

The Authority's investigation

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Issues

[6] The issues requiring investigation are whether or not Mr Maheta was unjustifiably:

- disadvantaged in his employment with SkyBus by being:
 - Issued with a written warning
 - Reassigned to the Express Service
 - By being placed on suspension
 - Being placed on unpaid suspension
- dismissed by SkyBus

Background

[7] Airbus Express Limited is a wholly owned subsidiary of the Australian based AATS Group, an internationally recognised leader in airport transit solutions. It operates in New Zealand under the trading name SkyBus and launched its Auckland based passenger transit services in October 2015. SkyBus transports approximately 75,000 airport employees and domestic and international travellers to and from Auckland airport every month.

[8] The company currently operates three bus services, namely the North Harbour Express, Auckland City Express and Airside at Auckland Airport (Airside). The Express service transports passengers to and from either Auckland CBD or Auckland's North Shore to Auckland Airport, while the Airside service involves the conveyance of passengers within the airport between terminals and passenger aircraft.

[9] SkyBus has approximately 33 drivers. Mr Peter Simpkin, Airside Manager, explained that it was difficult for SkyBus to recruit drivers with the right skillset to drive within the airport environment.

[10] Airside in particular operates in a safety sensitive and security enhanced environment. Mr Simpkin said that drivers receive an allowance of \$1.00 per hour when driving Airside in recognition of the increased safety and security risks.

[11] Ms Himani Shah, HR Consultant at the relevant time, explained that applicants for driving jobs with SkyBus are required to undergo a rigorous screening process and, in order to drive a 40 metre bus needed to obtain a Passenger Endorsement driver's licence (PE), which is issued by Land Transport

New Zealand (LTNZ). SkyBus also requires that an applicant holds a Class 4 driver's licence and can demonstrate relevant past experiences.

[12] As part of the recruitment process, SkyBus requires applicants to undertake a pre-employment driving assessment. Successful job applicants receive a comprehensive induction when they first join the company, including at least five days of full training. Additional training and support is provided for as long as it may be required. After completion of the induction programme an employee begins training under supervision from a mentor. This can last for two days or two weeks.

[13] Mr Maheta applied to SkyBus and following the recruitment process he was offered a position as a bus driver and commenced employment on 11 December 2017. Mr Maheta was issued with an individual employment agreement (the Employment Agreement) which he signed on 6 December 2017, prior to his commencing work on 11 December 2017.

[14] The Employment Agreement contained the following clauses:

1.2 You are employed in the conveyance of passengers in and around the Auckland airport and scheduled and unscheduled services to and from the airport in the airport vicinity.

...

4. COMPANY RULES

4.1 Drivers must obey all company rules as outlined in Appendix A. Failure to do so may result in disciplinary action.

...

5. HOURS OF WORK

...

5.2 You are employed as a full time driver who is available to work year round and who is guaranteed a minimum of 80 hours per fortnight.

...

8. WAGES

8.1 Your gross hourly wage rate will commence at **Driver Level 2 at \$21.50 per hour.**

...

10 AIRSIDE ALLOWANCE

10.1 Employees who are appointed by the Company to undertake Airside duties, will be paid an additional 25c per hour while undertaking the duties.

11. HEALTH AND SAFETY

11.1 The company is committed to providing a 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.

...

27. PERFORMANCE MANAGEMENT

27.1 The company will monitor your performance and if at any time you are not performing to the required standard, the company will outline the areas of dissatisfaction, indicate what is regarded as satisfactory performance and discuss ways in which that standard can be attained.

27.2 If, after a reasonable period you fail to achieve the required standard of performance, the company will meet formally with you to listen to your explanations in relation to the company's concerns and any other matters that you may wish to raise.

27.3 After consideration of your explanation and of all aspects of your employment record as well as the company's responsibility (if any) to the situation that has developed, the company will if appropriate put in place possible remedial steps such as training, counselling and/or redeployment.

...

30. MISCONDUCT

...

