

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 143/08
5123992

BETWEEN MICHAEL TAMATEA
 Applicant

AND CITYLINE (NZ) LIMITED
 Respondent

Member of Authority: P R Stapp

Representatives: Tanya Kennedy for Applicant
 Andrew Caisley for Respondent

Investigation Meeting: Wellington 21 August 2008

Further Information and By 30 September 2008
Submissions:

Determination: 24 October 2008

DETERMINATION OF THE AUTHORITY

[1] Mr Tamatea, while he was driving his bus, and a member of the public, who was driving a motor vehicle, became involved in a verbal altercation, after the driver failed to give way to Mr Tamatea. City Line suspended Mr Tamatea and conducted an investigation that lead to him being dismissed.

[2] Mr Tamatea has challenged his suspension and dismissal from his employment with City Line. He is seeking reinstatement, lost wages and compensation and costs.

[3] City Line denied the claims, and opposed reinstatement.

Issues

[4] Was Mr Tamatea's suspension an issue at the time? Was the suspension raised as a personal grievance? If Mr Tamatea's suspension was a relevant issue was the suspension fair? Did Mr Lear say he "*wanted this guy off his shift now*"?

[5] Did the employer come to a reasonably held belief not to accept Mr Tamatea's version of the incident involving the member of the public who laid the complaint about his behaviour?

[6] Would a fair and reasonable employer have dismissed Mr Tamatea in all the circumstances? Was the process followed by the employer fair?

[7] Has there been any disparity of treatment towards Mr Tamatea by City Line?

Mr Tamatea's employment with City Line

[8] Mr Tamatea commenced his employment on or about 9 August 2004 as a bus driver with City Line (NZ) Limited. He was employed under the terms of a collective employment agreement as a member of the Tramways Union. He was paid \$16.00 per hour and worked roster arrangements. He had no disciplinary record, and had received a complimentary excellent customer service report in writing (11 December 2007).

20 March 2008 complaint

[9] On 20 March 2008 a member of the public, a driver of a motor vehicle, made a complaint in regard to Mr Tamatea's behaviour. The complaint related to an incident on 20 March 2008 at an intersection and allegations about a heated discussion between the driver of the vehicle ("the complainant") and the applicant, when Mr Tamatea followed the driver and pulled up alongside him. The complaint was put in writing. Another member of the public ("the witness") also complained.

[10] On the same day Mr Tamatea returned to the depot and filled out an incident report with the help of another employee and union delegate, Ms Corrina Rameka.

The events that followed the event of 20 March

[11] Mr Tamatea says he went to work on 21 March (Good Friday), and Mr Matthew Lear, the General Manager said “*I want this guy off his shift now*”, and he says he was sent home by another controller. Mr Lear adamantly denied the allegation and says he was not even at work on Good Friday. Mr Tamatea changed his evidence and said during the Authority’s investigation that he heard a controller say that Mr Lear had said he “*wanted this guy off his shift now*”. City Line adamantly disputed this claim.

[12] On 26 March 2008 Mr Tamatea was advised of the complaint when a letter was delivered to him. Mr Tamatea could not recall the circumstances of getting the letter, but it is common ground he received it. The detail of the complaint was outlined for him and he was advised of the opportunity to explain his version of the events. He was encouraged to get advice and take the matter up with the union.

[13] On 31 March Mr Lear sent an email to the complainant with questions about the incident. The questions were:-“Did the driver leave the bus unattended and approach you?-If the driver did leave the bus was this before or after the main verbal altercation?-Can you recall what you said to the driver and at what point?” The complainant replied in writing but the email was not given to Mr Tamatea and his representative. Nor was the name of the complainant passed on.

[14] City Line sent Mr Tamatea a “*please explain*” letter and enclosed the relevant complaints. The company was informed that Mr Tamatea had completed an incident report and a copy was obtained. Mr Tamatea requested that the incident report be treated as his response.

