

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 287
5399898

BETWEEN GRAHAM KEEPA
Applicant

A N D GO BUS TRANSPORT
LIMITED
Respondent

Member of Authority: Rachel Larmer

Representatives: Graham McKinstry and Rachel Rolston, Advocates for
Applicant
Simon Menzies and Jaime Bright, Counsel for
Respondent

Investigation Meeting: 01 July 2013 at Tauranga

Date of Determination: 05 July 2013

DETERMINATION OF THE AUTHORITY

A. Mr Graham Keepa is unable to pursue his personal grievance claim for unjustified dismissal because he entered into a full and final settlement agreement with Go Bus Transport Limited (Go Bus) on 16 August 2012.

B. Mr Keepa is ordered to pay Go Bus \$3,500 towards its legal costs.

Employment relationship problem

[1] Mr Keepa claims he was unjustifiably dismissed from his employment as a bus driver with Go Bus. He says the settlement agreement the parties signed on 16 August 2012 should not prevent the Authority from hearing his unjustified dismissal grievance claim.

[2] Mr Keepa claims he was pressured into resigning. He says he only agreed to resign to salvage his reputation so he could get work elsewhere. Mr Keepa claims Go Bus embarked on a course of conduct aimed at coercing him into resigning. He says he only resigned so he could have a clean employment record when seeking work elsewhere.

[3] Go Bus claims the parties entered into a binding full and final settlement agreement on 16 August 2012 which prevents Mr Keepa from pursuing his personal grievance claim.

[4] There is a conflict between the parties over when Mr Keepa's resignation occurred. Mr Keepa says he resigned after he had already been dismissed. Go Bus disputes that. Go Bus says Mr Keepa resigned before the disciplinary process had been concluded when it proposed termination as the appropriate disciplinary sanction. Go Bus says its acceptance of Mr Keepa's resignation stopped the disciplinary process from being completed.

Issues

[5] The issues for determination include:

- (a) Did the parties enter into a settlement agreement which prevents Mr Keepa from pursuing his personal grievance claim?
- (b) If so, did Mr Keepa sign the settlement agreement under duress?
- (c) If the settlement agreement does not prevent Mr Keepa from pursuing his personal grievance was he dismissed?
- (d) If Mr Keepa was dismissed, was his dismissal justified?
- (e) If Mr Keepa's dismissal was unjustified what, if any, remedies should be awarded?
- (f) What costs should the successful party be awarded?

Did the parties enter into a settlement agreement which prevents Mr Keepa from pursuing his personal grievance claim?

[6] Go Bus held a disciplinary meeting with Mr Keepa who was supported by an experienced union representative, Mr Bruce Graham, on 16 August 2012 to discuss two allegations of misconduct and one allegation of serious misconduct. The disciplinary allegations arose out of concerns related to Mr Keepa driving with one hand.

[7] After hearing Mr Keepa's response to the disciplinary concerns Go Bus' decision-maker, Mr Ashley Burton Operations Manager, adjourned the meeting for half an hour to consider the appropriate outcome. When the meeting reconvened Mr Burton advised he would impose warnings for both allegations of misconduct and that he "*proposed to terminate [Mr Keepa's] employment with one week's notice which [Mr Keepa] would not be required to work out*".

[8] When Mr Burton indicated termination as the proposed disciplinary outcome Mr Graham asked for an immediate adjournment, which was granted. During the adjournment Mr Graham advised Mr Keepa to resign to preserve his employment record which would help him when seeking new employment.

[9] Mr Keepa accepted Mr Graham's advice so when the disciplinary meeting reconvened he asked Mr Burton if he could resign. Mr Burton says he expressed reluctance at this suggestion because he was opposed in principle to allowing this to occur. Mr Keepa denies Mr Burton expressed any reluctance at the suggestion he be allowed to resign.

[10] This conflict is to be resolved on the balance of probabilities. I have preferred Mr Burton's evidence over Mr Keepa's evidence. Mr Burton's account of his reluctance and his principled stance against allowing an employee to resign during a disciplinary process was supported by unchallenged evidence from Mr Darryl Bellamy, Operations Director.