30.1.2 Driving a bus in a careless or dangerous manner ...

30.1.12 Failure to follow a lawful and reasonable instruction

31. SERIOUS MISCONDUCT

31.1 Serious misconduct includes but is not limited to

31.1.3 Driving a bus in a careless or dangerous manner.

...

31.1.10 Refusal to obey a reasonable instruction from a superior or refusing to perform assigned work or walking off the job without permission of the Operations Manager.

...

32. SUSPENSION

32.1 The company may suspend you from the workplace or from all or any of your usual duties and/or responsibilities to enable the company to investigate any workplace matter or for health and safety reasons. The suspension will be paid, unless you unnecessarily delay the suspension period, when it may be unpaid at the company's discretion

32.2 Before any suspension is implemented you will be given a reasonable opportunity to comment on the proposed suspension.

...

33. TERMINATION OF EMPLOYMENT

...

33.3 All drivers should familiarise themselves with the standards of conduct which the company deems to be misconduct and serious misconduct.

...

42. REASSIGNMENT

42.1 The company reserves the right to modify your job duties and/or title or to assign you to a new position with a different title at no less than base rate of pay, if in the company's opinion, that is necessary and in the company's interest.

APPENDIX A COMPANY RULES

You are required to obey the company rules. Failure to follow the company rules will be dealt with in line with the company's disciplinary procedures as appropriate.

...

(ii) Company vehicles must not be driven in a careless or dangerous manner.

[15] Mr Maheta expressed an interest in transferring from the Express service to Airside and undertook his first solo shift Airside on 4 July 2018.

[16] Mr Maheta was issued with a copy of the rules for Airside workers. This was issued by Auckland Airport. Section 1 was entitled “Statement of Purpose” and set out the following:

- 1.1 The airport is owned and operated by Auckland Airport. Access rights are granted at the discretion of Auckland Airport. Auckland Airport may grant access to parts of the Airside area to approved persons (being those persons who hold an airport identity card authorising them to have access to Airside areas). Access is conditional on ongoing compliance with all relevant safety and security procedures, completion of specific training requirements and all other Auckland Airport rules and requirements.

[17] Mr Maheta was also issued with the Auckland Airport Airside driving and vehicle permit rules which contained the following:

Section 1 General Guidelines

1.1 Statement of purpose

- 1.1.1 The purpose of these Airside driving and vehicle permit rules is to provide a safe and secure environment in which to undertake aerodrome operations. The overriding requirements are that all Airside vehicles must have certain equipment and characteristics.

[18] As a result of his transition to Airside Mr Maheta was subject to a three month probation period pursuant to clause 1.7.5 of the Airside Driving and Vehicle Permit Rules issued by Auckland Airport which states:

- 1.7.5.1. A new ADP holder has a probationary period of 3 months, during which supervision from the employer and oversight of driving behaviour is required to be monitored.
- 1.7.5.2. No warnings are to be issued in the 3-month probationary period. Any AIN issued in this 3 month period with a loss of demerits may also result in an immediate stand-down, depending on the seriousness of the offence. Drive-behinds will not be tolerated in this instance.

Drive Behind Issues

[19] Ms Shah said that Mr Maheta was involved in two drive-behinds in July 2018. Drive behinds arise when a vehicle drives behind an aircraft with its anti-collision lights on which is a high risk to health and safety and is strictly prohibited because of the jet blast damage potential.

[20] Ms Shah said that as a result of the drive behinds she and Mr Simpkin had an informal chat with Mr Maheta on 16 July 2018 to discuss the two incidents. Mr Simpkin and Ms Shah said that Mr Maheta had not disputed the drive behinds during the meeting, but he had claimed they were due to a lack of training. As a result he was provided with an additional three days of remedial Airside training.

[21] During the Investigation Meeting Mr Maheta disputed the evidence of Mr Simpkin and Ms Shah and denied the drive behinds had occurred. He stated that if Mr Simpkin had received a complaint, he should have been given a copy and explained that the additional training as being required due to a lack of solo driving being undertaken during his initial training.

[22] In early August 2018 Mr Maheta was involved in two further driving incidents.

