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## **Staunton v Transdev Auckland Limited (Auckland) [2016] NZERA 604; [2016] NZERA Auckland 402 (9 December 2016)**

Last Updated: 12 January 2017

**IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND**

[2016] NZERA Auckland 402  
5568780

BETWEEN RICHARD STAUNTON Applicant

A N D TRANSDEV AUCKLAND LIMITED

Respondent

Member of Authority: Nicola Craig

Representatives: Applicant in person

John Rooney, Counsel for Respondent

Investigation Meeting: 7 and 8 July 2016 at Auckland

Date of Determination: 9 December 2016

### **DETERMINATION OF THE AUTHORITY**

- A. Transdev Auckland Limited (Transdev) did not breach clauses of**
- B. C. the Transdev collective agreement as alleged by Richard Staunton.**
- Transdev did not unjustifiably dismiss Mr Staunton.**
- Transdev did not breach its duty of good faith to Mr Staunton.**
- D. A timetable is set for memoranda on costs, in the event that the parties are not able to resolve the matter themselves.**

### **Employment relationship problem**

[1] Transdev Auckland Limited (Transdev) operates trains on Auckland's suburban rail system on behalf of Auckland Transport (AT).

[2] Richard Staunton is an experienced locomotive driver having worked for KiwiRail and its predecessors for over 20 years. He began working for Transdev in early 2014.

[3] At the time Mr Staunton started with Transdev the plan to electrify the

Auckland suburban rail system was in place.

[4] From about April 2014 electric trains were in operation on some lines. These were single 3 Car electric trains (EMUs<sup>1</sup>). Transdev was in the planning stage of moving to 6 Car EMUs which would allow more passengers to be transported. Mr Staunton continued to drive diesel trains, rather than EMUs, at this time.

[5] Drivers had various concerns, including regarding health and safety, about the introduction of electric trains and the change from 3 Car to 6 Car EMUs.

[6] In late August 2014 Mr Staunton became branch secretary for the Auckland branch of the Rail and Maritime Transport Union (RMTU or the union).<sup>2</sup> In this role Mr Staunton had the opportunity to be involved in various groups within Transdev who were considering electrification and development issues. This included a Cab Committee.<sup>3</sup> Mr Staunton only had actual involvement in a group considering the change from 3 to 6 Car EMUs.

[7] Transdev developed a certification programme for drivers moving from driving diesel to driving electric trains. This included a theoretical component, the undertaking of a minimum of 10 supervised return trips to Britomart station and a sign off at the end from an assessor.

[8] Mr Staunton undertook the theory and the trips. On his final trip on 1 April

2015 he was signed off by his assessor as competent to drive EMUs. However, Mr

Staunton refused to sign the assessment form.

<sup>1</sup> EMUs – Electrical Multiple Units

<sup>2</sup> There was also a chair and vice chair of the branch

<sup>3</sup> The Cab Committee dealt with the functions of the train cabs and how drivers would interface with the new technology

[9] Mr Staunton maintained that he was not competent to drive EMUs as he had not signed his own assessment off. This assertion and his consequent refusal to drive EMUs led to a series of meetings between him and Transdev representatives. Mr Staunton raised five points or groups of concerns (which I will refer to as Mr Staunton's list):

- i. increase in drivers' skill and ability driving EMUs warranted additional remuneration;
- ii. extra training needed, as training had extended over too long a period;
- iii. EMU cab environment of a lower health and safety standard than previous cabs;
- iv. safety concerns over the 6 Car EMUs; and
- v. platform clearance issues, meaning further training required.

[10] The process eventually became a disciplinary one and Mr Staunton was dismissed by Transdev on 18 June 2015 for failure to follow a lawful and reasonable instruction, namely to drive EMUs.

[11] Mr Staunton claims that his dismissal was unjustified. When his claim was filed in the Authority in March 2016, he initially claimed interim reinstatement. This was withdrawn at a case management conference. The claim for permanent reinstatement continues. Transdev claims that Mr Staunton's dismissal was justified and opposes the reinstatement application.

[12] An investigation meeting was held on 7 and 8 July 2016. I heard evidence from Mr Staunton, and from Transdev's Robert Maxim (Train Service Officer), John MacIver (General Manager of Safety and Assurance), and William Staniland (Train Crew Manager).

[13] As permitted by [s 174E](#) of the [Employment Relations Act 2000](#) (the Act) this determination does not record all the evidence and submissions received but states findings of fact and law on issues necessary to dispose of the matter and specified orders made as a result.

