

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2014] NZERA Wellington 126  
5452905

BETWEEN            ANDREW CALLARD  
Applicant

AND                 WELLINGTON CITY  
TRANSPORT LIMITED  
Respondent

Member of Authority:     Michele Ryan

Representatives:         Kevin O’Sullivan, Advocate for Applicant  
Gillian Service, Counsel for Respondent

Investigation Meeting:    10 September 2014 at Wellington

Submissions Received:    Oral and written submissions at the investigation  
meeting and further information provided by the  
respondent on 10 December 2014

Determination:            15 December 2014

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     The applicant, Mr Andrew (Drew) Callard was employed by Wellington City Transport Limited (WCTL) as a bus operator for approximately 18 months until he was dismissed on 7 March 2014 with one week’s notice. He says he was unjustifiably dismissed and seeks unspecified sums for reimbursement of wages, compensation and costs.

[2]     WCTL says Mr Callard was justifiably dismissed for failing to attend and complete an alcohol counselling course in circumstances where completion of counselling was a condition for ongoing employment. In these circumstances WCTL asserts that the decision to dismiss Mr Callard was one that a fair and reasonable employer could have made in all the circumstances.

## Summary of relevant background information

[3] Almost a year after Mr Callard commenced his employment with WCTL, Duty Supervisor, Ms Jacqueline Siologa raised concerns with him about his poor attendance record<sup>1</sup>. During a meeting held 29 July 2013 he agreed to placement on an 'Attendance Plan'. Amongst other things Mr Callard was required to notify WCTL of his absence as soon as was practicable, and if unwell (either personally or for domestic reasons) he was obliged to provide a medical certificate.

[4] Despite those arrangements, in the week commencing 9 September 2013 Mr Callard did not attend work or notify WCTL of his absence until 12 September 2013. When he returned to the workplace on 16 September 2013 he met with his Ms Siologa. In the course of that meeting the smell of alcohol was detected on Mr Callard. He consented to a drug and alcohol screening test based on reasonable cause<sup>2</sup>.

[5] The results of the alcohol screening were initially recorded as negative, however, it was confirmed the following day that the screen results were non-negative and Mr Callard was suspended from work.

[6] A disciplinary meeting was held on 19 September 2013. Mr Callard does not dispute that by the conclusion of the meeting he had been made fully aware that he would receive a final written warning; that his attendance needed to improve and that his ongoing employment was dependent on his completion of a rehabilitation alcohol counselling course.

[7] On 26 September he received formal notification of the final written warning. Mr Callard was further advised that he was responsible for scheduling counselling sessions with Care NZ and was asked to inform Ms Siologa of his first meeting.

[8] Care NZ was authorised to liaise with WCTL and verify Mr Callard's attendance of counselling sessions<sup>3</sup>.

[9] Mr Callard attended two meetings between October and mid-November with Care NZ. However, two appointments scheduled for late November and early December were not attended at short notice. Following a cancelled appointment on 5

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<sup>1</sup> He had been absent from work for 31 days over 12 months

<sup>2</sup> In accordance with WCTL's 'Alcohol and Drug Free Policy'

<sup>3</sup> Mr Callard provided written consent on 3 October 2013

December 2013 Care NZ notified WCTL of Mr Callard's recent re-scheduling of appointments and reported that Mr Callard had advised that last minute shift changes were the cause. Care NZ stated that it had suggested to Mr Callard that he speak with WCTL about having time made available to him to attend sessions.

[10] On receipt of that information Ms Siolaga undertook an inquiry as to whether Mr Callard's roster over the material times had been altered. She found that it had not. She made arrangements to meet with Mr Callard and his support person on 20 December to discuss the matter. In the interim Mr Callard attended a further counselling session on 19 December 2013 and made arrangements for another appointment on 13 February 2014.

[11] During the meeting of 20 December both parties referred to prior informal discussions between them. It was not clear from the evidence when precisely these occurred however it is apparent Mr Callard had previously complained to Ms Siolaga about difficulties with scheduling appointments as these needed to be arranged three weeks in advance but his weekly roster was confirmed only one week ahead. In response to Mr Callard's complaint Ms Siolaga had devised a shift pattern to accommodate daytime appointments.

[12] The meeting of 20 December largely focussed on why Mr Callard had not told Ms Siolaga that he had rescheduled two anticipated counselling sessions. Ms Siolaga and WCTL's HR consultant reinforced the expectation that Mr Callard was required to book appointments and then liaise with Ms Siolaga so that she could accommodate his roster around the timing of counselling sessions.