Incident on 5 August 2018

[23] On 5 August 2018 an incident occurred in the international terminal when Mr Maheta was enroute to pick up passengers from the gate lounge to take them to the aeroplane. When he was driving along a straight road the front part of the bus had collided with a steel bollard.

[24] Mr Maheta said he had accepted full responsibility for the incident and immediately reported that incident as required.

Incident on 7 August 2018

[25] Two days later on 7 August 2018 when Mr Maheta was on duty at the domestic terminal another driver had noticed damage to the vehicle Mr Maheta was driving when it was parked alongside him and brought it to Mr Maheta's attention.

[26] Mr Maheta had not completed an accident report and Mr Simpkin had been made aware of the damage subsequently.

[27] The reported damage was a broken window. Broken glass is referred to in the Airside Rules issued by Auckland Airport as 'Foreign Object Debris' (FOD) which is: "easily ingested by a jet's intake" and: "likely to foul, obstruct, damage, endanger or create a hazard to an aircraft, and/or danger any person." It must be cleared because it constitutes a danger to safe operations within the airport.

[28] As a result of the damage report Mr Simpkin said he had arranged for one of the SkyBus mechanics to check the vehicle and secure the broken window. He had then checked the CCTV footage from the bus to verify who was driving when the accident occurred, and how it had occurred.

[29] Mr Simpkin said that all SkyBus buses have a hard drive which records footage from multiple video cameras on the bus. He had removed the hard drive, plugged it into a USB port and downloaded the footage with the software supplied for that purpose.

[30] Mr Simpkin said that the camera footage was stamped and showed Mr Maheta driving the vehicle and hitting a bollard, which had caused significant damage to the window and panel.

[31] Mr Simpkin said he had been concerned that Mr Maheta had driven the bus for approximately four hours loading and unloading passengers after the window had shattered.

[32] Mr Maheta denied the incident had occurred, although he accepted that there may have been a minor collision between the bus and a short bollard which he believed was insufficient to prove that the window damage had been caused by it.

[33] Mr Maheta accepted in cross examination that he was aware of his responsibility to check the vehicle at the start of his shift but on that day he had forgotten to do so.

[34] Mr Maheta also agreed that the vehicle had been checked by an Aviation Security officer at the start of his shift which was standard procedure.

9 August 2018: Commencement of the disciplinary process

[35] Ms Shah sent a letter on behalf of SkyBus to Mr Maheta dated 9 August 2018. The letter was headed "Invitation to attend formal meeting" and it stated:

You have had two incidents on Airside – 05 August 2018 and 07 August 2018 – causing extensive damage to the bus that you were driving. It was noted in the letter that CCTV footage would be available to view at the meeting.

The letter stated under the heading "Suspension":

You were advised that the proposal was to suspend you from your employment on full pay while we investigate the matter. You agreed with that proposal and having considered the seriousness of the allegations against you, I believe that it is appropriate in the circumstances that you remain suspended on full pay until the investigation and any outcome is finalised.

[36] The letter invited Mr Maheta to bring a support person to the meeting with him.

[37] Ms Shah said she had met with Mr Maheta on 9 August 2019 and handed him the letter. She had also advised to Mr Maheta that SkyBus proposed suspending him on full pay while it investigated the matter and Mr Maheta had agreed that suspension was appropriate until the investigation had been concluded.

10 August 2018 Disciplinary meeting

[38] Mr Maheta attended the disciplinary meeting on 10 August 2019 without a support person. The meeting was also attended by Mr Simpkin and Ms Shah. During the meeting the concerns of SkyBus were explained to Mr Maheta and he was shown the CCTV footage of both the incidents. Mr Maheta was provided with a flash drive with a copy of the footage during the meeting.

[39] During the meeting Mr Maheta acknowledged the incident on 5 August 2018 and Ms Shah said he admitted that he should have been more careful with his driving and checked his mirrors. Mr Maheta had also pointed out that he had immediately reported the incident to his supervisor when he discovered what had happened.

[40] However, Mr Maheta denied the incident on Friday, 7 August 2018 as being his fault or that it had occurred while he was driving. He stated he had not felt the bus hit the bollard or heard the glass shatter.

