

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2011] NZERA Wellington 118
5296283

BETWEEN RALPH DICKINSON
 Applicant

AND GO-BUS TRANSPORT
 LIMITED
 Respondent

Member of Authority: G J Wood

Representatives: Scott Jefferson for the Applicant
 Andrea Twaddle for the Respondent

Investigation Meeting: 19 May 2011 at Napier

Submissions Received: 19 May 2011

Determination: 11 July 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Ralph Dickinson) claims that his dismissal by the respondent (Go-Bus) for assault on a work colleague was unjustified, because he had only assaulted him in response to his intimidatory and threatening behaviour. Furthermore, this behaviour had been brought to the attention of Go-Bus before, but it had failed to address it and accordingly provide a safe working environment for him.

[2] Go-Bus claims that the dismissal of Mr Dickinson was justified because the assault was a disproportionate response to the actions of his colleague and entirely inappropriate work-related conduct. Go-Bus also considers that while it was aware of the personality conflict between the two men, it took all practical steps to address Mr Dickinson's issues and provide a safe working environment.

Factual discussion

[3] Mr Dickinson commenced employment with Go-Bus as a bus driver on 19 January 2009. Go-Bus, as its name implies, is a bus company that provides a public transport network within Hawke's Bay and other regions. Mr Dickinson was worked out of Go-Bus' depot in Hastings although, like some other drivers, he lived in Napier. As a result, Go-Bus decided to put on a van that workers based in Napier could use to get to and from work in Hastings. This was of great financial benefit to the workers who use it, such as Mr Dickinson, whose own transport was highly unreliable.

[4] Another worker who made use of the van was a Mr Gary Esau. Unfortunately, over time, Mr Dickinson and Mr Esau simply did not get along. In fact, Mr Esau did not get along with a number of his co-workers and management, but they considered him to be little more than a nuisance, and certainly not dangerous. Either because of his particular behaviour towards Mr Dickinson or Mr Dickinson's sensitivity to the same, Mr Dickinson believed that not only were they totally incompatible but that Mr Esau was a threat to him. In particular he relied on threats Mr Esau made about his gang connections. No other witnesses gave evidence that Mr Esau ever claimed such gang connections, but when raised at the Authority meeting, considered them to be just another exaggeration by Mr Esau, and certainly not a threat.

[5] The issues between Mr Esau and Mr Dickinson particularly related to Mr Esau running other workers down, including Mr Dickinson himself. For most of March, the two simply drove to work in silence. On 9 April, Mr Esau confronted Mr Dickinson about stories Mr Esau had told Mr Dickinson about other workers, which Mr Dickinson then relayed to those other workers. When it got back to him this upset Mr Esau and he had a confrontation with Mr Dickinson about it. Mr Esau swore at Mr Dickinson and indeed said at one point he was "*so close to death it wasn't funny*".

[6] Mr Dickinson complained to Go-Bus, including by way of a written complaint. The complaint was investigated by the depot manager, who told the Authority that his investigation showed that Mr Dickinson was also very aggressive during the confrontation. He therefore warned him to keep away from Mr Esau, not to offer any provocation and not to talk about Mr Esau with anyone else. Mr Esau was given the same advice.

[7] Mr Esau was quite unwell during June 2009. On 19 June in the afternoon he was unable to work through his shift because of personal pressures. When he saw him driving towards him the next week Mr Dickinson responded by waving his finger around his ear to indicate that Mr Esau was crazy. Mr Esau complained to the depot manager, who investigated by speaking to an independent witness. The depot manager concluded that Mr Dickinson's behaviour was highly inappropriate. He told Mr Dickinson that his dislike for Mr Esau was not to spill over and affect the smooth running of the workplace. He was also told that he would be given a specific written directive to refrain from speaking to Mr Esau unless it was necessary for operational reasons, and that he should otherwise go about his business with Go-Bus as though Mr Esau was not there. In addition he was asked to refrain from discussing Mr Esau with others, and to refrain from indulging in any other actions liable to provoke a negative response from him. Mr Dickinson took no action to challenge this directive. Mr Esau was also told to be non-reactive to Mr Dickinson and refrain from speaking to him or talking about him.

[8] Matters flared up again on 16 July when someone informed the depot manager that there had been more immature name calling between the two. The depot manager spoke to both of them and told them that he was not interested in being a referee, and was not going to get involved in another round of *he-said-she-said*. He also stated that they were both capable of provoking the other and reacting, that as they had both told him they needed their jobs they should act accordingly and that these matters had been raised many times before. He also advised that if this kind of behaviour continued, the end result may well be disciplinary action.

[9] Mr Dickinson sought to be transferred to the Napier depot but unfortunately there were no full time positions there. Both Mr Esau and Mr Dickinson sought alternatives to having to travel in the same van, and both were told that they were free to provide their own transport if they wanted to. However, they both chose to continue with the free transport provided by Go-Bus.

[10] There was another verbal altercation between the men on 24 July, but no action was taken by anybody about that.

[11] On Tuesday, 18 August, Mr Esau complained to the depot manager that he had been assaulted by Mr Dickinson in the work van and that he wanted the Police involved. The depot manager arranged for him to go to the local Police station, who

later told him that Mr Dickinson needed to be interviewed. The depot manager arranged for that. On his return, the depot manager told Mr Dickinson that a serious complaint had been made against him and that an investigation was needed. He was told that suspension was proposed for the course of the investigation. Mr Dickinson's response was basically to shrug his shoulders. He did say, however, that he did not think it was a matter for the company because it happened outside of working hours. The depot manager decided to suspend Mr Dickinson while the investigation was undertaken, although he offered Mr Dickinson part time work in Napier.

