

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2018] NZERA Auckland 308  
3027711

BETWEEN

HENRY KAWITI  
Applicant

A N D

AIRBUS EXPRESS LIMITED  
TRADING AS SKY BUS  
Respondent

Member of Authority: T G Tetitaha

Representatives: R Morgan, Advocate for Applicant  
S Laphorne/M Chen, Counsel for Respondent

Investigation Meeting: 4 October 2018 at Auckland

Submissions Received: 4 October 2018 from Applicant  
4 October 2018 from Respondent

Date of Determination: 9 October 2018

---

**DETERMINATION OF THE AUTHORITY**

---

- A. Mr Kawiti was the subject of two previous final warnings the effect of which could have resulted in him being dismissed.**
- B. However there are procedural defects in terms of the requirements of s103A of the Act. These defects were not minor and did cause unfairness. In the circumstances Mr Kawiti was unjustifiably dismissed.**
- C. Mr Kawiti's conduct does require a substantial reduction in remedies. The remedies are to be reduced by 50%.**
- D. Airbus Express Limited is to pay lost remuneration of one weeks net wages to Henry Kawiti including a reduction of 50% for contributory behaviour pursuant to ss.123(b), 128 and 124 of the Employment Relations Act 2000.**

**E. Airbus Express Limited is to pay compensation of \$3,500 to Henry Kawiti including a reduction of 50% for contributory behaviour pursuant to ss.123(c)(i) and 124 of the Employment Relations Act 2000.**

**F. Airbus Express Limited is ordered to pay to Henry Kawiti \$1,200 towards his legal costs.**

### **Employment relationship problem**

[1] Henry Kawiti was employed by Airbus Express Limited trading as Sky Bus (Sky Bus) until he was dismissed on 9 January following an altercation with a taxi driver. Mr Kawiti alleges he was unjustifiably dismissed.

### **Relevant Facts**

[2] Mr Kawiti was employed as a bus driver on or about 31 October 2016. His job involved transporting passengers between the Airport and the Auckland CBD.

#### ***First final warning – April 2017***

[3] In April 2017 Sky Bus received complaints of two incidences about Mr Kawiti's driving. It was alleged he narrowly missed two vehicles while driving along Mt Eden Road. He was issued with a first and final warning on 27 April 2017 for 12 months for serious misconduct of driving erratically, constantly changing lanes and crossing over to the other side of the road.

#### ***Second final warning – December 2017***

[4] In October/November 2017 further concerns about his driving arose. Mr Kawiti was issued with a second final warning for 12 months on 5 December 2017 for serious misconduct over two incidences. One incident involved him driving off from a bus stop without retracting a wheelchair ramp resulting in it breaking off; a second incident involved him swearing at a truck driver with passengers on board and undoing his seat belt whilst driving.

#### ***Dismissal incident – 3 January 2018***

[5] On 3 January 2018 Mr Kawiti had left the Auckland Sky Bus terminal and was driving across the intersection of Queen Street and Mayoral Drive, Auckland Central. The evidence

about this incident was contained within CCTV footage from three cameras on the bus Mr Kawiti was driving.

[6] A taxi driver had illegally parked on the broken yellow lines near the exit from the intersection onto Upper Queen Street. The taxi had stopped to collect passengers whom had hailed him from the side of the road.

[7] Mr Kawiti pulled up alongside the taxi driver and stopped. At that stage the taxi driver was inside his cab. The taxi driver got out and then proceeded to load his passengers.

[8] Mr Kawiti can be heard telling the driver to “move forward, I can’t get out”. From the CCTV footage a car can be seen in the turning lane on the right of the bus. Mr Kawiti believed the bus was unable to safely move forward unless the taxi driver moved forward first.

[9] The taxi driver does not say anything and appears to ignore Mr Kawiti’s request. He proceeds to the rear of the taxi on the roadside to load his passengers.

[10] At some stage the car on the right side of the bus can be seen moving forward. Mr Kawiti then moves the bus out over the centre line then back. At this stage the taxi driver is standing at the rear of the taxi on the roadside and has turned to face forward. The back end of the bus can be seen swinging close to the taxi driver before Mr Kawiti drives off up the hill towards Karangahape Road.

[11] No injury or damage resulted. Mr Kawiti then proceeded to complete his bus run to the airport. Little did he know the taxi driver followed the bus to the airport and took down the bus licence plate number before dropping his fare at the airport terminal.