[41] Ms Shah said that during the meeting Mr Maheta stated that he had been an exemplary driver on the Express service, to which she and Mr Simpkin had agreed. There had been no dispute between the parties that Mr Maheta had been an excellent driver when driving the Express route.

[42] SkyBus wrote to Mr Maheta on 13 August 2018, setting out the outcome of the formal meeting. It was noted in the letter that during the investigation meeting on 10 December 2018 the CCTV footage had been viewed of the incident on 7 August and Mr Maheta had been shown photos of the glass debris.

[43] The letter stated under the concern that: “you hit your bus against the pole at Domestic terminal, shattering the right side glass of the bus – as seen on CCTV footage:

- We would like to note that even after viewing the footage, you were hesitant to admit to the causation of the accident. You are insistent that the accident couldn't have been your fault as you did not feel the glass hit the pole or hear the glass shatter even though the glass shattering is quite audible in the footage. As discussed our concerns regarding your responses are: ...
 1. You failed to exercise reasonable safety during those incidents.
 2. You have been on Airside just over a month and already have two incidents. As we have explained, you had impeccable record on Express however, we have observed that you have had difficulty adjusting to the Airside environment with wider buses and narrower roads.
 3. Even after viewing the CCTV footage of 7 August incident, you were still arguing the causation and result of the accident.

[44] The letter continued to advise Mr Maheta that he was being issued with a written warning which would last for a period of 12 months and that: “we are taking you off the Airside roster effective immediately” and he would be transitioned back to the Express service as soon as possible, stating:

We propose to start your retraining on Monday, 13 August 2018 however, you declined stating that you needed to think if you wanted to go back to Express and will get back to me by Monday 13 August 2018.

We had initially proposed your paid suspension for Friday 10th August, Saturday 11th August and Sunday 12th August but since you declined our offer to work in Express, your paid suspension day would only be Friday 10th August 2018 – rest of the days will be unpaid. We would also like to note that Himani Shah informed you of your two weeks' notice period if you

intended to resign – failure to provide the two weeks’ notice period will result in deduction of two weeks in lieu of notice from your final termination pay.

We would like to note that you were provided all the CCTV that SkyBus had of the incident on 7th August 2018 on a USB device after the meeting, as per your request.

[45] SkyBus proposed to retrain Mr Maheta on the Express bus service. Ms Shah said this was standard procedure following a driver’s long absence because there may have been changes to the bus timetables and route rescheduling.

[46] Mr Maheta refused to undertake the retraining, emailing a lengthy letter to SkyBus on 13 August 2018 in which he stated: “you have advised me of your decision to take me off the airside and to express service and that there is nothing available at present for express service”. Mr Maheta further requested: “detailed and proper minutes of the meeting for records” and “continuous video footage and not so many short clips”.

Proposed further meetings

[47] Mr Maheta was invited to an informal meeting with Mr Nathan Hooker, General Manager, and Ms Shah to discuss the concerns he had raised in his letter. However, Mr Maheta failed to attend the meeting.

[48] Ms Shah said the meeting was rescheduled for 6 August 2018 and once again Mr Maheta failed to attend the meeting.

[49] Mr Maheta’s then legal representative sent a letter to SkyBus on 20 August 2018, raising a personal grievance on Mr Maheta’s behalf. The letter set out that the disciplinary action being taken by SkyBus was unjustifiable because SkyBus failed to follow a fair process, stating that SkyBus had failed to provide all relevant information, namely:

- (a) The specific allegations against Mr Maheta
- (b) Copies of the meeting notes;
- (c) Unedited video footage.

The letter accused SkyBus of pre-determination and failure to investigate properly. The letter explained that Mr Maheta considered the transfer to the Express service to be a demotion which he did not accept and requested that Mr Maheta be reinstated to his position on full pay as an Airside driver.

