

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
OFFICE**

BETWEEN Patrick Rodney Brown
AND Leopard Coachlines Ltd
REPRESENTATIVES Graeme Riach Counsel for applicant/respondent
Grant Slevin Counsel for respondent/applicant
MEMBER OF AUTHORITY Helen Doyle
INVESTIGATION MEETING Christchurch, Tuesday 28 and Wednesday 29 November 2006
SUBMISSIONS RECEIVED 1 February 2007
9 February 2007
DATE OF DETERMINATION 13 March 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Patrick Brown and Leopard Coachlines Limited both lodged applications with the Authority which shared common issues of fact and required an assessment of the same event. Accordingly, the two claims were consolidated and investigated together.

[2] Patrick Brown commenced employment with Leopard Coachlines Limited (*Leopard*) in October 2005 as a bus driver. He says that he was unjustifiably dismissed from his employment on 3 February 2006 following an accident involving the bus he was driving and another bus on Major Hornbrook Road on Saturday, 28 January 2006. Major Hornbrook Road is a steep and winding road in the suburb of Mt Pleasant, Christchurch.

[3] Mr Brown seeks reimbursement of lost of wages in the sum of \$9,360, compensation in the sum of \$10,000 and costs.

[4] Leopard operates a fleet of buses. The buses provide transport to the public and operate on routes in and around Christchurch. Leopard says that its decision to dismiss Mr Brown was justifiable.

[5] Leopard claims damages against Mr Brown for what it says is a breach of his employment agreement. Leopard says that Mr Brown breached an implied term of his employment agreement when he deliberately disobeyed an instruction to wait at his designated position when travelling downhill on Major Hornbrook Road until the uphill bus had passed his bus. Leopard says that when Mr Brown attempted to negotiate a corner on Major Hornbrook Road while another bus was coming up the hill, he crossed the centre line of the road and deliberately or recklessly caused a collision with another bus.

[6] Leopard seeks an award of \$5,046.89 to meet the cost of repairing both buses because it was uneconomical for the company to claim insurance for the repairs. The additional claim for loss of revenue after the accident was abandoned in final submissions and Mr Brown returned his uniform so there is no longer a compliance order sought with respect to its return.

[7] Mr Brown denies causing the collision with the other bus and deliberately disobeying the instructions of Leopard with respect to waiting at a designated point. He says that it was not intended, in terms of the collective agreement, that he make payment for any loss after an avoidable accident.

The issues

[8] The issues to be determined are:

Personal grievance

[9] The test for justification is set out in s.103A of the Employment Relations Act 2000. It requires that the question of whether a dismissal was justifiable must be determined on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

- Was the investigation into Mr Brown's actions on 28 January 2006 fair and reasonable?
- Was Leopard justified as a result of that investigation in concluding that Mr Brown's conduct on 28 January 2006 amounted to serious misconduct?
- Was dismissal an appropriate penalty?
- If the dismissal was unjustified, then what remedies should be awarded and is there any issue of contribution?

Breach of employment agreement

- Did Mr Brown breach his employment agreement?
- If it is found that Mr Brown did breach his employment agreement, then should Leopard receive damages for the loss it suffered?
- If the answer to that is yes, then how are those damages to be quantified?

The collective employment agreement

[10] Mr Brown was a member of the National Distribution Union Inc (*the Union*). Leopard and the Union were parties to a collective employment agreement which covered Mr Brown's work as an urban bus driver.

[11] Clause 3.1 of the collective agreement provides that the Leopard's drivers' manual is included in and forms part of the collective agreement. The manual contains Leopard's policies and procedures, including a comprehensive disciplinary process and a list of conduct/actions which are considered serious misconduct and actions which are considered less serious misconduct. There is also within the manual a specific section on accident procedures.

Mr Brown's relationship with the other bus driver involved in the accident

[12] There was a personality clash between Mr Brown and the other bus driver at Leopard involved in the accident. I shall refer to the other driver as X. The situation between the two drivers rapidly deteriorated and came to the attention of management.

[13] The Mt Pleasant route had been X's permanent shift since 24 October 2005. Mr Brown was, on occasion, rostered to drive on the Mt Pleasant route. There were incidents between Mr Brown and X in late 2005. The situation got to the stage where any contact between the two seemed to be fraught with difficulties. The General Manager of Leopard, Matt O'Malley, became aware of the conflict and specifically about a complaint X had made to the Police about a threat to kill. Mr Brown denied making such a threat.

