

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 137
5295725

BETWEEN NEIL GRIFFIN
 Applicant

A N D CITIBUS LIMITED
 Respondent

Member of Authority: Helen Doyle

Representatives: Janie Kilkelly, Counsel for Applicant
 Jason Sargeant, Advocate for Respondent

Investigation Meeting 18 November 2010 at Dunedin

Submissions Received: 6 December 2010 from Applicant
 15 December 2010 from Respondent

Date of Determination: 16 September 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Neil Griffin was employed by Citibus Limited as a full time bus driver from June 2008 until 24 December 2009 when he was dismissed from his employment. He says that his dismissal was unjustified.

[2] Mr Griffin says that his actions in closing the door of the bus when a woman had entered the bus he was driving and abused him for what he described as a perceived driving infraction, and continuing to drive with the woman on board to the next stop did not amount to serious misconduct. He says his actions were reasonable in all the circumstances.

[3] Mr Griffin further says that the process adopted at the disciplinary meeting following which he was dismissed was flawed in that the decision to dismiss him was predetermined and he was treated in a disparate manner to other drivers.

[4] Mr Griffin seeks reimbursement of lost wages in the sum of \$4,926.40 together with compensation in the sum of \$10,000 and a contribution towards his costs.

[5] Citibus Limited (Citibus) says that it concluded, after a fair and impartial disciplinary meeting, that Mr Griffin had acted in a manner which had irreconcilably breached the trust it must have in him and that the decision to dismiss him was fair and reasonable and justified in the circumstances. It says that after the woman boarded the bus to complain about his driving, Mr Griffin closed the bus door without warning and drove the woman against her will to the next bus stop.

[6] The delay in the issue of this determination is regrettable. As a result of the 22 February Christchurch earthquake, the Authority until quite recently was unable to access its file in this matter and importantly its notes, and sincerely regrets any inconvenience this has caused.

Issues

[7] The Authority will need to determine the following issues:

- Was there a full and fair disciplinary investigation by Citibus that disclosed there was conduct on the part of Mr Griffin that amounted to serious misconduct?
- Was the decision to dismiss Mr Griffin a decision that a fair and reasonable employer would have reached in all the circumstances at the time the dismissal occurred?
- If the Authority concludes that the dismissal was unjustified, what remedies should be awarded and are there issues of contribution and mitigation?

[8] The Authority, in assessing justification, needs to apply the test of justification in s.103A of the Employment Relations Act 2000 inserted by the Employment Relations Amendment Act (No 2) 2004, given that the dismissal occurred before 1 April 2011.

Was there a full and fair disciplinary investigation by Citibus that disclosed there was conduct on the part of Mr Griffin that amounted to serious misconduct?

[9] Mr Griffin's work was covered at the material time by a collective employment agreement. He was also given a staff handbook and the contents of that were referred to in evidence and submissions. Disciplinary procedures are set out in clause 27 of the staff handbook that provides employees should act reasonably at all times having regard to their individual conditions of appointment, the provisions of this manual, the interests of Citibus Ltd and the public they serve. There are definitions of conduct in that clause considered misconduct and considered serious misconduct. It is stated at the start of each list that they are not to be regarded as exhaustive.

[10] On 23 December 2009, Mr Griffin advised his supervisor Richard Roberts that he could expect to receive a complaint from a woman claiming she had been kidnapped. He also explained that she had sworn at him in a road-rage type incident. The supervisor asked Mr Griffin to write an entry of what occurred in the near miss incident book and Mr Griffin wrote the following entry for 22 December 2009: "*Swarn (sic) at by car driver*". He then signed the entry.

[11] The general manager of Citibus, Tony Collins, was alerted to the entry in the incident book the following morning. A woman also arrived at the office of Citibus on the morning of 23 December 2009 and made a complaint. She was interviewed by a supervisor and her statement was then signed. The details of her complaint were as follows:

Bus pulled out from bus stop near Couplands Bakery heading south down Andersons Bay Road. I braked heavily as the bus pulled out in front of me. If I hadn't of brake so suddenly I would have hit his back wheel. I move into the right lane and tried to get his attention by tooting my horn, he ignored me. I stopped my car in front of the bus at the stop by the dairy in Musselburgh Rise. I left my car running and my children in the car and I approached the side window of the bus to talk to the bus driver but he shut the window in my face. I then went around the front of the bus to the front door and I stepped onto the bus, I asked the driver "did you see me you pulled out right in front of me and I have my children in the car". He said that he was six bus lengths in front of me. He then shut the door of the bus behind me and started driving the bus down the road and he wouldn't stop the bus. I told him my children are in the car and to stop and let me off. I kept on pushing the dinger for him to stop. He finally stopped at the next bus stop (Bayfield School). He opened the doors and I

jumped out and yelled "I'm reporting you". Then I had to run ½ a km back to my car that was still running with my children in the car.