[14] This determination has been issued outside the statutory period of three months after receiving the last submissions from one of the parties. I record that when I advised the Chief of the Authority that this would likely occur he decided, as

permitted by [s 174C\(4\)](#) of the Act, that exceptional circumstances existed for providing the written determination of the Authority's findings later than the specified date in [s 174C\(3\)\(a\)](#) of the Act.

## Issues

[15] Although Mr Staunton's case primarily relates to his dismissal, clauses of the relevant collective employment agreement between RMTU and Transdev 4 (collective agreement) became an issue, with Mr Staunton saying that he was not required to drive EMUs unless Transdev first complied with its contractual obligations. These contractual issues overlapped with the five points in Mr Staunton's list. Mr Staunton sought a compliance order regarding one of the agreement's clauses.

[16] Mr Staunton's claims necessitated a consideration by me of provisions of the

collective agreement, which will be set out before dealing with the dismissal claim. [17] The issues for investigation and determination are:

- (a) Was there non-compliance by Transdev with clause 14 of the collective agreement regarding a joint commitment to training?
- (b) Was there non-compliance by Transdev with clause 21 of the collective agreement regarding health and safety?
- (c) Was there non-compliance by Transdev with clause 37.1 of the collective agreement regarding skills based pay?
- (d) If so, what remedies (if any) should be awarded against it, including consideration of a compliance order regarding clause 37.1?
- (e) Was Mr Staunton unjustifiably dismissed by Transdev, including consideration of any disparity of treatment?
- (f) If so, what (if any) remedies should Mr Staunton be awarded, including reinstatement?
- (g) Did Transdev breach its good faith obligations towards Mr Staunton?

4 Veolia Transport Auckland Limited [Transdev's former name] and RMTU Collective Agreement

1.07.12 to 30.06.15

(h) Should either party be ordered to make a contribution towards the other's costs?

[18] Mr Staunton also raised concerns regarding the [Health and Safety in Employment Act 1992](#) (the HSE Act), which was in force during the time of his employment. However, the Authority has no jurisdiction to hear offences prosecuted under that Act.

## The process leading to dismissal

[19] Mr Staniland, the Train Crew Manager, phoned Mr Staunton on 20 April

2015, after Mr Staunton refused to sign his assessment form. Mr Staunton outlined his concerns on the phone, and then followed up on an email to Mr Staniland a few days later.

[20] The company was having a busy time with electrification and a meeting to discuss the issues was not held until 21 May. Mr Staunton brought a support person. He discussed his concerns and there was some response from Transdev. Mr Staunton said that the first point on his list (additional pay for additional skills) was the most important to him. Transdev agreed to provide additional training as requested. Mr Staniland said that he would go away and consider Mr Staunton's concerns further.

[21] At a follow up meeting on 29 May 2015 Transdev provided Mr Staunton with documents which he had requested regarding his health and safety issues. Mr Staunton said that he was primarily concerned with issue one (pay). It was agreed that Mr Staunton would float the idea of an EMU related pay increase with the RMTU branch, with a view to tabling it at the upcoming bargaining. Mr Staniland agreed to talk to Transdev's planning department about the possibility of Mr Staunton stepping out of the roster in order to solely drive locomotives. A transcript from a recording of this meeting runs to 14 pages.

[22] Mr Staniland emailed Mr Staunton on 2 June 2015 to report that the planning department had said that it would be too disruptive to have Mr Staunton driving only locomotives. In that email Mr Staunton was notified that a new roster incorporating the EMUs was commencing on 7 June. Mr Staniland stated:

I and the company held the view that although you were choosing to not drive EMUs, for your own reasons of principle, you are in fact competent to do so. Notwithstanding that we are happy to provide ongoing support as needed."

[23] The email also stated the company's expectation that Mr Staunton could operate EMUs while his outstanding issues were resolved.

[24] Mr Staunton replied that he still had concerns around the 6 Car EMUs and asked for Transdev's reasons for declining

additional remuneration for the additional skill. Mr Staniland emailed back that Transdev's position was that it could not offer superior terms and conditions (to the collective agreement) to individual union members. Mr Staunton was encouraged to take his outstanding health and safety concerns to the appropriate forums.<sup>5</sup>

[25] Once Mr Staunton refused from 8 June 2015 to drive EMUs when rostered to do so, he was called to a meeting. Until his dismissal Mr Staunton continued to refuse to drive EMUs when allocated to them during his rostered shifts.

