IN THE EMPLOYMENT COURT
AUCKLAND

AC 25A/09
ARC 48/08

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	REWA PATRICIA KEREOPA Plaintiff
AND	GO BUS TRANSPORT LIMITED Defendant

Hearing: 1 and 2 July 2009
(Heard at Hamilton)

Appearances: James Parlane, Counsel for Plaintiff
Simon Menzies, Counsel for Defendant

Judgment: 18 September 2009

JUDGMENT OF JUDGE BS TRAVIS

[1] The plaintiff, Ms Kereopa, has challenged the part of a determination of the Employment Relations Authority, which declined her claim that she was unjustifiably dismissed from her position as a bus driver for the defendant company for serious misconduct, consisting of smoking marijuana while operating a bus. The defendant cross-challenged the finding of the Authority that it had unjustifiably disadvantaged Ms Kereopa by the manner of her suspension before her dismissal. This meant that the whole matter before the Authority was challenged by way of re-hearing.

Factual background

[2] The plaintiff commenced employment as a bus driver in 2006. On or about 12 October 2006 Paul Bartosh, who was then employed as the operations manager, received an oral complaint from a person who was unable to read and write. The complaint included the allegation that the plaintiff had smoked marijuana while on duty. Mr Bartosh passed on the complaint to Daryl Bellamy, an operations director of the defendant. Messrs Bartosh and Bellamy considered the complaint to be a serious allegation affecting the safety of the public, the bus passengers and the driver herself as well as the defendant's reputation. They drafted a letter suspending Ms Kereopa on full pay, setting out all the allegations which included that she had been seen passing small bags of marijuana to a bus passenger as well as participating in the smoking of marijuana while on duty in late September 2006. She was advised to make herself ready for an investigation meeting.

[3] Mr Bartosh called Ms Kereopa into his office before she commenced duty the morning of 12 October 2006. Because he had told her it was a serious matter, she was accompanied by a fellow driver who was a union delegate. Mr Bartosh gave her the suspension letter. The letter invited her to make either verbal or written comment on the suspension notice. Ms Kereopa did not read the letter in Mr Bartosh's office but, in response to his verbal description of the allegation, denied any involvement with marijuana and offered to take a drugs test.

[4] From their investigations, Messrs Bartosh and Bellamy ascertained that the passenger with whom it was alleged that Ms Kereopa had smoked cannabis was the son of a fellow bus driver employed by the defendant. Messrs Bartosh and Bellamy attended at the home of the other driver and there met the son whom I shall call "A". At the time A was 16 years of age and a multiple sclerosis sufferer. Messrs Bartosh and Bellamy spent approximately one and a half hours interviewing A. The interview included discussions about matters other than the incident in question including A's hobbies. This was so that A would become relaxed. During the interview they said they went back and forth about the issues involving Ms Kereopa but A never changed his account and in the end they believed what he had said and found he was a credible witness. A then put his complaint into writing.

[5] Both Messrs Bartosh and Bellamy, when giving evidence, said that A wrote out his account without any assistance or prompting from them. A's written statement said that the plaintiff had given him two gram bags of *"weed"* which was equal to a *"tiny* (sic)" when he was at the transport centre one day. That allegation, which could not be clarified as to the date, was not pursued any further by the defendant. The written statement went on to say that one day, A had gone to see a mate in Flagstaff and Ms Kereopa was driving. She stopped at one of the bus stops for 5 minutes, pulled out a "*cone*" and told A to have a *"hit"*. He smoked it with her.

[6] Mr Bartosh also met a young woman who had accompanied A at the time of the alleged incident and was introduced to her at A's mother's house. I shall refer to her as "Ms B". Ms B later gave a written statement to the defendant. This stated that on 9 September she was on the Flagstaff bus with A and the plaintiff was driving. She stated the plaintiff stopped the bus at a stop for 5 minutes *"and took out a cone that people smoked pot through"*. She said the plaintiff offered A and her "*a hit*" and the three of them smoked it.

[7] In the last week of September Ms Kereopa was off work. When this was advised to the defendant, further inquiries were carried out and it was ascertained that the allegation of smoking cannabis had occurred on 9 September 2006. This was clarified in a letter Mr Bellamy wrote to Ms Kereopa on 20 October which stated that he had received an allegation that on Saturday 9 September 2006, while operating the route for Flagstaff service she had stopped her bus and had started sharing a *"cone"* with one of her customers. It was alleged that the "*cone*" contained marijuana, all or part of which she and her customer consumed before she continued on to the bus terminal. A response in writing was sought.

[8] Ms Kereopa who, by this stage, was represented by a union official, Bob Anderson, wrote on 24 October refuting all allegations made against her and requesting a copy of the relevant material pertaining to the accusation. The plaintiff asked that she be reinstated as soon as possible as she considered she did not pose any threat to the public whatsoever and had not done so at any time during her employment with the defendant.