[15] A meeting was held on 1 April 2008 involving Ms Rameka, Mr Tamatea, Mr Lear, and Kirsty Williamson, City Line’s People and Performance Advisor. According to Mr Lear and Ms Williamson this was the first time Mr Tamatea was available. Mr Lear says the union indicated that Mr Tamatea’s suspension was not opposed and the notes record that Ms Rameka said “get it over and done”. It was not subsequently challenged until the statement of problem was filed in the Authority on 17 July 2008.

[16] The suspension was confirmed in writing after the meeting on 1 April 2008 and there was no reply from the union subsequently. Later, Mr Phil Griffiths, the union organiser, requested that Mr Tamatea be allowed back to the premises and approval was granted. Mr Griffiths also expressed the opinion that Mr Tamatea should be allowed back to work as soon as possible.

[17] After the 1 April meeting difficulties arose in regard to arranging another meeting with the union. A planned meeting scheduled for 7 April was abandoned because the union was not available to represent Mr Tamatea. A letter dated 10 April 2008 was sent by Mr Lear outlining the issues and how seriously the company viewed the allegation in regard to the incident complained about.

[18] On 15 April a meeting took place with Mr Lear, Mr Griffiths, Mr Rostrevor Watene union delegate, and Mr Tamatea. The allegations were set out and a check made that the applicant and the union had all the relevant information. Mr Lear clarified that he had telephoned one of the witness to confirm that the statements that had been made were true and correct. The person stood by them. The applicant was then asked three questions about the incident and his alleged involvement of getting out of his bus, leaving it unattended, verbally abusing a member of the public who was in a car, spitting at that person and grabbing the complainant's vehicle's mirror and reaching inside the vehicle. There was an adjournment and when the meeting reconvened Mr Griffiths put the questions to Mr Tamatea. Mr Tamatea denied the allegations, but admitted spitting while he talked to the occupant of the vehicle because he got upset when the occupant allegedly made a racist comment. The meeting was adjourned to be reconvened later.

[19] On 16 April Mr Lear contacted the witness to check that person's version of events on the incident. That person confirmed that Mr Tamatea did leave his bus and approached the complainant's window. That witness replied in writing that "*he certainly did get off the bus and walked up to the driver's window of the other car I...thought he was going to punch the driver he was that angry*". She heard Mr Tamatea swear but could not hear the driver in the other vehicle and she did not see any spittle.

[20] On 21 April the parties met again. Mr Tamatea was asked for any further explanation. He was informed that any disciplinary action could include dismissal. It was decided to adjourn to enable Mr Lear to reflect on the submission Mr Griffiths made for Mr Tamatea. Mr Griffiths advised that he thought the language of the person in the vehicle was at the worst end of racial abuse. Mr Tamatea says he had been provoked; he denied spitting and did not grab the car as alleged.

[21] On 29 April a disciplinary meeting was held and attended by Mr Tamatea, Ms Rameka, Mr Watene, Ms Williamson and Mr Lear. Mr Tamatea was given an opportunity to say anything else for the company to consider. Other options were raised such as counselling and a warning. It was pointed out that this was Mr Tamatea's first offence and that there had been worse cases in the past gone unpunished. Mr Tamatea apologised. The meeting adjourned and Mr Lear and Ms Williamson deliberated and decided to dismiss Mr Tamatea. They returned to the meeting and dismissed Mr Tamatea. Mr Lear accepted responsibility as the decision maker. The decision was confirmed in writing.

Did the employer come to a reasonably held belief about Mr Tamatea's credibility?