[12] On 23 December 2009, Mr Griffin was given a letter by Mr Roberts from Mr Collins asking him to attend a disciplinary meeting the following day at 2pm. The purpose of the disciplinary meeting was to respond to an allegation of serious misconduct that he closed the door behind the woman and drove her, against her will and did not stop notwithstanding that she said her children were in her car and demanded to be let off, until the next bus stop. Mr Griffin was advised that he was welcome to bring a support person or representative to the meeting. A copy of the woman's written complaint was attached to the letter. The name and/or any other identifying details of the woman were not on the written complaint. I understand from Mr Collins' evidence that is the usual practice with a complaint. It is not unreasonable and there was no unfairness in that regard to Mr Griffin. There was no signature at the bottom of a statement. Although it is wise to have a complaint signed, in this case there was no dispute about the significant event complained of that the woman was kept on the bus against her will. I find nothing turns on the absence of her signature at the bottom of her complaint.

[13] Mr Griffin said that when he received the letter he talked to a union representative who advised him to write down a description of what had happened. Mr Griffin duly did that in the evening of 23 December 2009.

[14] On 24 December 2009, Mr Griffin was due to start work at 2pm. Mr Roberts telephoned Mr Griffin and advised him that the disciplinary meeting was being brought forward to 1pm. There was some dispute as to the exact time that the meeting started. In Mr Griffin's written evidence he referred to it starting at 1.30pm but in his evidence to the Authority he thought it started about 1.20pm and that it finished about 15 – 20 minutes later between 1.35pm and 1.40pm, a departure from his written evidence of a finish time at 2pm. I prefer Mr Griffin's oral evidence about the meeting start and finish times as more accurate than his written statement. Mr Collins also recalled the meeting being delayed. He said he thought because Richard Trainor, the operations manager of Citibus who attended the meeting as well, had been delayed. He recalled that he was ready to start the meeting at 1pm. I find that the meeting commenced between 1.10pm and 1.20pm and I accept Mr Griffin's evidence

that deliberations by Mr Collins and Mr Trainor following the adjournment of the meeting were less than one hour and more like 45 minutes.

[15] Mr Griffin attended the meeting with Marius Brok who is the Vice President of the Dunedin Branch of the New Zealand Tramways Union. Mr Griffin confirmed in his evidence that before the meeting he had talked about his written statement to Mr Brok. Mr Collins the decision maker attended the meeting with Mr Trainor.

[16] Mr Collins took handwritten notes of the meeting. These were no longer available. His evidence was that from the handwritten notes he had prepared some typed minutes that were provided to the Authority. Mr Griffin accepted that the notes covered the basis of the meeting.

[17] It is common ground that the disciplinary meeting commenced with Mr Collins advising of the allegation that Mr Griffin drove his bus with a woman on board against her will. Mr Collins emphasised the serious nature of the matter. Mr Brok recalled the word kidnapping being used.

[18] Mr Griffin then read the statement he had written the previous evening. He agreed in his statement that the woman got out of her car and headed towards the window of his bus to talk to him. He wrote that as he had no desire to speak to or listen to her, due to her swearing, he closed the window as she left her car. He agreed that the woman then headed to the door of the bus and when she arrived at the door he said *don't get on* but this was ignored by her and when she got onto the bus, pushing some passengers out of the way he said that he reiterated *get off the bus* which she ignored and started yelling abuse at him. He said in his statement that, as the woman was intent on using him as the way to get rid of her frustrations and he had passengers who had the right to get home and a timetable to keep to, he closed the door but that did not make her stop her abuse or realise the bus was about to depart and he drove to the next stop where the woman and other passengers alighted.

[19] Mr Collins explained to the Authority that because he felt there was no difference between the sequence of events described by both the complainant and Mr Griffin he wanted to understand measures taken by Mr Griffin to defuse the situation, steps to persuade the woman to leave the bus and whether there was any regret or remorse on the part of Mr Griffin for the incident. He said that he wanted to

know if this was an isolated incident with exceptional circumstances that would not be repeated.

[20] The conduct alleged to be serious misconduct of closing the bus door after the woman had come onto the bus and then driving off with her was not in dispute. It was not in dispute that the woman made requests to be let out after Mr Griffin started to drive the bus and that he did not adhere to those requests to stop until he reached the next bus stop. Mr Griffin could not recall the woman mentioning her children in asking to get off but he accepted she could have. He knew that she had a car close to where she got onto the bus and there were child car seats in the back of her car and a male passenger in the front seat in his twenties. There was no issue taken with Mr Griffin's statement that the woman had been verbally abusive towards him and was swearing.

