

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2020] NZERA 472
3081015

BETWEEN

ANDREW NGOVI
Applicant

AND

TRANZURBAN HUTT VALLEY
LIMITED
Respondent

Member of Authority: Geoff O’Sullivan

Representatives: Bede Laracy, advocate for the Applicant
Mike Gould, counsel for the Respondent

Investigation Meeting: 14 August 2020

Submissions [and further Information] Received: 14 and 18 August 2020 from the Applicant
14, 17 and 18 August 2020 from the Respondent

Date of Determination: 16 November 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Andrew Ngovi was employed by Tranzurban Hutt Valley Limited (Tranzurban) in June 2018. His terms and conditions of employment were set out in an individual employment agreement (IEA) signed by the parties on 11 June 2018.

[2] Mr Ngovi was advised of his dismissal by letter on 11 June 2019 on eight days’ notice with his final day being Wednesday, 19 June 2019. The dismissal letter advised him he was being dismissed in reliance on clause 1.7 of his employment agreement.

[3] Mr Ngovi claims that his dismissal was void of procedural and substantive merit and the decision to dismiss him was not one that could be the action of a fair and reasonable

employer in the circumstances. He claims compensation for loss of income, a sum of \$18,000 for hurt and humiliation and costs. Mr Ngovi's original claim also asked that he be reinstated to his role as yard person. That claim however has been withdrawn.

[4] Tranzurban denies the claims saying that the dismissal of Mr Ngovi was justified because of his inability to obtain the required passenger endorsement (P endorsement) which was necessary in order to enable him to undertake driver duties during the course of his employment. In doing so, Tranzurban says it relied on clause 1.7 of the IEA which provides as follows:

It is agreed that as you are employed as a Driver, should you lose the required licence or endorsement, this will be grounds for summary termination of employment. Similarly, should you be convicted of any crime that impacts on our risk assessment of you in accordance with Clause 1.6, this would be grounds for summary dismissal.

Issues

[5] The following are the issues for investigation and determination:

- (a) Does clause 1.7 of the IEA between the parties allow Tranzurban to dismiss Mr Ngovi from his employment for the reasons set out in the dismissal letter of 11 June 2019?
- (b) Was the process followed by Tranzurban sufficient to enable it to justify the dismissal in terms of the test of justification contained in s 103A of the Employment Relations Act 2000 (the Act)?
- (c) Was Mr Ngovi unjustifiably dismissed? And if so;
- (d) What remedies would he be entitled to and what deductions if any should be made from any award as a result of any contributory conduct on Mr Ngovi's part?

The Authority's investigation

[6] At the investigation meeting held in Wellington, I heard evidence from Mr Ngovi as the applicant, followed by evidence on behalf of Tranzurban given by Natalie Cobden, the General Manager, and Marilyn Watkins, the Human Resources Manager for Tranzurban. At the end of the investigation meeting, I heard submissions from Mr Laracy on behalf of Mr Ngovi and from Mr Gould on behalf of Tranzurban.

The Evidence

Mr Ngovi

[7] Mr Ngovi gave evidence regarding his employment. He confirmed he signed the IEA on 11 June 2018 which also contained a position description in schedule 1 of the IEA. The position Mr Ngovi was hired for was titled “Yardperson/Driver: Urban-School bus”. The position description defined his specific responsibilities as being a Yardperson/Driver.

[8] Mr Ngovi gave evidence that he was from Kenya and understood that in order to complete the driver duties part of his position he would need the appropriate licences which would also include his Class 2 and P endorsement. His evidence was that he had completed the Class 2 course in August 2018 and had it endorsed.

[9] In order to obtain his P licence, he needed a Police clearance from Kenya. He says he started that process at the end of August 2018 and had his fingerprints taken and mailed his application form to the Kenyan High Commission in Canberra, Australia. From his perspective he felt the process should have taken up to three months to process.

[10] In December 2018 he had still not received advice regarding his Police clearance and documentation from the Embassy. For all of this period, he had been working as a Yardperson for Tranzurban. He says he had a conversation with the then Operations Manager, Ms Christina Taurua informing her of the delays. He says he asked if he could just stay in the yard as he loved doing the yard work, and says that Ms Taurua agreed with this, saying she had no problem with him carrying on the yard duties indefinitely. He says there was a discussion of the delays and challenges he was experiencing with his application but following this conversation, he waited for the documents to arrive and continued on with his duties which included bus transfers, fuelling, grooming and general housekeeping of the yard.

