

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2012] NZERA Christchurch 89  
5313097

BETWEEN                      JAMES FRANCIS DUFFY  
   Applicant  
  
AND                              HEBBERDS BUS SERVICES  
   2009 LIMITED  
   Respondent

Member of Authority:        M B Loftus  
  
Representatives:              Gavin Amey, Advocate for Applicant  
   Maurie Hebbard, Representative of the Respondent  
  
Investigation Meeting:        29 November 2010 at Nelson  
  
Submissions received:        At the investigation meeting  
  
Determination:                14 May 2012

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     The applicant, Mr James Duffy, claims he was unjustifiably dismissed from his employment with the respondent, Hebbards Bus Services (2009) Limited (Hebbards).

[2]     While Hebbards accepts that it ceased employing Mr Duffy, it claims to have been able to do so as he was a casual employee who could have no expectation of ongoing employment.

[3]     Hebbards claims Mr Duffy's behaviour on 8 March 2010 justified the decision.

**Acknowledgement**

[4]     Unfortunately a considerable period of time has passed since the investigation meeting. The situation has arisen as a result of the file being inaccessible due to

Christchurch's earthquakes, compounded by workload issues. I appreciate the parties' patience and regret any inconvenience suffered.

### **Issues**

[5] There are two issues that I have to determine. They are:

- a. The nature of Mr Duffy's employment (fixed term or ongoing); and
- b. If ongoing, whether his cessation could be justified.

### **Background**

[6] Heberds is, as its name suggests, an operator of passenger transport buses. One of its services is the delivery of children to and from school under a contract with the Ministry of Education. Mr Duffy was engaged to drive one of the school buses.

[7] Mr Duffy first met Mr Maurie Heberd when, having applied for a job as a driver, he was interviewed for the position in December 2002. Mr Duffy says he asked about the hours and future prospects. He claims Mr Heberd guaranteed 21 hours a week (20 driving and 1 for cleaning / fuelling) and advised he had a six year contract with the Ministry of Education. Mr Duffy suggests Mr Heberd implied he could remain for the duration of the contract if he chose but accepts this was not guaranteed. Heberds say they gave an indication of likely hours and tenure but no guarantee.

[8] Mr Duffy was successful and signed an employment agreement on the day of interview. The document signed by Mr Duffy can no longer be found but the parties agree that it was a form document. Here I observe that while the one page agreement falls short of the requirements of s.65 of the Employment Relations Act 2000, its contents are sufficient for the determination of this claim.

[9] The agreement names the parties before specifying that the employee would commence at the beginning of the 2009 school year. It then contains the following statement, which is followed by a brief job description:

*Heberds Bus Services agrees to pay you \$\_\_ per hour, the gross pay being determined by the total number of hours worked each week. All holiday pay is included in this hourly rate. I agree that I am employed part time to drive a school bus only when the school year is*

*open and operating. The weekly hours include the fuelling, washing and cleaning of the bus.*

[10] The initial period of employment was without major incident but problems arose during the third term when Mr Duffy was injured when assaulted. Mr Duffy did not comment on the circumstances, while Mr Hebbard portrays it as the outcome of a drunken brawl at a party. Whatever the cause, the injury led to a dispute about entitlement to sick pay and public holidays. It subsequently involved the Department of Labour and triggered a steady deterioration in the relationship between Hebbards and Mr Duffy. The relationship is now extremely poor and this was illustrated throughout the investigation meeting by antagonistic exchanges and the trading of various accusations. These shall not, however, be discussed if they do not impact on the issues I must determine.

[11] On 19 November 2009 a memo, dated 17 November, was placed on the seat of each driver's bus. It read:

*TO ALL DRIVERS*

*All drivers must sign a new contract for the next year 2010, stating they will drive again for the year of 2010. All drivers must do ongoing training as directed as a condition of their employment. The cost of this will be paid for by Hebbards Bus Service (2009) Limited, but all drivers are expected to put their own time forward to gain better qualification for their future employment.*

[12] Accompanying the memo was a new employment agreement in which the paragraph quoted in clause 9 above is amended to read:

*Hebbards Bus Services agree to pay you \$\_ per hour, gross pay being determined by the total number of hours worked each **fortnight**. All holiday pay is included in this hourly rate. I agree that I am employed **casual (no fixed hour employment)** to drive the school bus only when the school year is open and operating. The **fortnightly** hours including the fuelling, washing and cleaning of the bus. (highlighting of differences between this and the original agreement is mine)*

[13] Mr Duffy decided not to sign the new agreement for two reasons. His primary concern was it eroded his conditions in that it replaced his permanent part time status with that of casual, thereby threatening his permanency of employment. He also harboured negative views emanating from the ongoing dispute about leave.