[21] Ms Kilkelly submitted that the conduct by Mr Griffin in closing the door with the woman on the bus and driving off with her against her will until the next bus stop had been reached was not conduct which, in all the circumstances, would have amounted to serious misconduct. I find that it is conduct that might amount to serious misconduct.

[22] I have then considered whether there was a fair process in which Mr Griffin or his representative were able to put forward explanations and matters in mitigation in relation to the conduct or whether as alleged there was predetermination of the outcome which would make the process unfair.

[23] It was not unreasonable for Mr Collins to want to question Mr Griffin beyond the contents of that statement to understand aspects of the conduct so that he could make some conclusions as to its seriousness.

[24] The Authority heard from both Mr Griffin and Mr Brok about whether Mr Brok felt he was able to effectively represent Mr Griffin throughout the disciplinary meeting. One of the allegations of procedural unfairness was that he was not able to do so. In a departure from his written evidence, Mr Griffin confirmed at the Authority investigation meeting that Mr Collins did ask who would be answering the questions and Mr Griffin agreed he would be answering the questions. Mr Brok, likewise in a departure from his written evidence, agreed with Mr Trainor's recollection of this particular matter. I find that Mr Collins, rather than simply

stopping Mr Brok from participating, asked for clarification about the role of Mr Brok and who would answer his questions about the incident. Mr Griffins felt that his representative was cut off from making a statement at that particular time although Mr Brok was allowed to do so toward the end of the meeting.

[25] A representative or support person is entitled, when representing an employee in a disciplinary meeting, to make statements or comments as they think would best assist that employee. I think it likely that Mr Collins' intervention meant that Mr Brok was then somewhat confused about what he could say and when and this is supported by Mr Trainor in his evidence.

[26] That said, as a matter of commonsense, Mr Griffin was clearly the best placed person to answer questions about what happened as he was the driver and he agreed to do so. Little is achieved by having two people talking at once and Mr Brok did have an opportunity towards the end of the meeting to make a statement in support of Mr Griffin in which he referred to the issue of stress with heavy traffic and lots of people at that time of the year. In order to ascertain whether there was any unfairness I asked Mr Brok what he wanted to say when Mr Collins interjected. He said that he wanted to tell Mr Collins that it was understandable why Mr Griffin wanted to deliver the passengers on time and the woman on the bus would not leave and therefore he closed the door. Mr Griffin was able to put forward, and did both in his written statement and orally at the disciplinary meeting, by way of explanation his desire to keep to the timetable for the sake of the passengers on board. Such explanation is reflected in the letter of dismissal dated 24 December 2009.

[27] I have carefully considered whether Mr Griffin was, as he says in his written statement, stopped from saying all he wanted to about the incident in circumstances where he said he did not believe he was being listened to and he was becoming distressed.

[28] Mr Griffin in my view was able to answer the questions put forward by Mr Collins and did so along the lines outlined in his written statement with one exception that I shall come to shortly. His defence was that he had done nothing wrong. There was no change from that position at the time of the Authority investigation. Mr Griffin was able to explain to Mr Collins that the woman was abusive. He was able to state that he had done nothing he felt to apologise for in terms of his driving and therefore did not do so. He stated that he did not consider his

conduct to be that of abduction because the woman had voluntarily got onto the bus he was driving and that the actions he took, closing the door and driving off, were the right ones at the time in order to comply with his timetable requirements and get other passengers home.

[29] There was one change from the written statement. I find that Mr Griffin answered two questions from Mr Collins about whether the woman would have heard him ask her to get off the bus before he closed the door. His response was that he did not, in hindsight, think she had heard him. Mr Griffin now says that he would have expanded on that to say he did make the statements to get off the bus but the woman was not listening to him because she was carrying on abusing him. A conclusion though, even with that expanded explanation, was still available to Mr Collins that the woman probably did not hear anything that was said about getting off the bus. Mr Griffin accepted that he did not warn her he was about to drive off. He did not say for example that he needed to stick to his timetable and if she did not get off he would drive away. He said that he relied instead on the hissing of the doors as they closed to warn her.

