

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 122 /10
File Number: 5282298

BETWEEN Peter Windsor
Applicant

AND Mana Coach Services Limited
Respondent

Member of Authority: Denis Asher

Representatives: Dale O'Reilly for Mr Windsor
Darren Mitchell for the Company

Investigation Meeting Wellington, 3 June 2010

Submissions Received By 11 June 2010

Determination: 5 July 2010

DETERMINATION OF THE AUTHORITY

The Problem

[1] Was Mr Windsor unjustifiably disadvantaged, unjustifiably constructively dismissed and is he owed wages?

The Investigation

[2] During a telephone conference call on 30 April 2010 the parties agreed to an investigation on 3 June. Agreement was reached on timelines for witness statements

and bundles of documents. Efforts by the parties during the investigation to settle this matter on their own terms were unsuccessful.

[3] All of the references to page numbers (“p”) are to those in the parties’ agreed bundle of documents.

Background

[4] While the legal issues flowing out of them are hotly contested by the parties, most of the key facts involving the applicant and respondent are either largely not in dispute or readily able to be established.

[5] Mr Windsor was employed by the Company as a driver on 11 February 2009.

[6] His terms and conditions of employment were set out in a collective employment agreement.

[7] At around 4.00 p.m. on Friday 14 August 2009 a 13 year old girl and her father laid a complaint about a driver at the Company’s office.

[8] The Company described both complainants as agitated and upset. Amongst other things, the girl said the driver in question engaged her in conversation during a bus trip and at one point, when she was the only passenger, stopped the bus. She says he got her to change the route plan sign, asked her to put her cell phone number on his cell phone, took her cell phone and put his contact details into it and took a photograph of her with his cell phone.

[9] The Company took a copy of the complainant’s bus ticket; she showed a representative of the respondent, who wrote it down on the copy of her ticket, a number stored on her cell phone. The complainants provided the Company with a written complaint (p 34).

[10] From the cell phone Mr Windsor was identified as the driver. He was advised a serious complaint had been received, suspended on pay and advised arrangements to meet would be confirmed in writing.

[11] By letter dated 17 August Mr Windsor was advised of a complaint of alleged sexual harassment (p 35). It also said the allegations were serious and could result in his dismissal; it was recommended he attend the disciplinary meeting with a representative.

[12] The Company met with Mr Windsor on 18 August.

[13] Following another meeting with the Company the complainant and her father provided an enlarged, typed complaint (p 38).

[14] The Company advised Mr Windsor of another disciplinary meeting (on 21 August) and provided him with, amongst other things, a copy of the amended complaint (p 41).

[15] At the meeting on 21 August Mr Windsor provided his first typed response (p 36). He later provided a second, typed statement (p 53) as well as a driver's report (p 103). In his statements, and amongst other things, Mr Windsor said it was the complainant who engaged him in conversation. He also said she took his phone while it was left unattended as he was checking the vehicle for rubbish and put her name and number in it, and took a photograph of herself with his phone; all of which he later deleted. The complainant did not leave when the bus reached the end of its route; she could have left at any time as the doors were open. She also refused his direction, at the same location, to leave the bus. He said the complainant – while he was cleaning the bus – climbed into the driver's seat, "*beating me to the seat*" (page 37), refused his direction to get out of the seat, and only left the seat after he allowed her to change the destination sign. Mr Windsor said the complainant only left the bus after receiving a call from her friend. He said many of her claims were lies and described her behaviour at the time as "*weird behaviour ... getting worse*" (page 55).

[16] The Company advised Mr Windsor it would be meeting with the complainant and her father again and that it would type up and merge chronologically the applicant's responses which would be sent to Mr Windsor for comment before being used in discussion with the complainant. That document was later emailed to Mr Windsor who declined to respond to it.

[17] The Company met with the complainant and her father next on 25 August.

[18] The Company then met with Mr Windsor on 26 August. The respondent advised him it did not regard the matter as sexual harassment but did regard his behaviour as serious and it could result in his dismissal. Mr Windsor's representative advised the applicant had received legal advice not to answer any more questions.

[19] Later the same day the Company asked Mr Windsor if he wanted to respond to its preliminary decision to dismiss him.