[22] City Line did come to a reasonably held belief not to accept Mr Tamatea's version of the incident because:

- a. It had independent corroboration that there had been an incident and some of Mr Tamatea's behaviour was witnessed;
- b. Mr Tamatea was found to have initiated the secondary confrontation by pulling up alongside the driver and confronting him;
- c. Mr Tamatea accepted he was angry and upset;
- d. Mr Tamatea accepted that his anger caused him to spit while he was speaking;
- e. Mr Tamatea's inexplicable decision to confront the motorist down the road and driving along side that driver, after that person did not properly give way, did not excuse or justify Mr Tamatea's action in the circumstances and his reliance on provocation by the motorist making a racial slur, because this took place after Mr Tamatea had initiated the confrontation;

- f. Mr Tamatea had an opportunity to put his point of view. He was aware of the conflicting evidence;
- g. City Line accepted that Mr Tamatea said that the motorist failed to give way, when the motorist denied that. It was open for the employer to believe the complaint and the witness, despite incomplete information, and draw its own conclusions that Mr Tamatea did get out of his bus, was angry and confronted the driver.
- h. The complainant put his complaint in writing as requested. There was a procedure followed by Mr Lear and although documentation of the initial complaint made by the complainant over the telephone and Mr Lear's telephone calls to the complainant have not been produced that is not fatal because Mr Tamatea was given the relevant information concerning the complaint. Three written reports were taken into account: the complainant's, the witness's and Mr Tamatea's.

Would a fair and reasonable employer have dismissed Mr Tamatea?

[23] It was open to a fair and reasonable employer to dismiss Mr Tamatea because:

- a. Mr Tamatea's action of following the driver and confronting that person, including getting angry, breached trust and confidence. It was open to the employer to rely on this ground given Mr Tamatea's job was unsupervised and involved public safety that could have been compromised by his decision to confront the driver;
- b. City Line drew the linkage between what Mr Tamatea did, using the information from the complainant and an independent witness, and to make an allegation that Mr Tamatea's action amounted to serious misconduct and he had breached trust and confidence;
- c. A letter dated 17 April from Mr Lear putting Mr Tamatea on notice of the allegations has potentially confused the employer's reasoning because that letter referred to Mr Tamatea breaching the Land Transport road rules in regard to the right of way rule and pulling up alongside another vehicle on the wrong side of the road. I am satisfied that that letter put forward the substance of the complaint in regard to the incident for Mr Tamatea to comment on. Furthermore the allegation that there had been a breach of the Land Transport road rules disappeared and

instead City Line relied upon Mr Tamatea's alleged behaviour as being serious enough to be a breach of trust and confidence taken up on the 19 April and at meetings on 21 and 29 April. The initial allegation probably disappeared because on the information that Mr Lear received he accepted that Mr Tamatea took evasive action when the other driver failed to give way. Mr Lear reasonably decided, upon making that decision, he did not need to interview another driver who Mr Tamatea said witnessed the first incident.

- d. At the final meeting there was an opportunity given for Mr Tamatea to raise any other matters for consideration and Ms Rameka explained how sorry Mr Tamatea was for what he had done, and she suggested counselling and a warning as an appropriate sanction. I am satisfied Mr Lear considered these suggestions. However, because Mr Lear considered the confrontation that Mr Tamatea initiated when he pulled up alongside the driver of the vehicle amounted to serious misconduct, it would be open to a fair and reasonable employer to conclude, as City Line did, that Mr Tamatea had breached trust and confidence;
- e. Mr Lear also took into account Mr Tamatea's prior service, that Mr Tamatea was a likeable person and the consequence that a dismissal would have on him. The union had no issue with these at the time, when it had an opportunity to comment on anything the company should consider when making its decision. Thus, the company cannot be criticised now, and it was not fatal that although Mr Lear considered these, he did not tell the applicant and his representative;
- f. The grounds relied upon are within the bounds of the behaviour code and the law, especially since Mr Tamatea was put on notice that his conduct, if it was found to have been established would be serious enough for disciplinary action, including possible dismissal. Mr Tamatea's action was not a display of "*a reasonable standard of care*" in his employment under the code;
- g. City Line's procedure was in line with the behaviour code.
- h. There is evidence of training delivered on handling stressful situations and difficulties encountered on the roads that included Mt Tamatea, and I am satisfied he would have been aware of conflict resolution because he attended a course that covered it, including staying claim.