[14] Mr Duffy says he and Mr Heberd had a verbal altercation over his refusal to sign. Mr Heberd has no recollection of that, though his Manager, Mr Russell Johnston does recall Mr Duffy was refusing to sign, that he (Johnston) knew about it and discussed it with Mr Duffy though not acrimoniously.

[15] There was also a dispute about payment for driver training which was required by the Ministry of Education as a contractual condition. Mr Duffy claims that he was concerned that he would now have to undertake training during his own time and not be paid as he had previously (see memo – 11 above). He therefore refused to attend. Heberds say no – training would be paid time but in total upon completion. Two other ex-employees gave evidence with one of those being called by the company. Neither was paid for attending training, with the company witness saying she raised it with Mr Johnston but was told it was not paid time. She adds that a challenge was inadvisable as it would jeopardise ongoing employment. The issue is relevant for two other reasons:

- a. It added to the tension between Heberds and Mr Duffy; and
- b. During the investigation Heberds raised the issue as a further justification for dismissal. The contract with the Ministry of Education requires all drivers complete a specified course within six months, as well as two half days continuation training per annum. Heberds say Mr Duffy's refusal to train, meant that the contract precluded his retention.

[16] Mr Duffy claims that on 8 December 2009 (a date after school had ended for the year) Mr Heberd phoned and advised that he was going to address the leave issues but then went on to abuse Mr Duffy and advise that he leave. Mr Duffy says he responded by stating he would not leave and asking when he would commence in the new year. He claims Mr Heberd said he did not know. Mr Duffy says he therefore kept in touch with other drivers and, as a result, ascertained that 2 February 2010 was the recommencement date. Mr Heberd denies the claims regarding abuse and refusing to advise a start date.

[17] In any event Mr Duffy simply reported to work on 2 February 2010 and commenced working. Mr Duffy says he and Mr Heberd had a discussion over which bus he was to use on 3 February, but the employment agreement and his failure to

sign was not raised. Mr Heberd says the failure to sign did not worry him as Mr Duffy was a casual and, at that time, they had work for him.

[18] Mr Duffy claims to have raised another driver's use of an unregistered bus with Mr Heberd on 18 February. He says nothing was done so he queried it again the following day and was told to *mind his own business*. He says this led to two tense days before he received a warning for his behaviour. Whilst not directly on point, the warning contains the following which should be noted:

*This is your first and final warning if this happens again and you don't stop interfering with management decisions I will have no option but to dismiss you from your employment with Heberds Bus Services 2009 Limited. This is not the first time you have interfered with management decisions. You are only responsible and employed to drive your own bus and must not interfere with the management of other buses in our fleet or with the drivers that drive these buses. It is none of your business if the registration label is not in one of these buses, as it can take many days for the label to arrive by NZ Post even though they are registered.*

[19] Mr Duffy goes on to say

*On the 2nd March 2010 I informed Russell I had 150k left. I requested the Friday off as I did not feel that the situation would be remedied in time.*

[20] This is a reference to the vehicle's road user charges (RUC) licence and the distance left before it expired. Mr Duffy was concerned that should the vehicle be stopped with an expired RUC licence he, as the driver, could be personally liable for any resulting fines.

[21] Mr Duffy goes on to say that the RUC license expired during the morning run on 4 March and that he advised Mr Heberd upon his return to the depot. He also says that he told Mr Heberd that he would not drive the vehicle until a new one was issued. He says Mr Heberd simply said it *wasn't his* [Duffy's] *problem*. A third party witnessed Mr Duffy's comment but did not hear Mr Heberd's response. Mr Heberd neither accepts nor denies making the alleged response. In those circumstances, and given the comment in the warning letter about interference, I conclude it more likely than not that Mr Heberd gave the alleged response.

[22] Mr Duffy completed the afternoon run but used another bus. He did not work on the Friday.

[23] Mr Duffy arrived at work around 7.30 on Monday 8 March. Whilst performing a routine check of the bus he noted that it did not yet display a valid RUC license. He therefore decided not to drive. He sent a text to Mr Johnston, who was on the road doing one of the school runs and then went home.