[11] Mr Bellamy says Mr Burton met with him immediately after Mr Keepa asked if he could resign and expressed reluctance to agree to that request. Mr Bellamy says he convinced Mr Burton to allow Mr Keepa to resign provided Mr Keepa agreed to sign a full and final settlement agreement so that Go Bus would not face a subsequent constructive dismissal claim.

[12] Mr Burton says he returned to the disciplinary meeting and advised Mr Graham and Mr Keepa he would accept Mr Keepa's request to resign if he signed a full and final settlement agreement because Go Bus wanted to avoid a potential constructive dismissal claim. Mr Keepa and Mr Graham deny Mr Burton gave any explanation as to why Go Bus required Mr Keepa to sign a full and final settlement agreement.

[13] I have resolved that conflict in favour of Mr Burton, so consider it more likely than not he specifically referred to Go Bus' wish to avoid a potential constructive dismissal claim. Mr Burton's evidence was corroborated by Mr Bellamy who had raised the full and final settlement agreement idea.

[14] Mr Burton was described by Mr Graham as a "*stickler for procedure*" and someone who was "*very methodical*" so it makes sense he would explain why Go Bus wanted Mr Keepa to sign a full and final settlement agreement if it agreed to allow him to resign.

[15] Mr Burton also gave clearer evidence than Mr Keepa who on occasions appeared to be confused about what had occurred. I consider it likely Mr Burton would have explained to Mr Keepa and Mr Graham why Go Bus required Mr Keepa to sign the full and final settlement agreement if he wanted his resignation to be accepted.

[16] Mr Graham and Mr Keepa both agreed with Go Bus's requirement that a full and final settlement agreement be signed by the parties so Mr Burton arranged for that and a letter of resignation to be prepared. The full and final settlement agreement identifies the parties and then states:

The parties above hereby agree as a result of a dispute between them for Go Bus Transport Limited to accept from Graham Keepa as a full and final settlement of the issue, his immediate resignation from the company with one week's notice. It is also agreed he will not be required to work out that notice.

[17] The settlement agreement was signed by Mr Burton on behalf of Go Bus and by Mr Keepa on 16 August 2012. Mr Keepa also simultaneously signed a resignation letter which says:

I Graham Keepa do hereby give notice of my resignation from Go Bus Transport Limited, effective from 16 August 2012. My last day of work will be 23 August 2012.

[18] Mr Keepa says he thought he was just having a dismissal changed into a resignation and did not understand he was compromising his ability to pursue an unjustified dismissal grievance against Go Bus arising from the disciplinary proceedings. I do not accept his evidence about that.

[19] I prefer Mr Burton's evidence so find on the balance of probabilities that Mr Burton told Mr Keepa that if he wanted to resign he would have to sign a full and final settlement agreement so he could not later claim he had been constructively dismissed.

[20] I am therefore satisfied Mr Keepa knew or ought reasonably to have known that a condition of Go Bus allowing him to resign was that he had forgone the right to pursue subsequent proceedings against it. There would have been no need for the parties to have signed the settlement agreement if Mr Keepa's evidence was correct.

[21] Mr Graham told me he had experience in facilitating resignations for employees in Mr Keepa's situation so I consider he could and should have advised Mr Keepa about the effect of the settlement agreement before he signed it. Any failure to do so gives rise to an issue between Mr Keepa and his union about the adequacy of the advice the union gave him. I do not consider it is for Go Bus to inquire into the adequacy of the advice given by an employee's chosen representative.

[22] I also accept Mr Burton's evidence that Mr Keepa and Mr Graham both assured him they were not going to pursue a claim against Go Bus but merely wanted to preserve Mr Keepa's clean disciplinary record because that is consistent with what Mr Keepa said was in his mind at the time he entered into the settlement agreement.

[23] I am satisfied accord and satisfaction occurred. The settlement agreement signed by the parties acknowledged the existence of a dispute between the parties (Mr Keepa disputing that Go Bus was justified in pursuing disciplinary action against him) and it acknowledged that Go Bus would accept Mr Keepa's resignation as a "*full and final settlement of the issue*" (being his dispute and dissatisfaction about the disciplinary process he was involved in).

