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THE ADVOCATE

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Driving Everyone Crazy

The recent Employment Court decision, ***Keepa v. Go Bus Transport Ltd*** [2015] NZEmpC 180, although of no great interest on its facts, raises and/or reiterates a number of interesting side issues for our consideration.

Mr Keepa was a driver for Go Bus in Tauranga from 7 March 2011 until his termination in August 2013. His Regional Manager (Mr Burton) had, from very early in his employment at Tauranga, raised a number of issues, including his manner of dealing with passengers, and most importantly repeatedly driving with one hand. There was also a significant amount of positive feedback to Mr Keepa about his performance.

On 24 July and 6 August 2012 further assessments by a trainer/assessor took place. The first drew attention to failures of driving standards, including again driving with one hand. A requirement was set for further training.

On 13 August Mr Keepa was given formal feedback on the assessment. He was unhappy about the content and immediately went to Mr Burton's office in an agitated state. Having heatedly taken issue with the reports he started to walk away. Mr Burton called him back but Mr Keepa refused to return without a support person. Mr Burton explained that this was not a disciplinary meeting, and again requested Mr Keepa to return, he refused to do so.

Mr Burton was frustrated at Mr Keepa's response and lack of commitment to improve. He therefore wrote formally requiring Mr Keepa to attend a disciplinary meeting to respond to three allegations:

"(a) Failure to comply with Safe Driving Policy by driving with only one hand on the steering wheel;
(b) Failure to comply with the Code of Conduct Policy through indifferent performance in response to attempts to offer and conduct training;
(c) Failure to comply with the Code of Conduct Policy by failing to carry out lawful instructions of a manager."

The failure in (c) referred to his refusal to stay at the meeting. The parties met several days later, with Mr Keepa represented by a union delegate. Having provided Mr Keepa with the opportunity to explain Mr Burton adjourned and then returned stating he intended to deal with the first two allegations by way of formal warnings and that he was contemplating dismissal on the third for insubordination. He explained that these decisions were subject to receiving further representations from Mr Keepa.

In response to this Mr Keepa adjourned the meeting and then asked to be allowed to resign rather than have his employment terminated. He did not try to dissuade Mr Burton from the dismissal or warnings. The resignation was agreed to and a formal record of settlement and resignation drawn up.

Mr Keepa subsequently pursued a grievance claiming that his employment ended as a result of unjustifiable action on behalf of Go Bus:

a. Mr Burton was acting in breach of the principle of "*nemo judex in sua causa*" (No man shall be a judge in his own cause), in that he was involved in all the circumstances giving rise to the disciplinary process and then conducted the final meeting and delivered the disciplinary decision.

b. That the instruction (to not leave the meeting) was not lawful or lawfully given.

c. That it was not necessary to consider the signed documents because the ending of the dismissal was wholly unjustified and that the resignation amounted to a constructive dismissal. Go Bus argued that the agreement to resign was agreed in accord and satisfaction and on that basis he was estopped from taking any action against the employer.

While unremarkable in itself, the decision raises a number of interesting issues.

Client Services:

- General advice in relation to all employee-related issues
- Resolving Personal Grievances and Workplace Disputes
- Employment Agreements - drafting and negotiation
- Employment Relations Authority/Employment Court and Mediation Representation
- Employment Relations Strategies
- Training
- Monthly newsletter

Disclaimer:

This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact **Neil McPhail**, **Raewyn Gibson**, or **Peter Zwart**.

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Nemo Judex In Sua Causa

Mr Keepa's concerns are ones that arise from time to time with small employers where the decision-maker in a disciplinary setting may commonly be personally embroiled in the facts. Mr Keepa argued that Mr Burton was so involved in the circumstances leading to the disciplinary meeting that he was not impartial. He was a witness to the altercation between himself and Mr Keepa and then became the inquirer and decision-maker hence becoming a '*judge in his own cause'*. In doing so Mr Keepa referred to the Supreme Court decision ***Saxmere v. Wool Board Disestablishment Ltd*** which referred directly to the involvement of a Judge in the facts of a case. The Court in this case did not accept this argument stating that an '*employer carrying out a disciplinary function is not acting judicially'* and went on to distinguish between the *'exacting standards (of natural justice) expected of a Court to the relatively rudimentary standard expected of an employer'*. What was expected was not whether or not Mr Burton '*breached the principle of nemo judex in sua causa, . . . but rather whether his involvement in the dispute with Mr Keepa and his partiality reached a stage that he should have stood aside to comply with the requirements of (a fair and reasonable employer)'.* On the facts the Court determined that there was no such breach.

Tentative Decision-Making

A series of Employment Court decisions have indicated a requirement or a preference for an additional step in the disciplinary process whereby the employee is given the opportunity to respond to either a preliminary finding or to a conclusion on fact before any final penalty is determined. In this case Judge Perkins considered this requirement as part of the overall consideration of the requirements of a fair and reasonable employer. In reaching a finding that Mr Burton was '*particularly careful to ensure that Mr Keepa was accorded fairness'*, the Court went on to state that there:

". . . was no need for Mr Burton to have given Mr Keepa the opportunity to make further final submissions and pleas following the decision being reached that warnings or dismissal were in contemplation. By that stage he had already allowed Mr Keepa . . . to respond to the allegations."

The Court went on to state:

"A disciplinary process was appropriately put in place. Mr Burton was meticulous in notifying the allegations, allowing Mr Keepa to be represented and fully working through matters at the meeting. The process was conducted in a cautious manner. Probably Mr Burton was over-cautious in allowing further representations at the final stage."

While linked to the facts of this case, the Judge's findings appear to state (clearly) that such a step need not be considered mandatory.

Accord and Satisfaction

Mr Keepa argued in this case that Go Bus could not rely on the recorded settlement and resignation as a defence because of the actions of Mr Burton in breach of the principle of nemo judex in sua causa.

He also argued that it was unenforceable because no monetary consideration was given.

The Court did not accept either argument, the latter on the basis that Mr Keepa *"gained a significant advantage from being allowed to resign rather than being dismissed insofar as any future employment prospects were concerned. The advantage to Go Bus from the settlement was that it would see an end of the matter and not be facing any further action; although that, as has transpired, was a vain hope."*

The Court therefore held that the settlement and resignation were binding on the parties and that even if he had a valid case on the facts, Mr Keepa would have been estopped from pursuing an action against his employer.

In conclusion, while unremarkable on its own facts, the Go Bus decision provides insight into three significant and common issues; the ability of a small employer to be his or her own decision-maker, the requirement for an additional procedural step and enforceability of informal settlements between the parties. As always these situations are all fact dependent, that being said this case is helpful in its views of the law surrounding dismissal procedures.

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