

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN John Irving (Applicant)

AND Transportation Auckland Corporation Limited t/a Stagecoach
Auckland (Respondent)

REPRESENTATIVES Ashley Sharp, Counsel for Applicant
Andrew Caisley and Jane Taylor, Counsel for Respondent

MEMBER OF AUTHORITY Robin Arthur

INVESTIGATION MEETING 28 September 2005

SUBMISSIONS RECEIVED 5 October 2005 (Applicant); 12 October 2005 (Respondent); and 14
October (Applicant in reply)

DATE OF DETERMINATION 28 October 2005

DETERMINATION OF THE AUTHORITY

[1] The respondent dismissed the applicant on 13 May 2005 for serious misconduct, specifically not following what the respondent considered were lawful and reasonable instructions given to the applicant by his manager. The applicant says he was unjustifiably dismissed and seeks remedies of reinstatement, lost wages and compensation for hurt and distress.

[2] The matter was not resolved in mediation. The Authority subsequently investigated the matter through a one-day meeting followed by written submissions. Evidence was heard from the applicant; his manager at the respondent's Mt Roskill depot, Colin Somerville; the respondent's human resources manager, Gavin Cook; and Auckland Tramways Union vice-president Perry Davis.

[3] The respondent's papers filed in this matter referred to itself as Stagecoach New Zealand Limited. Mr Irving was in fact employed by Transportation Auckland Corporation Auckland, which, jointly with Cityline (NZ) Limited, trades as "Stagecoach Auckland". The entitling of this matter on the Authority's record has been amended accordingly.

[4] The facts, in summary, are these: Mr Irving, a bus driver, refused to hand over to the respondent – or as the parties called it, "cash in" – the money he collected in fares on certain days when he finished after his rostered times. This was because the company had refused to pay him for two occasions on which he had finished work late. Some days later the respondent accepted Mr Irving was owed money for the two late finishes and agreed to pay it. Mr Irving was then told to "cash in" but refused to do so until he was actually paid his overdue pay. His employment agreement required him to "cash in" within 24 hours of getting a notice from the respondent to do so. The respondent issued written instructions to "cash in". Mr Irving did not comply with those

instructions. The respondent scheduled an investigation meeting and suspended Mr Irving. Mr Irving then “cashed in” fares he held but did not resign from his view that he would withhold fares until he received his overdue pay. The respondent’s representatives met twice with Mr Irving and his representative – once to investigate the issues and once in a disciplinary meeting. At the second meeting the respondent resolved to dismiss Mr Irving for disobeying lawful and reasonable instructions. He was dismissed for serious misconduct and paid one week’s pay in lieu of notice.

[5] The Authority must determine whether the dismissal was justified by considering whether the respondent’s actions were what a fair and reasonable employer would have done in all the circumstances. Issues to be considered in determining this matter include:

- Whether the respondent’s instructions to Mr Irving to “cash in” were lawful and reasonable?
- Whether Mr Irving’s conduct in not “cashing in” amounted to serious misconduct?
- Whether dismissal was an outcome available to the respondent?
- Whether the parties acted in good faith and followed the terms of Mr Irving’s employment agreement for resolving employment relationship problems?

Background

[6] Mr Irving has worked as a bus driver for more than nine years.

[7] At the time of his dismissal he was employed under the terms of an expired collective employment agreement. The parties agree that, at all relevant times, Mr Irving’s terms and conditions were based on the expired agreement.

[8] Throughout this period bargaining on the terms for renewal of the agreement was the subject of an extended dispute which included strikes and overtime bans by the respondent’s workers.

[9] Terms and conditions applying to Mr Irving and relevant in this matter include “cashing up procedures” (clause 31); “disciplinary procedures” (clause 42); and “resolution of employment relationship problems” (clause 43).

[10] Clause 31 required Mr Irving to pay in all cash resulting from the sale of tickets and operation of an electronic ticketing machine at the end of each duty (that is a shift) or as directed by the company. He was responsible for “making good” any shortages within 24 hours of being notified of the shortage. Ten minutes was allowed in each duty to attend to cashing up procedures.