[24] Mr Duffy claims that about half an hour later Mr Johnston telephoned *And told me I was gone. Not to come back and again, that Morrie would send me a letter.*

[25] The day's events were followed by a letter from Mr Hebbard. Dated 9 March 2010, it reads:

*Jim*

*It is not acceptable for you to just not turn up for work, when 40 minutes from when you were to start your school run, you text my manager didn't phone with an explanation to say why just you weren't going to drive the bus. You gave no valid reason for this except the RUC label was not displayed on the window of your bus. This is not a reason for not driving the bus. You jeopardised the safety of many young school children that were waiting on the side of the road not knowing where to go or what to do.*

*The safety of these children is paramount to my company and you as a driver were responsible for the safety of these children. Under my contract with the Ministry of Education I must employ responsible drivers of good character and trustworthy nature to assure that children arrive to school and are transported in a safe and reliable manner.*

*You have already had a written warning for your disgusting behaviour.*

*At this present time we have no further work for you.*

[26] Mr Johnston states that Mr Duffy's text was sent at 8.06am but that he did not open it till 8.25 when he got to the school to drop the children off. He says it read *No RUC no run.* He says he as a bit bemused as the new RUC license had been bought on the 4<sup>th</sup> (which the evidence confirms it was, but no one could advise why it was not yet in the bus). Mr Johnston says he telephoned Mr Hebbard and advised him of the situation. He says he can not remember whether he then telephoned Mr Duffy or it was the other way round but accepts he advised *Your finished, don't bother to come in this afternoon. You'll get a letter from Maurie* or words to that effect.

[27] Mr Heberd states that when he got the call from Mr Johnston he simply made a decision. As Mr Duffy had not signed the new employment agreement and was refusing to attend training that was it. He then wrote the letter.

[28] The last point to be noted is Heberds insistence that expiry of the RUC licence does not, in itself, create an offence and that Mr Duffy had nothing to worry about. This claim is reliant on s.23(3A) of the Road User Charges Act 1977 which provides for a 500 kilometre grace period within which an expired RUC license can be replaced.

### **Determination**

[29] As said in opening, there are, potentially, two issues to be determined. They are the nature of the relationship between Heberds and Mr Duffy and, depending on the answer, whether or not Heberds can justify its decision to cease employing Mr Duffy.

#### ***Did Mr Duffy have a casual or on-going relationship with Heberds?***

[30] It is Heberds position that the arrangement between itself and Mr Duffy was *for 40 weeks only, approx 1 school year or 190 days* [Mr Heberds Statement of evidence forwarded to the Authority on 19 November 2010]. In other words the employment was of fixed duration and came to a natural conclusion at the end of the school year on 4 December 2009.

[31] The argument is that Mr Heberd was then offered a casual contract which he effectively accepted by commencing work the following year. As a casual he could then be terminated at will.

[32] This approach relies upon an assumption that the initial engagement was of fixed tenure. Its problem is that I simply can not conclude that to be the case. To be a valid fixed term arrangement an employment agreement must meet the requirements of section 66 of the Act. This agreement does not. It does not even say that the arrangement will come to an end at the end of the school year, let alone how or why (the valid rationale required under s.66(2)(a)).

[33] What the agreement says is that Mr Duffy will be employed *part time to drive a school bus only when the school year is open and operating*. Part time is a term indicative of an on-going relationship and the *school year* is not limited to the 2009 year.

[34] Mr Duffy then refused to sign the new agreement. His refusal was express and therefore he can not be considered to have agreed to an alteration of his employment status. He definitely did not agree to become a casual. I therefore conclude this was an on-going relationship.

***Can the termination be justified?***

[35] The conclusion that Mr Duffy had an on-going relationship with Hebbberds means that the decision to terminate (which the company accepts it made) was a dismissal. The law requires that Hebbberds therefore justify its decision.

[36] Section 103A of the Employment Relations Act 2000 (the Act) states, or at least did state, that the question of whether a dismissal is 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 ... occurred.*

[37] That test is used as Mr Duffy was dismissed before the now current test came into force on 1 April 2011. Section 7 of the Interpretation Act 1999 provides *An enactment does not have retrospective effect*. Section 4 makes it clear that all enactments are subject to the Interpretation Act 1999 unless the enactment provides otherwise. Given there is no suggestion in the Act that the new s.103A has retrospective effect, it is the earlier test that must apply.

