

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 462/10  
5279069

BETWEEN                      SHANNON HENRY  
                                         Applicant  
  
AND                                GO BUS TRANSPORT  
                                         LIMITED  
                                         Respondent

Member of Authority:      Vicki Campbell  
  
Representatives:            Max Whitehead for Applicant  
                                         Andrea Twaddle for Respondent  
  
Investigation Meeting:      3 June 2010 at Hamilton  
  
Submissions Received:      11 June 2010 from Applicant  
                                         18 June 2010 from Respondent  
  
Determination:                28 October 2010

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**DETERMINATION OF THE AUTHORITY**

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[1] Ms Shannon Henry was employed by Go Bus from 1 November 2007 until her dismissal in May 2009. Ms Henry was dismissed for sexual harassment and claims the dismissal was unjustified and seeks reinstatement. Ms Henry also claimed her employment was subject to an unjustified disadvantage however, the disadvantage claim was withdrawn on the day of the investigation meeting. Go Bus denies the claim for unjustified dismissal.

[2] The issue for determination is whether Ms Henry's dismissal can be justified by Go Bus and if not, what, if any, remedies should be awarded.

**Witnesses under summons**

[3] The Authority issued summonses for two witnesses who were required to attend the investigation meeting and give evidence. The witnesses were Mr Simmons and Mr Matthews. The Authority wished to question these two witnesses with regards to their involvement in the investigation process undertaken by Go Bus.

[4] Neither witness attended at the appointed time. Mr Simmons had accepted payment to attend the investigation meeting. This matter is now in the hands of the Department of Labour's Legal team.

### **Background**

[5] Go Bus contracts to provide school bus services throughout the North Island. In March and April 2009 it had contracts to provide services in Ohakune. Four drivers were offered the work in Ohakune. As they were all Hamilton based drivers accommodation was provided for them.

[6] The accommodation was a rented four bedroom house. The four drivers (3 male and 1 female) each had their own bedrooms but were required to share kitchen and bathroom facilities.

[7] Ms Henry had received a final written warning on her position on 12 March 2008. This warning related to Ms Henry swearing at a school child while undertaking a school bus run.

[8] Just prior to the complaints which led to Ms Henry's dismissal, Go Bus had also investigated complaints that Ms Henry had shown pornographic material to students and allegations that she had told some students that she would be getting "...pissed..." with the students. Ms Henry received a reprimand as a result of the investigation into these allegations and the expected standards of conduct were discussed with her. Go Bus was also to put in place an action plan to assist Ms Henry, however that never eventuated.

[9] On 3 April Ms Henry made allegations about two of the other drivers residing with her in Ohakune, regarding use of illegal substances, driving while under the influence and escapades with a young girl from the local college. These allegations were passed onto a colleague who passed them onto Mr John Pye, Depot Manager for the Ohakune area. These allegations were investigated and both employees were subject to a disciplinary process. I understand that neither employee is currently working for Go Bus.

## **The dismissal**

[10] Section 103A requires the Authority to have regard to all the circumstances at the time of the dismissal, including the contractual obligations between the parties and the resources available to the employer<sup>1</sup>.

[11] Although the Authority does not have unbridled licence to substitute its decision for that of the employer<sup>2</sup> it may reach a different conclusion, provided that conclusion is reached objectively, and with regard to all the circumstances at the time the dismissal occurred<sup>3</sup>.

### *The allegations*

[12] On 6 April 2010 Mr Henry Simmons contacted Mr Pye and made allegations that Ms Henry had sexually harassed him on 31 March and 1 April 2010. Mr Simmons was one of the four drivers on temporary assignment in Ohakune. Mr Simmons was asked to provide his complaint in writing which he did, and this was received by Go Bus on 11 April.

[13] Prior to Go Bus receiving Mr Simmons written complaint, a second employee, Mr Lonny Matthews who was also on temporary assignment in Ohakune made a written statement confirming the allegations made by Mr Simmons. Coincidentally Ms Henry's complaint which she made on 3 April was regarding the conduct of these two employees.

[14] On receipt of the formal notification of the allegations from Mr Simmons and Mr Matthews Go Bus wrote to Ms Henry outlining the allegations and seeking a response before Go Bus determined whether disciplinary action would be necessary.

[15] Ms Henry wrote on or about 22 April 2010 denying all the allegations. Go Bus wrote to Ms Henry and advised her that a formal disciplinary meeting would proceed and that she could have a representative with her. The allegations were once again set out for her and a copy of the Sexual Harassment policy was attached for her information.

