

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2012] NZERA Christchurch 98  
5340544

BETWEEN	JOHN DUNCAN VERNON GRANT Applicant
AND	HEBBERDS BUS SERVICES 2009 LIMITED Respondent

Member of Authority: Dzintra King

Representatives: Gavin Amey, Advocate for Applicant  
Maurie Hebbard, Advocate for Respondent

Hearing: 18 April 2012

Determination: 22 May 2012

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**DETERMINATION OF THE AUTHORITY**

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[1] The applicant, Mr John Grant, claims he has been unjustifiably disadvantaged and unjustifiably dismissed by the respondent, Hebbards Bus Services 2009 Limited (“Hebbards” or “the company”); and that he is owed wages and holiday pay.

[2] Mr Grant was employed as a school bus driver on 3 February 2009.

[3] On 12 October 2010 he received a warning regarding a verbal altercation with Mr Russell Johnson, his manager.

**The Suspension**

[4] On 22 August 2011 Mr Grant took a camera with him on the bus. He wanted to have a photo of himself with the bus. When the children became aware of the camera they became excited and asked if they could take photos, which they proceeded to do.

[5] It appears that some children talked to their parents about Mr Grant's having a camera and photos being taken. Complaints were made by some parents, the Board of Trustees and the school. No details of these complaints were supplied to Mr Grant.

[6] Mr Kevin Holdaway, the Supervisor, said he decided to stand Mr Grant down after a man from the Board of Trustees, whose name Mr Holdaway could not recollect, telephoned Mr Holdaway and told him to stand Mr Grant down. There was a lack of clarity as to whether the date this took place was 25 or 28 August 2011.

[7] The payroll records show that Mr Grant was paid for 14.5 hours on 26 August, which is a Friday, which was the payday. That was the last payment before a payment for 9.5 hours made on 9 September 2011.

[8] I conclude that Mr Grant was suspended on 25 August

[9] On 31 August 2011 Mr Heberd, who had not spoken to Mr Grant about the incident, wrote him a letter which said:

*As you are aware you have been taking photos of the children on your bus and giving the children your camera to take photos of themselves for you.*

*This is a very serious concern to me and my company. We have had complaints from various parents of these children, plus the school and the Board of Trustees.*

*This must stop now you are to have no contact with the children you transport on your bus. If you have problems with the children's behaviour you must report this to the management and the school immediately.*

*You are only employed to drive the school bus.*

*You must drive the route and the bus the management appoints you to and drive the designated hours the route takes.*

*If you can't drive the hours and timetable that any said run takes we will no longer be able to employ you.*

*This is your second and last warning the next time you will be dismissed.*

[10] Although this letter indicates that Mr Grant's employment was not terminated, no contact was made by the company to discuss a return to work until Mr Holdaway contacted Mr Grant in early September.

[11] On 5 September 2011 Ms Megan Strong, the Acting Principal of Riwaka School wrote as follows to Mr Heberd:

*It has been brought to my attention that the bus driver who inappropriately took photos of some of our students is back driving the Kaiteriteri run.*

*As I am sure you can imagine this causes us some concern as taking photos of primary students without their parent's permission is not only improper but unlawful as well.*

*I understand you have to follow processes as set down by the Department of labour, however, we ask that you remedy this situation and have the following suggestions:*

- a. Heberds Bus Services supervisor for the run while this driver is transporting primary school age students; or*
- b. He is removed from any Riwaka School run altogether.*

*We would also like to make a strong recommendation that all your bus drivers are educated on appropriate behaviour with minors.*

[12] Mr Grant said that on or about 11 September Mr Holdaway contacted him to return to work. Mr Holdaway said he made the decision to reinstate Mr Grant as he thought things had died down. Mr Grant did the morning run. When he returned for the afternoon run he was met by Mr Holdaway, who gave him a copy of the letter from the school and sent Mr Grant home. I find that Mr Grant's employment was terminated at this stage and that the date of termination was 5 September 2011.

[13] Although Mr Grant says he returned to work on 11 September this cannot be the case. The letter from the school is dated 5 September and refers to Mr Grant being back at work. The 11<sup>th</sup> of September was a Sunday and therefore there would have been no work. Furthermore, the last payment to Mr Grant was made on 9 September.

[14] There was no further contact between the parties until about a month later when Mr Grant said he phoned Mr Heberd, who was abusive. Mr Heberd did not remember the phone call.

[15] There was no investigation carried out by the employer. Mr Grant was not given notice of any disciplinary proceedings and Mr Grant did not have a proper opportunity to provide an explanation. Mr Heberd said he did not need to conduct an investigation as the matter was clear.

### **Payment of Wages**

[16] Mr Grant claims he has been short paid. Mr Grant's employment agreement (a minimal document which does not meet the requirements for an employment agreement pursuant to s 65 Employment Relations Act 2000) provides that he is to be paid \$16 an hour depending on the number of hours worked each week. The hours include time taken to fuel, wash and clean the bus.

[17] On 21 March 2011 Mr Heberd wrote to Mr Grant saying that after checking the time it took to drive his bus route it had been found that the average hours to do the run per fortnight were 32 to 35 hours, including all incidental requirements, and that in future he would pay Mr Grant only for 35 hours.