[50] SkyBus’s legal representative responded on its behalf on 21 August 2018, advising that SkyBus did not accept that Mr Maheta had been unjustifiably disadvantaged or that he had been demoted, and that the company had a contractual right to reassign its drivers. The letter stated:

- ...
4. In the meantime, SkyBus is pleased to note that Mr Maheta intends to return to work.
 5. Under the terms of Mr Maheta's individual employment agreement, which he signed on 5th December 2017 (**IEA**) he is employed as a driver "in the conveyancing of passengers in and around the Auckland Airport".
 6. Clause 42 of his IEA entitles the company to assign him to a new position and accordingly, when he returns to work tomorrow SkyBus requires him to work on the Express service.
 7. Mr Maheta is required to sign in at the Express depot at 8.30am to work on an 8.30am to 7pm shift and he will undergo refresher training with trainer ... which is standard practice when drivers are transferred from Airside to Express.

[51] Mr Maheta's then legal representative responded on 20 August 2018 noting that Mr Maheta would not be returning to work the following day.

[52] Ms Shah said that Mr Hooker wrote to Mr Maheta by letter sent on 24 August 2018 inviting him to attend a formal disciplinary meeting on 28 August 2018 in relation to his unauthorised absence from work pursuant to clause 31.1.10 of the Employment Agreement. The letter stated:

Concerns

Accordingly, we would like to discuss with you and to hear your version of events in relation to the following allegation:

- That since 13th August 2018, (when you resigned to work on Express) you have persistently refused to obey a reasonable instruction from a supervisor and, you have refused to perform assigned work without the permission of the Operations Manager.

Under clause 31.1.10 of your individual employment agreement, refusing to obey a reasonable instruction or to perform assigned work constitutes serious misconduct.

At the meeting you will be given an opportunity to respond to the allegations and to present any additional information you consider is relevant. The company will give full consideration to your explanation before a decision about what disciplinary action, if any, is reached.

Whilst no decision has yet been made, due to the serious nature of the allegations it is possible that the outcome of this disciplinary process may result in disciplinary action, up to and including summary dismissal.

[53] That same day SkyBus's lawyer provided a substantive response to Mr Maheta's personal grievance denying that Mr Maheta had been unjustifiably disadvantaged.

[54] On 24 August 2018 Mr Maheta's then lawyer advised that Mr Maheta would not attend the meeting and that Mr Maheta:

Does not accept the demotion. This is because there were fundamental flaws in regard to the investigation process and therefore the demotion – as the outcome flowing from the investigation – is unjustified.

Therefore our client cannot return to work as he does not accept the demotion.

[55] SkyBus wrote to Mr Maheta on 29 August 2018 with the outcome of the formal meeting. The letter noted that Mr Maheta had not been cooperative regarding attendance at an informal meeting and by not answering the telephone or emails. The letter continued to advise Mr Maheta that a meeting had been held in his absence and a preliminary decision made to terminate Mr Maheta's employment on the basis that he was refusing to return to work as instructed and stating:

I am satisfied that pursuant to clause 31.1.10 of your individual employment agreement, your refusing to obey a reasonable instruction and refusing to perform assigned work constitutes serious misconduct.

We are satisfied that our investigation in this matter is fair and reasonable and after careful consideration of the matter, our preliminary decision is to terminate your employment with SkyBus as at 29th August 2018, resulting in summary dismissal. We would like to invite you to another meeting on Friday, 31st August 2018 ... to discuss the preliminary decision further before we make a final decision. Alternatively you can provide your feedback in writing. You are entitled to have a representative or support person with you at any meeting in relation to these matters.

[56] Mr Maheta responded via his representative on 3 September 2018 in an email which noted that Mr Maheta did not accept that a lawful and reasonable instruction had been issued:

This is because our client has provided a clear justification as to why he will not return to work – he does not accept the demotion.

The email noted that Mr Maheta had raised a personal grievance challenging the process in relation to the investigation and the substantive outcome.

[57] After carefully considering Mr Maheta's response and all the relevant information, SkyBus confirmed its decision to terminate Mr Maheta's employment summarily on 6 September 2018.

Was Mr Maheta unjustifiably disadvantaged by SkyBus?

[58] Mr Maheta is claiming unjustifiable disadvantage. Section 103 (1)(b) of the Act is applicable to disadvantage grievances and states:

That the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer;

[59] The elements of s103 (1) (b) are twofold:

- (a) An unjustifiable action by the employer, which
- (b) Affected the employee's terms and conditions of employment, and this was to the employee's disadvantage.

