IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

WA 179/10
File Number: 5299286

	BETWEEN	Nick Temarama Applicant
	AND	Mana Coach Services Limited Respondent
Member of Authority:	Denis Asher	
Representatives:	Kevin O'Sullivan for Mr Temarama Darren Mitchell for the Company	
Investigation Meeting	Wellington, 14 October 2010	
Submissions Received	21 October 2010	
Determination:	4 November 2010	

DETERMINATION OF THE AUTHORITY

The Problem

[1] Was Mr Temarama unjustifiably dismissed by the respondent (the Company) for failing to report to work on time or to notify its operations staff of his lateness? Can he rely on an issue that was raised for the first time in the Authority's investigation, that his termination was invalid because the related disciplinary process was conducted in a bus and not (as required by his collective employment agreement) in an office?

[2] If he was unjustifiably dismissed, what remedies if any – including reinstatement – are appropriate?

[3] Or can the Company rely on the process it employed and its substantive decision, including as it did reliance on an earlier final written warning for the same conduct?

[4] Each party seeks costs.

The Investigation

[5] During a telephone conference call on 4 June 2010 the applicant's representative agreed the employment relationship problem was between Mr Temarama and the Company. The parties agreed to a one day investigation in Wellington on Thursday, 14 October. Agreement was also reached on timelines for witness statements.

[6] Efforts by the parties during the investigation to settle this matter on their own terms were unsuccessful. A timetable was agreed for filing final, written submissions.

Background

[7] The relevant facts are not in dispute.

[8] The Company operates an extensive passenger urban bus service throughout the Porirua Basin, Newlands/Wellington City and Kapiti Coast.

[9] Mr Temarama was employed by the Company as a part-time driver on 28 July 2004.

[10] Following a request from Mr Temarama, he was assigned from 29 June 2009 to a fixed Monday to Friday broken shift on a permanent basis. As a consequence his hours of work were consistent from week to week other than when he took on extra work.

[11] Throughout the course of his employment Mr Temarama was frequently late for his allocated shift and/or failed to report his lateness in a timely manager to management as required. Mr Temarama was reprimanded as a consequence.

[12] As a result of his conduct, and following a formal disciplinary meeting on 11 January 2010 Mr Temarama was issued a formal written warning in respect of his lateness and failures to report his lateness or absences in a timely manner. That warning was not contested by the applicant.

[13] Because of continuing lateness for work and failures to report his lateness in a timely manner another disciplinary meeting was convened on 2 February and resulted in a final written warning being issued. The warning specifically advised that any further failure without good cause to report his lateness or absences in a timely manner within the following 12 months may place his continued employment in jeopardy. That warning was also not contested by the applicant.

[14] On 25 February Mr Temarama was due to start work at 06.25 but did arrive until 06.40; he did not report his lateness to the Company.

[15] At a disciplinary meeting on 9 March Mr Temarama repeated what had already been communicated to the Company, that his son had been hospitalised. He said he had left the hospital to drive to work but was delayed by road works. He also advised he had to return the borrowed vehicle he was driving to a friend and was unsuccessful in his attempts to call the respondent from his cell-phone.

[16] The Company rejected Mr Temarama's explanation on the grounds that information from the Wellington City Council disclosed there were no road works in the area claimed by the applicant, that it was questionable why he had allowed himself the limited time he did to get to work while returning the borrowed vehicle and his cell-phone indicated he had tried to make a call at 06.33 (eight minutes after his scheduled start time) but had left out the area prefix when in fact he should have known well the number he had to call.

[17] The Company said the claim Mr Temarama stayed at the hospital by his son's bedside overnight was not raised by the applicant before it made its decision to dismiss him.

[18] As it emerged during the Authority's investigation, Mr Temarama's terms and conditions of employment - contained as they were in a collective agreement in force from 3 October 2007 until 18 May 2010 – included the following provision:

23.7 Disciplinary interviews and warning procedures ***shall be invalid*** *unless conducted within the privacy of a closed office.*

(emphasis added)

[19] The parties agree that the disciplinary meeting on 9 March 2010 which culminated in the Company's decision to terminate Mr Temarama's employment was conducted in a bus (the normal office being unavailable because of staff training).

Findings

[20] With reluctance I am satisfied Mr Temarama was unjustifiably dismissed. I say 'reluctant' because it is almost certain that had the meeting been conducted in the privacy of an office, the employer would have reached the same, justifiable, decision it came to following the meeting in the bus.

[21] My reasons are as follows:

[22] I do not accept the respondent's submissions that s.157 of the Employment Relations Act 2000, i.e. that the statutory obligation on the Authority to consider the *"substantial merits"* of the case permits me to ignore this fundamental, binding, contracted undertaking. As the Court of Appeal observed in *Fuel Espresso Limited* v *Hsieh* [2007] NZCA 58, *"agreements are made to be kept"* (par 21).

[23] I also do not accept the respondent's contention that, via the Oxford Dictionary's definition, a bus can be equated with a *"room or building used as a place of business"* (above) on the ground that the vehicle is a place of business and therefore –

as I understand the submission – should be regarded as an office. An office is not a bus, but is instead – as the definition makes clear – a room or a building. The Company therefore failed to meet its literal obligation by conducting its interview in a bus.