[12] The taxi driver then returned to town and attended the Sky Bus head office. He met with HR consultant, Himaini Shah. Ms Shah took down the details of the bus concerned and asked the taxi driver to provide his complaint in writing. She then contacted Central Control who advised the bus driver was Mr Kawiti and obtained the CCTV footage from three cameras located at various points on the bus. This was provided to the (then) operations manager, Nathan Hooker. Mr Hooker had been tasked with the decision making about this matter.

[13] Mr Hooker wrote to Mr Kawiti on 5 January 2018 inviting him to a disciplinary meeting. The letter alleged on “Wednesday, 03 January 2018 we received a complaint from a taxi driver about your altercation with him and about your unprofessional conduct”. It gave no further details of the concerns but noted “CCTV footage can be provided upon request.”

[14] The letter then set out the relevant parts of his employment agreement to be considered:

The relevant clauses of your employment agreement that have been considered state:

**11 HEALTH AND SAFETY**

11.1 The company is committed to providing healthy and safe work environment. You will take responsibility for ensuring your own safety and the safety of others in the workplace, including complying with all health and safety requirements, policies, procedures, training, guidelines and recommendations.

**28 COMPLAINTS FROM THE PUBLIC OR A CUSTOMER**

28.1 Where the company receives a complaint from a member of the public, the company will endeavour to inform you as soon as reasonably possible.

28.2 You will make an explanation in writing, with regard to the complaint, within 24 hours of receiving written notification. Written notification should include a copy of the written complaint.

28.3 Management after considering your explanation will advise you (and your representative) as to whether the matter is one justifying instant dismissal or a warning or if your explanation is not satisfactory.

**30 MISCONDUCT**

30.1 Misconduct may give rise to a formal warning being issued, and in serious cases may constitute serious misconduct for which you may be summarily dismissed. The continuation of misconduct, which is not restricted to the repetition of a particular act, may also lead to eventual dismissal. Misconduct includes, but is not limited to, the following conduct:

30.1.2 Driving a bus in a careless or dangerous manner;

30.1.18 Invalid and proven complaints by a passenger or customer against you.

**31. SERIOUS MISCONDUCT**

31.1.3 Driving a bus in a careless or dangerous manner;

31.1.4 Acting in an offence or abusive manner.

[15] The disciplinary meeting occurred on 9 January 2018 at 6.00 am. This was the first day Mr Kawiti was due back at work after the incident and before the start of his shift. He attended the meeting without a support person. This was because he had been unable to get the person he wished and decided to go ahead with the meeting without him.

[16] The meeting lasted approximately an hour. Part of that hour was utilised by Mr Kawiti viewing the CCTV footage for the first time. An allegation was then put to Mr Kawiti that he “purposely” drove very close to the taxi driver within a hair’s breadth of crushing him.

At hearing Mr Hooker stated he also believed that the bus had touched or brushed against the taxi driver.

[17] At the meeting Mr Kawiti stated he believed the taxi driver was in the wrong for parking on the broken yellow lines. He did not elaborate any further. From Mr Hooker's evidence the meeting became tense so he took a break at one stage for 5-10 minutes to allow matters to calm down. He then reconvened the meeting and Mr Kawiti was told he was summarily dismissed.

[18] A letter setting out the dismissal decision was sent to Mr Kawiti on or about 10 January 2017 noting:

**Concerns**

- We received a complaint about your careless driving where you came within hair's breadth of crushing the complainant between the bus and his car

**Your response to the concerns**

- You refused to acknowledge your mistake even after viewing the footage. You were more concerned that the taxi driver was parked illegally on yellow lines and he was getting away with it.
- As discussed, we agree that the taxi driver was absolutely at fault but that was no reason for your actions. You purposefully drove very close to him – this reaction to the situation was what concerned us more.

Henry, we heard your account of events and reasons for your action. After careful consideration of the matter and of your explanation we have determined that your actions construed as serious misconduct, more specifically reckless in driving, H&S breach, bringing the company into disrepute and poor professional attitude.

[19] On 2 March 2018 Mr Kawiti raised a personal grievance. He also disputed the 5 December 2017 warning. No statement of problem or application for leave to raise a grievance out of time in respect of that warning has been filed. As a consequence that grievance is not for determination today.