[38] Having just said that the test of justification applicable as of 1 April 2011 is not that to be applied here, I believe it appropriate that it be referred to. I do so given a view that the new tests' content, or at least subsections (b) to (d) inclusive, succinctly codify that which case law has, for many years, considered the basic requirements of a fair process. The new provision requires that:

*(3) In applying the test in subsection (2), the Authority or the court must consider—*

*...*

*(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and*

(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and  
 (d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

[39] There was simply no compliance with the above requirements – no raising of concerns, no discussion, no attempt to ascertain exactly what happened and, most importantly, no attempt to discuss why it occurred. Indeed the decision maker, Mr Heberd, never even spoke to Mr Duffy – he simply told Mr Johnston to phone and advise Mr Duffy of his termination.

[40] A fair and reasonable employer would not act so arbitrarily especially as:

- a. Mr Heberd was aware that the Mr Duffy had concerns about the bus and whether or not it could be taken on the road; and
- b. Mr Heberd admits to taking account of issues other than the events of 8 March (see 27 above). Mr Duffy had a right to comment on those issues and their relevance to the decision to dismiss.

[41] The defence hastily added during the investigation meeting concerning training also fails (see 15 above). It was never put to Mr Duffy and Heberds has, in my view, abrogated its right to rely upon it by failing to pay employees who attended. Attendance was a contractual undertaking entered into by Heberds, not its staff.

[42] I therefore conclude this dismissal was unjustified.

### ***Remedies***

[43] The conclusion the dismissal is unjustified raises the question of remedies. Mr Duffy seeks \$15,000 as compensation for *embarrassment + humiliation + stress* along with another \$6,000 for the way in which the dismissal was handled and \$5,000 lost wages.

[44] Mr Duffy earned \$256 a week from Heberds. He also had another job but that was unaffected by these events. He replaced the income he had previously had with Heberds with some seasonal work picking fruit. His evidence is that this lasted

some four weeks and only grossed \$448. He says he then sought a replacement position but without success until November 2010.

[45] Section 128(2) of the Act provides that the Authority must order the payment of a sum equal to the lesser of the sum actually lost or 3 months ordinary time remuneration. Case law allows a higher award but requires that there be an attempt to mitigate the loss.

[46] In this instance the actual loss exceeds three months earnings but there is no evidence that Mr Duffy made a real attempt to mitigate his loss. He did not even contact Work and Income preferring to *seek work independently*. He gave no evidence about the form of his quest.

[47] In such circumstances I conclude it appropriate to simply apply the Act and recompense the loss suffered over the three months following the dismissal. That totals \$2880.

[48] Mr Duffy also seeks compensation for hurt and humiliation but offered no evidence in support of his claim. That said, it was clear from his demeanour that he felt aggrieved though questions must be asked about whether that was the result of his dismissal or the unsustainable relationship he appears to have had with Mr Hebbert.. In the circumstances, and having considered the evidence, I conclude a moderate award of \$4,000.00 to be appropriate.

[49] The conclusion that remedies accrue means that I must, in accordance with the provisions of s.124 of the Act, address whether not Mr Duffy contributed to his demise in a significant way.

[50] Mr Duffy chose not to commence work and effectively abandoned a number of children on the side of rural roads. The evidence is that his actions were of great concern to his employer, the school and affected parents. I am not surprised. It was a stupid act about which he now expresses remorse and one that I conclude could easily give rise to a consideration of 100% contribution.

[51] Against that I must balance a conclusion that not all blame may be attributed to Mr Duffy. He did not contribute to the unfair way in which his dismissal was handled and he had raised his concerns about the RUC license with his employer. He even warned his employer that he would not drive the bus and why. Hebberts

response was, in my view, totally deficient. No-one made Mr Duffy aware of the grace period applicable to renewal of the RUC license and the fact his fears were groundless.

[52] It is unfortunate that the children became (perhaps unwittingly) pawns in what was getting close to an unsustainable relationship between Mr Heberd and Mr Duffy. Both contributed to the situation that arose – equally I conclude. I therefore reduce the remedies that might otherwise have accrued to Mr Duffy by half.

### **Orders**

[53] For the forgoing reasons it is concluded that Mr Duffy has a personal grievance and the following orders are made;

- i. The respondent, Heberds Bus Services (2009) Limited, is to pay the applicant, Mr James Duffy, \$1440.00 (one thousand, four hundred and forty dollars) as recompense for wages lost as a result of the dismissal; and
- ii. Heberds is to pay Mr Duffy a further \$2,000.00 (two thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act.

### **Costs**

[54] I reserve the issue of costs. I ask that the parties try to resolve the issue but failing that, and in the event Mr Duffy wish to seek a contribution toward his costs, he is required to lodge and serve an application within 28 days of this determination. Heberds is to file any response within 14 days of the application.

MB Loftus  
Member of the Employment Relations Authority