

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Lawrence Lachman Naidu (Applicant)

AND The Chief Executive in Respect of
the Inland Revenue Department (Respondent)

REPRESENTATIVES Phirak Appleton, Counsel for Applicant
Susan Hornsby-Geluk, Counsel for Respondent

MEMBER OF AUTHORITY Ken Anderson

INVESTIGATION MEETING 28 September 2005

SUBMISSIONS RECEIVED 14 October 2005 and 31 October 2005

DATE OF DETERMINATION 14 December 2005

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

- [1] Mr Naidu was an Investigator with the Inland Revenue Department (“the Department”). He claims that he was unjustifiably dismissed on 30 June 2004. Mr Naidu seeks that the Authority finds that he has a personal grievance and award him the remedies of reinstatement, reimbursement of lost wages and \$20,000 in compensation.

Background Facts and Evidence

- [2] Mr Naidu commenced his employment in the Tauranga office of the Department in September 2002. The position of Investigator involved working with taxpayers and ensuring compliance with taxation legislation.
- [3] It appears that as of October 2003, the Department had some concerns pertaining to the general work performance of Mr Naidu and there is some evidence that various steps were taken to discuss these concerns with him in the context of recognised performance management planning, but it seems that he was somewhat evasive. However, as the dismissal of Mr Naidu was not based on performance concerns as such, the Authority is not required to investigate or make any findings pertaining to his general work performance.

Events leading up to the dismissal

(a) *Request for use of Department car – 27/28 February 2004*

- [4] At the material times leading up to the dismissal of Mr Naidu, Mr Bevan Spalding was his Team Leader. On Thursday 26 February 2004, Mr Naidu sent an email to Mr Spalding setting out his travel intentions for Friday 27 February and Saturday 28 February. Mr Naidu proposed that on the Friday, he would travel from Tauranga to Cambridge for the purpose of an audit related matter at an Accountant's office. Next, Mr Naidu proposed travelling to Hamilton to meet with a Public Service Association ("PSA") Organiser and then, time permitting, Mr Naidu intended to meet with the Accountant of a Hamilton business for an audit related matter.
- [5] From Hamilton, Mr Naidu intended to travel to Auckland to meet with the Accountant and/or owner of a restaurant business for audit related purposes. Mr Naidu proposed that he would stay Friday night in Auckland and on the Saturday, he would visit the Massey University Albany Campus for study purposes, pertaining to a work related course he was enrolled in. Mr Naidu anticipated being back in Tauranga by early Saturday evening.
- [6] Mr Spalding declined Mr Naidu's request to have a Department car for weekend use. Mr Spalding subsequently confirmed the efficacy of his decision with the Area Manager for the Department, Mr Anthony Morris. It had been decided that it was unnecessary for Mr Naidu to be in Auckland for study purposes. Mr Morris says that he was in New Plymouth when Mr Naidu contacted him about the refusal of vehicle use and that this was either on Thursday evening 26 February or at breakfast on Friday 27 February. Mr Morris confirmed to Mr Naidu the denial of the request for the use of a Department vehicle.
- [7] The evidence of Mr Morris is that he subsequently discovered that Mr Naidu did not attend work on Friday 27 February and hence did not proceed with the appointments that had apparently been arranged for that day. Mr Morris says that he was concerned that Mr Naidu would decide not to attend the arranged meetings at such short notice, and because Mr Naidu had not advised of his absence.
- [8] It was then decided to contact the three taxpayer parties that Mr Naidu said that he was going to meet. All three conveyed that they did not have an appointment with Mr Naidu on 27 February. Mr Morris says that he was concerned that Mr Naidu may not have been honest about his intended use of a Department vehicle on the days in question.
- [9] The outcome of this discovery was that Mr Mark Walker, a Human Resources Advisor employed by the Department, undertook a preliminary review of Mr Naidu's use of vehicles for work related purposes. The evidence of Mr Walker is that the purpose of the preliminary review was to ascertain if there was any evidence to suggest that an investigation should be commenced. Mr Walker conducted a review for the period 1 July 2003 to 17 March 2004.

(b) *Accommodation booking at Palmerston North*

- [10] While the review of Mr Naidu's work activities, and associated vehicle usage, was taking place, on 8 March 2004, the Department received a fax from a motel in Palmerston North confirming a booking for Mr Naidu for 25 and 26 March 2004. Mr Morris became aware of the fax. He says that he had two concerns. The first being, that it is not the procedure of the Department for officers or employees to book their own accommodation - a separate unit does that. The second concern being, that the booking related to dates that Mr Naidu had sought

study leave for, but the Department had advised that it would not be covering the costs.