**Was Mr Kawiti unjustifiably dismissed?**

[20] The fact that Mr Kawiti’s employment was terminated is accepted. The onus falls upon Sky Bus to justify whether its actions were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.<sup>1</sup>

[21] In applying this test I must consider the matters set out in s.103A(3) of the Employment Relations Act 2000 (Act). These matters include whether having regard to the resources available, an employer sufficiently investigated the allegations, raised the concerns with the employee, gave the employee a reasonable opportunity to respond and genuinely consider the employee’s explanation prior to dismissal.

[22] I must not determine a dismissal unjustifiable if the procedural defects were minor or did not result in the employee being treated unfairly.<sup>2</sup> A failure to meet any of the s.103A(3) tests is likely to result in a dismissal being found to be unjustified.<sup>3</sup>

***Were the concerns sufficiently investigated?***

[23] The letter dated 5 January 2018 states “we received a complaint about your careless driving where you came within hair’s breadth of crushing the complainant between the bus and his car”. There was no oral or written complaint from the taxi driver at the time dismissal occurred. A written complaint was received on 11 January 2018 – 2 days after the dismissal.

[24] No interview with the taxi driver had been undertaken. Ms Shah only noted down the bus details and obtained CCTV footage. It was misleading to suggest there had been a complaint from the taxi driver as expressed in the letter when none had been received. As conceded by Mr Hooker the “complaint” arose from the employer’s view of the CCTV footage not the taxi driver.

***Were the concerns raised prior to dismissal?***

[25] The invitation letter dated 5 January 2018 does not detail in advance any of the concerns that were raised at the disciplinary meeting. The letter refers to a complaint from a

---

<sup>1</sup> See s.103A(2).

<sup>2</sup> Section 103A(5).

<sup>3</sup> *Angus v Ports of Auckland Limited* [2011] NZEmpC 160 at [26].

taxi driver about an altercation without any detail. It also sets out various parts of the employment agreement without any explanation about their relevance.

[26] The remaining findings of serious misconduct relating to “H&S breach, bringing the company into disrepute and poor professional attitude” were never raised with Mr Kawiti at all. Ms Shah accepted that they did not have a chance to properly discuss these issues at the disciplinary meeting.

[27] The health and safety breach would have been the failure to report the “near miss” or accident that occurred when the bus moved too close to the taxi driver. It should have been reported to the employer pursuant to clause 11.2 of his employment agreement, which Mr Kawiti acknowledged. This was not referred to at all in the invitation letter. The employer’s actions did not meet the requirements of the Act.

***Was Mr Kawiti given a reasonable opportunity to be heard?***

[28] In short no. He was only given the full details of one allegation at the disciplinary hearing then expected to provide his reply. Mr Kawiti explained that he was overwhelmed by the allegation. He wanted more discussion and a support person to help him but could not find someone at short notice. He felt it was all too much at once.

[29] When asked what difference more time would have given him, he believed he would have been able to provide a fuller explanation. He vehemently denied he was trying to run the taxi driver over by his actions. He stated he was concerned about not breaching his first final warning in April 2017. He had been warned about crossing over the centre line and was trying to avoid doing so. He was anxious about blocking traffic from a busy intersection and believed there was sufficient room for him to continue only after the car in the right hand side turning lane had moved forward. The CCTV footage shows the bus pulling out over the centre line and then pulling back in. Mr Kawiti said he looked in his rear view mirror and saw the taxi driver at the rear of his car. He thought “where did you come from”. He asserted he was trying to get past without “collecting anyone.” He had believed the taxi driver was on the pavement but accepts this was wrong given the CCTV footage. It appears given more time he could have provided an explanation about possible mistake. This may have indicated his conduct was misconduct as opposed to serious misconduct.

*Was there genuine consideration of his responses?*

[30] Again the answer must be no because of the above defects. There are also difficulties with the finding of reckless driving in the letter dated 10 January 2018. The employment agreement only provided for careless or dangerous driving, not reckless driving.

Even if as suggested by Mr Hooker, reckless driving equated to dangerous driving, it can be both misconduct and serious misconduct under clauses cl 30.1.2 and 31.1.3 of the employment agreement. He found there was serious misconduct because Mr Kawiti had purposefully driven close to the taxi driver and lacked remorse.

