

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2011] NZERA Wellington 37  
5325609

BETWEEN YESOK NARAYAN  
Applicant

AND WELLINGTON CITY  
TRANSPORT LIMITED  
TRADING AS GO  
WELLINGTON  
Respondent

Member of Authority: P R Stapp

Representatives: Kevin O'Sullivan for Applicant  
Blair Scotland and David Gould for Respondent

Investigation Meeting: 26 January 2011 at Wellington

Further information by  
telephone conference: 4 February 2011

Determination: 8 March 2011

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Mr Narayan was dismissed on 4 November 2010 for allegedly receiving cash fares and not issuing tickets correctly. Go Wellington received a complaint from an experienced industry operator and regular bus passenger who said that she witnessed his behaviour. Mr Narayan was asked for an explanation and to attend an investigation meeting. He was represented. He was suspended on pay while further data on the ticketing and audit reports were obtained. He was presented with the findings and had an opportunity to discuss options in the disciplinary process. The decision to dismiss him was made by Go Wellington's operations manager.

[2] The respondent has denied Mr Narayan's claim that his dismissal was unjustified, and it opposed reinstatement.

### **Issues**

[3] Mr Narayan claimed that the allegation against him was not true. He further claimed that Go Wellington did not substantiate the reason for dismissal and there was no evidence to prove that tickets were not issued for cash fares. He claimed that his dismissal was not the action of a fair and reasonable employer.

[4] The legal test applied in this matter is s 103 A of the Employment Relations Act where the question of whether the dismissal was justified must be determined, on an objective basis, by considering whether the employer's actions were what a fair and reasonable employer would have done in all the circumstances at the time of the dismissal. Those circumstances in this matter can be summarised briefly. They are that Go Wellington's operations manager made a decision on the credibility of a complainant instead of believing the applicant, that the cash flow account and ticketing details were not helpful; and that the operations manager took into account that the applicant had been counselled on his obligations arising from two prior complaints on the same type of issue.

[5] From the above the following questions arise:

- a. Did the employer come to an honestly held belief based on an allegation that Mr Narayan did receive cash and not issue tickets to passengers on his bus? Was the decision maker entitled to rely on credibility when other information was not helpful? Was the decision maker entitled to use two prior complaints in reaching a decision?
- b. Did Mr Narayan's actions amount to serious misconduct?
- c. If there is a personal grievance is it practicable to reinstate Mr Narayan: Did he receive cash and not issue tickets?

- d. What other remedies should be applied and has there been any contributory conduct by Mr Narayan?
- e. Who should be awarded costs and how much?

### **The facts**

[6] Mr Narayan had worked as a bus driver for Go Wellington on a work permit. He is seeking permanent residence. He has had two periods of employment with Go Wellington, interrupted by needing to renew his work permit.

[7] A complainant says that during a bus trip she observed Mr Narayan receive cash and not issue tickets to passengers, and leave one ticket in the ticket machine and on sell it to another passenger at the next stop. She says this occurred on 13 October 2010 on route number 44 between Willis Street and the Newtown shops on Riddiford Street. The complainant says she observed three incidents while on that occasion she was sitting on the front seat of the bus. She sent an email (document 10) with a picture of the bus to Go Wellington's operations manager. She informed the operations manager that the driver was a very reluctant electronic ticket issuer to cash paying customers. She explained what she saw happening when she was in the front seat.

[8] Mr Narayan was sent the email allegation for an explanation. Mr Narayan replied in writing (18 October 2010). He disagreed with the complainant's allegations. He maintained he was not ripping the company off and was doing his normal duties and the complainant misunderstood the procedure. He said that he had issued tickets to all his passengers and none of them had complained. He accepted that there was a ticket in the machine which he was unable to cancel. He says he explained that to the complainant when that person asked what he was doing.

[9] The operations manager met with Mr Narayan and his union secretary on 28 October 2010. The outcome was that Mr Narayan was suspended on pay and the operations manager decided to carry out further checks on what the complainant had witnessed and whether the ticketing detail would reveal anything. The operations manager contacted the complainant on 1 November 2010 and a record was kept in a

file note. The complainant again confirmed what she had seen. The complainant replied positively to a direct question from the operations manager as to whether she saw the driver take cash for a fare and not issue a ticket during the trip: she replied “yes”, that was what she witnessed. The ticketing data showed that there were cash tickets being issued but did not conclusively show whether the driver was being honest or not.