[14] There was a meeting organised to try and deal with the conflict between the two drivers. In attendance at the meeting was Mr O'Malley, Gary Fitzgerald, the Assistant Manager at Leopard, Mr Brown, X and the Union's senior site delegate, Don Broun. That meeting focused on trying to resolve the conflict between the two drivers.

[15] On or about 24 January 2006, Mr Brown contacted his lawyer, Ms MacGougan and talked to her with a view to resolving the problem he had at work with X. Ms MacGougan talked to Mr O'Malley about the situation. There is some dispute as to the exact nature of the discussion, but I find there was general agreement that Mr Brown and X should be kept apart. Ms MacGougan also advised Mr O'Malley that Mr Brown would be undertaking an anger management course. Mr O'Malley was pleased that was going to occur.

Getting around the tight corners

[16] There was a further difficulty for Leopard in that X and Mr Brown would not, for whatever reason, talk to each other by radio. Drivers would normally alert each other by radio about their positions on a hill road so they could safely navigate tight S-bends. This was not an option available to Mr Brown and X.

[17] Mr O'Malley said that some changes were made to the roster so that X and Mr Brown would not have to meet in the cafeteria. Leopard has less ability to change the driver rosters to suit individual drivers. This was because the changes had an impact on other drivers and not just Mr Brown and X. It is also a feature of Leopard's employment policies that it tries to maintain regular hours for its staff.

[18] Leopard accepted that it was generally possible to ensure that the drivers can avoid direct contact, but it is less possible to ensure that they do not even need to pass each other in different buses.

[19] Mr Brown and X had worked on the Mt Pleasant route together each Saturday from early December 2005. X worked on this route as part of his permanent shift and Mr Brown as a result of rostering.

[20] One of the matters in dispute was whether Mr Brown was given specific instructions/directions about travelling on Major Hornbrook Road prior to 28 January 2006. Mr Brown said that he was unaware of any standard directions from Leopard in relation to navigating the corners on Major Hornbrook Road. Leopard, on the other hand, says that Mr Brown was instructed that if he was in the bus travelling downhill on Major Hornbrook Road, he should stop and wait at specific positions for the bus travelling uphill, if it looked like the buses might meet on a tight corner.

[21] Mr O'Malley says he is sure that he gave such an instruction to Mr Brown and that he could vividly recall the discussion. Mr Fitzgerald confirms that he also told Mr Brown to wait at the tennis court above the tight corners until the other bus went pass. A supervisor, Michael Bowers, said at the Authority investigation meeting that X and Mr Brown both told him they had been told to stop and wait at the tennis court until the uphill bus went by. X also confirmed that Mr O'Malley gave him an instruction to stop at the top of the hill by the tennis court until the bus going uphill went pass.

[22] Having carefully considered the evidence, I am satisfied, on the balance of probabilities, that both Mr Brown and X were told to wait at specified positions, including at the tennis court, until the uphill bus went by on Major Hornbrook Road prior to 28 January 2006.

Events of 28 January 2006

[23] On Saturday, 28 January 2006, Mr Brown was travelling downhill on Major Hornbrook Road and X was travelling uphill. An accident occurred on a tight corner when the rear of Mr Brown's bus crossed the centre line and collided with the right wing mirror of X's bus. The back windows of the bus X was driving were broken as a result of the impact. Mr Brown did not have any passengers on board his bus but there were two passengers on X's bus.

[24] There is no dispute that both Mr Brown and X quickly made radio contact with the depot and advised of the accident. Both drivers were shaken by the accident but fortunately no one was hurt. The evidence was that they blamed each other for the accident. The Police attended at the scene of the accident and took statements. A representative from Leopard also attended.

[25] Mr Brown said that X stopped initially in response to his waving at him to do so before he entered the corner. He said that X then moved forward, contributing to the collision.

[26] X said, when interviewed by Mr O'Malley and Mr Fitzgerald, that as he came up the hill he saw Mr Brown's bus and stopped. He said that he then moved a few metres further left and applied the hand brake. X said that Mr Brown's bus kept coming towards his bus, crossing well over the centre line and then making contact with his bus.

Analysis and conclusions with respect to the personal grievance that Mr Brown was unjustifiably dismissed

[27] There is no dispute that Mr Brown was summarily dismissed on 3 February 2006. The conclusion reached by Leopard following its investigation was that the accident was avoidable and that Mr Brown was at fault with respect to the accident.