[24] Mr Keepa received the benefit or consideration of not having the disciplinary process he was involved in continued or completed. Go Bus' documentation records Mr Keepa's employment ended as a result of his resignation, not as the result of a dismissal or disciplinary process. Although Mr Keepa's evidence was that he had already been dismissed before he resigned, I do not accept that for reasons discussed later.

[25] I find the disciplinary process had not been completed by the time Mr Keepa resigned. The disciplinary process had got to the stage where Mr Burton had proposed a disciplinary outcome of termination so the next step was for Mr Keepa to respond to that proposal with any information he wanted considered before Mr Burton finalised his decision about the appropriate sanction.

[26] Mr Keepa's response at that point was to ask if he could resign, which Mr Burton reluctantly said he would accept provided Mr Keepa compromised his ability to subsequently bring proceedings against Go Bus. Mr Keepa and his representative agreed to that condition so Mr Keepa and Mr Burton signed the settlement agreement and Mr Keepa signed the letter of resignation.

[27] On that basis Go Bus processed the ending of Mr Keepa's employment as a resignation. I find the disciplinary process was not concluded because a final disciplinary outcome was never imposed because Mr Keepa's resignation superseded the conclusion of the disciplinary process.

[28] I consider Mr Keepa received the benefit of a clean employment record which was desirable from his perspective in terms of obtaining future employment. Mr Keepa was also released from the obligation of working out his contractual notice period. In return Go Bus got finality because it believed Mr Keepa did not have any come-back over the disciplinary concerns it had raised with him. I therefore find there was a clear and unequivocal resolution of the differences between the parties at the stage that both parties signed the settlement agreement.

[29] I consider it likely Mr Keepa understood the nature of the transaction he was entering into when he signed the settlement agreement. He was supported and advised by an experienced union representative who had attended a number of disciplinary meetings. The proposal for the resignation had come from Mr Keepa, not from Go Bus.

[30] It was open to Mr Keepa and/or Mr Burton to ask for time to take legal advice when Mr Burton proposed a full and final settlement agreement as a condition of accepting Mr Keepa's resignation, but they elected not to do so.

[31] I find Go Bus is able to rely on the settlement agreement which means Mr Keepa cannot now pursue his dismissal grievance before the Authority because I am satisfied there was offer, acceptance and consideration and that the parties intended the settlement agreement to be legally binding on both of them.

Did Mr Keepa sign the settlement agreement under duress?

[32] In the statement of problem Mr Keepa claims he was "*pressured into resigning to try and salvage his reputation so he could get work elsewhere.*" Mr Keepa says he was under the threat and pressure of losing his job.

[33] In order for Mr Keepa's claim of duress or undue influence to be successful he must establish on the balance of probabilities that he was subject to duress or undue influence at the time the settlement agreement was entered into. The test for undue influence is very high and the law provides relief only if an extreme loss of autonomy is established.¹ I find Mr Keepa is unable to establish the high threshold of duress or undue influence existed.

[34] Mr Keepa was accompanied at the disciplinary meeting by an experienced union representative who had attended many disciplinary meetings and who had negotiated exits for employees in Mr Keepa's situation. There is no dispute that the proposal to resign came from Mr Keepa not from Go Bus.

[35] I further find Mr Burton was reluctant, and expressed his reluctance on a number of occasions, to agree to Mr Keepa's resignation request. There was no pressure from Go Bus for Mr Keepa to resign, quite the contrary – it was a proposal Go Bus was not particularly receptive to.

[36] Mr Graham says he is familiar with the process of offering a resignation to avoid dismissal and I note he was specifically in attendance to provide Mr Keepa with support and advice. I therefore consider that even if Mr Keepa was under some confusion about the meaning of the settlement agreement, Mr Graham was there to provide him with advice in that regard.