[10] There was a further meeting on 2 November. Mr Narayan was informed of the discussion with the complainant. He pointed out that there had been audits conducted on him driving buses and that there were no irregularities. The operations manager was surprised about this because she says the audits are conducted without the driver’s knowledge. The operations manager was not aware of any audits involving Mr Narayan at that time. The meeting was adjourned so she could obtain any audit reports. Two audits (21 and 27 October) were found. Both reports noted that there was a hesitation by Mr Narayan’s to issue tickets.

[11] The operations manager advised Mr Narayan that the information led her to conclude that he had committed serious misconduct by taking cash without issuing tickets. She told him her reasons for this conclusion. The reasons were: (1) that she relied on the complainant’s information; (2) that the ticketing data was not helpful to determine any dishonesty; and (3) that Mr Narayan had been counselled on his obligations regarding practice and procedure relating to ticketing and cash fares earlier. Mr Narayan and his union secretary were asked for submissions in regard to the possibility that Mr Narayan would be dismissed. Mr Narayan responded in writing that included some of his personal circumstances and what dismissal would mean for him.

[12] At another meeting on 4 November the audit reports were discussed and Mr Narayan was given the final opportunity to make submissions in regard to being dismissed. After an adjournment Mr Narayan was advised his employment was terminated immediately and the decision and reasons confirmed in writing on 9 November 2010. The operations manager confirmed that she had decided Mr Narayan had failed to look after company money on prior occasions. Also she decided that his actions of taking cash and not issuing tickets was serious misconduct and led to a breakdown of trust.

## Determination

[13] It was entirely reasonable for the operations manager to believe the complainant because:

- a. The complainant's information was compelling and convincing. The complainant had worked in the bus industry for 20 years, although she has been out of it for the last 13 years. She had previously worked for Wellington City Transport and Stagecoach. She was previously a bus driver, a ticket inspector, a trainer of bus drivers (including about how to issue tickets), training manager overseeing the driver training school, Assistant Operations Manager and Operations Manager. She had helped develop the electronic ticketing system for Wellington buses that preceded the current system now in place. Also, she is a regular user of Go Wellington's buses to travel to and from work each day (Monday to Friday). The complainant raised her allegation in writing and supported it more fully in her evidence and has been consistent.
- b. The complainant had a clear understanding of the process for drivers to issue tickets to passengers paying cash. She was clear about what she says she saw happen between Willis Street and Riddiford Street. Her evidence before the Authority fills in the detail around the complaint she made. The complainant's evidence has been consistent, clear about what she had seen and was emphatic.
- c. The complainant had nothing to gain from making her complaint. She did not know Mr Narayan and satisfied me that there was no set up and that she did not have any prior involvement with anyone to check out Mr Narayan. I am satisfied there was no collusion between the operations manager and anyone else for that matter and the complainant to catch Mr Narayan out (having regard to the earlier complaints).

- d. In addition I am satisfied that the complainant sat in the front set (on the occasion related to the complaint) whereas she would have sat elsewhere on most other occasions (not challenged). As the complainant was sitting in the front seat it is more likely than not and highly probable that she saw what she says she saw.
- e. The ticketing detail and the audit reports raised by Mr Narayan did not contradict the complaint.
- f. The operations manager reasonably concluded that just because the passengers did not complain this was not relevant because the passengers may have been unaware or not concerned about getting a ticket. Given the responsibility is placed on the driver to issue a ticket I hold this was a plausible conclusion.
- g. A fair and reasonable employer would have rejected any issue about training raised by the union in Mr Narayan's defence because Mr Narayan accepted that he understood the process and procedures. Indeed assessments dated 11 June and 28 June 2010 (after commencing his second spell of employment) highlight that he was very familiar with using the snapper ticketing system.