[11] Ms Cobden wrote to him on 27 May 2019 informing him of the cancellation of his P endorsement application. The email provided:

I have just been advised today that on the 7 May 2019 you were advised by way of letter form [sic] the NZTA that your application for your passenger endorsement was cancelled due to you failing to provide the NZTA with your Kenyan Police clearance.

Please refer to the attached letter requiring you to obtain your passenger endorsement by 10 June 2019.

Please feel free to contact me should you have any questions.

[12] Mr Ngovi replied to Ms Cobden on 28 May 2019 requesting more time, stating it was not possible for him to meet the deadline. After acknowledging Ms Cobden's email, he responded:

I have not been chasing my P document on urgency reasons being that I had met with the former Operations Manager and told her I felt more productive and happy being a yardie. She had responded and encouraged me to do that if that was what I really desired. From then on, I put all my energy into the yard work and get the opportunity to be useful ...

[13] Ms Cobden further responded:

Andrew you commenced employment with Tranzurban Hutt Valley on 18 June 2018 as a Yardperson/Driver: Urban-School bus. It was made clear to you at that stage that the conditions of your continued employment required you to attain your Class 2 licence and passenger endorsement. You managed to attain your Class 2 licence on 2 August 2018. It has now been 11 months and you have still not been able to attain your P endorsement. It is disappointing that you have not been proactive in this area. I understand that you were made aware by way of letter from NZTA on 7 May 2019 that your application had been cancelled. Again, disappointing that you failed to make the company aware of this. I believe you have already been given sufficient time to take the necessary actions and so will not be extending this time.

As stated in my letter, you are required to obtain your passenger endorsement no later than 10 June. Failure to attain this will result in your employment being terminated.

[14] Mr Ngovi replied to this communication by stating amongst other things:

Thank you for your email. I understand the urgency of the passenger endorsement and I can confirm that I have already started the process.

And

Once again, thank you for the period you've allowed me to get my P endorsement and I hope that I will get it within that timeframe.

[15] Mr Ngovi says he then contacted a family member requesting they help him to get the certificate. He could not do it himself online because the system would not recognise him as he was working in New Zealand and the online platform would not recognise a New Zealand phone number. However, the family member reported back that they were not able to help him as the system in Kenyan would not allow them to further the process on his behalf even with his scanned fingerprints.

[16] On 7 June 2019 he reported to work and was advised that there was no work for him and he had been taken off the register. On 11 June 2019 he received the dismissal letter terminating his employment in reliance on Clause 1.7 of his IEA.

[17] Mr Ngovi gave evidence regarding the hurt and humiliation he suffered as a result of his termination. He said he felt extremely demoralised and had suffered a great deal in trying to understand why Tranzurban would not listen to his problems or grant him an extension. He stated he applied for various jobs without success and after four weeks chose to attend WelTec to study for a diploma in IT Technical Support.

Natalie Cobden

[18] Ms Cobden confirmed she was the General Manager of Tranzurban and decision maker. She confirmed that on 27 May 2019 she had emailed Mr Ngovi confirming she had been informed on 7 May 2019 that Mr Ngovi had become aware by way of a letter from NZTA that his P endorsement was cancelled. She confirmed she had given him until 10 June 2019 to obtain his P endorsement. She confirmed that the date was arbitrary and that she knew it was highly unlikely that Mr Ngovi would be able to obtain the P endorsement by that date. She confirmed that she had no particular contact with Mr Ngovi other than listening to his request that he be given an extension of time. She says he had made no reference to the cancellation of his application or any problems attaining a Police clearance.

[19] Ms Cobden confirmed that on 11 June 2019 she emailed Mr Ngovi terminating his employment effective 19 June 2019. She also confirmed that Mr Ngovi's employment was terminated in reliance on Clause 1.7 of the IEA. She referred to Mr Ngovi's evidence that he had had a discussion with Ms Taurua, the then Operations Manager, about remaining a permanent Yardperson. She stated that she would have needed to approve such an arrangement, and Ms Taurua had never approached her regarding the same. She also advised that the Yardperson role was a stepping stone, temporary position for drivers so that they can get vehicle experience whilst they progress with their Class 2 licence and P endorsement. She confirmed that no particular process was followed and that the decision to dismiss Mr Ngovi was made by her and was based on a view, not only that Mr Ngovi was in breach of Clause 1.7 of the IEA, but that he had been tardy in progressing the Kenyan Police clearance with NZTA and had cancelled his application without informing Tranzurban. This view was reached based on her belief that Mr Ngovi had received the 7 May letter from NZTA.