- [11] On 26 March 2004, Mr Spalding received a telephone call from the motel asking if Mr Naidu was going to arrive. The motelier advised that Mr Naidu had not arrived the night before and no cancellation had been made. The Department subsequently received an account for the cost of one nights' accommodation.

(c) *Matters of concern to the Department*

- [12] As a result of the review of Mr Naidu's activities conducted by Mr Walker, via a letter dated 13 April 2004, Mr Morris requested Mr Naidu to attend a meeting on 19 April 2004 to discuss the following matters:

- (i) The possible misuse of Department vehicles on six occasions between August 2003 and February 2004.
- (ii) The arranging of accommodation at Palmerston North, obtaining the benefit of corporate rates and bringing the Department into disrepute.
- (iii) Potentially misleading the Department in regard to purported vehicle usage on 27 February 2004.
- (iv) Possible unauthorised personal use of the internet during work time.
- (v) Unusual and potentially concerning behaviours regarding access to the Tauranga office on eight particular dates.

- [13] Mr Naidu responded that he was willing to attend a meeting but his representative was not available until 23 April 2004. However, on 19 April, Mr Naidu advised that that he would be off work for two weeks on medical grounds, due to stress brought about by issues in the work place. Mr Morris requested that Mr Naidu provide him with information pertaining to what had caused the stress and an explanation from Mr Naidu's doctor going to a diagnosis and prognosis as to the stress effects. Mr Naidu was also asked if he would be able to attend the meeting on 23 April 2004.

- [14] The evidence of Mr Morris is that he had some reservations about the meeting with Mr Naidu going ahead but Mr Naidu was apparently willing. After speaking to Mr Naidu's doctor, it was agreed that the meeting would go ahead on the understanding that Mr Naidu could bring it to an end at any time if he felt unable to continue.

(d) *Meeting 23 April 2004*

- [15] The Authority has viewed a transcript of this meeting (and the meeting on 13 May 2004). It appears that little was forthcoming from Mr Naidu as to his work related movements. There was also a lack of any information as to the stressors that he alleged existed in the workplace. Mr Naidu remained on sick leave, only coming into the office on 26 April 2004 to work with his PSA delegates, on a response to the matters that had been raised with him.

(e) *Medical matters*

- [16] Mr Morris received a letter dated 27 April 2004 from Mr Naidu's Doctor. The Doctor expressed concern about the recent mental health of Mr Naidu and conveyed that Mr Naidu was suffering from "significant depression with symptoms of anxiety." The Doctor expressed a belief that the major factor in Mr Naidu's condition was some ongoing stress at work. The Doctor gave details of the treatment that Mr Naidu was undertaking and a prognosis, concluding that Mr Naidu could conditionally return to work on 28 April 2004. However, it transpired that Mr Naidu continued to be under the care of his Doctor and it was agreed that

an independent assessment would be arranged in order for the Department to gain a better understanding of Mr Naidu's health issues.

[17] Mr Naidu returned to work on 3 May 2004. It appears that he spent his time with PSA delegates preparing a response to the matters that had been raised by Mr Morris but was not available for work. In a letter dated 11 May 2004, to Mr Daryl Gatenby, the PSA Organiser, Mr Morris expressed his concerns pertaining to Mr Naidu's health and well being. Mr Morris also conveyed that Mr Naidu was instructed to take special paid leave until the independent Doctor's report was received or 24 May 2004, whichever came first.¹

(f) *Meeting 13 May 2004*

[18] A further meeting took place on 13 May 2004. The purpose was to discuss the Department's concerns with Mr Naidu. However, at the beginning of the meeting, a letter from Mr Naidu's Doctor was presented. In essence, the letter conveyed that Mr Naidu should not be subjected to further questioning as "the additional stress has the potential to cause more harm." The Doctor suggested that Mr Naidu could return to work in his "ordinary capacity" but should be allowed some time to "allow his mental health to improve to a significant degree" and then the Department could seek the answers to the questions from Mr Naidu.

[19] On the basis of information received from Mr Naidu's Doctor, the Department decided to conclude the meeting and assess how to progress matters with Mr Naidu. Upon the receipt of a provisional diagnosis from the independent Doctor, Mr Morris extended the special leave for Mr Naidu until 11 June 2004. Mr Morris conveyed this information to Mr Gatenby via a letter dated 26 May 2004. Mr Morris also wrote:

"I have sufficient information available to me on which to make my tentative conclusions with regard to the investigation. I will write to Lawrence with my tentative conclusions by Monday 31 May 2004. Lawrence will be given until Wednesday 9 June to provide written comment on my conclusions and address any matters, for my further consideration."