[26] At the 11 June meeting Mr Staunton again relied on not having signed the assessment form. Transdev's representatives emphasised that they regarded Mr Staunton as competent to drive. Mr Staunton agreed that pay was his number one issue and asked for an additional increase for himself individually. Transdev repeated that it would not provide superior terms to individual union members.

[27] The meeting was adjourned while Transdev considered the information provided by Mr Staunton and his support person. Mr Staunton was then notified that Transdev was going to commence a disciplinary process with him.

[28] A letter was sent to Mr Staunton by Transdev formally inviting him to a disciplinary meeting on 18 June. Provided with the letter were notes of the three previous meetings, and the company's Performance Management and Disciplinary Procedure, and Standards of Conduct documents.

[29] The letter specified that refusal to carry out reasonable and lawful instructions, or refusing to perform work, is classified as serious misconduct in the Disciplinary

Procedure document, and dismissal was identified as a possible outcome.

#### 5 Joint Consultative, Health and Safety or Cab Committees

[30] Mr Staunton and his support person attended the 18 June meeting. Mr Staunton maintained that he was not certified to drive EMUs. The company restated its view that it considered him competent. Mr Staunton repeated his point about not being certified several times, including in response to Transdev asking what it could do to get him certified. After an adjournment Mr Staniland asked whether Mr Staunton was prepared to drive EMUs on an on-going basis. Mr Staunton replied "That's got nothing to do with the current issue".

[31] Transdev's human resource consultant said that the reason this question was being asked was because the answer could influence the decision making and any possible disciplinary sanction and "[y]our answer could mitigate the outcome of this process". Mr Staunton said "I'm not going to answer that". A further adjournment was then called.

[32] On resumption, Mr Staunton was told that Mr Staniland could not currently see any alternative, so his proposed outcome was termination of employment for serious misconduct. A further adjournment was taken to allow Mr Staunton to consider the proposed outcome.

[33] When the meeting resumed Mr Staunton was notified of Mr Staniland's decision on behalf of Transdev to dismiss. That was confirmed to him in a 23 June 2015 letter, which sets out the factors which Transdev took into account.

#### **Clause 14 – Training**

[34] I will now consider each of the breaches of the collective agreement which Mr Staunton alleges against Transdev. Clause 14 of the collective agreement includes a commitment by the union and the employer to encourage all employees to participate in and accept training opportunities.

[35] Mr Staunton considered that there were inadequacies in his training regarding EMUs (issues two and five on his list). However, when he raised these issues an agreement was reached, at least in principle, with Mr Staunton being able to access more training.

[36] Mr Staunton did not consider that the company's later instruction to drive EMUs was lawful and reasonable as he had not yet received the training. In some ways this was a chicken and egg situation, with Mr Staunton saying that he could not be instructed to drive until he had done the training, and the company saying that the training would only be supplied when the other issues, particularly Mr Staunton's prioritised request for additional payment, were resolved.

[37] Mr Staniland assessed that about two full eight-hour days of supervised training would have been needed. I consider that given Mr Staunton's repeated statements about the significance to him of the additional pay issue, it was reasonable for Transdev to hold off making the offered training available until the pay issue was resolved.

[38] Mr Staunton has not established that Transdev breached the collective agreement regarding training.

#### **Clause 21 – Health and Safety**

[39] Issues three (EMU cab of lower standard) and four (6 Car EMUs) on Mr

Staunton's list concerned health and safety.

[40] In clause 21 of the collective agreement the parties commit to excellent health and safety management and list various employer and employee obligations. This includes Transdev's obligation to provide and maintain a safe work environment, ensure all known hazards are assessed and controlled, and provide all necessary safety equipment and emergency procedures.

[41] By way of background, the introduction of EMUs required a safety case variation to be put to the independent regulator, New Zealand Transport Agency (NZTA) for approval. The variation took Transdev approximately two years to complete. That process included using the existing locomotive hazard logs, undertaking a large scale assessment of new risks introduced by EMU operations, and putting in place controls to eliminate, isolate and minimise risks. The variation was approved by NZTA on 1 December 2014, prior to EMUs going into full service on the rail network on 7 April 2015.

#### *EMU Cab*

[42] Mr Staunton believes that aspects of the EMU cab environment provided lower health and safety standards than the previous cabs. At least some of these issues had already been raised with Transdev by the union or drivers.