[14] However, whilst it was open to the operations manager to believe the complainant a fair and reasonable employer would not have decided to dismiss the applicant because:

- a. The union challenged the operations manager on using previous complaints about Mr Narayan's handling of cash and tickets that occurred two weeks before this complaint. In regard to the previous complaints Mr Narayan was given the benefit of the doubt at the time.
- b. Those earlier complaints did not involve investigations and disciplinary processes because for various reasons they fell outside timeframes that Go Wellington had to act and to undertake an investigation and conduct any disciplinary meeting. There were no

findings made. However, the operations manager went on to decide that Mr Narayan had failed to look after company money on prior occasions in her decision, and thus has unfairly included the earlier matters in her decision. I can only conclude that these were irrelevant matters that she took into account. There was no evidence she could rely on for her conclusion that Mr Narayan had failed to look after company money on prior occasions, I hold. Also, this conclusion is supported by the operations manager's evidence that she concluded his behaviour amounted to a pattern of behaviour, which I hold that she could not have done.

- c. It was found that the ticketing detail and balanced cash report whilst it was not inconsistent with the complaint, the details did not help establish whether or not Mr Narayan had been honest and or dishonest.
- d. Also, I hold that the threshold required from the employer to establish the offence has to be based on a sufficiently high level of evidence as the allegation is grave.

[15] Mr Narayan had been counselled about the obligations to issue all cash paying passengers with tickets on a prior occasion two weeks before the complaint. A reasonable employer was entitled to do that, I hold, since the company has placed such importance on its policies. Also, I hold that it was open to the operations manager to use this counselling as a factor in determining what to do because Mr Narayan was on notice of the obligations and how serious it would be if cash was taken without issuing tickets. It relates to his knowledge of the company's policies. Therefore, he knew the obligations. However, it was not open to the operations manager to use the fact of the counselling to draw a conclusion that there was some similarity in the pattern of Mr Narayan's behaviour in reaching her decision because she had no evidence from the earlier complaints of any misconduct and because no findings had been reached. I am supported in this conclusion because the company's witnesses say they gave Mr Narayan the benefit of the doubt at the time.

[16] I hold that the operations manager took into account and considered the issues the union raised such as Mr Narayan's cash balance, the challenge to the prior

complaints being raised, that that passengers had not complained and considered an issue about Mr Narayan's training. Mr Narayan hoped the audits would help him, but instead they did reveal hesitancy on his part in issuing tickets. The audit reports when they were completed were not followed up afterwards by Go Wellington to get Mr Narayan's feed back and to ensure that he was aware of any problems. The fact that this was not done was not fatal because Mr Narayan was given the retrieved audits that he requested to be looked at during the investigation and disciplinary meeting and to comment on.

[17] The operations manager gave evidence that she spoke to a couple of the complainant's previous managers at Go Wellington who would have worked with her. She says she did this to help establish how credible the complainant was. Although this was not raised with Mr Narayan and his representatives I hold that it was not fatal because the operations manager had good reason to rely on the dependability of the complainant because of her knowledge of that person's background, experience and expertise in the industry.

[18] There are two further matters arising from this. First Mr Narayan only ever said that he was telling the truth and that he followed the process and had received no complaints from passengers. In fact he categorically denied taking cash and not issuing tickets during the employer's investigation. He also told me that he would not jeopardise his permanent residence application. However, he did not discuss or explain whether or not there were any cash paying customers between Willis Street and Courtney Place that he could remember, except for one person who got on the bus at Courtney Place and who he says wanted to go to the Airport when he was driving to Seatoun. The fact that he did not discuss or explain whether or not there were any cash paying passengers is a significant absence in his explanation, I hold. He says he had to explain to the passenger who got on to pay cash at Courtney Place and wanted to go to the airport that that person needed another bus to get to the air port because he was going to Seatoun. In the meantime he activated a ticket but did not have time to cancel it when he says the passenger got off the bus and had not paid. The ticket remained in the ticket machine until the next stop when he sold it to another passenger who paid by cash. Mr Narayan says he would have had to pay for the ticket himself because his cash would not balance and by selling it this would balance his cash. The complainant says she does not recall seeing or hearing anything of the sort. She says

she did not see the passenger get off the bus after paying and she says the passenger did not take the ticket and Mr Narayan left it in the machine and sold it to the next cash fare passenger. Mr Narayan said that the complainant could not have seen what he was doing. However, I am satisfied that as the complainant was sitting in the front seat (not challenged) that it is more likely than not and highly probable that she did see what she says happened. That is the passenger paid by cash and went to sit down. The operations manager accepted what the complainant said, which she was entitled to do I hold.

