

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2012] NZERA Wellington 19  
5350660

BETWEEN            KEVIN GRAY  
                                 Applicant  
  
AND                    TRANZIT COACHLINES  
                                 (WELLINGTON) LTD  
                                 Respondent

Member of Authority:     Michele Ryan  
  
Representatives:           Graeme Clarke Advocate for Applicant  
                                 Michael Gould Counsel for Respondent  
  
Investigation Meeting:     25 January 2012  
  
Submissions received:     1 and 13 February 2012 from Applicant  
                                 8 February 2012 from Respondent  
  
Determination:             22 February 2012

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     The applicant Mr Kevin Gray (“Mr Gray”) was employed by the respondent Transit Coachlines (Wellington) Ltd, (“Transit”) for six and a half years as a driver prior to his dismissal. He was dismissed by Transit on 13 July 2011 for falsification of his time sheets and log book, unauthorised use of a company vehicle and claiming additional work time during absence from the workplace. Mr Gray says he was unjustifiably dismissed. He seeks reinstatement to his former position as well as reimbursement for lost wages, compensation and costs.

[2]     Transit denies that it dismissed Mr Gray unjustifiably and claims Mr Gray’s dismissal was justifiable and is what a fair and reasonable employer could have done in all the circumstances at the time.

**The facts**

[3] On the evening of Friday, 24 June 2011, Mr Gray sent a text message to the Tranzit's Operations Manager, Ms Sharon Mahon, stating: "*Sorry cant work nites cant sleep u know this health and safety*". The text message raised concerns for Ms Mahon as to Mr Gray's health and she responded by advising Mr Gray to take the weekend off but that she would speak with Company Manager Mr Daniel Hanson on Monday.

[4] On 29 June 2011 Mr Gray met with Human Resources Manager, Ms Marilyn Watkins and Mr Hanson to discuss the text message. A fatigue assessment was conducted during the meeting but no significant indicators of fatigue were identified. Mr Gray advised the issue was not that he was fatigued but that he was unhappy about the 10 hour break between the completion of rostered shifts when doing 'Rail work'<sup>1</sup> and the commencement of a following shift.

[5] Following the meeting of 27 June 2011 and in response to Mr Gray's assertions that a 10 hour break between shifts was common, Tranzit undertook a review of Mr Gray's timesheets from April 2011 until June 2011.

[6] The review revealed there were two occasions in the time period assessed where a 10 hour break had occurred i.e. 15/16 June and 16/17 June 2011 in contrast to Tranzit's preferred practice that drivers have a 12 hour rest period between shifts. The review raised additional concerns for Tranzit and it wrote to Mr Gray on 1 July 2011.

[7] The letter of 1 July 2011 was disciplinary in nature and advised Mr Gray that it had four serious concerns. Two concerns do not appear to be relied on by Tranzit as cause for disciplinary action and therefore it is unnecessary to repeat these in this determination. The alleged concerns relevant to these proceedings were stated in the letter, as well as a relevant excerpt from Tranzit's House Rules, as follows:

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<sup>1</sup> Work which involves transporting passengers when trains are not available.

3) ...

*This review has highlighted several inconsistencies:*

*14<sup>th</sup> June 11 ... Scheduled Finish Time 1.30am Time Sheet states: 2.00am*

*15<sup>th</sup> June 11 ... Scheduled Finish Time 1.30am Time Sheet states: 2.00am*

*4) It has also been brought to my attention that you have on occasion left the yard and taken a coach home between allocated work. Authorisation to leave the depot or to remove a vehicle from the depot has not been requested or issued. Your time sheet also does not reflect this unauthorised break.*

*Please refer to the Tranzit House Rules:*

*Serious misconduct will normally result in immediate dismissal.*

- *Falsification of company records, including time keeping records*
- *Unauthorised possession of company property*
- *Unauthorised absence from work, including misleading the employer as to the nature of/reason for an approved absence*

[8] Mr Gray sought and received a copy of his employment agreement and personnel file on 4 June 2011. Having received advice from his advocate he sent an email on 5 July 2011 requesting time sheet and waybill<sup>2</sup> records for the previous three months and any records relating to the allegations of inconsistency between the waybills and timesheets of 14 and 15 June 2011. He noted that the allegations in regards to leaving the depot in a company vehicle without authorisation lacked specificity and asked Tranzit to identify those occasions.