[31] At law serious misconduct:

... will generally involve deliberate action inimical to the employer's interests...[it] will not generally consist of mere inadvertence, oversight or negligence however much that inadvertence, negligence or oversight may seem an incomprehensible dereliction of duty.<sup>4</sup> It is conduct which "deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship."<sup>5</sup>

[32] Purposefully driving at or towards a person on the road would be serious misconduct possibly criminal conduct. At hearing Mr Hooker's basis for this finding was his belief the bus had in fact touched the taxi driver and the CCTV footage showing Mr Kawiti's looking at the rear of the bus using the bus mirrors "to get as close as possible to him". Mr Hooker was aware of a phenomenon of drivers using their vehicles to scare road users. This basis for the finding was not set out in the dismissal letter.

[33] Mr Kawiti was surprised at hearing to learn Mr Hooker's above views because this was the first time he had heard it. He denied this was the case and gave a different explanation at hearing of possible mistake.

[34] Standing back Mr Kawiti's actions could have raised concerns for an employer. From the CCTV footage Mr Kawiti was aware the taxi driver had exited his vehicle and was at one stage on the roadside. While Mr Kawiti may have believed the taxi driver was on the pavement, but he did not take time to properly check before moving his bus. This resulted in a "near miss" accident.

---

<sup>4</sup> *Makatoa v Restaurant Brands (NZ) Limited* [1999] 2 ERNZ 311 (EmpC) at 319.

<sup>5</sup> *Northern Distribution Union v BP Oil NZ Limited* [1992] 3 ERNZ 483.

[35] Mr Laphorne points out that even if the primary allegation is considered misconduct, Mr Kawiti could have been dismissed because of the prior warnings. I agree. Mr Kawiti was the subject of two previous final warnings, the effect of which could have resulted in him being dismissed.

[36] However there are procedural defects in terms of the requirements in s103A of the Act. These defects were not minor and did cause unfairness. In the circumstances Mr Kawiti was unjustifiably dismissed.

### **Remedies**

[37] As Mr Kawiti has a proven personal grievance he is entitled to seek the remedies of lost remuneration and compensation.

#### ***Lost Remuneration***

[38] Mr Kawiti gave evidence of job hunting by looking in the newspapers, engaging the services of a WINZ work broker to apply for jobs on his behalf and signing up with an agency that hires temporary truck drivers. He says he has evidence of applications for at least fifteen jobs but he thinks he may have applied for double that amount. In my view there is sufficient evidence to show he has mitigated any lost remuneration.

[39] Given the finding there was misconduct for which he could have been dismissed, his lost remuneration must be limited to his notice period of two weeks.

#### ***Compensation***

[40] Mr Kawiti seeks \$15,000 compensation. A recent Employment Court decision has defined the steps in assessing compensation.<sup>6</sup> I have considered this case using a similar approach set out below (albeit in a truncated way):

##### ***Step 1: Harm***

[41] There was evidence of harm financially and emotionally. He referred to his family's financial difficulties especially given his partner does not work. There were indications he felt bad after the loss of his job and fearful about what to do now given his age (61 years).

---

<sup>6</sup> *Richora Group Limited v Chen* [2018] NZEmpC 113 at [41] ff.

*Step 2: Extent of Loss*

[42] Mr Kawiti's evidence was:

- (a) He did not require any medical intervention or other assistance;
- (b) He did express some fear at what to do now at his age (61 years). He gave examples of the difficulties in finding work after a lifetime of always having employment;
- (c) He appeared guilty about the financial and emotional effects of the job loss upon his family. His wife does not have work. He relies upon two grown children's board payments to survive. He attests to there being little income and stress within the household as a result;
- (d) He stated at hearing he was not angry about the job loss. On the surface he presented as stoic but this may have been due to an inability to articulate his feelings at hearing. He seemed embarrassed to acknowledge the full extent of his hurt and humiliation.

[43] I would place his loss at the mid to lower end of the spectrum.

*Step 3: Where on the spectrum of cases does this case sit in terms of harm suffered?*

[44] Relevant recent cases in the Authority include:

- a) *Zuo v 123 Casino Ltd* [2018] NZERA Auckland 271 no long lasting effects \$7,000 reduced by 20% to \$5,600
- b) *LMN v Bank of New Zealand Ltd* [2018] NZERA Christchurch 115 compensation for effects of unjustified process (substantive justification for dismissal for redundancy) \$7,500

*Step 4: Where on the spectrum of cases does this case sit in terms of quantum?*

Mr Kawiti has (sensibly) accepted that the appropriate starting point here is less than \$10,000. In my view the evidence in this case sits below that point. An appropriate compensation amount would be \$7,000.