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<sup>1</sup> *Toll New Zealand Consolidated Ltd v Rowe*, unreported, 19 December 2007, Shaw, J, Auckland Employment Court AC 39A/07.

<sup>2</sup> *X v Auckland District Health Board* [2007] 1 ERNZ 66.

<sup>3</sup> *Air New Zealand v Hudson* [2006] 1 ERNZ 415.

[16] The disciplinary meeting went ahead on 8 May. Present at the meeting was Mr Ben Barlow, Operations Manager and Ms Kura Poulava, Human Resources Manager. It is common ground that Ms Henry did not want a representative to assist her and the meeting proceeded after Go Bus had confirmed that she was happy to proceed on that basis.

[17] Ms Henry again denied the allegations and suggested that the motivation for the two employees making the allegations was in retaliation for the allegations she had made about them three days before they raised their complaints.

[18] Ms Henry, in signing her employment agreement, acknowledged that she would adhere to the policies of Go Bus. The Go Bus policy on sexual harassment contains a list of examples of the type of conduct which might amount to sexual harassment. The list includes "...unwelcome sexual flirtation or suggestions..." and "...advances or propositions..." The conduct complained of by Mr Simmons included allegations that Ms Henry had flirted with him and made improper suggestions while dressed only in her underwear.

[19] The policy also makes it clear that sexual harassment may amount to serious misconduct and that disciplinary action up to and including termination of employment may result.

[20] I am satisfied the process of investigating the allegations against Ms Henry by Go Bus was full and fair. Ms Henry was given full information about the allegations against her, she was told of the possible consequences and that she could have a representative present at the meeting. Ms Henry chose not to seek advice or representation at the meeting and made it clear, upon enquiry from Go Bus that she was happy for the meeting to proceed on that basis.

[21] Ms Henry denied the allegations and raised the possibility that the allegations were made in retribution of her complaints about the two individuals concerned. Ms Poulava told the Authority that she had considered that it was possible the employees had made the complaints in retaliation for Ms Henry's complaint and so she had put that to them when she interviewed them about their complaints against Ms Henry. Both men denied they had made the complaints in retaliation.

[22] Ms Poulava also interviewed the fourth employee staying in the accommodation. He told Ms Poulava he had not witnessed anything at the house

except that he had seen Ms Henry walking around in her underwear early one morning. He told Ms Poulava that from that time onwards he stayed in his room until Ms Henry was dressed and ready for work. At the investigation meeting Ms Henry acknowledged that she usually went from her bedroom to the bathroom clad only in her underwear as she did not own a dressing gown. She would then get dressed while she was in the bathroom.

[23] Ms Poulava considered that the description of Ms Henry's underwear given by the fourth employee was very similar to the description given by both Mr Simmons and Mr Matthews. Mr Poulava concluded the allegations made by Mr Simmons were more likely than not, true. Given Ms Henry's previous work history, together with a finding that she had more likely than not conducted herself in a manner that was described in the company's policy as constituting sexual harassment the decision was made to dismiss Ms Henry for serious misconduct.

### **Credibility**

[24] The failure of Mr Matthews and Mr Simmons to attend the investigation meeting after being summonsed and, in particular Mr Simmons who had received payment for his attendance in advance leaves me with serious questions about their credibility.

[25] However, during the course of the investigation meeting it was also clear that Ms Henry's recollection changed at least three times from what she had sworn in her written evidence to the oral evidence she gave at the investigation meeting.

[26] Where the evidence was in dispute, I have preferred the evidence of Ms Poulava over that of Ms Henry.

### **Conclusion**

[27] Standing back and considering all of the facts objectively, I find the dismissal of Ms Henry was justified and the actions of Go Bus were what a fair and reasonable employer would have done in all the circumstances.

[28] The allegations of sexual harassment from Mr Simmons was conduct similar in nature to the previous unprofessional behaviour which Ms Henry had been warned

about and for which she had received a reprimand. These matters could not be ignored by Go Bus in the context of a disciplinary process.

### **Costs**

[29] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, Go Bus Limited may lodge and serve a memorandum as to costs within 28 days of the date of this determination. Any submissions in reply must be lodged within 14 days of receipt. I will not consider any application outside that timeframe without the prior leave of the Authority.

Vicki Campbell  
Member of Employment Relations Authority