[11] Clause 42 provided for an employee to be dismissed for serious misconduct, including “failure to obey a lawful and reasonable instruction from an authorised Company employee”.

[12] Clause 43 provided that an employment relationship problem “should be raised and discussed with the employee’s manager as soon as possible”. It also states that if an employee chooses to raise a problem in writing, “the employer agrees to respond in writing within 10 days of receiving the employee’s letter”. It further provides that if the problem is not resolved by discussion, any party may seek assistance from the Mediation Service.

The disputed pay

[13] On 7 April 2005 Mr Irving delivered to the respondent’s Mt Roskill depot office a report form stating he was not paid for time on 30 March and 1 April when he had worked late. The time on the two days totalled 25 minutes and he asked the company to “rectify” his pay.

[14] Mr Somerville dealt with the form the following morning. He checked company records on

Mr Irving's runs and made a note on the form, returned to Mr Irving, saying: "*On 30/3 and 1/4 you did not complete your last trip. Paid time only as agreed between union and company.*"

[15] At the time the union, as part of its campaign for a renewed collective agreement, had notified the respondent of an open-ended ban on voluntary overtime from 29 March. On Auckland's congested roads, bus drivers often run late and finish their rostered duty after the scheduled time. The effect of the ban was that drivers still out on the road near to their scheduled finish time would return to the depot without doing any further trips included in that duty.

[16] On 30 March and 1 April Mr Irving – as part of the overtime ban – had not completed his last run. Even without completing those trips, he returned to the depot after his scheduled finishing time. He then went to the office to go through the "cashing up" procedure. It was this "cashing up" time that he claimed was unpaid. Mr Somerville however refused Mr Irving's claim for overtime because he believed – reasonably, I find – that it was covered by the union overtime ban. The company had taken the position that if the drivers would not work overtime to finish their runs, the company would not pay for their time in returning to the depot and cashing up.

[17] Mr Irving was unhappy with Mr Somerville's response and sent him a note dated 12 April stating that there were "two consequences" for his refusal to pay the requested 25 minutes overtime:

"#1 Effective immediately: At any time I enter the depot late, I will not cash in. If you refuse to pay me for my time I certainly will not undertake any company business beyond my sign off time.

#2 If I am not paid 25 minutes at time and a half within 14 days, I will refer this matter to the Employment Relations Service [sic] for a determination. I will not hesitate to file a personal grievance against Stagecoach in relation to this matter."

Not "cashing in"

[18] Mr Irving did act immediately. On 12, 13, 14 and 15 April he did not "cash in" after finishing his shift. In each case, he says, the duty ran over his rostered finishing time. On 17 April he did have time to "cash in" and did so for his takings for that day and for 12, 13, 14 and 15 April.

[19] On 20 April representatives of the respondent and the union met to discuss issues related to the operation of the overtime ban. For drivers operating out of the Mt Roskill depot, Stagecoach agreed to pay for the time that drivers took to return to the depot and "cash in" after their rostered finishing time, even if the drivers had not completed all their scheduled trips.

[20] On 21 April Mr Somerville left a message with his office counter staff asking to see Mr Irving when he arrived at work following a union stop work meeting. He intended telling Mr Irving that the disputed 25 minutes would now be paid. Mr Irving did not return to work after the stop work meeting.

[21] Mr Somerville was absent from work from 22 April to 25 April – he was in court on 22 April; 23 and 24 were weekend days; and 25 April was the Anzac Day public holiday. When he returned to work on 26 April he received a further note from Mr Irving.

[22] Mr Irving's note of 26 April complained that Mr Somerville had not replied to his note of 12 April. He claimed the lack of reply breached clause 43.3 of his employment agreement, which required a written reply within 10 days of an employee raising a problem in writing. He stated he would refer "*this matter to the Employment Relations Service [sic] for a determination*". He invited Mr Somerville to attend mediation on the issue.