[28] I am satisfied the reasons for the dismissal are those summarised and set out in Ms MacGougan's letter dated 8 February 2006 and confirmed by Mr O'Malley at the Authority's investigation meeting. They were that Mr Brown disobeyed an instruction from Mr O'Malley and reinforced by Mr Fitzgerald to stop at a designated point, the tennis court, to avoid meeting the uphill bus on tight corners on Major Hornbrook Road. The other reason for dismissal was Mr Brown's unwillingness to accept responsibility for the accident.

[29] There is a conflict in the evidence about whether Mr O'Malley, when he dismissed Mr Brown, described his conduct as misconduct or serious/gross misconduct. I am required by the test in s.103A of the Act to objectively analyse whether a fair and reasonable employer would have concluded that Mr Brown's conduct constituted misconduct of a nature that justified dismissal and therefore do not need to resolve that conflict.

[30] Mr Riach, in his submissions, says that Mr Brown's conduct was not serious misconduct in terms of the collective agreement and generally, and that the accident was not deliberate. Mr Slevin says that Mr Brown was either reckless or grossly negligent in failing to obey a lawful instruction to wait at the tennis court until the other bus had passed and then failing to stop when it became apparent that the two buses would have to pass.

[31] It is necessary for me to consider the investigation and the conduct which was found as a result of that investigation. I need to also consider what the parties to the collective employment agreement agreed would constitute misconduct of a nature that justified dismissal.

[32] It was appropriate that Leopard commence an investigation into the accident between the two buses on 28 January 2006. Mr Brown expected to be questioned about the accident.

[33] There were several criticisms about procedural fairness during the investigation carried out by Leopard. The test of procedural fairness is not one of minute and pedantic scrutiny of the procedural elements but rather what would a fair and reasonable employer have done in

the circumstances. I take into account in assessing fairness the written disciplinary procedures, the allegations Mr Brown was facing and the serious potential consequences of dismissal.

[34] Two meetings were held with Mr Brown on 1 and 3 February 2006. At the conclusion of the meeting on 3 February 2006, Mr Brown was dismissed. Mr Brown attended both meetings with Ms MacGougan as his representative. Ms MacGougan gave evidence at the Authority's investigation meeting about her involvement in the process. Mr O'Malley attended both meetings with Mr Fitzgerald.

1 February 2006

[35] Mr O'Malley, in anticipation of the meeting on 1 February 2006, provided Ms MacGougan with a copy of the collective employment agreement and the disciplinary procedure from the drivers' manual which was to be followed. He advised that the meeting was to discuss a serious matter.

[36] I am satisfied that the meeting was, in accordance with the first step set out in the disciplinary procedure, a preliminary interview. The disciplinary procedure in the manual provides that it is only if the preliminary interview does not resolve the matter, that the interview then prepares the way for a full and fair investigation of the facts.

[37] The meeting did not run particularly smoothly at times. I am satisfied, though, that Mr Brown was given an opportunity to explain about the accident. Mr O'Malley asked Mr Brown whether he deliberately drove into X's bus. Mr Brown denied that he had done so. X's statement was also put to Mr Brown and Mr Brown was asked to indicate on a diagram where he thought the two buses were positioned at the time of impact.

[38] There is a camera on each bus at Leopard. X's camera was not working that day but Mr Brown's was. Ms MacGougan asked for a copy of the footage and was provided with it shortly before the final meeting on 3 February 2006. It was apparent from the camera footage that Mr Brown briefly stopped at the tennis court on 28 January 2006 and talked to someone. Mr O'Malley asked Mr Brown at the first meeting what the discussion was about. Mr Brown agreed that he had talked to a man through his bus window. He told Mr O'Malley that he said something to the man along the lines that he was worried or scared about another bus coming up the hill. It was also apparent from the camera footage that Mr Brown had signalled with his hand for X to stop just before he entered the sharp bend.

[39] Mr O'Malley initially understood from an answer Mr Brown gave to one of his questions at the preliminary meeting that Mr Brown accepted that he had been told to wait before the corners on Major Hornbrook Road if there was possibility of meeting the uphill bus. Subsequently, Mr Brown said he had not received an instruction to wait at the tennis court and thought he was required to wait at the shop which is below the corner in question.