[9] An investigation meeting was arranged for 26 October 2006. Ms Kereopa was advised that this was an investigatory meeting and that a final decision was unlikely to be made at that meeting. The meeting was attended by Messrs Bartosh and Bellamy for the defendant and Ms Kereopa and Mr Anderson. Ms Kereopa said she remembered being at the terminus for 5 minutes but that she had never smoked marijuana on the job although A had smoked a "*cone*" at the terminus. Ms Kereopa admitted that she had given the "*cone*", which at the hearing was explained to be a marijuana smoking pipe, to A, but that she denied giving A any marijuana. She told those at the meeting that A had then given the "*cone*" back to her. Mr Bartosh asked her why she would give a pipe, which she claimed to have found, to a young person. She replied that the pipe was empty when she gave it to A and empty when she got it back. She said that she knew A through a friend.

[10] Neither the plaintiff nor the union representative, Mr Anderson, asked Messrs Bellamy and Bartosh to carry out any further inquiries or requested them to interview any other witnesses. Mr Bellamy advised that they would be making a decision on the facts.

[11] On 31 October 2006 Mr Bellamy wrote to the plaintiff stating that the plaintiff, on 9 September, had conveyed two passengers to the Flagstaff terminal and, while there, she gave them a cannabis pipe that she claimed to have found on an earlier journey, that she had shared the *"cone"* with them and they then re-boarded the vehicle with her and were dropped off a little later. The letter advised that the consumption of drugs or alcohol on duty was strictly forbidden and that this breach of contract was very serious. She was invited to attend a disciplinary meeting on Wednesday 1 November 2006 and was advised that the disciplinary action could result in her dismissal.

[12] At the disciplinary meeting on 1 November 2006, attended by the same personnel, the plaintiff claimed that she had passengers on board at the time and did not share the "*cone*". She also asked why the defendant had pushed the complainants to make their complaints. Mr Bartosh replied that they had the responsibility to run a drug and alcohol free depot.

[13] The plaintiff said that she had heard her name was going around as being the ring leader involved in a recent strike action and in getting people to join the union. She also said she had been accused of assaulting another driver and of theft. Mr Bellamy responded that the matter being considered by the meeting was unconnected with any involvement on her part with the union. Ms Kereopa claimed that when the incident occurred there were at least three other people on the bus but she did not know them.

[14] The meeting was adjourned for some 30 minutes and on their return to the meeting, Mr Bellamy advised that he had gone through all the information and reached a decision that the incident had happened, that it amounted to serious misconduct and that they had no option but to dismiss her.

[15] They invited her to say anything but she responded that everything that could be said had been said. There was some discussion about a clause in the collective agreement which did not cover instant dismissal. Ms Kereopa was then summarily dismissed.

[16] Nothing emerged in the evidence before the Court that differed in substance from the accounts that were given, leading up to the dismissal on 1 November 2006.

[17] Ms B did not give evidence at either the Authority's investigation or to the Court. It was asserted on behalf of the plaintiff that Ms B was a fictitious person and that A's mother had written out Ms B's statement. That was contrary to the evidence of A who said he saw her write it out, and sign her name. A explained that Ms B had left Hamilton and was either in Auckland, somewhere in the South Island or in Australia .

[18] Mr Bartosh gave evidence that he had been introduced to Ms B at the house of A's mother. Mr Bellamy said he had not met Ms B but had relied on her statement and the statement from A when deciding to dismiss Ms Kereopa. He had interviewed A extensively. Neither A nor Messrs Bartosh and Bellamy were shaken in cross-examination and I found them to be credible witnesses and accept their evidence in its totality.

[19] In a material respect the statement made by the plaintiff to both Messrs Bellamy and Bartosh during the investigation, and to the Court when she gave her evidence, confirmed the presence of a young female friend with A at the time in question and that both A and the young woman had smoked marijuana out of a "*cone*".

[20] For these reasons I have given, I do not accept Mr Parlane's submission on behalf of the plaintiff that Ms B was a fabrication and that her statement was possibly written by A's mother.

[21] The plaintiff's evidence in Court was that she remembered the day quite well because a truck had backed into her bus and it was her last day of work before going off on ACC. She had pulled up at the bus stop at the Flagstaff terminal. A, who Ms Kereopa knew, and also knew of his drug use, had been sitting on the bus with a female friend whom the plaintiff said she did not know. The plaintiff said that she picked up a pipe of an unknown type from the floor of the bus where A had been sitting and had given it to him. A then sat at the bus stop and smoked it. A then boarded the bus again and gave the pipe back to the plaintiff. The pipe was empty when it was returned to the plaintiff. A's female companion also boarded the bus and together they disembarked at another stop. The plaintiff denied that it was her pipe and said she later disposed of it. The plaintiff said she was not *"a druggie or a liar"*, that she had not shared the "*cone*" with A, and that she had never left her seat in the driver's position for the 5 minutes while the bus was at the Flagstaff terminal. She claimed that she had never smoked marijuana on the job.