Was the process fair?

[24] The process was fair. Mr Tamatea was represented and assisted by his union, thus, he had support. Furthermore one of the meetings arranged was cancelled when the union did not turn up, and another meeting was postponed ensuring that the union was present. Mr Tamatea was given an opportunity and time to respond to the allegations and comment on the employer's conclusions. City Line considered all the matters Mr Tamatea and his representatives raised.

[25] Mr Tamatea knew what the company was concerned about. He had access to the relevant information on which the company was relying. He was informed of the company's findings and the possible outcomes being considered for his input and comment.

[26] Mr Tamatea was not provided with email correspondence that City Line had with the complainant such as emails dated 20, 25 and 26 March. I agree these were immaterial and could not be regarded as prejudicial because they were about process. Mr Tamatea knew the substance of the complaint throughout.

[27] Next he was not provided with a reply email from the complainant dated 31 March. This was not prejudicial because it restated the matters raised by the complainant in the written complaint and was given to Mr Tamatea. The company had accepted that there had been a racial slur and it was taken into account only in as much that the comment was made by the driver after Mr Tamatea had started the confrontation. Mr Tamatea's explanation was considered but the company found that it did not provide sufficient justification for what Mr Tamatea did and for him to use as mitigation for his action. This was because any racial slur was made after Mr Tamatea made the decision to confront the driver and got angry. Those were conclusions open to a fair and reasonable employer.

[28] The complainant's surname was not released to protect the complainant. It would have been good practice for City Line to have told Mr Tamatea the name because he never said he knew who the complainant was and I am satisfied the company had no reasonable reason involving Mr Tamatea to withhold the name. However, the non disclosure of the name is not fatal because:

- a. The altercation was admitted;
- b. City Line accepted there had been a racial slur, but that happened only after Mr Tamatea made the decision to confront the driver;
- c. Mr Tamatea offered no reason why he should have been given the name at the time;
- d. Mr Tamatea understood what the incident was about and admitted it occurred, although some of the facts remained disputed;
- e. There was no request for the name at the time;
- f. City Line has been consistent with its reasoning comparing its witness' evidence from the witness statements and the letter of dismissal;
- g. It is always open to an employer to protect privacy so long as the substance of the complaint is made available to an employee. That was the case here, and it was not an issue for the applicant and his representative at the time that the name had not been released. The main focus for the applicant was on the allegation and what had been involved;
- h. There was an independent witness to the event who was prepared to be named and who was willing to give evidence.

[29] I am satisfied that there were no other circumstances that would impact on City Line's decision to terminate Mr Tamatea's employment because:

- a. Mr Tamatea was represented by his union and they had every opportunity to raise any circumstances for the employer to consider and take into account;
- b. City Line gave the union an opportunity to raise any further matters;
- c. City Line considered the matters raised by the union;
- d. Although Mr Tamatea had an issue about stress in the work place, City Line discounted it because Mr Tamatea had never raised it as an issue previously for the employer to consider and take appropriate action;
- e. Mr Tamatea was not able to satisfactorily say what the problem was with the company's training to mitigate his situation. The company countered his evidence with an adequate explanation of the training provided and the expectation on drivers facing difficult situations and conflict;

- f. The company was entitled to consider the matter on its own merits and given the information conveyed about other situations by both parties it was open to City Line to discount any disparity issue.
- g. Mr Tamatea expressed his sorrow about his action at the end of the disciplinary process, and through his representative. City Line was entitled not to accept that he was sorry at that point.
- h. City Line came to the conclusion that Mr Tamatea's behaviour was serious. It was open to Mr Lear to make a decision to dismiss Mr Tamatea instead of providing counselling and a warning as suggested by the union.

Has there been any disparity of treatment?