[40] It was also put to Mr Brown that he had made a comment to his supervisor on 28 January 2006 about X. It was put to Mr Brown that he had said words to the supervisor along the lines *we're going to have some fun on the hill tonight*. Mr Brown denied making that comment.

[41] The preliminary meeting ended on the basis that the Police report about the accident had not yet been received and Mr O'Malley would advise Ms MacGougan when he received the report.

Sick leave or suspension

[42] Mr Brown had not returned to work at Leopard after the weekend the accident occurred because he was still quite shocked about the accident. Ms MacGougan provided Mr O'Malley with a medical certificate at the end of the first meeting on 1 February 2006 supporting that Mr Brown was not fit to return to work.

[43] Ms MacGougan says, notwithstanding the medical certificate, she made it clear to Mr O'Malley on 2 February that Mr Brown wished to return to work. She said that it was at that point that Mr O'Malley told her that Leopard was still waiting for the Police report and Mr O'Malley refused to discuss payment of Mr Brown's wages. Mr O'Malley did not accept this and said he understood Mr Brown was unwell and unable to return to work.

[44] Mr Brown was not entitled to paid sick leave as he had not been at work for six months. It was arranged, that he could take his days in lieu for the period of investigation.

[45] I have placed some reliance on the medical certificate that Ms MacGougan gave Mr O'Malley at the end of the meeting on 1 February 2006. It refers specifically to the stress of the accident on 28 January 2006. It concludes by saying that *under this particular stress Patrick cannot work until further notice and we trust management will help to resolve the situation so that Patrick can feel safe in the workplace*. If Mr Brown wanted to return to work then further and clear notice had to be given. There was some confusion about the matter. I do not find the evidence so clear to enable me to conclude Leopard knew Mr Brown wanted to return to work and did not either suspend or permit him to return during the investigation process.

3 February 2006

[46] There was a further meeting on 3 February 2006. This meeting was, in terms of the disciplinary process in the drivers' manual, a disciplinary interview. The meeting was held at the offices of Ms MacGougan's law firm.

[47] The video and a copy of the Police report were provided to Ms MacGougan shortly before the meeting.

[48] The Police report contains a statement given by Mr Brown. X said that he gave an interview to the Police at the scene. It may have been that he talked to someone other than the officer who wrote the report because the Police report states that X left the scene prior to being spoken to. In terms of what happened, the Police report sets out that:

Vehicle 1 was going uphill and vehicle 2 was going downhill. Both approached a 90° bend in the road & vehicle 1 stopped just before the bend. Vehicle 2 continued on down and as the bus did vehicle 1 moved forward. The rear right end of vehicle 2 has crossed the centre line and collided with the right wing mirror of vehicle 1 caving three rear windows on the right side of vehicle 2.

[49] Ms MacGougan was critical of the short time within which she had to consider the Police report. The Police report was not lengthy and no request for adjournment was made. The two passengers who were on X's bus did not appear to have been interviewed and for reasons given during the Authority's investigation meeting would probably not have been able to add anything to the understanding of how the accident occurred. I am not satisfied that there was unfairness in the provision of that report.

[50] Notes were provided to the Authority by both Ms MacGougan and Mr O'Malley of the meeting. Aside from what was said when Mr Brown was dismissed, there is no significant difference between the two sets of notes.

[51] The meeting commenced with Mr O'Malley outlining who he had spoken to and what evidence he had considered as part of the investigation into the accident. Mr O'Malley put, as required by Leopard's disciplinary process, Leopard's assessment of the situation. That was that the accident was totally avoidable and Mr Brown should have stopped and avoided the accident. The fault for the accident was, in Leopard's assessment, Mr Brown's not X's. Ms MacGougan says that specific allegations were not put to Mr Brown but it seemed clear to me from the notes that the discussion concentrated on the avoidability of the accident if Mr Brown had stopped in accordance with instructions.

[52] Leopard was required in terms of its policy to give the results of its investigation to the employee and management's opinion of the employee's explanations concerning the conduct in question. It was not put to Mr Brown or Ms MacGougan at that meeting that it was Leopard's opinion that Mr Brown had deliberately driven into X's bus. As an aside, Mr Brown was never charged by the Police although he was given an infringement notice for driving over the white line while turning right and fined \$150.

[53] Ms MacGougan was given an opportunity to make submissions in relation to Leopard's assessment. She told Mr O'Malley and Mr Fitzgerald that Mr Brown had signalled to the other driver to stop but he did not. She said that Mr Brown had a clean driving record and that the accident was not Mr Brown's fault and the Police were not intending to charge him.