[9] Tranzit wrote to Mr Gray on 5 July 2011 although it appears this correspondence was sent prior to receipt of Mr Gray's information request of the same date. The allegations against Mr Gray expressed previously in the letter of 1 July 2011 were restated word-for-word as recorded at paragraph [7] above. The letter further advised the allegations "*are deemed serious misconduct which can result in disciplinary action up to termination of employment*". Mr Gray was recommended to bring a support person to a meeting scheduled for 11 July 2011 to hear his response to the allegations.

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<sup>2</sup> Documents which record information such as where and what time passengers are required to be picked up and transported to.

[10] On 7 July 2011 Tranzit wrote in response to Mr Gray's information request and attached an electronic copy of surveillance footage which purported to show when completion of work time occurred, although Mr Gray says he was unable to view the footage. The dates of alleged concern for time sheet inconsistencies were different to those expressed in Tranzit's earlier correspondence and no dates were referred to that related to the allegations of unauthorised use of a company vehicle, as follows:

*...you will find the following documentation enclosed.*

*Your concern that you only have a 10 [sic] break when rostered to Rail work  
Time Sheets 19 June 2011 and 3 July 2011*

*Time keeping inconsistencies [sic]*

*Please refer to the supplied surveillance footage and your completed Log Book &  
Time sheets: 16 & 18 June 2011*

*Time sheets: 24 April 2011 & 5 June 2011*

*Unauthorised departure from the depot and the removal of a company vehicle*

*Please refer to your log book sheets and time sheets supplied*

[11] Mr Gray and his advocate met with Mr Hanson, Ms Watkins and Tranzit's Senior Appraiser Mr Graeme Foote at 10.30am on 11 July 2011. Prior to the disciplinary meeting Mr Gray had prepared a written statement which was read out by his advocate. Notes were also taken by Tranzit in the meeting. Both these documents were provided in evidence to the Authority.

[12] In response to the allegations of inconsistencies between scheduled finishing times and actual finish times recorded on his time sheets, Mr Gray frankly admitted that when he was unable to take a break he would falsely record a half hour (unpaid) break in his log book and add half an hour onto his time sheet so as to ensure he was paid for the time he worked. He said that all the drivers do this and it was common practice amongst them. He also advised that he rounded recorded time either up or down on his time sheet to the nearest half hour according to the time that he finished.

[13] Mr Gray's explanation to the allegation that he had on occasion left the yard and taken a coach home was that he had always advised Ms Mahon prior to taking the coach home and at no stage has she advised him that he was not to do so. He said whenever he had taken the vehicle home between scheduled jobs this had been recorded in his log book which was supplied to the company every fortnight. He stated that this had occurred over the last four years and he had never hidden this fact. The meeting concluded soon after midday and Tranzit advised Mr Gray that it would consider the information it had obtained from him. No discussion or arrangements were made as to what may happen next.

[14] At 9am on 13 July 2011 Ms Watkins contacted Mr Gray by phone. She read out the contents of a one page letter dated the same day which advised Mr Gray of his dismissal as of that date.

## **Discussion**

[15] Tranzit is required to justify its decision to dismiss Mr Gray according to the recent amendments<sup>3</sup> to s103A 'Test of justification' of the Employment Relations Act 2000 ("the Act"). Pursuant to the new s103A test, the Authority must consider and determine, objectively, whether Tranzit's actions were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[16] The Employment Court in its recent decision *Angus and McLean v Ports of Auckland Limited*<sup>4</sup> provided guidance as to the interpretation of the new test and held:

*[35] ...the new test allows for more than one possible justifiable outcome and more than one possible justified methodology."*...

...