[43] The first issue was that there was no alarm to let the driver know when the headlight of the train had not been turned on. Mr Staunton understood that this was still in discussion with AT.

[44] The second issue concerned cleaning and hand-washing facilities. In locomotives a sink, paper towels and wet wipes were provided. With EMUs the drivers were told that they would be issued with wet wipes to carry, and that paper towels would be in the cab, but when Mr Staunton did a trial drive there were no paper towels present.

[45] Thirdly, an entertainment radio 6 was not provided in the EMU cabs, unlike in locomotives. Mr Staunton considered that these radios helped alleviate fatigue and had supported a petition to get them put in.

[46] This issue had been raised by drivers previously. AT did not want entertainment radios for safety reasons. In early 2013 Transdev arranged for an overseas expert to come and assess the situation. The expert concluded that potential disadvantages or risks associated with the radios, at least in the metropolitan environment, outweighed any potential benefits. Transdev therefore decided not to include radios in EMUs.

#### *6 Car EMUs*

[47] Issue four on Mr Staunton's list covered fire extinguishers, evacuation, cameras/monitoring and staffing levels in the carriages.

[48] Mr Staunton was concerned about the non-availability of fire extinguishers in carriages which train managers 7 or the public could readily access. Extinguishers in

6 Car units are locked in the cabs at the ends of the train.

<sup>6</sup> An entertainment radio was distinct from a radio to communicate with

#### *7 Conductors*

[49] Transdev considered that EMUs were built with very significantly less fire loading than earlier units due to materials with improved fire retardant properties being used. A risk assessment was done regarding fire extinguishers using the ALARP (as low as reasonably practical) principle. The safety case variation identified controls and procedures which were in place. NZTA had approved the 6 car variation, including the fire extinguishers.

[50] The next issue concerns the evacuation of trains. Mr Staunton thought that with 6 Car EMUs there was some ambiguity regarding the driver's and train manager's respective duties in emergency passenger evacuations.

[51] Transdev says that there was an updated evacuation document which had been approved by NZTA. Mr Staunton was not aware of this and was relying on an earlier draft version. Unfortunately Transdev may have provided him with that earlier draft in response to his request for clarification on the evacuation issue, although this could not be clearly established.

[52] The next issue related to a small number of stations where the platform was curved, meaning that the train manager could not immediately see all the doors of the

6 Car units. Cameras were put up at those stations making doors viewable on a monitor. Mr Staunton was concerned about the possibility of the camera or monitor failing.

[53] In terms of staffing levels, the union had sought more than one train manager for the 6 car EMUs. Mr Staunton accepts that during a meeting with Transdev he said that staffing levels would not be a show stopper for him, on their own.

## *Conclusion on health and safety*

[54] Transdev's position is that it had been through a comprehensive programme to get the EMUs into service, and this included extensive union involvement. As part of the variation approval process NZTA had appointed an independent assessor. The variation included risk assessments. In addition RMTU and Transdev representatives signed off each individual piece of rolling stock against an extensive checklist before it was put into service.

[55] During cross examination it appeared that Mr Staunton was not aware in a detailed way of various discussions and documents which dealt with some of his

issues. This was not surprising as he had not been to Cab Committee meetings, or to consultations that had occurred prior to him becoming branch secretary. He was not always aware that an issue had been considered, consulted with the union about and was resolved as far as Transdev and the union were concerned.

[56] On the basis of the evidence before me, I am not satisfied that Transdev refused to consider and work through health and safety issues raised. There appears to have been extensive union involvement, although the union may not always have got the specific outcome which it sought on a particular issue. There were several forums established to deal with issues, which Mr Staunton was advised by Transdev to utilise.

[57] I do not consider that Mr Staunton has established that any of his health and safety issues put Transdev in breach of its health and safety obligations under the collective agreement.

### **Clause 37.1 - Remuneration**

[58] Clause 37 starts as follows:

#### **37 PAY SCHEDULE**

##### **37.1 Skill based pay**

The parties to this agreement recognise that one of the important ways we can meet our customers' changing needs in an efficient and productive way is to work as teams. This requires flexibility and a willingness to take on new skills and take on new tasks. The parties also recognise the mutual benefits that come from this. Employees will have a chance of learning new skills, to develop alternative career paths and have access to higher gains in terms of earning opportunities. The employer gains in its ability to meet its customers' needs more efficiently.