[54] Mr O'Malley suggested that Ms MacGougan take an adjournment to consider Leopard's view of the accident. Ms MacGougan and Mr Brown duly adjourned for 10 to 15 minutes. Ms MacGougan returned and made further submissions that Mr Brown was not at fault for the accident.

[55] Mr O'Malley and Mr Fitzgerald then took an adjournment to consider Ms MacGougan's submissions. On their return to the meeting, Mr O'Malley advised that Mr Brown was to be dismissed with immediate effect from 3 February 2006 for the reasons which I have set out earlier in this determination. Mr O'Malley said that Mr Brown was to be paid for that day and the following day. Ms MacGougan said that she asked to make submissions about penalty after the decision had been delivered but was told by Mr O'Malley that they had decided to let him [Mr Brown] go. Mr O'Malley denied refusing Ms MacGougan an opportunity to make submissions with respect to penalty. I prefer Ms MacGougan's evidence that she did in all probability ask after the decision had been delivered to make some submissions.

[56] Mr O'Malley said the process did not have a separate step between the disciplinary interview and the decision. He is correct that there is no separate step in the disciplinary process. In terms of fairness and reasonableness, I have considered this matter, along with the other issue raised by the applicant about fairness. That is whether Mr Brown and Ms MacGougan were aware that dismissal was a possible outcome from the process.

[57] Mr Brown said at the Authority's investigation meeting that he thought he would be warned and allowed to return to work. Ms MacGougan said she was never advised that dismissal was considered as a possible outcome at either meeting. Mr O'Malley said he was sure that Mr Brown and Ms MacGougan would have been aware that dismissal was a possible outcome of the disciplinary process because the disciplinary process spelt that out. I find that Ms MacGougan and Mr Brown were not advised that one of the possible outcomes could be dismissal.

[58] In terms of the disciplinary process, it provides that not all disciplinary interviews lead to dismissal. The objective of the procedure is set out and that is to hopefully avoid that outcome. The procedure also sets out that the purpose of the disciplinary process is to, amongst other matters, give the employee the opportunity for input and to reach a fair decision as to any appropriate disciplinary response.

[59] In my view, the failure to make it clear to Ms MacGougan and Mr Brown that dismissal was a possible outcome was unfair and not merely in a technical way. With an objective of the process being to avoid an outcome of dismissal, that possibility in my view must be known to the parties so that a fair decision as to any appropriate disciplinary response can be reached. Ms MacGougan did not have the opportunity to make submissions during the process understanding that a possible outcome for Mr Brown could be dismissal. This became particularly significant because there was no separation between the disciplinary interview and the delivery of the decision to dismiss and therefore no separate submission received about penalty. One of the significant matters where submissions could have made a difference was whether Leopard could have confidence in Mr Brown in the future. It would be difficult for a fair decision as to an appropriate disciplinary response to be reached without any input from an employee or their representative.

[60] A fair and reasonable employer would have advised Mr Brown that a possible outcome of the disciplinary interview was dismissal. This did not occur on this occasion. Ms MacGougan was not able to make any specific submissions with respect to an outcome other than dismissal because she did not understand that was a possibility. For this reason, I find that the process was unfair to Mr Brown.

Was the finding of serious misconduct justified as a result of the investigation?

[61] The bend in question on Major Hornbrook Road is difficult to navigate. The evidence presented at the investigation meeting was to the effect that it was not uncommon for buses and even cars to cross over the white line on this particular bend. It appeared that there were times when, in order to navigate around the corner, a bus required more than just the side of the road it was on. Bus drivers would try to avoid meeting on the corner by using a radio to advise the other of their whereabouts when travelling. X said that if it had been another driver on the day, he would probably have suggested they both stop and then considered reversing, if it was safe, back into a driveway. He said that he did not know if Mr Brown would have listened to him. These two options, given the very poor relationship between Mr Brown and X, were not available.

[62] Mr Brown entered the corner very slowly, driving under 20kph. He waved at X to stop. The rear right end of Mr Brown's bus collided with X's right wing mirror. The incident occurred very quickly. Mr Brown stopped after the windows on X's bus shattered and got out of his bus. He went over to X's bus and proceeded to blame him for the accident.