Justification

[22] There being no issue that the plaintiff was dismissed, the onus rested upon the defendant to satisfy the test of justification in s103A of the Employment Relations Act 2000 ("the Act"), which provides:

> ***103A Test of justification***
> *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 considering whether the employer's actions, and how the employer acted, were what a fair and*

reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[23] Mr Parlane's first argument was that the collective agreement, which bound the defendant and Ms Kereopa, did not have a summary dismissal clause in it and provided no express or implied authority to the defendant to dismiss an employee for serious misconduct. He referred to the evidence Mr Bellamy had given during cross examination that this was the defendant's first collective agreement, that there had been a difficult negotiating period and that it was agreed that this document would be rolled over from a previous company. Mr Parlane therefore submitted that the defendant had bargained away its right to summarily dismiss the plaintiff and instead had chosen to breach the collective agreement. He relied on clause 20 which provides:

> ***20 WARNINGS, OFFENCES, DISMISSALS AND COMPLAINTS***
>
> ***(A) Complaints from the Public***
>
> *Where complaints from the public are received about a Driver, the worker shall be given a written copy of the complaint. The worker shall give an explanation in response to this complaint in writing within 24 hours after receiving the written complaint. The worker shall have the right to have a copy of the written complaint which has been made against him/her.*
>
> *After considering the worker's explanation and if further disciplinary action is to be taken, a disciplinary meeting will be held. The Employee is to be advised that they may be accompanied by a representative or support person and also be advised of the possible outcome of the meeting.*
>
> *If as a result of the meeting the Employee is to receive a warning, it will be dealt with in accordance with the warning procedures detailed in sub clause B.*
>
> ***(B) Warning Procedures***
>
> *Warning procedures will be as follows:-*
>
> *(i) Verbal warning. The employee will be verbally advised of the problem and asked to rectify it. The warning will be noted on the employer's copy of the complaint form.*
>
> *(ii) Written warning. If the problem or related problem persists, the employee will be issued with a written warning. It will highlight what the problem is and ask that the situation be corrected. The consequences, if not corrected, will be dismissal. This written warning is the final warning.*

> (iii) *Dismissal. Dismissal occurs when the previous warnings have failed to bring about any real long lasting change or improvement in a problem area. When dismissed, the employee will be given the appropriate notice, which the employee may have to work out, or alternatively, the employee will be paid wages in lieu of notice and asked to leave immediately. At the time of dismissal the employee shall be entitled to have a witness present.*

[24] Mr Parlane submitted that the agreement therefore did not permit summary dismissal and the defendant had breached clause 20 by not having used the warning process and instead had unreasonably and unjustly dismissed the defendant.

[25] Mr Menzies for the defendant did not dispute the collective agreement had no express provisions for dismissal for serious misconduct but contended that the wording showed no intention to exclude such dismissals. He submitted that the defendant had to meet the reasonable standards of fairness and justification set by s103A and relied on the mutual duties of trust and confidence and fidelity, citing *Auckland etc Shop Employees etc IUOW v Woolworths (NZ) Ltd*[1]. He submitted that the breach of the term of trust and confidence, implied into every agreement, by an act of serious misconduct, may well justify a summary dismissal. He also relied on the lack of a "*complete agreement*" clause in the collective which left it open to imply a right to dismiss by implication or custom.

[26] I accept Mr Menzies' submissions. It would be a most unusual collective agreement which expressly excluded the right to dismiss for serious misconduct which had destroyed the essential trust and confidence implied into every employment agreement. The collective agreement in the present case contains no such clause. Further the key wording is in the third paragraph of clause 20A which states: *"If as a result of the meeting the Employee is to receive a warning, it will be dealt with in accordance with the warning procedures …"*. If there is not to be a warning, as in this case because a decision was made to summarily dismiss the plaintiff, the warning procedure does not apply.

[27] Mr Parlane's submissions did not address the issue he touched on in cross-examination, namely that the decision to suspend and commence the investigation on

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[1] (1985 ERNZ Sel Cas 136; [1985] 2 NZLR 372; [1985] ACJ 963

12 October 2006 was made before the defendant had received a written complaint. At that stage the defendant had only received an oral complaint from an illiterate complainant. This complaint was later typewritten for him by Mr Bartosh on 17 October. Mr Bartosh read it back to the complainant who signed the statement and Mr Bartosh witnessed his signature. That was some 5 days after the defendant had already commenced its investigation. In view, however, of the seriousness of the allegation I would not have been persuaded, had it been argued, that the failure to obtain a written copy of the complaint before commencing the investigation and suspending the plaintiff would, in all the circumstances, have prevented the defendant justifying its actions.