[60] Mr Maheta must therefore establish that there was some unjustifiable action by SkyBus which affected his terms and conditions of employment to his disadvantage.

Was Mr Maheta unjustifiably disadvantaged by being issued with a written warning?

[61] Mr Maheta had been subject to a three month probation period when he was transferred to work Airside. Airside is a safety sensitive and security enhanced environment of which the drivers are made aware.

[62] Within a few days of driving Airside Mr Maheta was involved in two drive behinds. Drive behinds are strictly prohibited under Airside Rules for health and safety reasons and may, if reported, result in high demerit points and/or suspension of a Auckland Airport Drivers Permit.

[63] Whilst Mr Maheta denied that he had been involved in the drive behinds at the Investigation Meeting, he confirmed that he had attended the meeting held on 16 July 2018 with Mr Simpkin and Ms Shah. Their evidence was that the purpose of the meeting was to discuss the drive behinds, and Mr Maheta provided no alternative explanation as to the reason for the meeting.

[64] Mr Simpkin and Ms Shah's evidence was that during the meeting Mr Maheta had attributed the drive behinds to a lack of training, as a result of which he had been provided with an additional three days training. Mr Maheta confirmed that the additional training had been provided.

[65] Despite the additional training being provided, a short time afterwards Mr Maheta had been involved in an incident of 5 August 2018 which he admitted, and which had resulted in damage to the bus he had been driving.

[66] Mr Maheta denies that he caused the extensive damage to the bus he was driving on 7 July 2018 when there was a further incident, stating that at most, he had only grazed a bollard on that occasion.

[67] Mr Maheta had failed to carry out the required vehicle check prior to starting his shift on 7 July 2018. The Aviation Security check completed at the start of Mr Maheta's shift had not noted any damage and I observe it is reasonable to conclude that a broken window which would have the potential to constitute FOD would have been noted and drawn to Mr Maheta's attention at that time. However no damage had been noted during the Aviation Security check and only became apparent some time into Mr Maheta's shift when it was drawn to his attention by another driver.

[68] In all the circumstances I find SkyBus had reasonable grounds for concluding that Mr Maheta's driving had been careless and issuing him with a written warning.

[69] I determine that Mr Maheta was not unjustifiably disadvantaged by being issued with a written warning.

Was Mr Maheta unjustifiably disadvantaged by being reassigned to the Express Service?

[70] Mr Maheta was employed as a Driver by Skybus and his job duties pursuant to s 1.2 of the Employment Agreement was: “the conveyance of passengers in and around the Auckland Airport and scheduled an unscheduled services to and from the airport”. It was not disputed that Mr Maheta was not permanently assigned to Airside.

[71] Mr Maheta was in receipt of an additional \$1.00 per hour when driving Airside pursuant to clause 10.1 of the Employment Agreement. Whilst Mr Maheta’s evidence was that this was in recognition of his promotion to Airside, Mr Simpkin’s and Ms Shah’s evidence was that a driver moving to Airside was not a promotion and the additional hourly allowance was in consideration of the additional safety and security risks.

[72] Clause 42 of the Employment Agreement recognised the right of SkyBus to reassign a driver to new duties or a new position: “if in the company’s opinion this is necessary and in the company’s interest”.

[73] Mr Maheta was subject to a probationary period. Mr Simpkin and Ms Shah had reached a view which I have found was open to them as a reasonable employer that Mr Maheta had been careless in his driving. The incidents on 5 and 7 August 2018 had resulted in damage to the vehicles he was driving which had been expensive to repair.

[74] A broken window and resultant glass damage was a potential FOD hazard and driving a bus with a broken window was a breach of Mr Maheta’s Employment Agreement and the Airside Rules.

[75] Mr Maheta failed to check the vehicle at the start of his shift on 7 July 2018 as he was required to do. Any pre-existing damage would have been detected and dealt with at that stage. If the later incident of colliding with a bollard caused the damage, Mr Maheta should have reported it at that time.