[63] A fair and reasonable employer would not have concluded from the camera evidence, Police report, the speed Mr Brown was travelling and his reaction after the accident that the collision was deliberate or intentional. It was open to a fair and reasonable employer to conclude that the accident was an avoidable one if Mr Brown had stopped as instructed and waited at the tennis court. Mr Riach submits that it was not established that Mr Brown's conduct in not stopping at the tennis court until X had passed was deliberate and suggests that it was inadvertent. He further submits that in relation to stopping just before the corner that Mr Brown thought he could get around. Mr Brown denied he had been instructed to wait at the tennis court during Leopard's investigation so it was not clear what he was thinking at the time. Mr Brown explained to me that he did not wait because he did not want X to make a humiliating gesture or comment to him. I do accept that in moving away from the tennis court Mr Brown probably did not have the instruction from Mr O'Malley at the forefront of his mind. He couldn't see X's bus and the camera footage shows he was generally relaxed until just before the S bend when he saw X's bus and gestured to him to stop. The footage does suggest Mr Brown thought mistakenly that he could turn the corner safely. The failure to stop, just before the corner in my view, is about the avoidability of the accident and carelessness rather than a deliberate failure to follow instructions. I find however, that a fair and reasonable employer would conclude, given Mr Brown did stop momentarily and mention to a bystander at the tennis court that he was concerned about X coming up the hill, the decision to proceed downhill rather than wait was more probably deliberate than inadvertent.

[64] I have considered the drivers' manual which forms part of the employment agreement and covered Mr Brown's work. It classifies the conduct of deliberate failure to follow additional instructions given by management, which I consider this was, as less serious misconduct for which in most cases the penalty will be a warning. The rules do provide that there may be cases where the degree of seriousness of the matters classified as less serious may amount to serious misconduct and the severity of the breach may warrant dismissal.

[65] There is also reference within the manual to bus damage. It provides that avoidable accidents are treated very seriously and the driver will be formally warned if an accident is the result of careless and/or inattentive driving.

[66] A fair and reasonable employer would conclude that in terms of the drivers' manual there was misconduct by failing to stop as instructed at the tennis court. If Mr Brown had stopped for about one minute until X had driven past him before proceeding downhill the accident could

have been avoided. It was further open to a fair and reasonable employer to conclude that Mr Brown was at fault for the accident.

[67] I am not satisfied though that the conduct disclosed by the investigation, when considered against Leopard's own drivers' manual with respect to failure to follow instructions would be considered by a fair and reasonable employer as serious misconduct of the type which is required for summary dismissal. Avoidable accidents are treated seriously but the driver is formally warned rather than dismissed.

Decision to dismiss

[68] Mr O'Malley said that in making his decision to dismiss he was concerned that Mr Brown would not accept any responsibility for the accident and had no trust in him that he would follow instructions in the future. Mr O'Malley said it may have been different if Mr Brown had accepted some responsibility or apologised.

[69] I can understand why Leopard would be annoyed that Mr Brown would not accept responsibility for the accident. Considering the matter objectively, however, the difficulty with accidents is that they happen very quickly and they are not a planned event. Often those involved in accidents have no real appreciation of what actually occurred. Mr Brown may genuinely have believed that he was not at fault for the accident. He may have seen X moving albeit to the left and mistaken that movement as driving forward. If the confusion that generally surrounds accidents is combined with the very dysfunctional relationship between X and Mr Brown, it is perhaps less surprising that Mr Brown thought X contributed to the accident.

[70] There was concern that Mr Brown would not follow instructions in the future. I have found, though, that Mr Brown did not appreciate the possibility that he would be dismissed at the end of the process and therefore did not have an opportunity to persuade Mr O'Malley or reassure him that he could be trusted in the future. Leopard's disciplinary process supports alternatives to dismissal. A warning also sends a strong signal as to future conduct.

[71] Mr O'Malley treated the conduct as serious misconduct and did not see an alternative to dismissal. I have concluded though that, in terms of the drivers' manual, the conduct disclosed from the investigation did not justify a finding of serious misconduct and I have also found elements of procedural unfairness. I do not find that the investigation into Mr Brown's conduct, the finding of serious misconduct and the decision to summarily dismiss Mr Brown were actions that a fair and reasonable employer would have done in all the circumstances that existed at the time the dismissal occurred.

Determination

[72] Mr Brown has a personal grievance that he was unjustifiably dismissed. He is entitled to remedies.