[30] Mr Tamatea has relied on disparity of treatment in as much as other employees were not dismissed for more serious allegations. This would involve full enquiries of each of the circumstances and it is sufficient to say that City Line has responded to a number of different situations raised by Mr Tamatea and says that they have to be considered in their own context and on their own merits. I agree. It is open to the employer to make its own decision considering the merits of the particular circumstances. There was no one else involved and treated differently to Mr Tamatea in the incident associate with the complaint. Indeed there has been no argument that there was any ulterior motive for the dismissal that might have caused some link with a disparity argument. Therefore I hold there is no argument of disparity.

Other matters:

(i) The suspension

[31] There is a dispute over whether or not Ms Rameka opposed Mr Tamatea's suspension from his employment. Mr Tamatea had an opportunity to comment about what the employer wanted to do given the complaint. I hold that this was not an issue at the time because:

- a. The union did not challenge the suspension at the meeting held on 1 April;
- b. The union did not challenge the suspension any time after that meeting until the statement of problem was lodged;

- c. Prior to the statement of problem being filed there was nothing put in writing by the union challenging the suspension;
- d. It is open to conclude that Mr Griffiths's arrangements for Mr Tamatea to gain access to the workplace during this suspension support the suspension not being an issue at the time;
- e. The comments attributed to Mr Griffiths at the time would not have been sufficient to raise a personal grievance challenging the employer's action suspending Mr Tamatea. There was no follow up written personal grievance on the suspension action;
- f. There was a serious complaint which would ordinarily justify a suspension. If I am wrong and there was any procedural inadequacy about the suspension Mr Tamatea was not prejudiced because he continued to get paid, his union was representing him and an investigation and disciplinary process was being followed. There was no disadvantage.
- g. The letters sent from Mr Tamatea's representative immediately after the dismissal that put City Line on notice of a personal grievance were only concerned about the dismissal. There were no other details, except a request for mediation and reinstatement.

(ii) Did Mr Lear say "*I want this guy off his shift now*"?

[32] This allegation has no foundation, I hold. This is because:

- a. The allegation was raised suddenly by Mr Tamatea in August 2008.
- b. The allegation was not raised during the disciplinary process.
- c. Mr Tamatea and his witnesses could not explain why such an allegation had not been raised earlier.
- d. The allegation does not feature in Mr Griffiths's chronology of events dated 12 April.
- e. The allegation was not referred to in the statement of problem lodged in the Authority.
- f. Documents raise the prospect that Mr Tamatea was rostered off and had applied for leave.

- g. A day sheet shows that Mr Tamatea did not work on 21 March 2008. He now has changed his evidence on the date and I hold this makes his evidence not plausible because of the time that has elapsed.
- h. Mr Tamatea referred to different people being involved; and named another person (the controller) when he realised that Mr Lear was most probably not at work on 21 March.
- i. Mr Tamatea was at work the day before ie 20 March and he completed his duties at the normal shift finish time so he could not claim with any corroborating evidence that he was suspended from work on that day.
- j. There were no witnesses or at least none were requested to appear and be interviewed by me.
- k. It is possible that Mr Tamatea has got confused with a message from Mr Lear requesting him instead of starting his normal shift on 1 April to report to the main depot for a meeting and arrange for a union representative to be present.
- l. Mr Lear forgot about an email over arrangements for one of the meetings with the union, and was questioned, about his evidence on Mr Tamatea not distinguishing himself during his employment with City Line. First I accept that Mr Lear's forgetfulness over the email was genuine, and does not mean that his evidence was necessarily unreliable. Second Mr Tamatea produced awards he had received during his employment. Both parties were entitled to rely on their opinions of the awards, but that information was not a factor relied upon at the time. Mr Lear's opinion does not mean his evidence was unreliable in other matters.

Conclusion on Mr Tamatea's claims

[33] Mr Tamatea does not have a personal grievance over his dismissal. Mr Tamatea's suspension was not an issue in the raising of the personal grievance at the time, and, thus, I hold, he has no unjustified action disadvantage personal grievance.

[34] Mr Tamatea's claims are dismissed.

Costs

[35] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority