

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2022] NZERA 576
3172602

BETWEEN IVAN YOUNG
 Applicant

AND CITYLINE (NZ) LIMITED
 Respondent

Member of Authority: Michael Loftus

Representatives: Kevin O’Sullivan, advocate for the Applicant
 Andrew Caisley, counsel for the Respondent

Investigation Meeting: 11 October 2022 at Wellington

Submissions Received: At the investigation meeting

Date of Determination: 7 November 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Ivan Young, claims he was unjustifiably dismissed by the respondent, Cityline (NZ) Limited (Cityline), on 28 March 2022.

[2] Cityline accepts it dismissed Mr Young but is of the view it can justify its decision given serious misconduct on Mr Young’s part.

Background

[3] Before proceeding it is worth noting that this is one of those rare situations in which there is no disagreement about the pertinent facts. The disagreement is over how Cityline responded to what occurred.

[4] Cityline operates a passenger transport service from two depots in the Wellington region, Eastbourne and Kaiwharawhara. Cityline employed Mr Young as a bus driver, otherwise known as an Operator, and he was based at the Eastbourne depot. He drove both single and double deck buses.

[5] On 17 March Mr Young was involved in an accident which ultimately contributed to his dismissal. He was driving a double deck bus and tried to enter the garage at Eastbourne which is a low building incapable of being accessed by a double deck bus. Impact was at approximately ten kilometres per hour and the damage substantial. It cost some \$98,000 to repair.

[6] From Cityline's perspective the accident was not Mr Young's only transgression that day with it saying he also failed to stop at a compulsory final stop immediately outside the depot and did not complete either the timesheet or log off process required at that stop. He also exceeded the speed limit of five kilometres per hour when driving through the depot and failed to park the bus in one of the requisite bays.

[7] In the words of Cityline's Operations Manager, Kenneth Pearson, this was of concern as:

The role of a bus driver obviously carries significant responsibility. Bus drivers must drive with due skill, care and attention at all times. Any failure to do so can have very serious, and indeed fatal, consequences. The respondent must have trust and confidence in all of its employees that they will, at all times, drive with proper skill, care and attention.

[8] The following day, 18 March, Mr Pearson wrote to Mr Young. His letter advised an investigation would be undertaken into the accident and the possibility it was caused by unsafe driving. The letter advised the allegations were serious and, if proven, could constitute serious misconduct. It also advised Cityline intended suspending Mr Young pending an investigation and he would be required to attend a meeting the following Monday, 21 March, for the purpose of discussing the proposed suspension.

[9] The meeting occurred as scheduled and Mr Young was accompanied by a Union representative. The issues were outlined and Mr Young was given an opportunity to comment. The evidence is he stated his driving into the building had not been deliberate but other than saying that his intention was to respond more fully during the investigation

meeting rather than a meeting called to consider his suspension. Having considered the response the decision was made to suspend and that was confirmed by letter that day.

[10] Here it should be noted that, in the words of Mr Pearson:

... we have a process whereby we conduct an initial investigation first, to determine whether a formal disciplinary process is warranted or not. Sometimes the initial investigation is sufficient to resolve matters and no formal disciplinary investigation is required. On other occasions, the initial investigation is not sufficient to dispose of the matter and a more formal investigation follows.

[11] The same day Mr Young was sent a formal letter headed "*Invitation to investigation meeting*". It reiterates the salient points and reflects the two stage disciplinary process. It again notes that if, following the investigation meeting, disciplinary action is required the outcome might range from a verbal warning to termination of employment. The letter also advises the investigatory meeting would occur the following day, Tuesday 22 March, and that Mr Pearson would be accompanied by the Service Delivery Supervisor.

[12] The meeting occurred as scheduled and Mr Young was accompanied by a Union representative. Mr Pearson outlined Cityline's concerns including the failure to stop at the last bus stop and complete required procedures, speed and driving into the garage.