(g) *The letter of 31 May 2004*

[20] Mr Morris wrote a comprehensive (11 pages) letter to Mr Gatenby, summarising the findings of the Department's investigation into the "actions/activities" of Mr Naidu. Mr Morris revisited his letter of 13 April 2004, and he also set out the various issues that had arisen in the investigation and Mr Naidu's response. The letter concluded with a summary of the tentative conclusions of Mr Morris:

"In summary my tentative conclusions are:

- a) That on his trips in an Inland Revenue motor vehicle of 14 to 18 August 2003; 25 to 28 September 2003; 14 to 15 November 2003; 19 to 21 December 2003 and 12 February 2004 Lawrence used the motor vehicle for personal/private purposes and that such use was unauthorised.
- b) That his trip in an Inland Revenue motor vehicle on 3 December 2003 was for a business reason.
- c) That on 26 February 2004 Lawrence's actions were dishonest and that he deliberately set out to mislead his employer and that the intention of doing so was to gain personal/private use of an Inland Revenue motor vehicle.
- d) That on 8 March 2004 Lawrence used knowledge he had gained as an employee of Inland

¹ On 25 May 2005, the independent Psychiatrist provided a provisional diagnosis that Mr Naidu had major depression.

Revenue for personal benefit when he made a personal accommodation booking at the Aubyn Court Motor Lodge, Palmerston North for 25, 26 and 27 March 2004. His actions have brought Inland Revenue into disrepute and committed Inland Revenue to expenditure which was unauthorised.

- e) That on 25 occasions between 18 July 2003 and 9 February 2004, Lawrence used Inland Revenue computers to access the Internet for personal purposes during work time and that this access was unauthorised. Given the uncertainty regarding when the Internet should be used and Lawrence's response that he has made up time I do not intend to take this matter further."

[21] Mr Naidu was invited to provide written comments in relation to the above findings by 9 June 2004. Mr Morris also conveyed that his final decision would be made on 11 June 2004. Following representations from Mr Gatenby on behalf of Mr Naidu, Mr Morris agreed to extend the time for Mr Naidu to respond to the tentative conclusions until 21 June 2004, with the final decision being made on 23 June 2004. Mr Naidu's paid special leave was also extended to that date.

(h) *Mr Naidu's Response*

[22] Mr Naidu responded by way of a comprehensive (7 pages) letter dated 22 June 2004. Mr Naidu gave an explanation for the various events pertaining to the use of the Department's vehicles on the specific occasions. However, I note that Mr Naidu only provided a very cursory explanation as to the itinerary that he provided to Mr Spalding relating to his travel intentions for Friday 27 February 2004, and the fact that there were no appointments arranged with the taxpayers that he had alluded to.

The dismissal - 30 June 2004

[23] In a letter dated 30 June 2004, Mr Morris conveyed to Mr Naidu (via Mr Gatenby), his final decisions pertaining to the internal investigation of the actions of Mr Naidu.

Use of motor vehicles / access to internet

[24] Mr Morris conveyed that in regard to Mr Naidu's use of Department vehicles on 25 September 2003, 3 December 2003 and 12 February 2004, and the access to the internet, he had considered Mr Naidu's explanations and had given him "the benefit of the doubt" and no further action would be taken. However, in regard to Mr Naidu's use of the Department motor vehicles on 14 August 2003, 14 November 2003 and 19 December 2003, Mr Morris concluded that Mr Naidu had used the vehicles for an unauthorised purpose.

Accommodation booking

[25] In regard to the booking made by Mr Naidu at the Aubyn Court Motor Lodge and the failure to cancel it, Mr Morris concluded that Mr Naidu had booked the accommodation without being given authority to attend the block course in Palmerston North, and furthermore, he had no authority to book the accommodation at Inland Revenue corporate rates, and by not cancelling the booking, Mr Naidu had compounded matters and brought the Department into disrepute.

Itinerary for Friday 27 February 2004

[26] Mr Morris concluded that Mr Naidu had misled Mr Spalding for the purpose of obtaining the benefit of using an Inland Revenue motor vehicle for his own means.

Breach of obligations under codes of conduct

- [27] Mr Morris also concluded that Mr Naidu had breached his obligations under the Inland Revenue Code of Conduct and the Public Service Code of Conduct but he did not provide any specifics as to why he reached this conclusion.
- [28] Mr Morris concluded that he no longer had the necessary trust and confidence in Mr Naidu to maintain the employment relationship and Mr Naidu was dismissed with one month's pay in lieu of notice.