You will be provided with a generic jobs description covering the work undertaken in your position. Your duties may be changed by adding or deleting tasks and in such cases you will be consulted before the changes are made. The employer will, in consultation with its employees and the union develop a competency based certification process that will recognise the attainment of new skills.

[59] Mr Staunton considers that it was unacceptable for drivers who were currently diesel locomotive drivers to have to increase their skill and ability by training to become qualified EMU drivers, without additional remuneration. He believes that either the company should pay more to all drivers who obtained those skills, or if it was not prepared to do so, should pay him alone additional remuneration.

[60] It is not clear that Mr Staunton, during the meetings with Transdev, specified any particular new skills which he saw as required for driving EMUs. For the sake of argument I will accept that new skills were involved in driving electric trains, noting that this is not accepted by Transdev. Mr Staunton's argument is that Transdev breached clause 37.1 by refusing to pay more money for the additional skills.

[61] However, clause 37.1 does not require any specific payments to be made by Transdev. It does not set out for example, that a higher duties allowance of \$2 per hour is payable in particular circumstances. What it does do is set out some principles which the parties have agreed to regarding the importance of new skills and changes that may be made to duties with consultation. It also says that a competency based certification process will be developed recognising the attainment of new skills.

[62] Even if, again for the sake of argument, Transdev had refused to enter into such a process, that does not mean that Mr Staunton or all EMU drivers, would automatically be entitled to more money. The clause specifies only that a certification process shall be developed.

[63] A process requiring certification was in fact developed by Transdev, in consultation with the union, for drivers to become EMU certified. This included the theory component and supervised trips.

[64] This process did not include any extra payment for EMU driving. Mr Staunton says that evidently no one had broached the subject. Mr Staniland agreed that Mr Staunton was the first to raise it. Mr Staniland's view was that one set of skills driving one type of train was being replaced by another set of skills driving another type of train. He discussed this with a union representative who generally agreed. Both Mr Staniland and Mr Maxim considered that the electric trains were probably easier

to drive overall than locomotives.

[65] Mr Staunton was initially on the union's bargaining team for the 2015 negotiations. As agreed with the company at the 29 May meeting, Mr Staunton raised his issue within the team but there was not sufficient support for making a claim for an extra EMU payment. Mr Staunton still wished to pursue payment for him individually, so resigned from the team.

[66] After failing to convince Transdev that they should pay all EMU drivers extra, during May and June meetings Mr Staunton pursued the prospect of a payment for himself for the additional skill. Mr Staniland believes that Mr Staunton felt that if he was successful in his own claim it would be applied to everyone else.

[67] At the meeting on 3 June Transdev advised that it was not able to offer superior terms and conditions than those in the collective agreement, to individual employees. Transdev may, under s 61 of the Act, have been able to offer individual terms in addition, as long as they were not inconsistent with the collective agreement provisions. However, Transdev can hardly be criticised for deciding that it did not want to take this approach. Its preference was to have all unionised staff on the collective agreement terms only.

[68] In cross examination it was put to Mr Staunton that money was the most important thing to him on his list of issues. He denied that, saying that it was (Transdev) not adhering to the collective agreement. In response to a statement that the clause only provided for consultation, Mr Staunton maintained that he regarded Transdev as having breached clause 37.1. He says that if there was a breach of contract on-going, it was probably against the law for him to accept it, and if it was not addressed he was not going to stay (with Transdev).

[69] When asked about how reinstatement would work when he was still requiring payment for extra skills, Mr Staunton said that it could be a one-off payment of \$1; that it did not have to be a substantial or on-going amount.

[70] Mr Staunton says that on occasions Transdev had entered into individual arrangements. On further exploration it appeared that although arrangements had been made with groups of staff, these were done by way of formal variation to the collective agreement, or agreed plan, with the union.

[71] In conclusion, Mr Staunton has not established that Transdev was in breach of clause 37.1 for not offering additional pay for EMU drivers. There was no request by the union for that discussion to occur. Effectively it was a shared view between the RMTU and Transdev that the introduction of EMUs was the continuation of an existing skill set. Transdev were entitled to say that it did not want to offer an individual on the collective agreement a different pay deal to other drivers on the same agreement.

[72] Mr Staunton appears to have had genuine concerns about aspects of the EMUs, especially the 6 Car units. However, the way he conducted himself at points during his dealings with Transdev suggests that he may have had another motivation or plan, which did not involve wanting to work for Transdev.

[73] After Mr Staunton undertook his final assessment, Mr Maxim asked if there was anything else he could do for Mr Staunton, to which Mr Staunton replied, there is not much point, I am not going to be doing EMUs, I will be doing other things.