[23] Mr Somerville responded promptly with a letter dated 27 April which acknowledged Mr Irving's note of 12 April claiming the 25 minutes additional pay for working late. It explained that he had asked to see Mr Irving on 21 April:

"so I could explain to you that we agree with you however you did not turn up for work. Payroll has been advised of this and payment of the 25 min should be in your next pay."

[24] The following day Mr Somerville discovered that Mr Irving had not "cashed in" his takings for 23 and 26 April totalling \$306.25. This came to his attention when he read a report generated daily listing all drivers who had not paid in their takings.

Company instructions

[25] Using a standard form, addressed to Mr Irving and including the relevant amount, Mr Somerville directed Mr Irving to "make good" the shortage within 24 hours. The form set out the cashing up procedures at clause 31 of the employment agreement and included a note stating that "[u]nauthorised use of Company Money is theft and is classed as serious misconduct".

[26] The information on amounts which should be cashed in comes from an electronic record kept on a form of computer disc the parties called a "module". A driver collects a module when he or she signs on each day. The driver connects the module to the electronic ticketing machine in his or her bus. On completing the duty, the module is returned to the depot office where it is placed in a reading machine. The machine provides a report on tickets issued and the cash takings which the driver should pay in. The driver then pays the money into automated cash collection machines, referred to by the parties as "CDS machines". Sometimes these machines will not be operating properly. In that event, Mr Somerville and Mr Davis told me, drivers usually complete "cashing in" the next day.

[27] Each driver keeps his or her cash box – containing their float, and any takings yet to be paid in – in an individual security locker at the depot. The company also has a key to each driver's locker.

[28] Mr Irving responded emphatically to Mr Somerville's 28 April instruction. He returned a copy of it to the respondent's office with the following handwritten note added:

When I have 25 min at time and a half in my hand I will be prepared to cash in late. I have been pissed around for 3 weeks over 25 minutes. I will not be pissed around like this again. Irving

[29] On 2 May Mr Somerville wrote to Mr Irving restating clause 31 and the expectation that he follow the respondent's procedures for cashing up. He stated:

"You must pay in all money received from the sale of tickets and operation of the electronic ticketing machine at the completion of each Duty or as soon as possible thereafter. ... If you fail to cash up correctly in the future then the Company will treat this as serious misconduct and you will be subject to the Company's disciplinary procedure as per clause 42.7 [the serious misconduct clause]."

[30] The same day he issued a further standard form requiring Mr Irving to "make good" a shortage of \$709.35. Company records provided to the Authority investigation show that following the 28 April instruction Mr Irving had not "cashed in" takings he collected while working on 28, 29 and 30 April.

[31] Following the May 2 instructions Mr Irving did not cash in takings of \$184 he collected on 3 May.

Investigation and disciplinary procedure

[32] On 4 May Mr Somerville asked counter staff to tell Mr Irving that he wanted to meet with him when he came into the depot office to start his duty. Mr Somerville was told that Mr Irving would not meet with him. The two men disagree about what happened next. Mr Somerville says he went and spoke to Mr Irving. Mr Irving's brief of evidence says this did not happen but he told me in his evidence at the investigation meeting that he did not remember Mr Somerville coming out to talk to him. I consider it most likely that Mr Somerville's recollection is correct.

[33] Mr Somerville says Mr Irving said he would not meet with him unless accompanied by a union representative. Two Tramways Union delegates were available at the depot at the time but Mr Irving wanted a union representative from another depot to accompany him. Although Mr Somerville did not consider the discussion he wanted to have with Mr Irving to be of a disciplinary nature, he properly, I find, did not insist on going ahead in talking to Mr Irving without his representative of choice being present.

[34] Mr Somerville prepared and had delivered to Mr Irving a letter suspending him from duties on full pay from 4 May and asking him to attend an investigation meeting on 11 May. The days from 5 to 10 May were not to be paid as they were notified as a six day strike by union members about collective bargaining issues. The letter encouraged Mr Irving to bring a representative and advised that following the meeting and after considering his responses, the Company would decide whether to take disciplinary action. The letter also stated:

As you have been advised, the Company has concerns that you have not been cashing up at the end of each day and have not accounted for monies taken during your duties since 23rd April 2005. The Company views this matter very seriously and as potential serious misconduct. ...