Analysis and Conclusions

- [29] Mr Naidu says that his dismissal was unjustified, largely on the alleged grounds that the explanations provided by him were reasonable and credible and should have been accepted by the Department. Effectively, Mr Naidu seeks to have the Authority re-open the investigation that his employer conducted, but that is not the role of the Authority. Neither is it the role of the Authority to place itself in the shoes of the employer in regard to its analysis of the information received, as a result of, what I find was a properly conducted investigation into the alleged conduct of Mr Naidu. As the Employment Court has stated:

“A personal grievance is not an appeal to the Employment Relations Authority from the employer's findings of fact but is an inquiry into the question whether the employer actually believed, and did so on reasonable grounds following a fair inquiry, that the employee had been guilty of misconduct so serious that it warranted dismissal. In reaching conclusions, an employer is entitled to draw reasonable inferences from surrounding or circumstantial facts and it is not a valid objection that such inferences may not have been the subject of direct proof. The employer is also entitled, where there are conflicting accounts, to choose between them, either preferring one to another or rejecting one and accepting the other.” *Chief Executive of the Ministry of Maori Development v Travers-Jones* [2003] 1 ERNZ 174 at 184.

- [30] Furthermore, it is not for the Authority to substitute its decision to dismiss or not, for that of the Department. Rather, the role of the Authority is to determine whether the Department's decision was a fair and reasonable one in the circumstances.²
- [31] I conclude that the Department conducted a careful and proper investigation into the alleged misconduct of Mr Naidu and that at all times the various findings of that investigation were put to him for his response. Then, having acknowledged his response, further investigation into the matters he raised took place and the findings of the Department were communicated to Mr Naidu and his representative. Furthermore, the investigation took place over a reasonable period of time and was both thorough and fair.
- [32] In determining whether the decision of the Department to dismiss Mr Naidu was a fair and reasonable one in the circumstances, I have taken into account the submissions advanced for him. Firstly, Mr Naidu says that the evidence available to the Department did not establish that there was a “grave” charge to be explained by him and that the Department simply chose not to believe Mr Naidu without any substantive grounds to establish that his version of events was not credible. It has also been submitted for Mr Naidu that the Department made assumptions rather than engaging in considered deliberations in making its decision to dismiss.

² *BP Oil NZ Ltd v Northern Distribution Union* [1992] 3 ERNZ 483 (CA).

- [33] Had it simply been just a matter of Mr Naidu's use of a Department vehicle on any one of the three occasions³ that the Department took into account, then the submissions advanced for Mr Naidu may have carried some weight, particularly given that there appears to be at least a possibility that the application of the Department's motor vehicle policies may not be as consistent as the Department espouses. However, given that it is obvious that Mr Naidu sought to mislead his employer as to his intentions pertaining to the use of a Department vehicle on 27 and 28 February 2004, coupled with the flaws in his explanations as to the use of the vehicles on the three occasions in question, then I find that the conclusions reached by Mr Morris were reasonably available to him.
- [34] Indeed, on its own, the matter of Mr Naidu's dishonest behaviour regarding the proposed travel plans for 27 February 2004, was a fundamental breach of trust and confidence warranting dismissal. On top of all of this was the incident involving what can only be seen as an attempt on the part of Mr Naidu to manipulate the corporate accommodation concessions to his own advantage. Then, to compound matters, Mr Naidu failed to cancel the accommodation when it was no longer required, hence raising an issue as to the repute of the business practices of the Department.
- [35] The breach of trust and confidence is particularly marked given the position of trust held by held by Mr Naidu and the need to maintain a particularly high standard of honesty and integrity, given the general nature of the role of Inland Revenue Department Investigators in their day to day role upholding adherence to taxation legislation. I also note that the *Professional Requirements* set out in the *Inland Revenue Human Resources Manual*, provides that employees of the Department are expected to: "Perform our official duties honestly, faithfully and efficiently, respecting the rights of the public and our colleagues."

Determination

- [36] In case there is any doubt, I record that I have not found it necessary or appropriate, to take into consideration s.103A of the Employment Relations Amendment Act (No 2) 2004, as at the time that Mr Naidu was dismissed (30 June 2004), that legislation had not come into force. But in any event, in my considered view, an application of the legal precedent set down in either of the often applied Court of Appeal decisions; *W & H Newspapers Limited v Oram* [2000] 2 ERNZ 448 (CA) and *BP Oil NZ Ltd v Northern Distribution Union* [1992] 3 ERNZ 483 (CA), to the specific facts relating to the misconduct of Mr Naidu, would have the same result
- [37] On the basis of the considerable evidence presented, and given the totality of the misconduct of Mr Naidu and the position of trust that he held, I find that the Department were entitled to view his actions as serious misconduct warranting dismissal, hence the dismissal of Mr Naidu was justified. It follows that I must find that Mr Naidu does not have a personal grievance and hence the remedies that he seeks from the Authority cannot be granted.

³ 14 August 2003, 14 November 2003 and 19 December 2003.

Costs

[38] Costs are reserved. The parties are invited to reach a resolution of this matter. In the event that a resolution is not achieved, submissions may be made to the Authority for an order, within 28 days of the date of this determination.

Ken Anderson
Member of Employment Relations Authority