[74] Mr Staunton understood that this conversation was confidential or informal. Mr Maxim agrees that that was the case but says that he was concerned that Mr Staunton would leave Transdev as a driver, and wanted him to stay. I accept that Mr Maxim was genuinely concerned about Mr Staunton.

[75] The minutes of the 21 May 2015 meeting refer to Mr Staunton being asked if there was any alternative that may be considered, and his reply including that his alternatives may be outside of Transdev.

[76] The notes of the 18 June disciplinary meeting record Mr Staunton being asked at one point about his response to the proposed outcome of dismissal and saying "What? Sorry I was thinking about State of Origin", and later another reference to Mr Staunton mentioning State of Origin.

[77] A note which Mr Staunton put up advising drivers about his dismissal and the fact they would need a new representative, referred to there (unfortunately) being no excuse to finish the bathroom renovations now.

[78] However, when questioned by the Authority and in cross examination, Mr Staunton denied that he had any other motivations. He says that he did not have anything specific that he wanted to be doing rather than working for Transdev and he had no other motivation for not driving EMUs other than his list of issues. Under cross examination about what other options he may have been thinking about, he referred to there being two train driving companies in Auckland.

[79] I am unable to progress this issue any further.

[80] Under s 103 of the Act the test of justification is whether Transdev's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances.

[81] In this case it is useful to consider substantive justification separately from an assessment of the procedure undertaken by Transdev, but I will firstly consider Mr Staunton's claim of disparity of treatment.

## Disparity of treatment

[82] Mr Staunton claims that he was treated differently from another driver. This is based on that driver asking for training and getting it, whereas Mr Staunton did not. Also, unlike Mr Staunton, the other driver was not told that he did not need to sign off his assessment form, in order for Transdev to regard him as competent. Transdev denied disparity. Neither party called the other driver to give evidence.

[83] The difficulty with Mr Staunton's argument is that the other driver did not sign, only asked for further training, was given further training and then signed. Mr Staunton was offered further training but also raised a variety of other issues, and indicated that without resolution of the payment issue he was not prepared to proceed. In those circumstances I am not satisfied that the situations of the other driver and Mr Staunton are sufficiently similar to say that Transdev treated Mr Staunton in an unfairly different way.

## Substantive justification

[84] Mr Staunton was dismissed for failing to follow a lawful and reasonable instruction, namely to drive EMUs.

[85] It is well established that employees are bound to follow lawful and reasonable instructions made by their employer in the context of the employment relationship. In *Wellington, Taranaki and Marlborough Clerical, Administrative and Related*

*Industrial Union of Workers v College Group Ltd* 8 the Arbitration Court held that orders will be lawful and reasonable if they:

(a) Do not require [the employee] ...to perform any act contrary to law;

(b) Are within the scope of the [employee's]... contractual obligations;

and

(c) Do not demand the performance of impossible or dangerous tasks.

[86] The third item can be supplemented in this case by s 28A of the HSE Act 1992 which was in force at the time of these events in 2015. That section permits employees to refuse to do work if the employee believes that the work they are required to perform is likely to cause serious harm to them.

[87] Transdev relies on the finding of the Employment Court in *Duncan v Sky Network Television Ltd* that the test for whether disobedience was wilful or not is an objective one and that a strongly held belief that has no bona fide or objective basis would not provide a ground for refusal to obey a lawful instruction. 9

[88] In order for disobedience to justify a dismissal, the disobedience must not only be wilful, but dismissal must in all the circumstances be a decision that a fair and reasonable employer could have made. 10

[89] Turning to the present case, Mr Staunton clearly and continuously refused to undertake the work of driving EMUs. Transdev gave him an explicit instruction that it expected him to undertake that order, although it accepted that he may still have some issues which were to be resolved.

*Was this a lawful and reasonable instruction?*

[90] Considering the first test in *College Group Ltd*, there is nothing to indicate that the instruction to drive EMUs was unlawful.

8 [\[1984\] ACJ 315](#) at 325

9 [\[1998\] 2 ERNZ 354](#) at page 360

10 *Butcher v OCS Ltd* [\[2008\] ERNZ 367](#) at [58], although the Employment Court there referred to whether the employer "would have" dismissed, as that was the statutory test at that time.

[91] Mr Staunton did not argue that driving an EMU was outside the scope of his contractual obligations. He was employed to drive trains, and the order related to driving trains.