[24] While I accept the respondent's submission that the Company's representatives made every effort to ensure the meeting on the bus was secluded and the venue effectively private, and that this defence (clause 23.7) was not raised prior to the respondent's decision to dismiss Mr Temarama (and that he and his representatives consented to the use of the bus, private as it was, at the time), I cannot accept the conclusion urged on me to put aside the clear provision of the parties' agreement.

[25] In determining this matter, and in respect of s. 103 A of the Employment Relations Act 2000 (the Act), I apply the observation of the full Employment Court, set out at para [37] in *Air New Zealand Ltd v V* (2009) 9 NZELC 93,209 and 6 NZELR 582, namely that the Authority is required to objectively review all the actions of an employer up to and including the decision to dismiss, against the test of what a fair and reasonable employer would have done in all the circumstances.

[26] I am satisfied a fair and reasonable employer, objectively measured, would rely on, and fully implement, the contractual terms between the parties – terms freely entered into with its employees – before, in this case, dismissing Mr Temarama. In other words, the Company would rely on the parties' employment agreement requiring it to conduct all *"disciplinary interviews and warning procedures … within the privacy of a closed office"* (above) or accept the risk of them being declared invalid..

[27] The failure to adhere to its own contracted undertakings leads to conclude that a fair and reasonable employer, objectively measured, would (indeed, could) not proceed to dismiss a worker. In this instance the Company therefore unfairly and unreasonably dismissed the applicant.

[28] I am reinforced in this conclusion by the judgement of the then Chief Judge of the Employment Court in *New Zealand Tramways Union (Wellington Branch)* v *Wellington City Transport* (t/a Stagecoach New Zealand) [2002] 2 ERNZ 435,

wherein the respondent was found to be in breach of its disciplinary procedure as set out in the relevant collective employment contract.

Remedies

Reinstatement

[29] Mr Temarama seeks reinstatement. It is the primary remedy: s. 125 of the Act. Mr Temarama said he made no effort to find alternate employment because, as he put it rhetorically, who would employ him when they would learn he had been dismissed?

[30] The Company says it is not practicable to reinstate Mr Temarama because of his poor work attendance, that he has demonstrated his failure to meet the respondent's legitimate requirement of strict timekeeping and because it would create significant disharmony with the applicant's former colleagues who have had enough of covering for his timekeeping and attendance transgressions.

[31] I accept that it is not practicable to reinstate Mr Temarama. That is because of his abysmal timekeeping history and his dishonest conduct in attempting to explain his lateness to work on the morning of 25 February. As is made clear above, but for the failure to hold the meeting in an office Mr Temarama would have been, objectively measured, justifiably dismissed. I also note that reinstating Mr Temarama would see him returning to an extant final warning with – based on his work performance to date – the real prospect of further poor timekeeping and dismissal for the same.

Hurt and Humiliation

[32] Mr Temarama raised a claim for financial compensation for hurt and humiliation for the first time during the Authority's investigation. A figure of $5,000 was advanced by his advocate. Mr Temarama's belated evidence in support of this claim was limited, being to the effect the dismissal had on him when he was obliged to tell his family of his dismissal arising out of events on the day of his son's hospitalisation, and that the Company had failed to demonstrate "*compassion*" when his son was in hospital (oral evidence).

[33] I do not accept this claim: Mr Temarama was the author of his own misfortune and entirely responsible for any bad news he had to deliver his family. He clearly lied to his employer in respect of non-existent road works and failed - without any explanation then or to the Authority – to telephone notice of his lateness in advance of his scheduled start time. None of his evidence in respect of hurt and humiliation related to the inappropriate venue leading to the decision to (unjustifiably) terminate his employment.

[34] During the Authority's investigation he properly did not attempt to link his commendable attendance at his son's beside with being unable to dial his employer's (well-known to the applicant) telephone number.

Lost Wages

[35] Mr Temarama seeks lost wages from the date of his dismissal. He made no effort to mitigate his losses. As Chief Judge Colgan made clear in *Allen* v *Transpacific Industries Group Ltd (t/a "Mediasmart Ltd")* (2009) 6 NZELR 530, par 78:

> *… dismissed employees are not only under an obligation to mitigate loss but to establish this in evidence if called upon. This will require, in practice, a detailed account of efforts made to obtain employment including dates, places, names, copies of correspondence and the like.*

[36] No compensation for lost wages is therefore payable to the applicant.

Contributory Fault

[37] If I am wrong in these conclusions I am, in the alternative, satisfied Mr Temarama's contributory fault in respect of the situation that gave rise to his personal grievance amounts to 100% and no compensation for hurt and humiliation or lost earnings is therefore payable: s. 124 of the Act applied.

Determination

[38] Mr Temarama was unjustifiably dismissed. However, I decline to reinstate him and/or award any compensation for humiliation and lost earnings.

[39] Costs are reserved. In respect of the latter, and subject to the parties' submissions if required, I note here that, on his evidence to the Authority, Mr Temarama's costs extend only to the $70 filing fee.

Denis Asher
Member of the Employment Relations Authority