

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA8/2018
[2018] NZCA 301**

BETWEEN MOHAMMAD ASLAM
 Applicant

AND TRANSPORTATION AUCKLAND
 CORPORATION LIMITED
 Respondent

Hearing: 14 June 2018

Court: Brown, Clifford and Williams JJ

Counsel: R S Pidgeon for Applicant
 S R Worthy and D S Gunasekara for Respondent

Judgment: 9 August 2018 at 3.30 pm

JUDGMENT OF THE COURT

- A The application for leave to appeal is declined.**
- B The applicant must pay the respondent costs for a standard application on a band A basis and usual disbursements.**
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REASONS OF THE COURT

(Given by Brown J)

Introduction

[1] The applicant, Mr Aslam, applies for leave under s 214(2) of the Employment Relations Act 2000 (the Act) to appeal against a decision of the Employment Court dismissing Mr Aslam's claim for unjustifiable dismissal by

Transportation Auckland Corporation Ltd (Transportation Auckland).¹ Leave may be granted if, in the opinion of this Court, a question of law involved in the proposed appeal is one that, by reason of its general or public importance or for any other reason, ought to be submitted to this Court for decision.²

Relevant facts

The incident on the bus

[2] Mr Aslam was employed as a bus driver. On 4 July 2016 there was an incident when Mr Aslam was driving bus route 392 from Onehunga into the Auckland city centre. One of the passengers drew to Mr Aslam's attention that the bus had failed to turn left onto Market Road, instead continuing to Newmarket. Mr Aslam erroneously thought that he was following the correct route. Hence he did not accept that he was driving the wrong way. This led to an exchange between them, during which the passenger took a video on his mobile phone, which culminated in the passenger leaving the bus.

[3] Later that day the passenger made a complaint to the Transportation Auckland call centre alleging a verbal and physical assault by Mr Aslam, stating that Mr Aslam had shoved the passenger off the bus.

The disciplinary procedure

[4] Mr Aslam was employed pursuant to the NZ Tramways Union-Auckland First Union Incorporated Collective Agreement 2015–2017 (the Collective Agreement). It provided a non-exhaustive definition of serious misconduct, including abuse of a member of the public or company employee and assaulting another person whilst on duty or on company premises.

[5] Clause 47 of the Collective Agreement dealt with disciplinary procedures and process requirements. Specifically cl 47.2 provided that when an issue arose, the employer would usually make initial inquiries with the employee concerned to

¹ *Aslam v Transportation Auckland Corporation Ltd* [2017] NZEmpC 161.

² Employment Relations Act 2000, s 214(3).

determine whether formal action was required. Clause 47.9 (Investigations) provided that if the employer believed that an incident, allegation or matter was one of serious misconduct, an investigation meeting would be arranged. If the employer was not satisfied with the employee's explanation in regard to the incident or allegation, a disciplinary meeting would be held.

[6] Clause 47.10 (Disciplinary Meetings) provided that after considering the employee's explanation the employer was to advise the employee if, in the employer's opinion, the matter was one that might result in disciplinary action being taken. If it was, then the employer would give the employee an opportunity to attend a meeting. If the employer was not satisfied with the employee's explanation in regard to the matter after the disciplinary meeting, then the employer may choose to issue either verbal counselling or a warning or dismissal.

The process followed concerning the incident

[7] Transportation Auckland initially investigated the allegation by talking to the passenger, requesting a further written account of the incident from the passenger and requesting any evidence that he might have. The passenger supplied a further written statement and the video he had taken.

[8] At a meeting on 13 July 2016 Mr Froggatt, the President of the Tramways Union, was advised of the complaint and shown the video. Mr Froggatt then met with Mr Aslam privately, following which they both met with Mr McLeod, the Regional Operations Supervisor employed by Transportation Auckland. After a period during which Mr Aslam was questioned, Mr Aslam was shown a copy of the passenger's complaint and the video three times. While Mr McLeod considered the video seemed to show Mr Aslam manhandling the passenger, Mr Froggatt claimed that Mr Aslam was defending himself. As Mr McLeod had concerns about Mr Aslam returning to work, it was agreed that he would be suspended on full pay while a cl 47.9 investigation was arranged.

[9] On 19 July 2016 an investigation meeting was conducted led by Mr McLeod. At that meeting Mr Aslam stated that he did not touch the passenger, that the passenger had touched him and Mr Aslam had told him to return to his seat. Both the passenger

and Mr Aslam had become angry and Mr Aslam had told the passenger to get off the bus.

[10] Following the investigation meeting Mr McLeod wrote a detailed report concluding that there were sufficient grounds to progress to a disciplinary meeting. On 22 July 2016 he wrote to Mr Aslam informing him of his conclusion that Mr Aslam's actions constituted serious misconduct. Mr Aslam was invited to attend a disciplinary meeting on 29 July 2016.

[11] At the disciplinary meeting, after initially denying that he had moved towards the passenger or into the aisle, it appears that Mr Aslam accepted, following a further viewing of the video, that he had moved down the aisle towards the passenger. Mr McLeod concluded that Mr Aslam's conduct amounted to serious misconduct. The meeting was adjourned and Mr Aslam was told that a further meeting would be held.

[12] In a letter of 5 August 2016 to Mr Aslam, Mr McLeod set out the details of the investigation and the disciplinary meeting, confirmed his finding that Mr Aslam's actions constituted serious misconduct, and advised of his preliminary view that Mr Aslam's employment should be terminated summarily. Before a final decision was made, Mr McLeod invited Mr Aslam to a further meeting on 11 August 2016 to consider appropriate disciplinary action.

[13] At the meeting on 11 August 2016, after further discussions, Mr McLeod confirmed his preliminary view to dismiss Mr Aslam. That decision was recorded in a letter to Mr Aslam dated 18 August 2016.

The decision of the Employment Court

[14] Mr Aslam's personal grievance claim that he had been unjustifiably dismissed³ was rejected by the Employment Relations Authority.⁴ His challenge to that

³ Employment Relations Act, s 103(1)(a).

⁴ *Aslam v Transportation Auckland Corporation Ltd* [2017] NZERA Auckland 45.

determination was dismissed by the Employment Court in the judgment he seeks to appeal.⁵

[15] The Court concluded that the process followed by Transportation Auckland was fair, that Mr Aslam was advised of Transportation Auckland's concerns and had several opportunities to respond to those concerns, and that Mr McLeod properly investigated the complaint and considered Mr Aslam's explanations and submissions.⁶

[16] The Court considered that the passenger's complaint was consistent and credible.⁷ While, as Mr McLeod had recognised, the video recording did not show Mr Aslam touching the passenger, nevertheless it showed Mr Aslam's initial movement towards the passenger and the audio recorded the passenger twice saying "get your hands off of me".⁸ The Court considered it was open to Transportation Auckland to find that, while not conclusive, the video supported the passenger's version of events and to prefer that version.

[17] The Court noted that in deciding that summary dismissal was warranted, Mr McLeod took into account not just the unwanted physical conduct with a passenger but also the lack of honesty in the course of the investigation, the shifting explanations in relation to how far Mr Aslam moved into the aisle, and the lack of acceptance of responsibility.⁹ The Court considered that those were reasonable considerations and that Mr McLeod's decision was one that was open to a fair and reasonable employer in the circumstances.¹⁰

The application for leave

The original application

[18] On 10 January 2018 Mr Aslam filed an application for leave to appeal. The application was deficient in that it failed to identify any questions of law. In a

⁵ *Aslam v Transportation Auckland Corporation Ltd*, above n 1.

⁶ At [54].

⁷ At [56].

⁸ At [57].

⁹ At [60].

¹⁰ At [61]. The test of whether a dismissal is justifiable 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 occurred: Employment Relations Act, s 103A(2).

Minute dated 14 February 2018 Asher J directed that full particularised grounds of appeal were to be filed and served on or before 28 February 2018.

The amended application

[19] An amended application for leave dated 17 April 2018 identified as questions of law three matters:

- (a) Did the Employment Court err in law in finding that the [Transportation Authority's] decision to uphold the allegations against [Mr Aslam] and terminate his employment were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal for the purposes of Section 103A of the Employment Relations Act?
- (b) Did the Employment Court err in law in finding that the investigation into the allegations against [Mr Aslam] was sufficient for the purposes of Section 103A of the Employment Relations Act?
- (c) Did the Employment Court err in law in finding that [Mr Aslam] was given a reasonable opportunity to respond to [Transportation Auckland's] concerns before dismissing or taking action against him for the purpose of Section 103A of the Employment Relations Act?

[20] Transportation Auckland opposed the amended application on the grounds that the identified questions were not in reality questions of law but, in any event, they were not of general or public importance.

The refinement of the proposed questions of law

[21] In his written submissions Mr Pidgeon, for Mr Aslam, formulated six errors of law in the Employment Court's finding that the investigation by Transportation Auckland into the allegations against Mr Aslam was sufficient for the purposes of s 103A. However in oral argument he confined his argument to three points:

- (a) Transportation Auckland unreasonably withheld information before questioning Mr Aslam (described as the entrapment allegation).
- (b) Mr McLeod predetermined the decision to find Mr Aslam had committed serious misconduct.

- (c) Transportation Auckland failed to adequately investigate conflicting versions of events or ascertain whether there were other witnesses.

Discussion

The entrapment contention

[22] The basis of this allegation lay in the fact that, although the video was shown to Mr Froggatt at the outset, neither the video nor the passenger's written complaint were shown to Mr Aslam until after he had provided his initial written response and, more significantly, until after a number of specific questions were put to him at the initial meeting on 13 July 2016. Mr Aslam's version of the sequence of events at the meeting is supported by the notes of the meeting made by two persons in attendance, Ms Wood (the Transportation Auckland Regional Human Resources Manager) and Mr Borren (the Regional Human Resources Adviser). Both those records contain reference to a complaint being made about entrapment. In Mr Borren's notes, the statement is attributed to Mr Froggatt.