*Step 5: What is a fair and just award in the present case?*

[45] Under this heading I have considered the issue of contributory conduct. The conduct leading to dismissal was both causative and blameworthy. Under s124 of the Act I must consider the extent to which Mr Kawiti's actions contributed to the situation and reduce remedies accordingly.

[46] The reduction of remedies by 100% is possible where, notwithstanding the establishment of a personal grievance, "there is misconduct which is so egregious that no remedy should be given". These cases are rare because "a finding of contributory fault of 50 per cent is a significant one."<sup>7</sup>

[47] There is insufficient evidence to prove contact occurred because the taxi driver was never interviewed and did not appear at hearing. The CCTV footage is inconclusive about contact between the taxi driver and bus. Further this was not a finding the respondent made at the time it dismissed Mr Kawiti.

[48] I am also unconvinced by the veracity of the taxi driver's complaint. Parts of the written complaint are not supported by the CCTV. The complaint states the taxi driver "pleaded to the driver to please let me get [out] of the way". This is not evidenced in the CCTV footage. It is Mr Kawiti who can be heard telling the taxi driver to move forward. The driver ignores Mr Kawiti and proceeds to load his passengers. A photograph the taxi driver has provided of his dirty shirt does not contain a date stamp and was only provided 7 days after the incident. Ms Shah did not view any clothing marks or lower back injury to the taxi driver when presented to the head office, yet he claims both had occurred as a result of the incident. Despite the alleged back injury the taxi driver was capable of driving to the airport to deliver his fare. The CCTV and complaint raises more questions than confirmation of egregious conduct. It required further investigation.

[49] However, Mr Kawiti's admitted conduct does require a substantial reduction in remedies. The remedies are therefore to be reduced by 50%.

---

<sup>7</sup> Xtreme Dining Limited v Dewar [2016] NZEmpC 136 at [216] and following citing in part *Telecom v Nutter* [2004] 1 ERNZ 315 (CA).

**Costs**

[50] Given Mr Kawiti was successful he is entitled to costs. Both parties accepted the daily tariff should apply. I am only minded to award costs of \$1,200. This is because:

- a) The applicable daily tariff would have been \$4,500;
- b) The hearing took two thirds of a hearing day. Two thirds of the daily tariff is \$2,970.
- c) The hearing did not require the usual amount of preparation because it proceeded on the basis set out in the statement of problem and reply and without the need to file briefs of evidence;
- d) It became evident during examination that the statement of problem was at times contradictory and unhelpful to the applicants case;
- e) The majority of examination was undertaken by the Authority and Mr Laphorne;
- f) The hearing was not complex;
- g) The applicable legal aid rates for a non-legally qualified advocate would have been \$1,440 including preparation of briefs of evidence and attending a 6-8 hour hearing day;
- h) A category 1 non-complex proceeding before the Employment Court where no preparation for hearing was required and a bare minimum statement of problem filed that was defective in part may have only recovered 0.5 hearing time and 0.5 days preparation. Given the likely costs award would have been the daily recovery rate of \$1,480;
- i) A category 1 non-complex proceeding before the District Court would recover \$1,180. Applying the same approach of 0.5 preparation and 0.5 hearing time would also result in a costs award of \$1,180. ;
- j) Drawing the above threads together, an award of less than the applicable daily hearing rate in the Authority is appropriate.

**Orders**

[51] Airbus Express Limited is to pay lost remuneration of one weeks net wages to Henry Kawiti including a reduction of 50% for contributory behaviour pursuant to ss.123(b), 128 and 124 of the Employment Relations Act 2000.

[52] Airbus Express Limited is to pay compensation of \$3,500 to Henry Kawiti including a reduction of 50% for contributory behaviour pursuant to ss.123(c)(i) and 124 of the Employment Relations Act 2000.

[53] Airbus Express Limited is ordered to pay to Henry Kawiti \$1,200 towards his legal costs.

**T G Tetitaha**  
**Member of the Employment Relations Authority**