[18] Mr Grant was of the view that he was employed to work 42 hours per week. However, this is not what the agreement provides. There was no contractual basis for Mr Grant to insist upon being paid for a 42 hour week.

[19] The time sheets filled in by Mr Grant are often not dated. The hours recorded on the time sheets do not always accord with the hours claimed. I am unable to conclude that Mr Grant actually worked the hours he is now claiming. Accordingly, I make no order for reimbursement of wages that relate to the hours alleged to have been worked.

## **Holiday Pay**

[20] Mr Heberd paid holiday pay to Mr Grant on a “pay as you go” basis. Section 28 (1) (a) Holidays Act 2003 provides that an employer may make payment on an “as you go” basis only if the employee is employed on a genuine fixed term employment agreement in accordance with s 66 Employment Relations Act 2000; or the work carried out is so intermittent or irregular that it is not practicable for the employer to provide four weeks’ annual leave. Mr Grant was not employed on a fixed term agreement nor was he a casual employee.

[21] Section 28 (4) Holidays Act 2003 provides if an employer has incorrectly paid annual holiday pay with an employee's pay in circumstances where s 28 (1) does not apply, and the employee's employment has continued for 12 months or more, then, despite those payments, the employee becomes entitled to annual holidays in accordance with s 16.

## **Decision**

[22] Mr Grant had an innocent explanation for the incident that led to his suspension and dismissal.

[23] Mr Grant was suspended without pay in circumstances which render the suspension unjustifiable. There was no contractual entitlement to suspend and the suspension was without pay.

[24] Mr Grant is entitled to be reimbursed for the wages he would have earned during the period of suspension. The suspension was effected on the afternoon of 28 August 2011 and was lifted on 11 September, when he was permitted to do only the morning run.

[25] The dismissal is not substantively justifiable and was procedurally flawed. It is very unfortunate that a number of people appear to have reached conclusions based on inadequate evidence. I am satisfied that while Mr Grant’s actions in taking the

camera onto the bus and then allowing schoolchildren to use it were foolish, he did not act with any untoward or maleficent motivation.

[26] Mr Grant has a personal grievance.

[27] Mr Grant is to be paid annual holiday pay.

### **Remedies**

[28] The calculations I am able to make regarding holiday pay indicate that Mr Grant is owed the sum of \$2,650.24.

[29] The period of suspension was from the afternoon of 25 August until the morning of 5 September. That is six days. In calculating the payments that should have been made for those six days I have taken Mr Hebbard's calculation of 17.5 hours per week as being an accurate summation of the time taken to drive the run, being 1.75 hours per run. Mr Grant is to be reimbursed for the afternoon run on 25 August and the two daily runs for the days of 26, 29, 30 and 31 August and 1 and 2 September. The total hours are 22.75 and the payment owed for those hours is \$364.00.

[30] I am satisfied that Mr Grant endeavoured to find alternative employment but was unsuccessful in doing so. Section 123 (1) (b) provides for the reimbursement of wages lost as a result of the grievance.

[31] Thirteen weeks' wages at \$16 per hour for a 17.5 hour week come to \$3,640.00. A deduction of ten days is required as a period of two weeks' school holidays fell within the thirteen week period. Deducting \$560.00 gives a total of \$3,080.00.

[32] Section 123 (c) (1) (i) provides for an award of compensation. Mr Grant has sought an award of \$20,000.00. The compensation award I make is for both the unjustified disadvantage and dismissal. I set the amount of compensation at \$10,000.00.

## **Contribution**

[33] Section 124 requires me to consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and, if necessary, to reduce the remedies accordingly. Consideration is to the situation that gave rise to the grievance not to the dismissal itself. Causation issues are determined at this stage, not blameworthiness. If there is a causal connection then it is necessary to determine whether those actions require a reduction in remedies. Such actions are generally blameworthy actions.

[34] There was a causal connection between Mr Grant taking a camera on the bus and the situation that gave rise to the personal grievance.

[35] The Heberds Bus Services Rules for Bus Drivers provide that drivers are not to talk to children unless there “*is a need for behavioural reasons.*” Mr Grant was aware of these rules and should not have interacted with the children. The interaction that arose as a result of his taking the camera was blameworthy. I assess Mr Grant’s contribution at fifteen per cent and reduce the remedies apart from holiday pay accordingly.

## **Summary**

[36] Heberds Bus Services 2009 Limited is to pay the following sums to Mr Grant:

- a. \$8,500.00 as compensation pursuant to s 123 (1) (c) (i).
- b. \$2,650.24 holiday pay.
- c. \$309.40 as reimbursement for the unjustified suspension pursuant to s 123 (1) (b).
- d. \$2,618.00 as reimbursement for the unjustified dismissal pursuant to s 123 (1) (b).

## **Costs**

[37] Costs were reserved. The applicant is to file a memorandum within 28 days of the date of this determination. The respondent should file a memorandum in reply within 14 days of receipt of the applicant's memorandum.

Dzintra King

Member of the Employment Relations Authority