[19] Secondly, the operations manager was entitled to rely on the complainant's information. The ticketing data was inconclusive, but what it did show was that there were no cash fares between Willis Street and Courtney place where the complainant says she observed Mr Narayan take cash from at least two passengers. This contrasts with the report that also shows that there were cash entries elsewhere in the route which makes it probable there were cash fares, as the complainant said, and suspiciously the record does not show any. The one cash entry related to the disputed last passenger while the complainant was on the bus. Therefore the operations manager reasonably concluded that Mr Narayan had on sold a ticket by believing the complainant and rejecting Mr Narayan's explanation. The ticketing information was consistent with the complaint's observation that the employer was entitled to make as a reasonable conclusion from the information available at the time.

[20] The union complained that Mr Narayan was never trained upon his second engagement with Go Wellington to refresh his knowledge. This is not a plausible defence because Mr Narayan told me he fully understood the procedures and processes. He accepted that he had been trained upon starting and he never had made any complaints or raised any issues of having difficulties in his work and about the audits. I am supported in reaching my conclusion by assessment reports on his driving capability produced during the Authority's investigation meeting.

[21] Unfortunately for Mr Narayan he has not been able to satisfy me of his claim that he did not do what was alleged. The correct weight of evidence was against him because he was observed by a reliable witness at the time. I am satisfied that the employer's investigation was thoroughly carried out. This is because the employer obtained the ticketing information, the cash flow account, and considered the issue

raised by the union about training and even went to the extent of checking out the complainant with her previous managers (not challenged). The employer was entitled to rely on the information from the complainant when the ticketing detail and cash information was found to be unhelpful and inconclusive, but not inconsistent with what the complainant says she saw. Therefore, I hold that it was open to a fair and reasonable employer to rely on credibility and given the seriousness and industry significance about receiving cash and issuing tickets for the company to decide that Mr Narayan had breached the company's policy. However, a fair and reasonable employer would not have included considerations and findings in regard to the earlier two complaints because no findings had earlier been reached.

[22] I conclude that the respondent did reach an honestly held belief that the allegation had substance, but a fair and reasonable employer would not on the evidence have been able to prove to the required degree that Mr Narayan had been dishonest by taking cash and that there had been a breakdown of trust because of his action based on a suspicion that he had not looked after the company's money. There was no missing cash that was unaccounted for. The complainant never saw what happened to any cash, and the ticketing and cash reconciliations were not helpful to assess Mr Narayan's honesty. This is because there was no proof that Mr Narayan had taken any cash. I hold that the operations manager only had a suspicion that Mr Narayan had been dishonest because of the witness saying she saw him display a hesitating action to avoid, until the last possible moment, issuing a ticket. This led the operations manager to conclude that Mr Narayan's action amounted to a breach of company policy in regard to ticketing. She included in her assessment that he had a pattern of behaviour, which I hold was based on the irrelevant consideration of the two prior complaints. Therefore a fair and reasonable employer would not have concluded that he was dishonest although it was open to the employer to conclude that he had breached the company's policy in regard to not issuing tickets, and thus concluding it was suspicious.

[23] A fair and reasonable employer would have categorised Mr Narayan's action as a breach of company policy for failing to issue tickets and receiving cash. In this regard the employer decided that Mr Narayan's actions amounted to serious misconduct which led it to conclude that there was a significant risk of trust. What the complainant said she saw was enough for the employer to rely upon in concluding

that there had been a breach of its policy, but fell short of the proof required to establish a breakdown of trust for dishonesty because the ticketing information was inconclusive, the cash balanced, and there had been no findings made on the two earlier complaints and there had been no follow up in regard to any inadequacy in the audit observations.