Marilyn Watkins

[20] Ms Watkins is the Human Resources Manager for Tranzurban. She confirmed that Mr Ngovi was employed as a Yardperson/Driver: Urban-School Bus on 18 June 2018. She states

he was given several verbal reminders in regard to lodging his application for his passenger endorsement with that application being lodged on 14 August 2018 although not by her or Ms Cobden. She says Mr Ngovi was advised at this time by NZTA that he would be required to supply his Kenyan Police clearance within seven months of his application.

[21] Ms Watkins confirms that upon completing a check with NZTA on 27 May 2019 in regards to the progression of recruitment applications, NZTA advised Tranzurban that Mr Ngovi's P endorsement application had been cancelled on 7 May 2019 as he had failed to supply the required Kenyan Police clearance within the timeframe. She confirmed Mr Ngovi was then written to and given until 10 June 2019 to obtain the required endorsement. When he did not do that, his employment was terminated. She confirmed that no other options were looked at and that she had no interaction with Mr Ngovi. She also advised that Tranzurban did not employ permanent yard staff in all areas. She confirmed however that Mr Ngovi had been working in the yard and accordingly there would still have been yard work for him to do if the company had wanted him to do so. However, Ms Watkins said that the company had not replaced Mr Ngovi in the yard.

Discussion

[22] The evidence before the Authority included the IEA which in terms of the position occupied by Mr Ngovi provides a position: Yardperson/Driver: Urban-School bus. It also provides in addition to the duties outlined in Schedule 1 of the agreement, Mr Ngovi would carry out any other reasonable duty The IEA contains the declaration in clause 1.4:

You declare you have the required drivers' licence/s endorsement to perform the duties required by this agreement. You agree to notify us immediately if you should lose the appropriate licence, endorsement or if any restrictions or conditions should be imposed.

[23] It was accepted by Tranzurban, that when it employed Mr Ngovi, it knew he did not have the licences they ultimately wished him to have. The position description set out specific responsibilities, one relating to Yardperson duties and the other to Driver duties. The evidence before the Authority from all parties was that Mr Ngovi carried out the Yardperson responsibilities and duties but not the Driver duties.

[24] Tranzurban's view was that the Yardperson position was just a filling position until Mr Ngovi acquired the appropriate licences and P endorsement. However, this is not what the IEA provides for. There is no mention in the IEA that employment was conditional on Mr Ngovi

obtaining a P endorsement. Having said that, it is obvious he could not operate as a Driver without this. So although he had been employed as a Yardperson/Driver, in the entire time he was employed by Tranzurban, he only carried out the Yardperson function.

[25] Tranzurban relies on Clause 1.7 of the agreement to justify the termination of Mr Ngovi's employment.

[26] As Mr Ngovi pointed out, Clause 1.7 refers to the loss of license or endorsement, but he did not do so; he never obtained the P endorsement. Further, he was not working as a Driver but was working as a Yardperson. Clause 1.7 seems to provide for summary dismissal where an employee is guilty of some serious wrongdoing. In other words, if an employee loses his licence, the clause seems to pre-suppose this would have come about as the result of some serious traffic infringement and it is understandable that this would be of a concern to an employer. Likewise the second part of Clause 1.7 provides that where an employee is convicted of any crime that impacts on the employers' risk assessment which seems to be tied to the Vulnerable Children Act, that too would be grounds for dismissal in terms of the IEA.

[27] This is not the situation here. The evidence is in essence undisputed. Tranzurban believed it employed Mr Ngovi to be ultimately a Driver and until he could carry out that function he was employed as a Yardperson. Tranzurban believed it employed Mr Ngovi to ultimately be a Driver. It wanted a Driver. Unfortunately, that is not what the IEA provides for. Further, it is clear the reason for dismissal was Tranzurban's frustration with what it saw as delays by Mr Ngovi in progressing his acquisition of a P endorsement through obtaining his Police clearance from the Kenyan Police. This is quite a different situation to that Clause 1.7 was designed to apply to. Tranzurban was not entitled to rely on Clause 1.7 of the IEA to terminate Mr Ngovi's employment because he had not managed to obtain his Police clearance and therefore P endorsement. Indeed, there were other ways Tranzurban could have dealt with Mr Ngovi if it felt he was delaying, or could not obtain the endorsement.