Contribution

[73] The Authority is required to consider under s.124 of the Employment Relations Act 2000 the extent to which Mr Brown's actions contributed to his personal grievance and if required reduce the remedies that would otherwise have been awarded.

[74] Mr Brown, in my view, did contribute to his personal grievance by not waiting until X's bus went past him at the tennis court as instructed. I have also taken into account that he told a bystander that he was scared. If that was in fact the situation, then I would have expected him to wait. There was, in my view, blameworthy on the part of Mr Brown and had he waited for about one minute the accident would not have occurred.

[75] I assess Mr Brown's contribution in the circumstances at 30%.

Lost wages

[76] Mr Brown was unable to obtain new employment until 11 October 2006. I have taken into account Mr Brown's personal circumstances which would have impacted in my view significantly on his confidence to apply for other positions. There is a shortage of bus drivers in Christchurch and Mr Brown's attempts at mitigation were somewhat limited. In the circumstances I do not intend to make an order in excess of three months' reimbursement of lost wages.

[77] Mr Brown is entitled to reimbursement of the sum equal to three months' loss of wages as a result of the personal grievance, taking into account the order I have made for contribution. The three months' wages are to be calculated at ordinary time remuneration. Leave is reserved to the parties to return to the Authority if the lost wages are unable to be calculated by agreement.

Compensation

[78] Mr Brown gave evidence about the effect the dismissal has had on him and on his relationship. I was provided with a medical certificate that confirms Mr Brown has been suffering from stress since his dismissal as a result of his view that he was mistreated by Leopard. He is still on medical treatment for that stress. Mr Brown particularly enjoyed his position at Leopard and I accept that his confidence was shaken badly by the dismissal. Mr Brown has sought \$10,000 for compensation and Mr Riach submits that this is a relatively modest claim.

[79] Mr Brown had worked for a comparatively short period of time but suffered badly as a result of his dismissal. In my view an appropriate starting point for compensation is \$8,000.

[80] Taking contribution into account, I order Leopard Coachlines Limited to pay to Patrick Rodney Brown under s.123(c)(i) of the Employment Relations Act 2000 the sum of \$5,600 without deduction.

Counterclaim

[81] Leopard's counterclaim is for the cost of repairs to the damaged buses following the accident in the sum of \$5,046.89. I accept that Leopard was required to pay that sum with respect to the repairs and that Leopard was professionally advised that it was not economical to make a claim under its vehicle insurance policy.

[82] Mr Brown's actions in terms of not following the instruction were capable of amounting to a breach of duty to his employer. The accident could have been avoided if he had done as instructed.

[83] The evidence from Mr O'Malley suggested discussion about employees' personal liability for damage to buses in some circumstances during negotiations. I am not satisfied that anything was actually agreed to in that respect. I accept Mr Riach's submission that the wording in clause 35.3 of the employment agreement, which provides that the employer's vehicle insurance policy covers employees only, implies that any damage would be covered by an insurance claim. There are other provisions in the drivers' manual that require the employee to take steps in facilitating an insurance claim.

[84] I do not find that it was within the contemplation of Leopard and the Union when they negotiated the collective employment agreement that employees covered by it would or could be personally liable for damage to a bus if there was an avoidable accident. In the circumstances, I make no award of damages to Leopard and the counterclaim against Mr Brown is dismissed.

Costs

[85] I reserve the issue of costs. The parties may be able to agree to costs and I would encourage this. In the event that agreement cannot be reached, the applicant should lodge and serve any submissions as to costs by 27 March 2007 and the respondent should lodge and serve any submissions as to costs in reply by 24 April 2007.

Summary of orders and findings

- I have found that Mr Brown was unjustifiably dismissed on 3 February 2006.
- I have found that Mr Brown contributed to his personal grievances and any remedies that I award to Mr Brown are reduced by 30% accordingly.
- I have ordered Leopard Coachlines Limited to pay three months' lost wages to Patrick Brown at ordinary time remuneration rate from the date of dismissal. The parties are to calculate the lost wages taking into account the contribution which has been assessed. I reserve leave to the parties to return to the Authority if there are any difficulties in such calculation.
- I have ordered Leopard Coachlines Limited to pay to Patrick Brown the sum of \$5,600 without deduction for compensation, taking contribution into account.
- I have dismissed the counterclaim against Mr Brown.
- I have reserved the issue of costs and in the event that agreement cannot be reached, have timetabled an exchange of submissions.

Helen Doyle
Member of Employment Relations Authority