[30] Mr Griffin alleged that Mr Collins persistently questioned him in a way that was bullying or harassment. I find where a question was repeated it was more likely Mr Collins had a genuine desire to properly understand the responses and what had happened and Mr Griffin was not so forthcoming in his answers. The questions I am referring to are about what was said to calm the woman down and what was said to her before the door closed and Mr Griffin drove away. Mr Griffin's answer to the question about what was said to the woman was not as it appeared in his statement and Mr Collins said he wanted to be clear about that. It may have been Mr Griffin was taken aback at Mr Collins' view of the seriousness of the allegation which was stated several times but objectively assessed it did not prevent him putting forward his primary defence that he did not do anything wrong.

[31] Mr Collins asked Mr Griffin to expand on the stress factors put forward by Mr Brok. Before he did so, and much was made of this, Mr Collins said words to the effect that he would have expected an inappropriate stress reaction would be to forcibly remove the person from the bus. I think it likely that Mr Collins said words to the effect that he could have understood that better than trapping the person on the bus. Mr Collins was voicing his thoughts and there was an opportunity for comment

to that. I do not think anything particularly turns on that. Mr Griffin's only comment to Mr Brok's statement about stress was about keeping to the timetable as people had a right to get home. Objectively assessed an explanation of stress does not sit as comfortably where the defence is an absence of wrongdoing, as it does with an explanation where it is accepted there was a mistake or lack of judgement about a particular matter.

[32] Ms Kilkelly submits that the disciplinary meeting was held too soon to the event to enable Mr Griffin to consider and formulate his defence. I accept that the timing of the matter right on Christmas was most unfortunate. Balanced against that the allegation was serious and as set out earlier Mr Griffin was clear in his defence that he had done nothing wrong. I am not satisfied that the timing of the meeting unfairly prevented him properly advancing his defence and issues in mitigation.

[33] Ms Kilkelly submits that the outcome was predetermined. She refers to particularly the final pay calculations and the knowledge that some members of the public had about the disciplinary outcome.

[34] I shall start though with considering whether the conduct of the meeting by Mr Collins suggested pre-determination or a closed mind. Objectively assessed he asked questions that were relevant given that the conduct alleged of trapping the woman on the bus was admitted, to establish if there were other issues to consider that would impact on the seriousness of that conduct. If an answer was unclear the evidence is that he repeated the question. If a process had been approached with a closed mind then it is less likely such an effort would have been made. He gave some thought that he then articulated aloud about issues such as stress and how they may have impacted on actions taken or not taken by Mr Griffin. I do not find that is indicative of a closed mind. I also accept Mr Sargeant's submission that it was not until about 1.45pm that another bus driver, Joanne Johnston, was asked to cover for Mr Griffin's 2pm shift and it is more likely that if there had been predetermination that such cover would have been organised earlier.

[35] It was alleged Mr Collins asked the payroll officer Akbar Saib to prepare Mr Griffin's holiday pay before the disciplinary meeting. The evidence was that Mr Collins asked Mr Saib for Mr Griffin's personal file in the morning and although Mr Saib was aware there was a disciplinary meeting he said in evidence that he did not know what it was about. He said that just in case it was necessary he printed off

pay records on his own initiative so that if required he could undertake any holiday pay processing. His evidence was supported by the Administration Manager at Citibus, Sheryl Spiers who came into the office to make sure everything was organised for Christmas. There was no evidence to satisfy me that Mr Collins asked for this to be undertaken before 2.30pm when he had made the decision to dismiss.

[36] I accept Mr Collins' evidence as inherently more likely that he did not talk to either the complainant or anyone outside of Citibus about the decision to dismiss before such decision was arrived at and conveyed to Mr Griffin at about 2.35pm. In doing so I accept that Ms Johnston overheard some members of the public talking on the day of the dismissal about the dismissal of Mr Griffin. She did not know however how they had heard about that. The Union thought that Mr Collins must have advised the complainant of his decision before Mr Griffin was told – see letter from Mr Simpson President of Tramways Union 30 December 2009. Mr Collins said in his evidence in fact he did not talk to the complainant until 5 or 6 January 2010 and he said that on being advised of this concluded Mr Griffin must have said something. Mr Griffin denies that he did. The evidence does not satisfy me that Mr Collins was the source of any knowledge about either the disciplinary process or the outcome.

[37] Ms Kilkelly submits that the most significant failure by Citibus was that it did not put its conclusion Mr Griffin could not be trusted because he did not believe that what he did was wrong and was not remorseful and may act in a similar manner again. I have carefully considered that matter. It was Mr Griffin's defence to the admitted conduct that he had done nothing wrong. As a consequence of that defence being put Mr Collins had to consider it and conclude whether he accepted that or not. He did consider it and did not accept that Mr Griffin had not done anything wrong and concluded that what Mr Griffin had done was wrong and that he had lost trust in him. He concluded that there was a risk of a repeat of such conduct. He did not in my view have to put his conclusion to Mr Griffin again for comment for fairness to be done.