[92] Mr Staunton argued that he was not competent to drive the EMUs because he had not signed off his assessment form. Other than seeking some further training, his position does not seem to be that he was incompetent at the actual tasks required, but more that he saw his signature as something in the nature of giving a necessary consent to undertaking that work. The form itself does not provide a specific statement as to what the driver is signing their name to.

[93] Whilst I accept that Mr Staunton may have initially thought that if he did not sign the document he would not be regarded as competent, he was later clearly informed by Transdev on more than one occasion that it considered that he was competent and his signature was not required.

[94] Mr Staniland says that an employee's signature is required on training documents so that when the company is audited by

NZTA they can be sure that the employee had in fact participated. His position is that the certification was still valid without a signature from the person being assessed.

[95] I am not satisfied that the employee's signature is required for Transdev to be satisfied that the driver is competent. As the company pointed out, if that were the case then even after the assessor considered a driver to be safe, a driver could ask for and be given a year's additional training but if they still refused to sign he or she would still not be certified.

[96] The third issue in terms of whether there was a lawful and reasonable instruction is whether the instruction was impossible or dangerous. In questioning by the Authority Mr Staunton mentioned for what appears to be the first time that he could not undertake the instruction to drive EMUs because he did not have the keys to the EMUs. However, the company said that these could have been made available very shortly had he agreed to drive.

[97] The driving here cannot be said to come within the category of impossible orders. Mr Staunton had some issues regarding health and safety concerns. However, I am not satisfied that the evidence established that this was a dangerous task which he was entitled not to undertake.

[98] I am also not satisfied on the evidence available to me that the driving of a 6

Car EMU could be said to be likely to cause serious harm to Mr Staunton, and thus justify a refusal to perform the work under s 28A of the HSE Act.

#### *Was Mr Staunton's refusal wilful?*

[99] Mr Staunton was clearly informed by Transdev on more than one occasion, what it expected him to do. The order to drive electric trains was identified as an instruction of the company, and the consequences were spelled out. Mr Staunton deliberately chose not to follow the instruction, so refusal was not accidental or unintended.

[100] However, Mr Staunton had beliefs about why he should not undertake the task, and particularly why he should not have to do so without additional remuneration for the additional skill involved. There is no evidence that Mr Staunton's refusal to work without additional remuneration was part of a campaign of refusal by a wider group of drivers to pursue such remuneration.

[101] Transdev were hamstrung by Mr Staunton's attitude in that he considered that Transdev had to offer him additional remuneration, despite that effectively being a matter for negotiation and Transdev not wanting to offer superior conditions to union members than were in the collective agreement.

[102] I am not satisfied that Mr Staunton's belief about his entitlement to additional remuneration had a bona fide or objective basis, as outlined in my consideration above of whether clause 37.1 was breached. I therefore do not consider that his belief provided a proper basis for refusing to undertake the instruction to drive EMUs.

#### *Other considerations regarding dismissal*

[103] Refusal to carry out reasonable and lawful instructions, or refusing to perform work, is classified as serious misconduct in Transdev's Performance Management and Disciplinary Procedure document.

[104] Given Mr Staunton's refusal to drive EMUs, were there other alternatives which the company should have explored? There were still some diesel locomotives being used on one outer part of the rail network, south of Papakura to Pukekohe.

Could Mr Staunton have been employed solely on that work, rather than having to drive any EMUs?

[105] I explored that issue with Mr Staunton at the investigation meeting, but he acknowledged that although it was possible it would have disrupted the roster and would be a very limiting role. There are no stations between Papakura and Pukekohe.

[106] In addition Mr Staniland understood that Mr Staunton was not currently certified for the diesel multiple units which worked there.

[107] The company had also earlier raised the prospect of Mr Staunton driving EMUs while his outstanding issues were resolved. Mr Staunton was unwilling to do this. Transdev therefore did explore temporary and on-going alternatives.

[108] I find that in all the circumstances Mr Staunton's refusal to drive EMUs was wilful disobedience of a lawful and reasonable instruction, and amounted to serious misconduct which a fair and reasonable employer could have decided to dismiss on.

#### **Procedural fairness**

[109] Under s 103A of the Act four factors are set out which I must take into account in considering the employer's process. They are whether the employer sufficiently investigated the allegations, whether the employer raised its concerns with the employee, gave him a reasonable opportunity to respond and genuinely considered his explanation.