[35] During the Authority investigation meeting I raised the issue of whether Mr Irving had been disadvantaged by not having the opportunity to comment on the prospect of being suspended and asked counsel to address this in submissions. I also heard evidence from Mr Davis that, although not specifically provided in the employment agreement (except for cases of public complaints against drivers), it was the Company's common practice (accepted by the union) to suspend workers on full pay pending investigation meetings. There was also no evidence, prior to me raising it, of any complaint about the suspension on pay by Mr Irving, or by Mr Davis (who represented Mr Irving in subsequent meetings with the company). There was also no pleading of unjustified disadvantage regarding the suspension in the problem as filed in the Authority. I note too that, but for the unusual intervention of a six-day strike, the investigation meeting would probably have been able to be called on 5 or 6 May. The practical effect of his suspension was that Mr Irving was paid for 4 and 11 May as he otherwise would have been but not for the six-day strike. In all these circumstances I do not find any disadvantage arising from his suspension.

[36] The respondent's investigation meeting was later rescheduled to 12 May. In the meantime Mr Irving had cashed in the takings he held. He says he was able to do this on 4 May because, while suspended on full pay, he had "plenty of time" to cash in as he was not out driving a bus. The additional money owed to Mr Irving for working late on 30 March and 1 April – around \$7 – was also paid. The pay record information regarding that payment, provided to the Authority in the respondent's documents, is dated 4 May.

[37] At the 12 May meeting Mr Davis restated Mr Irving's position that he did not cash in on certain days that he was late finishing his run because he was not paid for working late. Mr Irving also complained that Mr Somerville had not replied to his 12 April note within ten days as required by the employment agreement. It appears that it was at this meeting that Mr Irving became aware

for the first time that the originally disputed amount had by then been paid to him.

[38] Mr Somerville decided he was not satisfied with Mr Irving's explanation for not complying with the instructions to cash in given on 28 April and 2 May. He told Mr Irving that a disciplinary meeting would be held the next day.

[39] Mr Irving attended the 13 May disciplinary meeting with his representative Mr Davis. Mr Cook and Mr Somerville represented the respondent. Mr Cook outlined the respondent's concerns about following the cashing up procedures and asked Mr Irving to explain why he had not complied with the instructions to cash in. Mr Irving refused to answer Mr Cook's questions saying that he had gone over the issue at the previous day's meeting. He said the problem was caused by the company refusing to pay his overtime and not responding to his 12 April note within ten days. Mr Davis asked why the company had not gone ahead and taken the takings not cashed in from Mr Irving's security locker. Mr Davis also said that the problem lay with the respondent's counter staff and how they dealt with matters. Mr Cook responded that this was a different issue from the subject of the meeting – Mr Irving ignoring instructions. Mr Cook said it was not acceptable for Mr Irving to take the law into his own hands. Mr Irving then left the meeting.

[40] Mr Cook and Mr Somerville adjourned the meeting to consider Mr Irving's responses. They met again shortly after with Mr Davis and advised that they had decided to dismiss Mr Irving for serious misconduct. At Mr Davis' request Mr Irving was paid an additional week's pay in lieu of notice. A letter outlining the reasons for his dismissal was provided to Mr Irving later that day.

Determination

[41] For the reasons set out in the following paragraphs I find that the decision of the respondent to dismiss the applicant was one which a fair and reasonable employer would make in all the circumstances. I find that Mr Irving does not have a personal grievance and the Authority cannot assist further with his application.

• Were the respondent's instructions to Mr Irving to "cash in" lawful and reasonable?

[42] As a question of law the respondent was entitled by clause 31 of Mr Irving's employment agreement to require him to make good shortages within 24 hours of being notified to do so.