*[37] The effect of new s103A is that as long as what happened (and how it happened) is one of those outcomes that a fair and reasonable employer in all the circumstances could have decided upon, then the Authority and the Court will find that justified.*

[17] It is also clear from *Angus*<sup>5</sup> that procedural fairness remains an important feature of an employer's (in this case Tranzit's) process when contemplating a

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<sup>3</sup> Section 15 Employment Relations Amendment Act 2010

<sup>4</sup> [2011] NZEmpC 160

<sup>5</sup> Ibid at [26]

decision to dismiss or disadvantage an employee. Not only must the decision to dismiss be based on reasonable grounds but the way Transit undertook to make the decision must be fair.<sup>6</sup>

[18] In applying s103A(3) the Authority must give consideration to:

- a) *whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and*
  - 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.*
- (4) *In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.*
- (5) *The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of the defects in the process followed by the employer if the defects were-*
- (a) *minor, and*
  - (b) *did not result in the employee being treated unfairly.*

[19] The particular issues which need to be determined in this matter are:

- a. Did Transit fairly provide sufficient detail and information to Mr Gray about its concerns?
- b. Was Transit able to reasonably conclude that Mr Gray had engaged in the instances of serious misconduct it claims he did?
- c. Did Transit provide an opportunity for Mr Gray to comment on the information relevant to the investigation and Transit's decision to dismiss?

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<sup>6</sup> *NZ Food Processing IUOW v Unilever NZ Ltd* [1990] 1 NZILR 33,

**Did Tranzit fairly provide sufficient detail and information to Mr Gray about its concerns?**

[20] Ms Watkins advised the Authority that Tranzit is one of a group of nine companies. She is employed as a professional HR Manager to provide HR advice to those companies. Ms Watkins attended the meeting of 29 June 2011 which led to Tranzit commencing disciplinary action against Mr Gray and she was closely involved with the disciplinary process until Mr Gray was dismissed. In these circumstances I assess Tranzit was well resourced to undertake a fair investigation into its concerns in relation to Mr Gray.

[21] In his statement before the Authority, Mr Gray said that by the time he attended the disciplinary meeting he was confused about what Tranzit wanted him to explain and that some of the information he had requested had not been provided.

[22] In relation to allegations of time sheet inconsistencies Tranzit's letters of 1 and 5 July 2011 advised that the dates of concern were *14 & 15 June*. However Tranzit's later letter of 7 July 2011, in response to Mr Gray's request for information, listed *24 April and 5, 16 & 18 June 2011* as of concern. It is not apparent whether these dates were of additional concern for Tranzit or if it wished to substitute the dates previously advised with the dates advised on 7 July. Mr Gray says he received some information relating to the dates contained in the 7 July letter but not the time sheets or the way bills which would respectively identify when he finished a job and when he was scheduled to finish a job.

[23] In contrast to the dates raised by Tranzit as of concern prior to the disciplinary meeting, the notes of the disciplinary meeting evidence that only two dates were discussed in relation to time sheet inconsistencies: *12 and 23 April 2011*. Neither of those two dates had been advised to Mr Gray as being of concern before the disciplinary meeting. It appears during the investigation meeting Tranzit accepted Mr Gray's explanation as to events on 12 and 23 April but it then proffered written evidence before the Authority as proof of misconduct on these specific dates.

[24] Mr Gray also says that the time sheets in relation to the allegation of unauthorised removal of a company vehicle were not supplied. I have already noted

that Tranzit did not specify any particular dates in relation to this allegation in any of its communications to Mr Gray prior to the investigation meeting.

[25] In their respective statements before the Authority Mr Hanson and Ms Watkins each identically listed 11 dates as proof of Mr Gray's misconduct but those dates do not match any of the dates of concern alleged in any of the three letters (1, 5 and 7 July) to Mr Gray with the exception of 14 June which was categorised as relating to 'unauthorised use of a vehicle' as opposed to 'time sheet inconsistency' in the letters of 1 and 5 July). Before the Authority Tranzit did not challenge Mr Gray's concerns as to its failure to provide the information he had requested. Further Tranzit was unable to explain why the 11 dates put before the Authority were not put to Mr Gray prior to the disciplinary meeting. When asked what exact dates were of concern for Tranzit prior to the disciplinary meeting Tranzit was unable to directly answer and instead advised "it was the general pattern of behaviour".