[110] Mr Staunton does not challenge the disciplinary process followed by

Transdev.

[111] In terms of the investigation, Transdev had already had correspondence, discussions, and meetings with Mr Staunton about his concerns before the formal investigation and disciplinary process were commenced. These included:

(a) the initial phone discussion on 20 April 2015;

(b) Mr Staunton's subsequent email outlining his concerns;

(c) the meeting on 21 May, where Mr Staunton brought a support person;

(d) a further meeting on 29 May where Transdev provided health and safety material and both sides agreed to go and talk to others;

(e) the 2 June email notifying Mr Staunton that a new roster incorporating EMUs was commencing on 7 June but that he could operate these services while his outstanding issues were resolved; and

(f) subsequent emails between Mr Staunton and Mr Staniland.

[112] Although they were not part of the disciplinary process as such, I take these interactions into account in assessing whether the process was one which a fair and reasonable employer could have followed.

[113] Once Mr Staunton refused to drive EMUs when rostered to do so, he was called to the 11 June 2015 meeting, to which he brought a support person. The meeting was to investigate the issue of his refusal. Mr Staunton was given the opportunity to explain his position. Discussion occurred. The meeting was adjourned while Transdev considered the information provided by Mr Staunton.

[114] Mr Staunton was then notified that Transdev was going to commence a disciplinary process with him. Transdev then wrote to Mr Staunton formally inviting him to a disciplinary meeting on 18 June, and advising him about bringing a support person or representative. Meeting notes and company policies were provided.

[115] The letter states clearly that a refusal to carry out reasonable and lawful instructions, or refusing to perform work, is classified as serious misconduct in Transdev's policy and dismissal is a possible outcome.

[116] Further discussion occurred at the 18 June meeting. After an adjournment Mr Staniland asked whether Mr Staunton was prepared to drive EMUs on an on-going basis. Mr Staunton effectively did not answer the question. He was advised that the answer could influence the decision making and any possible disciplinary sanction. Mr Staunton still refused.

[117] A further adjournment was then held, after which Mr Staunton was told there did not seem to be any alternative to dismissal. A further adjournment was called to allow Mr Staunton to consider the proposed outcome. The decision to dismiss was made and was subsequently confirmed in writing. The letter details the factors taken into account.

[118] In summary, this was not a rushed process. There were four meetings held over almost a month period. There was time for Mr Staunton to consider his position between meetings and take advice if he wished to do so. He also brought a support person to the meetings.

[119] The allegation was sufficiently investigated. The company's concerns were clearly put to Mr Staunton on a number of occasions. The company gave Mr Staunton several opportunities to respond, and engaged in discussions with him about his concerns. It further investigated the issues which he identified. It considered his explanations and attempted to find alternative ways to resolve the situation.

[120] I am satisfied that Transdev met its obligations to provide a fair process and complied with all of the aspects outlined in s 103A (3) of the Act.

[121] In conclusion, I have found that there was substantive justification for Mr Staunton's dismissal, that the process was undertaken in a fair way and that there was no disparity of treatment. I find that Transdev acted as a fair and reasonable employer could have done and that Mr Staunton's dismissal was justified.

### **Good faith**

[122] Mr Staunton claims that Transdev was in breach of its good faith obligations regarding his overall treatment, the answers given to his health and safety concerns and lack of adherence to collective agreement provisions.

[123] My impression is that Transdev was responsive and communicative regarding the issues being considered. It responded to Mr Staunton's concerns, including providing various documents and taking issues away to discuss with others within the company. It was clearly communicated to Mr Staunton what the company's position was regarding the various issues which he raised. The prospect of dismissal was clearly identified to him. There is no indication of Transdev attempting to mislead or

deceive Mr Staunton.

[124] Overall Transdev made genuine attempts to resolve this situation and did not breach its duty of good faith to Mr Staunton.

### **Costs**

[125] Costs are reserved. The parties are invited to resolve the matter. Usually costs awards follow the event. In this case Mr Staunton has not been successful in establishing his claims.

[126] If the parties are unable to resolve this matter Transdev shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Mr Staunton shall have a further 14 days in which to file and serve a memorandum in reply. Submissions seeking costs must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[127] The parties could expect the Authority to determine costs, if asked to do so, on its usual 'daily tariff' basis unless particular circumstances or factors require an adjustment upwards or downwards. The daily tariff applicable at the time this case was filed was \$3,500 per day.

**Nicola Craig**

**Member of the Employment Relations Authority**

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