[28] Section 103(1)(a) of the Act provides that an employee may have a personal grievance against his employer for unjustified dismissal. The test of justification is provided for in s 103A of the Act. The section reads:¹

103A Test of justification

¹ s 103(1)(a) Employment Relations Act 2000

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

[29] In applying the above test, s 103A(3) requires consideration of a number of matters. That section provides:²

In applying the test in subsection 2, the Authority or the Court must consider—

- (a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and
- (b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employer; and
- (c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and
- (d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

[30] In this case, Tranzurban did not discuss with Mr Ngovi, its view that he had cancelled his application for the P endorsement and/or had been too slow in obtaining the qualification. Rather, it received advice from NZTA that it had written to Mr Ngovi and in the absence of a response, had cancelled his application. If Tranzurban had properly investigated the matter, it would have been made aware of Mr Ngovi's quite different perspective. He had not received any communication from NZTA, perhaps because it had gone to the wrong address. He had not cancelled his application. Although such a statement was contained in a letter from his representative, Mr Ngovi clarified this and was quite clear he had not cancelled the application and did not know that this had occurred. Indeed, once Tranzurban's concerns regarding the time that had passed, was brought to his attention, Mr Ngovi moved to attempt to further progress matters.

[31] Tranzurban could have investigated the matter and if it had, would then have been aware that Mr Ngovi was saying he had not received the correspondence. Tranzurban may well then

² s 103A(3) Employment Relations Act 2000

have assisted Mr Ngovi on getting the matter back on track with NZTA. However, instead of doing this, it set a time limit for Mr Ngovi to obtain his P endorsement which it knew was insufficient. Ms Cobden's evidence indicated Tranzurban was aware that Mr Ngovi would not be able to obtain the P endorsement in the ten day period it demanded. That is not the action of a fair and reasonable employer. Rather than investigating the matter further, the company wrote to Mr Ngovi on 11 June 2019, terminating his employment on eight days' notice. The justification for the dismissal was firmly fixed on Clause 1.7 of the IEA. As noted earlier, Clause 1.7 does not give Tranzurban the ability to dismiss Mr Ngovi in these circumstances.

Summary and Conclusions

[32] Mr Ngovi's dismissal was both procedurally and substantively unjustified. First the grounds relied on by Tranzurban did not constitute serious misconduct or indeed misconduct. Secondly, there was no investigation or an opportunity given to Mr Ngovi to explain any concern Tranzurban had. The process followed was deficient. Mr Ngovi was written to on the incorrect assumption he had received the 7 May 2019 letter from NZTA when he hadn't. He was then given ten days to obtain his Police clearance from Kenya. This was unreasonable. At the expiry of ten days he received a letter terminating his employment on eight days' notice. Justification for the termination was a reliance on Clause 1.7 of the IEA. It was not open to Tranzurban to rely on this provision to terminate Mr Ngovi's employment.

Remedies

[33] Mr Ngovi gave evidence of the hurt and humiliation he suffered as a result of the dismissal. He couldn't afford his flat and became reliant on friends who took him in as he sorted out his issues. He described going through a difficult time wondering why he had been treated in such a way by Tranzurban. He had four weeks without work before enrolling at WelTec. Accordingly, he has lost four weeks wages which equates to \$3,863.40 gross plus eight per cent holiday pay.

[34] Mr Ngovi also claims \$18,000 compensation for hurt and humiliation pursuant to s 123(1)(c)(1) of the Act. Having assessed his evidence in that regard, I consider an appropriate figure is \$15,000.

Contribution

[35] Section 124 of the Act requires me to consider whether or not Mr Ngovi contributed in any way to his dismissal. In essence, Mr Ngovi was dismissed, not because he had not obtained the P endorsement, but because Tranzurban had considered he had acted in a blameworthy way by not advising them when he had received the letter from NZTA on 7 May 2019. The fact that Tranzurban had that incorrect view came about simply because it did not investigate or discuss matters with Mr Ngovi. Even a cursory investigation would have revealed the misunderstanding and no doubt would have provided a better way forward for both parties. If the delay in obtaining the P endorsement had become a major concern for Tranzurban, then there were other ways it could have dealt with this. Accordingly, I am not satisfied that Mr Ngovi contributed to his dismissal in any blameworthy way. Having said that, it would of course have been preferable if there had been more regular dialogue between the parties as to their expectation of the timespan in which Mr Ngovi was expected to obtain his P endorsement, and the consequences to his employment if he could not.

Orders

[36] Tranzurban is ordered to pay Mr Ngovi:

- (a) a sum of \$3,863.40 gross plus eight percent holiday pay (less any PAYE); and
- (b) a sum of \$15,000 compensation for hurt and humiliation.

[37] Costs are reserved.

Geoff O'Sullivan
Member of the Employment Relations Authority