[26] Tranzit's letter of dismissal recorded one of the reasons Mr Gray was dismissed was because he had "*claimed additional work time during absence from the workplace*". This allegation was never put to Mr Gray at any point of the disciplinary process.

[27] In a disciplinary process, requirements of fairness include as a minimum, that an employer must be clear to the employee about what, and when, the matters of concern occurred. Section 4(1A)(c) of the Act requires an employer to provide to the employee information relevant to a decision which may adversely affect the employee's continued employment. This includes investigations into matters which may result in disciplinary action. It appears Mr Gray responded in a general way to the allegations against him. I accept however Mr Gray's evidence that he was confused as to what exactly Tranzit wanted him to explain and he was not provided with information relevant to the concerns Tranzit alleged.

[28] I consider Tranzit's procedural defects in failing to provide Mr Gray with the correct dates in respect of which it had concern and the information relevant to its concerns, together with its failure to advise him of its allegation that he "*claimed additional work time during absence from the workplace*", were significant. The defects resulted in breaches to the good faith provisions contained at s. 4(1A)(c) and

the minimum requirements of s. 103A(3)(b). As a consequence Mr Gray was unable to properly respond to the serious matters alleged against him.

**Was Transit able to reasonably conclude that Mr Gray had engaged in the instances of serious misconduct it says he did?**

[29] Transit dismissed Mr Gray for reasons stated in its letter of 13 July 2011 as follows:

*... you have stated that you had added addition [sic] hours to your time sheet and log book entries to the days in question.*

*Taking into account your explanations the following actions listed below amount to serious misconduct.*

1. *Falsification of company records, by your own admission*
  - a. *Additional 30 minutes to timesheet entries*
  - b. *Additional 30 minutes to log book entries*
  - c. *Claiming additional work time during absence from the workplace*
2. *The unauthorised use of a company vehicle*

*No permission was requested from either the Manager or Operations Manager to take a company vehicle home*

...

***Falsification of Timesheets and Log Book***

[30] It is apparent from the notes of the disciplinary meeting that the matter of rest breaks and how Transit arranged for rest breaks to occur was a pivotal point of debate during the disciplinary meeting. Mr Gray's advocate asserted that Transit was (amongst other things) in breach of NZ Transport Agency rules which relate to minimum rest breaks required for bus drivers.

[31] 'Land Transfer Rule: Work time and Log Books 2007' stipulates:

*s2.1(1) "A driver...must take a rest break after 5 and 1/2 hours of continuous work time".*

...

***Rest break*** means a period of rest time within a cumulative workday.

***Rest time*** means all time that

- (a) *is not work time; and*
- (b) *is at least 30 minutes in duration; and*

*(c) is not spent in a moving vehicle associated with work.*

[32] Mr Gray's individual employment agreement states:

*6.1 The Employee shall not be required to work more than the maximum legally permitted hours without an unpaid meal break of not less than 30 minutes.*

*6.2 The Employer will provide the Employee with tea, coffee, milk and sugar free of charge at all the Employer's depots for the Employee's refreshment breaks.*

[33] The essence of the dispute as conveyed in the Authority's investigation centred on whether it is permissible for drivers to take their required meal break on a bus or whether the employer must provide facilities separate to the bus for drivers to take their break in. Tranzit says as long as the driver is not working and the bus is not moving the driver is able to take a meal break on the bus. Tranzit says this practice is compliant with NZ Transport Agency ("NZTA") rules.

[34] Conversely Mr Gray and his advocate say Tranzit is not in compliance with industry practice, NZTA rules or Health and Safety in Employment Regulations 1995. They say a meal break cannot be taken on a bus as it is a moving vehicle whether it is moving or not, although Mr Gray conceded in cross examination that he could have a rest break on the bus when it was not moving. They further contended that the employer must provide facilities separate to the bus for the driver to take a meal break as required by Regulation 4, Health and Safety in Employment Regulations 1995. They say by Tranzit's failure to provide facilities separate to the bus in which the driver can take a meal break in, the driver was in effect working and this work time was not paid by Tranzit and is unlawful.