### **The event leading to Mr Callard's dismissal**

[13] On 13 February 2014 WCTL received an email from Care NZ which stated the following:

*Further to my email of December 5th 2013, as attached below.*

*Andrew has not attended his scheduled appointment today, and we have not had a call from him to cancel. This appointment time was confirmed by Andrew on 27-01-14.*

*Given his problems with attendance, as noted below, I have discussed this with my team leader and it has been decided to discharge Andrew and close his file.*

*Andrew has attended four out of seven scheduled appointments, with reasons for non-attendance noted in my email below dated 5 December 2013. Please contact me if you require any further information.*

[14] On 14 February 2014, Ms Siologa wrote to Mr Callard and advised that WCTL had concerns about “*non-attendance of a confirmed alcohol counselling appointment and that you have been discharged without completing the course*”. His omission was characterised as potentially serious misconduct and Mr Callard was advised that the matter would be investigated.

[15] There were delays in arranging a date that suited both WCTL management and Mr Callard’s support person but the parties met on 24 February 2014.

[16] The investigation meeting notes reflect the following: Mr Callard agreed that he had failed to attend the appointment scheduled for 11am on 13 February 2014. He stated that he had finished late the previous evening and transport arranged by WCTL did not deposit him home until approximately 1am. He says he was woken at 4.30am when his daughter arose to commence work and that he had a cup of tea and then fell asleep in a chair. He says he did not wake up until midday and realised he had missed his appointment.

[17] Ms Siologa was concerned by Mr Callard’s explanation and she reported the matter to her manager, Mr Nasau Fuimoano and to the National HR Manager of ‘New Zealand Bus’<sup>4</sup>, Mr David Gould.

[18] Mr Fuimoano corresponded with Mr Callard and made arrangements for a formal disciplinary meeting. Further delays were encountered due to the availability of Mr Callard’s representative.

[19] The parties met on 7 March 2014. Ms Siloga was no longer involved and Mr Fuimoano was assisted by an HR consultant. Mr Callard was represented by his union. Mr Callard repeated the explanation he had furnished to Ms Siolago. He conceded he had made no attempt to contact Care NZ, or Ms Siloga, or any other duty supervisor when it became apparent he had missed his appointment. He said his priority was to get to work on time, which was scheduled to begin at 2pm. I note Mr Callard’s written statement to the Authority says that he tried to locate Ms Siloga before his shift commenced. This aspect of his evidence is at odds with the content of

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<sup>4</sup> WCTL is a subsidiary of New Zealand Bus

notes drafted during the meeting which record that Mr Callard advised that he had intended to speak with Ms Siologa the following day. On balance I do not accept this aspect of Mr Callard's evidence.

[20] Following an adjournment Mr Fuimaono advised that the failure to attend the counselling session (in accordance with its drug and alcohol policy) or notify WCTL (or Care NZ) in the context of a final written warning against a background of rescheduled appointments and discharge from Care NZ services, led him to form a view that WCTL could have no trust and confidence in him. There is evidence of further discussion about whether Mr Callard could undertake counselling services elsewhere. In evidence Mr Fuimaono says he briefly considered this alternative but says that, given Mr Callard was already on a final written warning with that specific condition, he felt a line had to be drawn. At the end of the meeting Mr Callard's employment was terminated with one week's paid notice which he was not obliged to work out. The decision was formalised in a letter later that day which stated amongst other things:

The reason for the meeting was to investigate the serious concerns the Company had regarding your non-attendance of your alcohol counselling sessions as agreed in the final warning issued to you in September 2013. Care NZ the provider advised that you were discharged for non-attendance. We believe this has created a breakdown of trust and confidence in the employment relationship therefore (sic) have come to the conclusion that your employment will be terminated for serious misconduct.

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### **The law and the issues**

[21] The onus is on WCLT to establish that the actions it took were what a fair and reasonable employer could have done in all the circumstances.

[22] In *Angus v Ports of Auckland*<sup>5</sup> the Full Court observed that the legislation<sup>6</sup> (post April 2011<sup>7</sup>) contemplates that there may be more than one fair and reasonable response or other outcome that might justifiably be applied by a fair and reasonable employer.

[23] Where an unjustified dismissal is claimed as Mr Callard has done, the Authority must determine whether the employer's actions (in this instance Mr Callard's dismissal and the reasons for it) and how the employer acted (the process

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<sup>5</sup> [2011] NZEmpC 160

<sup>6</sup> Employment Relations Act

<sup>7</sup> Section 103A(2)

WCTL undertook which led to Mr Callard's dismissal) were what a fair and reasonable employer could have done in all the circumstances.<sup>8</sup>

***Was the process leading to Mr Callard's dismissal what a fair and reasonable employer could have done?***

[24] Having assessed the process WCTL's undertook prior to its decision to dismiss I am satisfied WCTL conducted a fair and reasonable investigation that complied with minimum standards of procedural fairness set out at s.103A(3).

***Could WCTL, as a fair and reasonable employer, have concluded in all the circumstances that Mr Callard's conduct justified his dismissal?***

[25] Mr Callard accepts that he did not attend the counselling session on 13 December. On his behalf it is submitted that his non-attendance of a counselling appointment, in the absence of evidence of wilful negligence, cannot be regarded as conduct which is so destructive of the employment relationship that continuation of it is an impossibility.