[13] Mr Pearson says that by way of response there was some discussion about overtime Mr Young had performed the preceding week, however it was his view that was not excessive and, in any event, Mr Young did not say that the accident had occurred because of overtime. In oral evidence Mr Young agreed he was not offering overtime as an excuse.

[14] It is Mr Pearson's view Mr Young really did not have an explanation and that was perhaps confirmed by the Union explaining, on his behalf, that he was on "autopilot mode". Mr Young's input was to simply apologise.

[15] Following that there was an adjournment during which Mr Pearson and his colleague considered what to do next. It is his evidence that "*Needless to say the company's concerns have not been alleviated by the explanation offered*" and that to have a driver on "autopilot mode" effectively meant the driver was not paying attention and not driving with appropriate care or skill. Accordingly, a decision was made to move to the next stage which was a disciplinary process.

[16] The meeting reconvened and Mr Young was advised of Cityline's decision. In Mr Pearson's words he:

... explained that there was a high risk of serious injury to the driver as well as to anyone who was nearby and that because he was still in the first portion of his shift I couldn't see that fatigue was an issue. I also confirm that Mr Young must have known he was driving a double decker shift, because he would have done a bus check in the morning and that he should have known the speed he was driving because he was a professional driver.

[17] An opportunity was then given for further explanation to which the autopilot reply was again offered. Mr Pearson explained that was inadequate but both Mr Young and the Union then confirmed they had nothing further to add.

[18] A further adjournment occurred during which Mr Pearson reached a preliminary conclusion that dismissal was warranted. He says:

Having a driver who is so disconnected from their driving that they do not know what speed they are going, do not know how big their bus is and manage to drive a bus into a building going twice the speed limit is deeply concerning.

The company cannot accept such a level of inattention on the job.

[19] The meeting concluded with Mr Young being advised that he had three days to consider and respond to Cityline's preliminary view.

[20] As events transpired Mr Young sought an extension and the final meeting occurred on 28 March. Mr Young was again represented by the Union. It is Mr Pearson's evidence that Mr Young again apologised, indicated he would like to keep driving but that he didn't have anything further to add. Mr Young agrees.

[21] On Mr Young's behalf the Union raised the fact there had been two other accidents in which a driver had hit the building with a double-decker bus. The first, in January 2020, had resulted in no disciplinary action and the second in February 2022 saw the driver receive a final written warning. The Union suggested a final written warning would therefore be a more appropriate outcome.

[22] Mr Pearson's evidence is that he considered that but concluded there were material differences from the February incident which was that upon which the parties focused. The most significant was that as a result thereof, Cityline had issued "*a specific and direct warning to all operators not to drive double-decker buses into the barn at Eastbourne*" and

Mr Young had had the benefit of that warning whereas the other driver hadn't. Add to that the fact the failures at the last bus stop had not occurred in February and Mr Young's speed was greater, especially at the point of impact by which time the other driver had slowed to the required speed.

[23] Mr Pearson goes on to say that for these reasons he considered Mr Young's conduct to be more serious and having considered the possibility of issuing a final warning he therefore decided to confirm the preliminary decision and dismiss. The outcome was recorded in a letter later that day.

Analysis

[24] As already said Cityline accepts it dismissed Mr Young. In doing so it accepts it is required to justify the dismissal. With respect to justification s 103A of the Employment Relations Act 2000 (the Act) states the issue:

... must be determined, on an objective basis, [by considering] 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 ... occurred.

[25] In determining this, the Act requires I consider, having regard to its resources, whether the employer conducted an adequate enquiry into its concerns. An adequate enquiry requires, as a bare minimum, that the employer put its concerns to the employee, allow an opportunity to reply and consider the response with an open mind.

[26] There is, however, no issue in these respects. Cityline's resources are not an issue and neither Mr Young nor his representative take issue with the process adopted by Cityline. Had I been required to, I would have found it adequate.