[12] Before the disciplinary meeting, Mr Dickinson's lawyer was provided with the letter inviting him to a disciplinary meeting, and statements from those involved. These included statements from the two other people in the van at the time of the assault.

[13] At the meeting, a response from Mr Dickinson was sought. Mr Dickinson indicated that he was now legally represented and would respond through his lawyer.

[14] The next day, Mr Dickinson was given advice of another disciplinary meeting. It was alleged that he had assaulted Mr Esau and that this may be serious misconduct justifying summary dismissal. A further statement taken from a witness was provided.

[15] Mr Dickinson responded through his lawyer, stating that any disciplinary investigation before the outcome of the District Court proceedings for assault would be premature. Go-Bus responded by noting that the Court process was completely separate from its investigative process, and proposed a meeting on 9 September.

[16] At this meeting, Mr Dickinson gave his written statement, which was then considered by Go-Bus. In his statement, he said that Mr Esau had not closed the door of the van and Mr Dickinson made a sarcastic comment about that. Mr Esau responded by saying he did not want to be near Mr Dickinson, and made negative comments about his personal hygiene and bus driving abilities. He later swore at him, and was told by Mr Dickinson to go back to sleep and later to shut his mouth. According to Mr Dickinson, Mr Esau then flung his face into his, and swearing at him told him to:

Hit me, go on hit me then you'll see what will happen.

Because of the aggressiveness in his manner I felt vulnerable and in danger so I struck out. I punched him about the head half a dozen times and he curled into a foetal position and pleaded for help. I clearly had taken a hold of the situation and decided to let him sit up. He asked if he could get another seat and I told him to go sit in the back.

[17] Mr Dickinson then went on to explain the lack of support from Go-Bus about his ongoing issues with Mr Esau, and that he did not believe that Go-Bus had provided a safe environment for him.

[18] There was little discussion at the meeting of Mr Dickinson's explanation, except whether or not there were three sessions of him punching Mr Esau as Mr Esau claimed, or only one as Mr Dickinson claimed. Mr Dickinson claimed that it only happened on one occasion.

[19] Go-Bus management then had an adjournment and considered the responses. On resumption, Mr Dickinson was told that Go-Bus could not overlook the fact that he had physically assaulted another employee. To it this struck at the *heart of the good faith employment relationship* and therefore it had no option but to dismiss him without notice.

[20] Later in Court, Mr Dickinson was discharged without conviction on the donation of \$200 to a charity. In sentencing him the Judge noted that:

Circumstances do not create an evidential foundation on which the defendant either objectively considered that he needed to act in self defence and in so doing, to apply force to the person of the complainant. Accordingly, there is no issue of whether, objectively, the force used is reasonable.

Mr Dickinson had other options but to strike [the complainant]; he acknowledges that in his evidence. There may have been some thoroughly provoking words used, an apparent invitation to strike [the complainant], but never as a matter of fact could that have been taken as an indication that Mr Dickinson was absolved from responsibility for the consequences if he elected to strike a blow. He did elect to strike a blow. His evidence is candid; the complainant was getting on his goat, he could have turned away and ignored him, but decided the time had come to escalate matters to a physical rather than a verbal level and thereupon punched [the complainant] and is thereby guilty of the charge which he faces.

[21] In evidence before the Authority, as his rationale for the assault, Mr Dickinson described it as a time when matters had so escalated that it had become a battle between "good and evil".

[22] The matter has remained unresolved despite mediation. It therefore falls to the Authority to make a determination.

Determination

[23] There was insufficient evidence to conclude that Go-Bus had not provided Mr Dickinson with a safe work environment. It was Mr Esau's safety which turned out to be at greater risk from Mr Dickinson, rather than vice versa. Furthermore, Mr Esau was also dismissed for his involvement in the incident and the overall poor relationship between Messrs Esau and Dickinson.

[24] In any event, any such failure to have effectively dealt with the issues between Mr Esau and Mr Dickinson, if proven, would not have absolved Mr Dickinson from his responsibilities as an employee when later assaulting Mr Esau.

[25] I accept that, with the benefit of hindsight, Go-Bus' interventions could have been better, but I do not accept that it ignored any of the issues of concern to Mr Dickinson. The depot manager spoke to both protagonists or otherwise dealt with matters by way of written directions on every occasion matters came to Go-Bus' attention, which should have been sufficient in these circumstances to have prevented the sort of incident for which Mr Dickinson is simply failing to accept responsibility. I can put the matter no better than the sentencing Judge. Mr Dickinson was not acting in self defence and the evidence clearly showed that.

[26] In this case, Go-Bus carried out a thorough investigation. It spoke to all witnesses, and there was sufficient evidence from Mr Dickinson's own statement alone for it to find serious misconduct. There simply is no excuse for punching a fellow worker in a work van on the way to work, and any fair and reasonable employer would conclude that this was serious misconduct warranting summary dismissal. This was not a battle between *good and evil* as Mr Dickinson would have it, but rather Mr Dickinson applying criminal means to ensure that he was no longer troubled by Mr Esau.

[27] Thus I am satisfied that Go-Bus conducted a full and fair investigation into the incident and reached a decision that a fair and reasonable employer would make in all the circumstances. Mr Dickinson basically admitted committing assault on a fellow worker in a work van. While no doubt he was provoked, perhaps severely, there was

no element of self defence and therefore the matter is clearly one of serious misconduct.

[28] I therefore dismiss Mr Dickinson's claims.

Costs

[29] Costs are reserved.

G J Wood
Member of the Employment Relations Authority