[23] It was Mr Pidgeon's submission that Transportation Auckland wished to avoid showing Mr Aslam the video in order to test whether his response would be consistent with what the video showed. He submitted that this did not amount to giving Mr Aslam a fair hearing and contributed to the finding that he had been dishonest.

[24] Mr Worthy's rejoinder was that this assertion was contrary to the Employment Court's explicit factual finding that Mr McLeod treated Mr Aslam fairly throughout. He made the point that Mr McLeod showed the complaint and the video to Mr Froggatt before the initial meeting, and that Mr Aslam was able to respond to the video and the complaint at that meeting once they were presented.

[25] On this issue the Employment Court stated:

[20] Mr Froggatt raised a concern that the video was not shown earlier in the meeting and that Mr Aslam had not seen a copy of the written complaint until the meeting had been going for a while. However, the meeting continued and Mr Aslam was able to respond to the material once he had seen it.

This point is not referred to again in the judgment and it is not apparent from the Court's discussion of the matters which Mr Aslam raised at the hearing whether the entrapment contention was squarely advanced.

[26] Mr Pidgeon argued that, had Mr Aslam been given the opportunity to consider the content of the video in advance of the meeting and discuss it with an adviser, it is likely that his memory would have been "jogged" and that he would have recalled that he did, in fact, leave his seat and move into the aisle of the bus as shown in the video. There is some validity in Mr Pidgeon's criticism of the process. However, given the nature of the incident it may be thought surprising that Mr Aslam professed no recollection of having moved from his seat into the aisle and confronting the passenger prior to being shown the video.

[27] The issue is whether a potential error of law can be identified in the Employment Court's conclusion that Mr McLeod was fair to Mr Aslam throughout given the circumstances where, at least on one interpretation, Mr McLeod held back the video evidence in the course of his initial questioning of Mr Aslam. If there was an element of unfairness in the procedure adopted, it is entirely possible, given that the video had earlier been shown to Mr Froggatt, that the Employment Court considered that s 103A(5) applied even though the Court did not refer to it.

[28] Section 103A(5) provides:

103A Test of justification

(5) The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were—

- (a) minor; and
- (b) did not result in the employee being treated unfairly.

[29] Viewing the matter with the most favourable complexion from Mr Aslam's point of view, we consider these circumstances give rise to a question of law concerning the consideration by the Employment Court of whether, in the particular circumstances, the employer had appropriately raised with the employee the concerns that the employer had before dismissing the employee.

[30] However we agree with Mr Worthy's submission that the dispute is confined to the parties and has no wider relevance to the general public or to employers generally. It is not a matter which satisfies the test in s 214(3) so as to warrant an appeal to this Court.¹¹

Alleged pre-determination of serious misconduct

[31] Mr Aslam's contention relies on the fact that, in a letter of 22 July 2016 inviting him to a disciplinary meeting, Mr McLeod stated that he had concluded that Mr Aslam's actions constituted serious misconduct. Mr Pidgeon submits that an employer must keep an open mind during the investigation but the letter was clear evidence that Mr McLeod had reached a decision prior to Mr Aslam being given an opportunity to respond to the allegations at the disciplinary hearing.

[32] On this issue the Employment Court observed that Mr McLeod gave evidence that he had not reached a firm view pending the meeting with Mr Aslam.¹² The formation of a preliminary view is an inevitable feature of the investigation process. Indeed cl 47.9 provides that an investigation meeting will be arranged if the employer believes the incident was one of serious misconduct.¹³

[33] On this issue we do not consider that any question of law arises.

Alleged failure to adequately investigate conflicting versions of events

[34] Mr Pidgeon submitted that there were significant discrepancies between the passenger's and Mr Aslam's version of events: specifically Mr Aslam did not agree that he had touched the passenger or used swear words. On this issue we agree with the respondent's submission that there was no error in the Employment Court's overall conclusion that the investigation was fair. Transportation Auckland had available to it not only the written record of the telephone complaint but the further written account

¹¹ At [1] above.

¹² *Aslam v Transportation Auckland Corporation Ltd*, above n 1, at [30]. The Authority's decision noted that at its investigation meeting Mr McLeod said there had been a typing error, that he had not decided there had been serious misconduct at that time but had decided there may have been serious misconduct.

¹³ At [5] above.

of the incident it requested,¹⁴ together with the video which the Court took into account in the manner noted at [16] above.

[35] With reference to the proposition that Transportation Auckland should have canvassed for witnesses to the incident, the respondent notes that this was not an issue raised by Mr Aslam at the time of the investigation or in the Employment Court. No issue of law arises in the circumstances.

Result

[36] The application for leave to appeal is declined.

[37] The applicant must pay the respondent costs for a standard application on a band A basis and usual disbursements.

Solicitors:
Integritas Law Firm, Auckland for Applicant
Kiely Thompson Caisley, Auckland for Respondent

¹⁴ At [7] above.