[27] Nor is it disputed Mr Young acted as alleged or that the transgressions were such that dismissal was an option open to Cityline under its policies and the employment agreement. The argument is a narrow one. It is that notwithstanding the points above, dismissal no longer remained an option for Mr Young as it would constitute disparity of treatment.

[28] It is submitted that by dismissing Mr Young Cityline acted inconsistently with past precedent. Indeed, it was suggested, albeit from the bar, this was the fifth incident involving a double deck bus driving into a single deck garage yet the first time dismissal had resulted.

It is therefore submitted, and was said at the time, that the decision to dismiss was not one a fair and reasonable employer could have reached.

[29] In considering a disparity argument there are three things I may need to resolve. The first is whether or not there has there been disparity of treatment? Second, and if so, is there an adequate explanation for the disparity? Third, and if not, is the dismissal justified notwithstanding the disparity for which there is no adequate explanation?¹

[30] Turning first to the question of whether Mr Young was treated inconsistently with others guilty of a similar transgression and there has therefore been a disparity of treatment. Here it should be noted Mr Young's focus was firmly on the accident and, as already said, he is apparently the fifth employee to drive a double deck bus into the roof of a low garage. I say apparently as neither party could offer any insight into one of the events or the actual outcome, which leaves the evidence falling well short of establishing disparity of treatment. That leaves three others.

[31] The first of those occurred in 2020 and while it is agreed the employee concerned was not dismissed neither party could, once again, offer any evidence or insight into what occurred and why the outcome was what it was. In such circumstances it is difficult to conclude there was any disparity of treatment with respect to this event.

[32] The second involved a mechanic who was the subject of a disciplinary process but resigned before it was completed. Given there was no formal outcome or decision made by Cityline there can be no argument the mechanic was treated differently to Mr Young.

[33] The third, and the one upon which the parties concentrated, was that which occurred earlier in 2022 and has already been referred to in paragraphs [21] to [23] above. It occurred some six to eight weeks before Mr Young's incident.

[34] It is Cityline's submission there was in fact no disparity if, for no other reason, Mr Young faced five accusations of improper conduct while the other driver only faced two. She had stopped at the compulsory final stop and while there completed the two required actions. Mr Young had not.

¹ *Chief Executive of the Department of Inland Revenue v Buchanan* [2005] ERNZ 767 (CA) at [45]

[35] There is, I find, strength to Cityline's submission there is no disparity given the differing accusations but even if that were not the case I conclude Cityline would be capable of explaining a disparity. In addition to the fact Mr Young faced three additional charges there were differences with respect to the "speed" allegation that Mr Pearson considered. Mr Young entered the depot at about three times the posted speed (15 km/h) while the other driver's entry speed was double (10 km/h) and while the other driver slowed to the required speed before hitting the garage, Mr Young did not. With respect to the accident itself Mr Pearson considered the fact the other driver had a shift which had her driving a double deck bus earlier in the day perhaps explained some disorientation. Mr Young could not make a similar claim.

[36] To Mr Pearson the most important factor was, however, the fact warnings about this risk had recently been posted through three different media. Here it should be noted that Mr Young's explanation that no-one reads these message was not supported by other evidence which was that one of the Operators main complaints is there are too many advisories and Cityline should try to reduce them.

[37] These conclusions mean I need not consider the third limb of the *Buchanan* test.

Conclusion and orders

[38] For these reasons I conclude there was no disparity and even if there was, Cityline's explanation is adequate. I find the decision to dismiss was one a fair and reasonable employer could have reached in the circumstances and Mr Young's claim therefore fails.

[39] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves but if they are not able to do so and an Authority determination on costs is needed Cityline may, as the successful party, lodge a memorandum on costs within 14 days of the date of issue of this determination. From that date Mr Young will have 14 days to lodge any reply memorandum.²

Michael Loftus
Member of the Employment Relations Authority

² www.era.govt.nz/assets/Uploads/practice-note-2.pdf