[43] As a matter of fact it was, I find, reasonable for the respondent to issue its instructions to Mr Irving on 28 April and 2 May. On 21 April it had sought to advise Mr Irving he would be paid for the disputed 25 minutes. The respondent's 27 April letter put that advice in writing.

[44] There was no legal entitlement for Mr Irving to withhold takings at any stage. Even if the company were in breach of a requirement to pay him overtime, clause 31 has no proviso that a driver need only follow the cashing up procedure if the company does not owe him or her any money. This also applies to his declaration on 28 April that he would not cash in until he was actually paid the disputed amount. Even if he had a legal or moral entitlement to refuse to cash up, that ceased from 27 April at the latest.

[45] I need not decide which parties were right prior to the respondent's 20 April decision to pay overtime for late running and cashing in. The instructions delivered to Mr Irving applied to takings not cashed in after 20 April. On 17 April he had paid in money he withheld prior to then. The takings subject to the instructions of 28 April and 2 May were collected and held by him for the days of 23, 26, 28, 29 and 30 April and 3 May. And from 27 April he was aware that the company would pay him for the disputed 25 minutes. If he had attended work on 21 April he would have

known sooner.

- **Was Mr Irving’s conduct in not “cashing in” serious misconduct?**

[46] The issue is not simply whether Mr Irving wilfully and deliberately disobeyed the respondent’s lawful and reasonable instructions to “cash in”. Rather it is whether his conduct justified dismissal.

[47] As was clear from his evidence in the Authority investigation meeting, Mr Irving is an intelligent and articulate man. Each step he took – including his 12 April and 28 April notes to the company – was intentional. There is no doubt that he deliberately flouted clause 31 of his employment agreement in pursuit of his campaign to be paid for the disputed 25 minutes.

[48] In this context I find that Mr Irving’s conduct in disobeying the 28 April and 2 May instructions was a “failure to obey a lawful and reasonable instruction from an authorised Company employee”. It was within the terms defined as serious misconduct by his employment agreement and capable of being held to be so, following suitable investigation.

- **Was dismissal an outcome available to the respondent?**

[49] I accept Mr Somerville’s evidence on the importance for Stagecoach of having its drivers follow its cashing up procedures:

It is essential that all bus drivers hand in their takings at the end of the shift, because this is the company’s way of earning money and it is also the way of ensuring that the correct money has been paid in by each driver at the end of each shift.

The takings belong to Stagecoach. If every bus driver was allowed to cash in their takings when they felt like it, then we would never keep track of who owed us what and chances are we would not get all of it returned to us.

[50] Ensuring proper cashing up is manifestly within the range of reasonable concerns of a fair and reasonable employer. I find that the respondent’s response to the particular concerns raised by Mr Irving’s actions were within that range.

[51] Mr Somerville’s evidence was that the company has taken similar approaches to cashing up issues with other drivers. He said at least five other drivers had been dismissed over such issues during the last two years.

[52] I am satisfied that the dismissal was an outcome available to the respondent. Further I am satisfied that the particular decision to dismiss Mr Irving for withholding takings – albeit to ‘make a point’ rather than any fault or lack of honesty on his part – was not a decision made *pour encourager les autres*, that is an excessive punishment meted out as an example to discourage others. Rather it was the exercise of a standard applicable to all employees.

[53] I also record that I have considered, and raised with the parties for comment, whether any of the employer’s decisions were overreactions in the context of an extended and bitter industrial dispute. There was no suggestion from Mr Irving that this was the case. There was also no evidence that his actions were any part of the union campaign in pursuit of collective bargaining goals. I am satisfied that this aspect of the circumstances had no undue impact on the respondent’s decision to dismiss Mr Irving.

- **Did the parties act in good faith and follow the employment agreement's terms for resolving employment relationship problems?**

[54] Mr Irving has suggested that the real issue was an alleged failure of the respondent to follow its own dispute resolution procedures.