[35] Regulation 4 Health and Safety in Employment Regulations 1995 states:

*Every employer shall take all practical steps to ensure-*

*(a) that facilities of the kinds described in subclause (2) are provided at every place of work under the control of the employer;*

[36] Subclause (2) lists a number of facilities that an employer shall take all practical steps to ensure are provided, including facilities for employees to have meals during work hours in reasonable shelter and comfort, separate from any plant.

[37] The question of what constitutes a legally compliant rest break including what “all practical steps” should be taken by an employer remained in stark contention at the disciplinary meeting and up to and throughout the investigation meeting. It needs to be noted that the issue for the Authority in these proceedings is not to make findings as to whether Tranzit is in breach of its obligations as to how its employees take rest breaks. The issue for the Authority to determine is whether it was reasonable for Tranzit to conclude that Mr Gray had engaged in serious misconduct by adding half an hour to his timesheet and log book or whether it was unreasonable of it to reach such a conclusion in circumstances where Mr Gray considered Tranzit to be in breach of its obligations and his conduct was a result of that perceived breach.

[38] Mr Gray deposed that he was not been given any instruction when he was employed by Tranzit about what he was to do in regards to taking rest breaks but acknowledged that he is very familiar with NZTA rules as to rest break requirements. He asserted that he had made “a mistake in bending to the company’s pressure to record false information in the log book” but later agreed that the company did not make him record false entries. He said difficulties in taking breaks had been raised with Tranzit over the years but had not been dealt with satisfactorily. Mr Gray was unable to advise the Authority as to when these difficulties had been raised with Tranzit or what had resulted other than stating Tranzit had inserted a statement on its Waybills stipulating drivers to: “*ensure a minimum rest break of 30 minutes before a maximum of 5.5 hours of work is reached.*” Mr Gray attested that relief drivers were available so drivers could have breaks but that this happened rarely if at all.

[39] An email written on 25 February 2011 by ex-employee Mr Colin Jackson to Tranzit complaining about the lack of relief drivers was produced to evidence Tranzit’s awareness that drivers were often not provided with relief for breaks and therefore not able to take rest breaks. However it is clear from the email that having raised the matter Mr Jackson was instructed by Tranzit to take a rest break after five and a half hours. On questioning by the Authority as to whether it was widespread practice for drivers to record rest breaks in their log books when none was taken, Mr Jackson responded that the other drivers were clear that they needed to break and that to not do so was in breach of the law. Mr Jackson advised the Authority that on occasions prior to his email of 25 February he had recorded a break in his log book

but claimed payment for the time worked. In response to questions as to why Transit did not take disciplinary action against Mr Jackson, Transit explained that when it became aware that Mr Jackson recorded rest breaks in his log book but worked through, Transit decided further training as opposed to disciplinary action was appropriate as Mr Jackson as a new employee of five months' experience. Transit submitted when it became aware via these proceedings that Mr Jackson had claimed payments for the break he no longer worked for it.

[40] Mr Gray says Transit's direction, as with Mr Jackson, was that drivers must take breaks after five and a half hours and were to pull over and stop even if passengers were on board. Alternatively if the required break occurred between scheduled trips the driver was to have the break on the bus. Mr Gray says when he did this, intending passengers would approach the bus and he felt obliged to let them on board. He says at other times at night on rail work in Waikanae there were no relief drivers and/or there was no place to go for food or coffee. In these circumstances Mr Gray's view was that Transit's directions did not comply with rest break requirements and he would record a break in his log book and add the time on his time sheet.

[41] Transit advised the Authority that it spoke to six of its 30 Wellington based drivers after the disciplinary meeting as to whether it was common practice that drivers record a break in the log book and add this time to their time sheets although it was not entirely clear when Transit made those inquiries. From those inquiries it says it was not common practice and this evidence supported the evidence given by Mr Jackson. Transit also advised the Authority that it did not accept that Mr Gray had not been provided with a break on 16 and 18 June 2011 as the team leader had confirmed he was relieved for rest breaks on those dates.

