involved at the time of the incident. In that light the Respondent's conclusion was reasonable because I accept that it would be open to a fair and reasonable employer in the same circumstances to conclude it could no longer have trust and confidence in such as an employee.

[37] Having said that I emphasise that the Authority's role is to determine whether the Respondent came to that conclusion against the standard of a fair and reasonable employer would do in the same circumstances. It is not to determine conclusively that the alleged events did occur but only that the employer could reasonably conclude that it was more likely than not that they did.

[38] I also do not ignore what could be described as flaws in how the Respondent went about coming to that conclusion. I note three of significance and explain why I

do not consider they alter the substantive outcome:

(i) the Applicant was not provided with Mr Speake's statement. That statement, however, was really only hearsay repeating Mr Patterson's allegations. The direct allegations in Mr Patterson's statement were presented to the Applicant for comment.

(ii) Neither Mr Bellamy nor Mr Bartosh spoke directly to the other teenager involved in this event. Through Ms Nicholson a handwritten statement from that other teenager was provided. However the contents of that statement was again really only repetition of Mr Patterson's allegation and it was his statement rather than this other teenager's statement that the Respondent appears to have relied on.

(iii) Mr Bellamy told the Applicant in the 26 October meeting that he would interview both that other teenager and again speak to Mr Patterson as part of his investigation. In fact Mr Bellamy did neither. He did arrange for Ms Nicholson to again confirm with Mr Patterson that his story was true. However Mr Bellamy had spoken at some length to Mr Patterson on 12 October and remained satisfied his story was more likely to be true. He had no new or different information from the Applicant about which he needed to question Mr Patterson further. There was no dispute from the Applicant that she was present at the time and venue of the alleged event, that the two teenagers were there, that marijuana was smoked and that the Applicant gave them the pipe to do so. The only issue in dispute was whether the Applicant 'shared the cone' and Mr Bellamy made his assessment of the information and credibility of the Applicant and Mr Patterson after detailed interviews with both.

[39] Ultimately, and as noted in the case law, the Respondent's investigation was not a trial or judicial process to be subjected to pedantic scutiny. It is clear that it put all the substance of the allegations to the Applicant and provided a reasonable opportunity for reply. It was entitled to reach the conclusion that it did.

Remedies

[40] For the established personal grievance of unjustified disadvantage in how the suspension was carried out, the appropriate remedy is a modest award of

compensation under s123(1)(c)(i).

[41] However I have not quantified that compensation award because of my conclusion that the Applicant's contribution to the situation giving rise to the personal grievance requires a 100 per cent reduction of that remedy under s124 of the Act.

[42] I reach that conclusion on the basis of the Applicant's admitted conduct alone. She gave a teenager – who was around 16 years old at the time of the event – a pipe to smoke cannibas and watched him smoke from it before taking the pipe back from him. Smoking cannibas remains an offence (s7) under the Misuse of Drugs Act 1975, as does possessing a pipe for the purpose of committing an offence (s13) and supplying certain types of prohibited pipes (s22(3).

[43] Whether the Applicant's actions did amount to any of these particular offences I do not know. However, at the very best, her actions were less than what could be expected of a responsible adult working in a responsible job in a public service. That she knew Mr Patterson and knew he claimed that smoking cannibas alleviated his medical symptoms was no excuse for facilitating his illegal behaviour.

[44] Because of the conclusions I have reached regarding the remainder of the Applicant's claim no other remedies are warranted and those claims are dismissed.

Costs

[45] The Applicant was legally aided. If there are costs issues that need to addressed, leave is reserved for counsel to submit memoranda on them by no later than 28 days from the date of this determination.

Robin Arthur
Member of the Employment Relations Authority