[28] The same may be said of the exercise of the power of suspension on full pay where that is not expressly provided for in the agreement. Again this was not a matter argued by Mr Parlane in his final submissions. Mr Menzies addressed it and relied on *Singh v Sherildee Holdings Ltd*[2] where Judge Couch stated:

> *[91] In the absence of an express contractual provision authorising suspension, it will only be in unusual cases that it is justifiable. The fact that an employer may have reason to suspect that an employee has engaged in misconduct, or even serious misconduct, does not of itself justify suspension while those concerns are investigated. To justify suspension, an employer must have good reason to believe that the employee's continued presence in the workplace will or may give rise to some other significant issue.*

[29] As Mr Menzies submitted, here there were safety concerns about a driver allegedly driving a bus after smoking cannabis which would have justified a suspension without delay. Mr Menzies cited *Graham v Airways Corporation*[3] at para 104 which found there was no immutable rule requiring that an employee must be told of the employer's proposal to suspend, with a view to giving the employee an opportunity to persuade the employer not to do so. The plaintiff was given the opportunity in the suspension letter of addressing the suspension and this went some

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[2] AC 53/05, 22 September 2005
[3] [2005] ERNZ 587 at para [104]

way towards mitigating the rather unsatisfactory procedure adopted. The plaintiff should have been advised of why the defendant was considering suspension and been given the opportunity to comment before the suspension was imposed. Because, however, it was on full pay and for short duration, this I find did not deprive the defendant of the ability to justify the eventual dismissal.

[30] Mr Parlane then submitted that if the defendant regarded the matter as serious misconduct it ought to have informed the police so that they could investigate the allegation against Ms Kereopa and her passengers of possessing drugs and use of drug utensils/paraphernalia, which Mr Parlane submitted was a serious criminal behaviour. He referred to the statements from A and Ms B which admitted that they had consumed cannabis.

[31] There will be many occasions when the serious misconduct being investigated by an employer also provides grounds for a criminal prosecution. That does not of itself create some obligation on the part of the employer to always refer the matter to the police and not to investigate and act on the allegations itself. To impose a requirement such as Mr Parlane advanced would in many cases not be in the interests of either the employer, or certainly the employee: see for example the judgment of *Wellington and Nelson Amalgamated Society of Shop Assistants and Associated Trades IUOW v Armed Forces Canteen*[4]. It may also lead to an employee remaining on suspension for a lengthy period while the police decide whether or not to prosecute, see for example the *Sotheran v Ansett NZ Ltd*[5].

[32] In the absence of any authority advanced by Mr Parlane I am not prepared to find that there was a breach of duty on the part of an employer not to refer an allegation of serious misconduct, which also constituted criminal offending, to the police for investigation.

[33] I accept Mr Parlane's submission that because two of the complainants, namely A and Ms B, were drug users the defendant was bound to treat their complaint with suspicion and to question their credibility. I am satisfied that Messrs

[4] [1981] ACJ 47
[5] [1999] 1 ERNZ 548

Bartosh and Bellamy did take care in their investigation to address that aspect. Their lengthy discussion with A satisfied them as to his credibility. I saw no evidence which successfully challenged that conclusion.

[34] Mr Parlane submitted that the investigation was tainted by the defendant's failure to ask Ms Kereopa to submit to a drug test. There was a conflict between the evidence of Ms Kereopa and the defendant as to whether she had volunteered for a drug test. I accept that she may have done so. However, I accept Mr Menzies's submissions, based on the evidence of Messrs Bartosh and Bellamy, that little would have been gained from such a test, well over 4 weeks after the incident in question. Even if such a drug test had proved positive it would not have, itself, carried any weight in relation to the events that had taken place on 9 September 2006.

Conclusion

[35] I am satisfied that the defendant has discharged the burden of showing that the investigation it carried out, even if it was less than ideal, was fair and reasonable. The conclusion it reached to summarily dismiss the plaintiff, having found a bus driver had provided a cannabis pipe to one of her passengers and had shared the contents with that passenger and his companion and then drove the bus, amounted to serious misconduct which went to the heart of the contract. In all these circumstances how the defendant acted and what it did, was what a fair and reasonable employer would have done in all the circumstances at the time of the dismissal.

[36] The plaintiff's challenge is dismissed. The defendant's cross-challenge is allowed. I note that the Authority when concluding that the suspension amounted to an unjustified disadvantage, found that there was 100 percent contribution and awarded no remedies.

[37] Costs are reserved and if they cannot be agreed may be the subject of memoranda, the first of which is to be filed and served within 30 days from the date of this judgment, with the memorandum in reply filed and served within a further 21 days.

B S Travis
Judge

Judgment signed at 2.30pm on 18 September 2009