[42] I accept that Mr Gray was generally unhappy about the quality of his rest breaks. However under questioning Mr Gray acknowledged that he had not advised Transit that he recorded rest breaks in his log book and added time to his timesheets as a means to address his unhappiness. I have considered Mr Gray's explanations as put to Transit in response to the allegations of "*falsification of company records, including time keeping records*" and find it was reasonable of Transit to conclude Mr Gray had engaged in serious misconduct. Mr Gray's perception that Transit was in

breach of its legal obligations does not justify his actions in falsifying his time sheets and the maxim 'two wrongs don't make a right' seems apt in this instance.

[43] In the disciplinary meeting Mr Gray had also stated in his written statement and during the meeting that he would round up or down his timesheet to the nearest half hour depending on what time he finished his work and this was also common practice with other drivers. Tranzit provided copies of time sheets filled out by Mr Gray in 2005 as evidence that Mr Gray was aware that the time sheets should be rounded to the nearest quarter of the hour. However this conclusion and the findings Tranzit made following its inquiries as to time sheet practices were not put to Mr Gray prior to his dismissal. I return to these matters later in this determination.

*Unauthorised use of a company vehicle*

[44] The other significant topic of discussion at the disciplinary meeting was the allegation that Mr Gray had, without authorisation, taken a bus coach home between allocated work. At the time of the Authority's investigation Tranzit's evidence was that there were seven dates of concern but as previously noted no dates were given to Mr Gray prior to the disciplinary meeting as to when Tranzit thought this action had occurred and again Mr Gray answered this allegation generally.

[45] Mr Gray's explanation at the disciplinary meeting was that he always advised Operations Manager Sharon Mahon when he was taking the coach home and at no stage had she said no. He referred to a recent incident on 14 June 2011 when he had advised Ms Mahon that he was at home and the coach had broken down. He also said by taking the coach home between scheduled jobs he saved Tranzit money on travel distance. Mr Gray said that he had been taking the vehicle home for four years. Tranzit disputed Mr Gray's response stating Ms Mahon had said that Mr Gray had never asked her if he could take a vehicle home.

[46] At the Authority's investigation meeting Mr Gray's evidence was that on days when he was working on a school bus run and later scheduled to do rail work he would take the bus to his home in the suburb of Newlands and spend his non-driving time there between scheduled jobs. He said that when he initially took vehicles home he sought permission to do so but over the years he had ceased asking permission on the assumption that Tranzit knew what he was doing. He says that he would plainly

record his home destination “Newlands” in the log book and if Transit had told him if it was not okay to take the vehicle home he would have complied.

[47] Ms Mahon’s evidence was that she had allowed drivers on occasion to take buses home if it was warranted and if the next shift commenced near the drivers’ home. She said Mr Gray had been granted permission to take a vehicle home when he had requested to do so and she estimated that this occurred “about twice a year”. She stated that on 14 June 2011 Mr Gray had contacted her and notified the coach was having mechanical problems. He had requested to take the coach home which she had agreed to. She says however it was not common practice for drivers to take vehicles home without permission and that drivers were aware of this. She said drivers must ask permission before taking a vehicle home but on the dates in question no permission had been sought by Mr Gray and she had been unaware that he had done so until his log book destinations had been reviewed following his text message.

[48] There was some dispute before the Authority between Mr Gray and Ms Mahon as to the events of 14 June. Ms Mahon says Mr Gray had contacted her when he was in Johnsonville and had asked to take the coach to his home nearby and this was agreed to because the coach was in need of repair. Mr Gray says he was at home when he became aware the coach was malfunctioning and had advised Ms Mahon of this. Mr Gray says this is evidence that Ms Mahon knew he took the coach home without prior express permission and if this was a problem, he questioned why she did not take this matter up with him at that time. I find it more likely than not that Mr Gray did phone Ms Mahon from his home but that Ms Mahon mistakenly assumed he was in Johnsonville at the time of the call. I am unable to conclude from this aspect of the evidence that Ms Mahon was aware of, and consented, to Mr Gray’s practice of taking vehicles home without express prior authorisation.