¹ *Cabletalk Astute Network Services Ltd v. Cunningham* [2004] 1 ERNZ 506

[37] The Court of Appeal in *Pharmacy Care Systems Ltd v. Attorney-General*² identified six requirements in order to establish duress. I find that none of those were present in this case. Accordingly, Mr Keepa is unable to establish that he was under duress or suffering from undue influence at the time he signed the settlement agreement. The compromise reached in the settlement agreement stands.

Was Mr Keepa dismissed?

[38] Even if I am wrong about the settlement agreement compromising Mr Keepa's right to pursue his unjustified dismissal claim, his claim would still not have succeeded because I find he was not dismissed. I consider Mr Keepa's employment ended as the result of a genuine resignation – he was not dismissed.

[39] There is a conflict in the evidence about when and how Mr Keepa's employment ended which I have resolved in Go Bus' favour.

[40] Mr Keepa essentially claims he was dismissed and then negotiated to have his dismissal turned into a resignation. Go Bus says it was in the middle of its disciplinary process and had only proposed the disciplinary outcome of termination which it sought Mr Keepa's feedback on before it made a final decision on the appropriate disciplinary sanction.

[41] Go Bus says Mr Keepa's only feedback on the proposed disciplinary sanction was to ask that he be allowed to resign. Go Bus says the resignation suggestion was made during its disciplinary process not after the disciplinary process had been concluded.

[42] I accept Go Bus' evidence that it never concluded the disciplinary process and therefore never implemented its proposed termination of Mr Keepa's employment because the final disciplinary outcome decision was superseded by Mr Keepa's resignation. By accepting Mr Keepa's resignation and signing the full and final settlement agreement Go Bus agreed to forgo reaching a final conclusion on its disciplinary process.

[43] I therefore conclude Mr Keepa's employment ended as a result of his resignation on one week's contractual notice which was tendered on 16 August and which ended his employment on 23 August 2012.

² [2004] CA 198/03, Hammond J.

[44] Go Bus never implemented its proposed termination of his employment, nor did it impose the two final warnings which it indicated were the sanctions for the two instances of misconduct it had been investigating. That satisfies me it did not complete its disciplinary process. Mr Keepa left his employment with Go Bus with a clean employment record. I find that would not have been the case had the disciplinary process already been concluded.

[45] Mr Graham says Mr Burton was a “*stickler for procedure*” and “*very methodical*”. Mr Graham agreed Mr Burton had said he “*proposed*” to terminate Mr Keepa’s employment. I accept Mr Burton’s evidence that before he had a chance to finalise the proposed sanction, Mr Keepa ended his employment, so Mr Burton never completed the disciplinary process. I am satisfied the disciplinary process was averted by Go Bus’ acceptance of Mr Keepa’s resignation.

[46] I consider Mr Keepa was not dismissed or constructively dismissed by Go Bus. Mr Keepa’s resignation was at his own initiative. It was not an outcome Go Bus sought and Go Bus did not pressure or coerce Mr Keepa into resigning. Rather Go Bus reluctantly agreed to Mr Keepa’s request he be allowed to resign in order to put all matters in dispute between the parties behind them.

[47] Even if Mr Keepa had been able to pursue his dismissal grievance it would not have succeeded because he cannot establish he was dismissed.

Outcome

[48] I find Mr Keepa agreed to a full and final settlement of all matters relating to his employment dispute so he may not now pursue his unjustified dismissal personal grievance claim before the Authority.

[49] Even if the settlement agreement was not binding, I would have held Mr Keepa’s employment ended as a result of his genuine resignation. That means his dismissal grievance would not have succeeded because he is unable to establish he was dismissed.

What costs should Go Bus be awarded?

[50] Go Bus as the successful party is entitled to a contribution towards its actual costs. I am satisfied from the information provided by Mr Menzies that Go Bus has incurred costs substantially in excess of the Authority's notional daily tariff.

[51] The parties agree there are no factors which would warrant an adjustment to the Authority's notional daily tariff which is currently \$3,500. Accordingly, Mr Keepa is order to pay Go Bus \$3,500 towards its actual costs.

Rachel Larmer
Member of the Employment Relations Authority