[76] SkyBus’s conclusion following the investigation into the 7 August 2018 incident was that Mr Maheta had been careless as a driver.

[77] Mr Maheta had been issued with a written warning for careless driving following SkyBus’s consideration of all the incidents which had occurred within Mr Maheta’s probationary period.

[78] In those circumstances I find that SkyBus was within its contractual rights to conclude that it was necessary and in SkyBus's interests to reassign Mr Maheta to the Express service and its action in so doing was justifiable.

[79] As a result, although Mr Maheta was financially disadvantaged by the removal of the \$1.00 per hour allowance for driving Airside, I find that this was not caused by an unjustifiable action of SkyBus.

[80] I determine that Mr Maheta was not unjustifiably disadvantaged by being reassigned to the Express Service.

Was Mr Maheta unjustifiably disadvantaged by being placed on suspension?

[81] SkyBus submits that Mr Maheta had not raised a personal grievance in relation to his being suspended on 9 July 2018.

[82] There is no claim in any of the written evidence of Mr Maheta raising this claim prior to the Investigation Meeting held on 11 November 2019.

[83] I observe that in the letter dated 9 August 2018 Ms Shah had stated: "You were advised that the proposal was to suspend you ... You agreed with the proposal ..."

[84] There is no evidence that Mr Maheta disputed the suspension, as it is clearly stated in the letter of 9 July 2018, that he had agreed to the suspension.

[85] I determine that a claim that the suspension was unjustifiable is raised out of time.

Was Mr Maheta unjustifiably disadvantaged by being placed on unpaid suspension?

[86] Mr Maheta said that he had been rostered to work Airside on Saturday 11 and Sunday 12 August 2018. However he was advised by Ms Shah during the meeting on 10 August 2018 that he was being immediately removed from Airside and transitioned back to the Express service.

[87] As confirmed in the 13 August 2018 letter Ms Shah's evidence was that Mr Maheta was not rostered for work on either Saturday 11 August or Sunday 12 August 2018 but SkyBus had initially intended to pay him for Friday 10 to Sunday 12 August 2018 pending his return to work for retraining on the Express service on 13 August 2018.

[88] In light of Mr Maheta's refusal to return to work because he declined to work on the Express service, it was decided not to pay him for 11 and 12 August 2018. As a consequence of his continued refusal to return to work, Mr Maheta was unpaid from 11 August 2018 until his dismissal on 6 September 2018.

[89] Mr Maheta provided the Authority with a transcript of the meeting held on 10 August 2018. That transcript records Mr Maheta telling Ms Shah that he had no issue with SkyBus not paying him while he considered what he intended to do.

[90] I find that the period of suspension ended on 10 August 2018 when Mr Maheta was informed of the decision to immediately remove him from working Airside and transition him to the Express service.

[91] I find that Mr Maheta, by informing SkyBus on 10 August 2018 that he wanted to think about his decision whether or not he would accept the offer of work in the Express service, and subsequently refusing to return to work, initiated the situation in which he was not being paid.

[92] I determine that Mr Maheta was not unjustifiably disadvantaged by being placed on unpaid suspension.

Was Mr Maheta unjustifiably dismissed by SkyBus?

[93] Mr Maheta was dismissed from his employment with SkyBus for serious misconduct after he failed to follow a reasonable instruction given by SkyBus, namely to return to work in the Express service.

[94] Justification for dismissal is stated in the Employment Relations Act 2000 (the Act), which at s 103A sets out the Test of Justification as being:

S103A Test of Justification

- 1) For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).
- 2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[95] The Test of Justification requires that the employer acted in a manner that was substantively and procedurally fair. An employer must establish that the dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

Procedural Fairness

[96] Mr Maheta had been involved in an incident on 5 August 2018 which he had reported. Two days later he had been involved in another incident which he did not report as a result of which he had been subject to a disciplinary process.

[97] SkyBus had obtained CCTV footage for both incidents and both had shown Mr Maheta as being the driver of the vehicle on the relevant days.