[49] When Transit was asked how Mr Gray’s practice over four years to take a bus home and record his home destination “Newlands” in the log book had gone unnoticed, Mr Foote explained that a senior or local Appraiser would check 10% of log book records at the end of every fortnight for the purpose of ensuring that NZTA rules were being complied with. However the destinations recorded in the log books were not checked as this was not part of the audit.

[50] Tranzit does not accept Mr Gray's contention that it had impliedly consented to allow him to take the vehicle home nor his assertion that if his conduct in this regard was unacceptable then it should have told him so. Mr Gray acknowledged that he did not seek permission on every occasion he took the coach home and Sharon Mahon's evidence is that she had given Mr Gray permission to take a couch home on average twice a year if requested and appropriate. In these circumstances it appears Tranzit was unaware that coaches were being taken home by Mr Gray as frequently as became apparent on review of his log book and I do not consider that Tranzit tacitly consented to a practice it was unaware of. In this regard I consider Mr Gray's assumption was not well founded. On the evidence I find it was reasonable for Tranzit to conclude that Mr Gray, without authorisation, took the coach home and that this was a matter of serious misconduct.

*Claiming additional work time during absence from the workplace*

[51] The letter which advised Mr Gray in writing of his dismissal stated as a finding of serious misconduct that he had "*claimed additional work time during absence from the workplace*". During the disciplinary meeting comment was made that Mr Gray should have returned to the depot between scheduled work. Mr Gray's response was that it was common practice to take a break at home between jobs. He asked why his case was different. I take Mr Gray's response was to question why other drivers were allowed to take down-time between scheduled jobs away from the depot and he was not. This issue was not taken any further at the disciplinary meeting. In the Authority's investigation Ms Mahon attested drivers do have down-time between driving duties but excluding rest breaks drivers are expected to be available for alternative duties. No evidence was provided to the Authority as to how down-time was managed and paid for by Tranzit when drivers' scheduled work finished away from the depot and another job, also away from the depot, commenced sometime after. I find that Tranzit could not have reasonably concluded Mr Gray had engaged in serious misconduct in this way without engaging in further discussion with him on the matter or making further enquires. As previously noted this allegation was not properly put to Mr Gray in any of Tranzit's correspondence prior to the disciplinary meeting and I find it was unfair of Tranzit to expect Mr Gray to then be able to respond to it or to rely on Mr Gray's limited response as sufficient to conclude serious misconduct on this matter. I conclude it was unreasonable for Tranzit to find

Mr Gray had engaged in serious misconduct at the point that it did as regards this specific allegation.

**Did Tranzit provide an opportunity for Mr Gray to comment on the information relevant to the investigation and Tranzit's decision to dismiss?**

[52] The notes of the meeting of 11 July 2011 indicate that having listened to Mr Gray's explanations to the allegations Tranzit concluded the meeting and told Mr Gray and his representative that it would consider the information. It appears there was no further interaction with Mr Gray until he was advised of his dismissal two days later over the phone.

[53] In response to questions from the Authority Mr Hanson conceded that when making the decision to dismiss Mr Gray there had been no discussion between the representatives of Tranzit about the possibility of an alternative sanction to dismissal, or with Mr Gray about that possibility. Tranzit submits there is no absolute requirement for an employee to be given a further opportunity to comment on penalty after the employer has found serious misconduct. Ms Watkins confirmed that when she spoke to Mr Gray on the phone on 13 July 2011 there was no discussion as to penalty. However Tranzit's investigation did not provide any mechanism for Mr Gray to discuss its investigation findings that there was serious misconduct let alone what sanction may occur as a result of those findings. I find this aspect of Transit's disciplinary procedure to be unfair.

[54] It is clear Tranzit decided Mr Gray had engaged in serious misconduct and dismissed him as a result. Tranzit's conclusions that Mr Gray claimed, (i) additional work time during absence from the workplace, (ii) signed off half an hour later than other drivers, (iii) rounded up time sheets inappropriately, and (iv) had been relieved for breaks, were never put to Mr Gray. Tranzit's findings as to rest break practices of other drivers was not put to Mr Gray for comment either. In this regard Mr Gray was deprived of any opportunity to comment on those matters before a final decision was made. Tranzit's omissions to advise Mr Gray of its investigation conclusions was not a minor procedural discrepancy and I do not consider its conclusions they were ones that a fair and reasonable employer could reach in the circumstances. Whether Mr Gray could have said anything to change Tranzit's view is speculative. I find that Mr Gray should have been provided with the opportunity to do so.