[20] Following the exchange of correspondence, a further meeting took place on 1 September.

[21] On 3 September the Company advised Mr Windsor by email of its decision to dismiss him: the respondent sought another meeting to finalise its decision (p 150).

[22] The final meeting occurred on 7 September: Mr Windsor resigned (p 160) but was also dismissed (pages 151-156).

[23] By letter dated 23 November Mr Windsor filed a grievance alleging unjustified constructive dismissal (pages 63-65).

Discussion and Findings

[24] In determining this matter I apply the observation of the full Employment Court, set out at para [37] in *Air New Zealand Ltd v V* (2009) 9 NZELC 93,209 and 6 NZELR 582, namely that the Authority is required to objectively review all the actions of an employer up to and including the decision to dismiss, against the test of what a fair and reasonable employer would have done in all the circumstances

[25] The basis of the Company's decision to dismiss Mr Windsor is set out in its termination letter dated 4 September 2009 (p 151). It alleged the applicant's actions on 14 August amounted to inappropriate and unacceptable behaviour, including soliciting personal contact details from a customer, providing his own and taking a photograph of the complainant.

[26] I accept for the following reasons the respondent's submission that Mr Windsor's dismissal was substantively and procedurally justified on those grounds.

[27] As the evidence that emerged during the investigation makes clear, Mr Windsor was provided with clear statements of the issues of concern to his employer, as they emerged. The process applied by the respondent was thorough, exhaustive and assiduous. The applicant was provided with repeated opportunities to put his side of the story and provide responses to the Company's concerns.

[28] Prior to making its decision to dismiss Mr Windsor, the respondent provided him with all relevant information, the basis of its concerns and a clear statement as to the nature of the serious disciplinary issue he faced.

[29] In particular, the Company tested the complainant's account on several occasions by, amongst other things, putting those accounts to Mr Windsor and, after obtaining his response, relaying them back to the customer and her father while in turn providing their response to the applicant.

[30] At the heart of the respondent's decision was a finding it preferred the complainant's version of events to those of its employee, the applicant: on clearly demonstrable grounds the Company found the complainant's version overall consistent, and Mr Windsor's account unreliable. That conclusion is I find fairly and reasonably made out. That is because, amongst other things, the changing nature of the applicant's account was identified to him by the respondent, in the course of its investigation. It did not understand from Mr Windsor's version of events key details, including how the complainant came to know the internal trip number and detailed workings of the ticket machine, unless the applicant had communicated them to the customer. In particular the Company did not understand why Mr Windsor would delete the image from his cell phone he claimed the complainant had taken of herself when the image might demonstrate whether she had taken it (as he claimed) or whether the applicant had taken it (as claimed by the complainant).

[31] The Company also found not credible Mr Windsor's account that he had left his cell phone lying about so that the complainant could take it, not return it when asked, load into it her cell phone number and take a photo of herself, and why he

would not radio telephone his base to report a significantly troublesome customer (including one who allegedly occupied the driving seat, and who refused to vacate it and the vehicle when instructed to do so by Mr Windsor, etc).

[32] Finally, the Company's findings were cemented in place by Mr Windsor's admission he had "*blurted*" (quoted at par 14 of Mr Norman's witness statement) out his cell phone number to the complainant. Of ongoing concern to the Company was the applicant's apparent inability to see any problem with this. Mr Windsor's attitude was reiterated at par 9 of his witness statement to the Authority where he states:

I saw no harm in saying my number at the time, but will certainly think twice in the future. On this though, since when is giving your personal phone number to a passenger serious misconduct which may result in dismissal?

[33] I accept the Company's submission that a significant contribution to its finding was the importance it places in having drivers in whom the Company has confidence in light of their unsupervised responsibility for safely transporting customers, including large numbers of students.

[34] In the alternative, in the event Mr Windsor was unjustifiably dismissed, his contributory conduct (by his own admission, providing his telephone number) would necessarily result in the award of no remedies because of its fundamentally inappropriate nature.

Determination

[35] Mr Windsor's application is dismissed.

[36] As requested, costs are reserved.

Denis Asher

Member of the Employment Relations Authority