[38] When the meeting adjourned Mr Collins and Mr Trainor considered what was said by Mr Griffin. Mr Collins concluded that the conduct of entrapping a woman on a bus and driving with her against her will was serious misconduct. He said that he considered the explanations given and matters raised in mitigation including the stress matter put forward. He concluded that he had lost all trust in Mr Griffin. After about

45 minutes, he typed out a letter of dismissal and arranged for the payroll officer, Akbar Saib, to make up Mr Griffin's final pay.

[39] The meeting then reconvened just after 2.30pm and the decision was advised to Mr Griffin that he was dismissed. He was provided with a letter and then a copy of his final pay slip.

Conclusion

[40] I find in conclusion that there was a full and fair investigation by Citibus for the reasons outlined above that disclosed conduct of keeping a non paying customer in the bus against her will that, objectively assessed, a fair and reasonable employer would have found to be serious misconduct.

Was the decision to dismiss Mr Griffin a decision that a fair and reasonable employer would have reached in all the circumstances at the time the dismissal occurred?

[41] I have objectively considered the relevant circumstances. Mr Griffin was driving at a busy time of the year being a few days before Christmas. It was a challenging and stressful time and he was dressed as Santa. Mr Griffin in his evidence refers to the embarrassment and distress of the situation where he had been approached by a woman who was verbally abusive and he did not want to interact with her in those circumstances. He did not for example feel in those circumstances that he wanted to give her his supervisor's name for her to complain to about his driving. Those are matters that a fair and reasonable employer would take into account in reaching a decision as to a disciplinary outcome. Objectively assessed his explanations supported that he saw himself as the victim of this woman's tirade and that in abusing him from outside the bus, then entering his bus and continuing to abuse him having pushed passengers he was not to blame for his actions in closing the door and moving away with her in the bus. Mr Griffin did not consider that abduction would be a matter that a fair and reasonable employer was entitled to take into account in terms of trust and confidence.

[42] Mr Griffin had had some customer training through the Kiwihost course about passenger interactions. Although this woman was not a passenger there was training about how to deal with a conflict type situation although not the situation he was facing with the woman on the bus. A fair and reasonable employer would take into account however that there had been some training.

[43] Mr Griffin did not consider that in closing the door behind the woman and driving away to the next bus stop he did anything wrong. He was therefore not remorseful. That is something I find a fair and reasonable employer was entitled to take into account in making its decision in terms of trust in future behaviour. It was not a situation where on hearing the woman's demands to be let off and, knowing that she was being driven away from her children and car, Mr Griffin immediately stopped and let her out. That would have shown some insight into the situation and the evidence supports that she clearly would have got out which was the objective. Instead Mr Griffin continued to drive until he chose to stop which was at the next bus stop to let other passengers out and she was then permitted to get out. One of the circumstances that a fair and reasonable employer would have taken into account was the absence of any insight into anything wrong about that conduct. There was no satisfactory explanation at the time of the dismissal as to why he did not stop earlier to let her off except that he was sticking to his timetable. Mr Griffin did not say he was so stressed that he could not stop and neither did he say there were no safe places to stop. Although he elaborated on his belief that stopping between stops was unlawful in his evidence I do not find that was the main reason he gave in the disciplinary meeting for not stopping, rather it was sticking to the timetable. He made a deliberate decision not to stop.

[44] Another circumstance is that Citibus provides transport services for the public and needs to have trust that their bus drivers can respond appropriately to a whole range of circumstances. There were some unusual circumstances in this matter. Mr Griffin was the victim of verbal abuse which would have been very upsetting and embarrassing to him. The conduct however, which he does not dispute, in closing the door behind the woman without warning her he was intending to drive off, and then not stopping when she asked to be released, is conduct I find in all the circumstances that a fair and reasonable employer would have reached the decision to dismiss Mr Griffin for. I was referred to one situation where it was alleged when compared there was disparity of treatment. I find that matter to be a different one on its facts and that there is no sufficient degree of factual similarity for a comparison of penalty to be made – *Sutherland v Air NZ Ltd* [1993] 2 ERNZ 386 at p 397.

[45] I find that the decision to dismiss Mr Griffin for entrapping a woman against her will who was not a passenger on the bus and refusing to let her off when she asked

was conduct for which a fair and reasonable employer would have reached the decision to summarily dismiss.

[46] I do not find, in this case, that Mr Griffin has a personal grievance that he was unjustifiably dismissed. There is nothing further I can do to assist Mr Griffin.

Costs

[47] I reserve the issue of costs.

Helen Doyle
Member of the Employment Relations Authority