[26] I agree that a failure to attend a rehabilitative counselling session, if looked at in isolation, is unlikely to be routinely characterised as conduct which "*deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship*"<sup>9</sup>

[27] However I regard the submission as too simplistic. I am unwilling to accept an inference broadly contained in submissions made on Mr Callard's behalf and in evidence that intentional wilfulness or recklessness must be established before conduct can be regarded as impairing or destructive of trust and confidence. In *W&H Newspapers Ltd v Oram*<sup>10</sup> the Court of Appeal held: "*...a single act of carelessness, when sufficiently serious, can impair trust and confidence*".<sup>11</sup>

[28] I accept submissions on WCTL's behalf that Mr Callard's conduct must be considered alongside the circumstances relevant to the parties at the time, including the nature of WCTL's business and the agreed terms of the employment relationship between the parties.

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<sup>8</sup> Section 103(2) Employment Relations Act

<sup>9</sup> *Northern Distribution Union v BP Oil* [1992] 3 ERNZ 483 at 487

<sup>10</sup> [2001] 3 NZLR 29

<sup>11</sup> *Ibid* at [45]

[29] It submits that the relevant circumstances comprise the following: WCTL is a bus company providing transport services. Alongside obligations to ensure safety it says reliability has special significance to the values and operation of the business. WCTL had sought to address concerns about Mr Callard's attendance and consumption of alcohol by way of a final written warning, which included an agreed condition that continued employment was contingent on attendance and completion of an appropriate counselling course.

[30] There is no dispute that Mr Callard did not object to the final written warning at the time it was issued. His evidence is that he "*willing engaged in [rehabilitative counselling]*" and knew he needed to do so "*if I were to keep my job*". I find that the terms of the final written warning with corresponding instructions could not have put Mr Callard on any clearer notice that his ongoing employment required him to comply with those demands and that, if he did not, his employment with WCTL was at grave risk. I am further persuaded that attendance at all scheduled counselling sessions was forcefully impressed on Mr Callard during Ms Siolago's ongoing communications with Mr Callard including her actions to rearrange rosters to promote that goal.

[31] Mr Callard refers to initial difficulties with his roster requiring him to reschedule appointments. He says WCTL was aware of the impediment and states those events should not have formed part of WCTL's considerations in deciding it no longer had trust and confidence in him.

[32] On balance I do not accept that Mr Callard was treated unfairly on this point. The rescheduling of appointments was first canvassed following receipt of Care NZ report about Mr Callard's attendance. On 20 December 2013 Mr Callard contended that there had been difficulties with scheduling appointments against his roster. The meeting notes record Ms Siolago questioning Mr Callard about his rescheduled appointments when she had actively tailored his rosters to ensure he attended counselling. Mr Callard's recorded response appears to have been that he was unaware he needed to advise Ms Siolago of any rescheduling and that the missed appointments had been "*accidental*" or due to "*[bad] luck*". The emphasis of the meeting moved to focus on ensuring Mr Callard understood his obligation to communicate with Ms Siolago.

[33] Based on the evidence I am not persuaded that WCTL accepted Mr Callard's view that counselling sessions had been rescheduled due to roster difficulties or that

the cause of missed appointments was in part due to WCTL, as stated by submissions on his behalf.

[34] I am further persuaded in this view by the content of the meeting of 7 March 2014. Although not expressed as clearly as it might have been, I am satisfied that WCTL challenged the proposition that Mr Callard's missed appointments had been due to his roster plan.

[35] Notwithstanding the above I also consider it was reasonable of WCTL, when determining whether it had trust and confidence in Mr Callard to take into account Mr Callard's rescheduling of appointments as a factor that can and was included as within "all the circumstances" when appraising its trust and confidence in him.

[36] Finally it is submitted that Mr Callard's engagement in four out of seven scheduled counselling sessions equates approximately to a 60% attendance rate. I understand this information was furnished to support the proposition that Mr Callard was largely compliant with his obligation to attend counselling and his dismissal was a disproportionate response by WCTL and therefore unreasonable and unfair.

[37] I agree with WCTL's submission that any argument that Mr Callard had largely complied with the final written warning and attended 60% of scheduled counselling appointments ignores the requirement that completion of the course was an accepted condition of the final written warning and of ongoing employment.

### **Determination**

[38] The role of the Authority in applying the test for justification is to assess the employer's conduct against a range of responses open to a fair and reasonable employer. Standing back and assessing objectively the circumstances which led to Mr Callard's dismissal I find that WCTL's decision to dismiss was a decision that was available to it. WCTL sought to address its concerns with Mr Callard in a final written warning and supported him to achieve the requirements of the warning. When Mr Callard breached conditions of the warning it fairly investigated and considered his response, but did not accept Mr Callard's explanations. Its conclusion that it could no longer have trust and confidence in Mr Callard was fair and reasonable in all the circumstances.

[39] I find that Mr Callard's dismissal was justifiable and his application is dismissed.

**Costs**

[40] Costs are reserved.

Michele Ryan  
Member of the Employment Relations Authority