[98] Mr Maheta had been invited to attend a formal disciplinary meeting on 9 August 2018 to respond to an allegation that he had been responsible for the two incidents while driving on Airside which had resulted in extensive damage to the vehicles he had been driving.

[99] During the meeting on 9 August 2018 Mr Maheta had been shown the relevant CCTV footage and been provided with a flashdrive containing the footage to take away from the meeting.

[100] Procedural fairness required that Mr Maheta was: (i) informed of the allegations against him; (ii) given the right to have a support person or representative at the meeting; (iii) been advised of the possible outcomes should the allegations be upheld including the possible termination of his employment; and (iv) provided with the relevant information.

[101] I find that SkyBus had acted in accordance with these requirements regarding Mr Maheta.

[102] SkyBus was also required to carefully consider Mr Maheta's response, and I find it did so before issuing him with a written warning.

[103] SkyBus did not obtain a written statement from the driver of the bus on 6 August 2018, the day before Mr Maheta drove it, whom Mr Maheta believed had been responsible for the damage to the vehicle which was detected the following day.

[104] I note Mr Simpkin's evidence that the CCTV footage clearly identified Mr Maheta as the driver at the time the damage occurred, but I also observe that Mr Maheta was required to carry out a vehicle check at the start of his shift and throughout the day.

[105] Mr Maheta failed to carry out the required vehicle check at the start of his shift on 7 August 2018, however the vehicle had been checked by an Aviation Security officer at the commencement of Mr Maheta's shift and no damage had been reported at that time i.e. following the conclusion of the previous driver's shift.

[106] Accordingly I find no unfairness to Mr Maheta by the omission of a written statement from the previous driver.

[107] Mr Maheta refused to return to work following the meeting held on 10 August 2018 and did so despite repeated requests from SkyBus. Mr Maheta would not accept the transfer to the Express service and refused to return to work unless he could work Airside.

[108] As a result SkyBus instituted a disciplinary process with Mr Maheta. The concerns SkyBus had with Mr Maheta and his refusal to return to work were communicated to him by (i) letter dated 20 August 2018; (ii) email dated 21 August 2018, (iii) email dated 22 August 2018; and (iv) by letter dated 24 August 2018 in which SkyBus informed Mr Maheta that he had persistently refused to obey a reasonable management instruction from a manager and refused to perform assigned work without the permission of the Operations Manager. Mr Maheta was therefore invited to attend a disciplinary meeting.

[109] Mr Maheta declined to attend the meeting and instead provided a written response.

[110] SkyBus responded by advising Mr Maheta of its preliminary decision and invited Mr Maheta to a meeting to discuss the preliminary outcome. Mr Maheta again declined to attend and maintained that he would not return to work on the Express service.

[111] As a consequence of Mr Maheta's continued refusal to return to work because he declined to work on the Express service, he was not paid for the period 11 August 2018 until his dismissal on 6 September 2018.

[112] I find that SkyBus acted in a procedurally fair manner towards Mr Maheta.

Substantive Justification

[113] Employers must have trust and confidence in an employee, this includes the employee obeying a reasonable instruction given by a manager.

[114] Having found that Mr Maheta had been responsible for driving carelessly which had resulted in damage to the buses he had been driving at the time, SkyBus was contractually entitled to reassign Mr Maheta to the Express service in light of its concerns about health and safety risks in a safety sensitive environment, and Mr Simpkin as Operations Manager, did so.

[115] Mr Maheta refused to return to work as an Express Service Driver as required and persisted in doing so despite the repeated instructions and the associated opportunities to return to work offered by SkyBus.

[116] In all the circumstances at the relevant time I find that this was a reasonable instruction on the part of SkyBus, refusal to obey which was considered to be serious misconduct pursuant to clause 31.1.10 of the Employment Agreement.

[117] I consider that at the date of his dismissal there was no real prospect of Mr Maheta returning to work at Express.

[118] I determine that Mr Maheta was not unjustifiably dismissed by SkyBus in all the circumstances at the time the dismissal or action occurred.

Costs

[119] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

[120] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[121] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.¹

Eleanor Robinson
Member of the Employment Relations Authority

¹ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].