[24] The operations manager went a step further and in her dismissal letter made a finding that Mr Narayan had failed to look after company money on prior occasions. There was no basis for this conclusion when she and another manager had given Mr Narayan the benefit of the doubt in regard to the previous complaints.

[25] For the above reasons I hold that Mr Narayan has a personal grievance for unjustified dismissal.

### **Contribution and Remedies**

[26] Mr Narayan's contribution has been considerable considering his evidence around the ticket he left in the ticketing machine and on sold and without following the proper process of putting it to one side and reporting it. His action has left him exposed to suspicion of dishonesty and the findings that he breached company policy.

[27] Also, he faced a real difficulty that the complainant was such a strong and vital witness, and I too, like the operations manager found her to be a very credible and compelling witness given her experience, her knowledge, that she sat in the front seat of Mr Narayan's bus, that she says she saw at least three instances of cash being taken without tickets being issued to the passengers, and without Mr Narayan providing any adequate explanation except that he denied being dishonest. That may be so, but he has been seen to breach company policy on taking cash and not issuing tickets. There has been no accounting for the cash because the cash flow account balanced and the ticketing information was inconclusive, but this is not inconsistent with what the complainant says she saw. Indeed the complainant went further to say that Mr Narayan's actions were deliberate because she saw that he waited as long as possible after passengers paid their cash and to move on before he needed to give them a ticket.

[28] There is also an indication from the audit assessments that Mr Narayan had a hesitancy to issue tickets, and it was decided earlier that he needed to be counselled on his obligations when two other complaints had been received prior to this incident about the same thing. Whilst there were no findings made on the earlier complaints the employer had an obligation to inform him of the complaints, which it did so, and it acted prudently to ensure he knew the obligations. In Mr Narayan's favour the assessment also said that he printed tickets for others straight away and the ticketing information and cash flow account were inconclusive of any dishonesty. However, Mr Narayan's explanation and denial have been overshadowed by the complainant's evidence of what she saw.

[29] This means that because he has been found to breach the company's policy on receiving cash and not issuing tickets for which he had been previously counselled, I find it would be impracticable to reinstate him. The company is entitled to expect trust from its employees to follow the correct procedures, especially where the company relies on drivers to correctly tally their cash boxes. This is a very heavy responsibility placed on drivers by Go Wellington. Ordinarily a complaint on its own would not be cause for a dismissal or the threshold that would be used by Go Wellington to rely on without detailed enquiries. I accept the operation's manager explanation of the practice she uses to apply when a complaint is made by customers. Go Wellington's trust in Mr Narayan has been put at very real risk because of the suspicion surrounding his actions. Also, Mr Narayan's earlier counselling on the company's requirements and his failure to issue a ticket properly in this instance means that he has put any trust at risk. Given that risk I find it would be impracticable to reinstate him.

[30] I now turn to the claim for lost wages. Mr Narayan failed to mitigate his losses. In this regard although he was working on a work permit requiring him to work for Go Wellington he did nothing about trying to arrange any other work or liaise with the Department of Labour immigration services about his circumstances. He did not try and obtain any other work as he would be expected to do so. It is not a defence for doing nothing when his work permit only allowed him to work for Go Wellington, especially where there has been no evidence that the immigration services have done anything to prevent him mitigating his losses. For example, Mr Narayan

has not provided any evidence that the immigration services would refuse to amend his work permit if he had found alternative work to meet his obligation.

[31] I further hold his failure to comply with company policy means that he has contributed fully to the situation giving rise to his personal grievance because the breach was a serious breach. As such with a 100% deduction for contribution I am not prepared to award him remedies for compensation for lost wages and hurt and humiliation.

### **Orders of the Authority**

[32] The applicant has a personal grievance for unjustified dismissal.

[33] His claim for reinstatement is dismissed on the grounds that it would be impracticable to reinstate him. His claims for lost wages and hurt and humiliation are dismissed due to his level of contribution. In addition Mr Narayan's failure to support any mitigation on his lost wages would impact to reduce his lost wages anyway.

[34] Costs are reserved.

P R Stapp  
Member of the Employment Relations Authority