### *Summary*

[55] Overall I find that Tranzit's investigation procedure contained a significant number of procedural defects which collectively impacted unfairly on Mr Gray's ability to respond to the allegations against him. Tranzit failed to:

- (a) properly advise Mr Gray of its concerns and when the concerns occurred, in breach of s. 103A(3)(b);
- (b) provide relevant information in breach of s 4(1A)(c)(i) to allow him answer those concerns;
- (c) advise Mr Gray of its findings of serious misconduct and allow him an opportunity to comment on those findings prior to dismissing him.

[56] The procedural defects were substantial and unreasonable to such a degree that Mr Gray's dismissal was unjustified. Mr Gray has a personal grievance.

### **Remedies**

[57] Having found that Mr Gray's dismissal was unjustified I turn to remedies. Mr Gray seeks reinstatement, lost wages, an unspecified amount of compensation for hurt and humiliation, and costs.

### *Contribution*

[58] In considering whether Mr Gray is entitled to any remedies for his unjustified dismissal the Authority must apply s124 of the Act, which requires that remedies are to be withheld or reduced where there has been contribution or fault on the part of the employee. I find there is a significant causal connection between Mr Gray's actions of taking a coach home without authorisation, falsifying his time sheets and log book and the situation that gave rise to his personal grievance. I assess Mr Gray's contribution to the situation that gave rise to his personal grievance as being 75 percent.

### *Reinstatement*

[59] The Employment Relations Amendment Act 2010 amended the principal Act. As at 1 April 2011 reinstatement is no longer the primary remedy. Section 125(2) now provides that the Authority may provide reinstatement if it is practicable and reasonable to do so. Mr Gray's evidence is that he does "not think that Tranzit is

honest or transparent in its dealings with drivers”. He attests he has “lost trust with the Company, most definitely”. His reasoning for seeking reinstatement is that he had been unable to find another job at the same level of pay. On questioning by the Authority as to how he thought his relationship with Transit would be if he was to return to work he stated that “the relationship would be very strained”. In these circumstances and where Mr Gray has significantly contributed to the employer’s loss of trust and confidence in him I do not think it is reasonable or practicable to order Mr Gray back into an employment relationship with Transit. I decline to make an order for reinstatement.

#### *Lost Remuneration*

[60] Section 128(2) of the Act stipulates that the Authority must order the employer to pay to the employee the lesser of the sum equal to the lost remuneration or three months’ ordinary time remuneration. The evidence is that within six weeks of his dismissal Mr Gray obtained some casual work albeit at a lower rate of pay than when he was employed by Transit. Transit must reimburse Mr Gray at his ordinary time remuneration for the first three months following the dismissal, less his net earnings of \$2670.38 from his alternative employment during that period, with the difference then reduced by a further 75% to reflect Mr Gray’s contribution. Because of his contribution I decline to order reimbursement for lost remuneration following the first three months.

#### *Compensation*

[61] Mr Gray gave limited evidence of the effect his dismissal had on him. He says he was “gutted” by his dismissal and felt humiliated by what happened to him. He states that right up to the point he was advised of his dismissal he did not believe the concerns Transit had with him were serious. On the basis of the evidence available I award \$4000 as compensation under s123(1)(c)(i). However this sum is reduced by 75% to \$1000 to reflect Mr Gray’s contribution.

#### **Costs**

[62] Costs are reserved.

**Summary of Orders**

- A. Transit is ordered to reimburse Mr Gray his ordinary rate of remuneration for three months, less net earnings of \$2670.38 with the difference then further reduced by 75%.
- B. Transit is ordered to pay Mr Gray \$1000 as compensation pursuant to s123(1)(c)(i) of the Employment Relations Act.

**Michele Ryan**  
**Member of the Employment Relations Authority**