[55] These are subject to the statutory good faith requirements. Particularly relevant is s4(1A) of the Employment Relations Act 2000 requiring parties in an employment relationship to “be active and constructive” in maintaining a productive relationship in which the parties are “responsive and communicative”.

[56] In this light I find that the respondent was responsive and communicative. Mr Irving's 12 April note requested payment of the disputed 25 minutes within 14 days. By 21 April Mr Somerville was trying to contact Mr Irving to advise that he would be paid the disputed amount – a response within the requested timeframe.

[57] Mr Somerville had not responded to the 12 April note within the ten days set for a written response from the employer in the employment agreement. I find that breach to be technical and slight. He responded to Mr Irving's 26 April note complaining of a lack of response within 24 hours.

[58] The good faith obligation and the employment agreement's provisions for dispute resolution are a “two-way street”. Mr Irving made no real effort to discuss his problem with his manager as required by clause 43.3(a). He then attempted to invoke the mediation clause which applies where “the problem is not resolved by discussion”. At the Authority investigation meeting he responded to this point by suggesting that it was not his “*position*” as a driver to seek to arrange meetings with his manager. Given that he persistently pursued his cause in other ways, that response was not compelling.

[59] Mr Irving was a person of some experience of the dispute resolution procedures. He had clearly studied the terms provided in his employment agreement. His evidence was that he had successfully taken another problem through to the mediation stage the previous year.

[60] He began his campaign on the disputed pay issue on 12 August with one measure that was “effectively immediately” – a refusal to cash in “at any time I enter the depot late”. And he proceeded not to cash in on that and subsequent days. It is not a measure provided for in the dispute resolution procedure. His second suggested measure, which would apply only if he was not paid the 25 minutes, was to refer the matter for a determination or raise a personal grievance. The latter suggestion was made without Mr Irving having attempted the primary dispute resolution provision of discussing the matter with his manager. From the beginning, I find, it was Mr Irving and not the company, who in the words of his own brief of evidence, was “*cocking a snoot at the statutory dispute resolution processes*”.

[61] A further aspect relates to Mr Irving's good faith obligations to be “active and constructive”. He says that he was not aware until the meeting of 12 May that he had been paid the disputed 25 minutes pay. It was made clear to him, from at least 27 April, the company would pay. He took no steps between that day and 12 May, to check his pay slip or his bank account, to see whether the amount had been paid. Rather he continued on the basis of his 28 April note to refuse to cash in without even knowing whether he had been paid the disputed amount. That was neither active nor constructive.

[62] While these comments may seem critical of Mr Irving, they are made only because there are

statutory and contractual obligations on both parties. The tone of much of Mr Irving's evidence was that these obligations applied only to the respondent. Ultimately Mr Irving's dismissal occurred because he ignored his own obligations and took measures he was not entitled to take.

[63] I note however that there is no suggestion Mr Irving was anything but scrupulous in his care of the takings that he withheld to press his cause. I accept his evidence that he carefully counted the cash and kept it stored in his security locker on the respondent's premises. That all the money was accounted for is confirmed from the records of the amounts that he did cash in on 18 April and 4 May. His actions were matters of principle, however quixotic, and there is no criticism of his honesty.

[64] That Mr Irving kept the takings on the respondent's premises does not change the reasonableness of his dismissal for not complying with the respondent's instructions. The employment agreement provided Mr Irving was to cash in when required. The respondent was not required to seek out the money itself.

Costs

[65] There was no application for costs in the respondent's statement in reply or written closing submissions. Shortly before the investigation meeting the Authority and the respondent were advised that Mr Irving was in receipt of legal aid for his application. No order for costs is made.

[66] If required for the purposes of s40(4) of the Legal Services Act 2000 I specify that the amount of costs that would have been awarded, had the provision of legal aid not limited the applicant's liability, is \$1200. That amount is at the lower end of the range of costs typically awarded against an unsuccessful employee party following a one-day investigation meeting for a personal grievance application of this type. It takes account of the limited resources of the applicant.

Robin Arthur

Member of Employment Relations Authority