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Go Bus Transport Limited v Hellyer [2016] NZEmpC 177 (23 December 2016)

Last Updated: 23 December 2016

IN THE EMPLOYMENT COURT CHRISTCHURCH REGISTRY

[\[2016\] NZEmpC 177](#)

EMPC 291/2015

IN THE MATTER OF a challenge to a determination of
the
Employment Relations Authority

BETWEEN GO BUS TRANSPORT LIMITED
Plaintiff

AND KEVIN HELLYER Defendant

Hearing: 18 August and 5 October 2016
(Heard at Dunedin)

Appearances: A Toohey, counsel for plaintiff
P Cranney, counsel for
defendant

Judgment: 23 December 2016

JUDGMENT OF CHIEF JUDGE G L COLGAN

A The defendant was dismissed unjustifiably by the plaintiff both under ss 103(1)(c) and 104 and, separately and additionally, [s 103A](#) of the [Employment Relations Act 2000](#).

B The defendant is entitled to compensation for loss of wages in the sum of \$6,235.39.

C The defendant is entitled to compensation for lost holiday pay in the sum of \$498.84.

D The defendant is entitled to compensation for lost KiwiSaver benefits in the sum of \$187.06.

E The defendant is entitled to compensation under [s 123\(1\)\(c\)\(i\)](#) of the [Employment Relations Act 2000](#) in the sum of \$12,800.

F The defendant is entitled to interest on the foregoing sums for reimbursement of lost wages, holiday pay and KiwiSaver benefits,

GO BUS TRANSPORT LIMITED v KEVIN HELLYER NZEmpC CHRISTCHURCH REGISTRY [\[2016\] NZEmpC 177](#) [23 December 2016]

calculated at the rate of 5 per cent per annum from 3 February 2015 until the date of payment of those amounts pursuant to cl 14 of sch 3 to the [Employment Relations Act 2000](#).

G The defendant is entitled to costs.

Introduction

[1] On the early afternoon of 12 August 2014 in Dunedin, Mrs Hellyer was without her purse and its contents including cash and a Go Bus electronic card. These items were in the car which her husband, the plaintiff Kevin Hellyer, had driven earlier that day to work at the Dunedin depot of Go Bus Transport Ltd (Go Bus) where he was based as a driver. At about 2.35 pm that afternoon Mrs Hellyer boarded a scheduled bus service driven by her husband. She could not and did not pay for a \$2.90 ticket to take her to a stop near the bus depot where she could retrieve her purse. Just how the events of that day led, several weeks later, to Mr Hellyer's dismissal from his Go Bus employment, is the subject of this case.

Nature of proceeding

[2] The issues in this employer's challenge by hearing de novo to a determination of the Employment Relations Authority,¹ finding Mr Hellyer to have been dismissed unjustifiably by Go Bus, include whether the plaintiff discriminated against Mr Hellyer unlawfully by dismissing him. If so, what remedies may flow from this unlawfully discriminatory dismissal? Alternatively, even if it was not unlawfully discriminatory, was Mr Hellyer's dismissal what a fair and reasonable employer

could have done in all the relevant circumstances at the time, and how Go Bus did so? On this question too, the Court may have to determine remedies if the plaintiff

was dismissed unjustifiably.

1 *Hellyer v Go Bus Transport Ltd* [2015] NZERA Christchurch 125.

[3] Unfortunately, because of a substantial under-estimate of the matters at issue and, therefore, the time required for the hearing, it could not be completed on the single day that counsel had originally agreed would be sufficient. The hearing was not able to be resumed for about seven weeks because of the differing availabilities of counsel, witnesses, the Court and a courtroom.

The Authority's determination

[4] As already alluded to, the trigger for the dismissal was Mr Hellyer's conduct in allowing his wife to travel on the bus he was driving without paying a \$2.90 fare and without following Go Bus's procedures to account for this fare if it was not paid before her journey began. The relevant background to the case includes that Mr Hellyer had been engaged in collective bargaining for his union before his dismissal. The Authority found that, in deciding upon dismissal, Go Bus's reliance on that union activity amounted to unlawful discrimination by it including in its dismissal of the defendant. Finding Go Bus's dismissal of Mr Hellyer to have been unjustified, the Authority would have awarded Mr Hellyer \$7,794.24 for lost wages calculated on the basis of a weekly loss of \$649.52 for the period of 13 weeks from his dismissal, less one week's wages paid by Go Bus. The Authority would also have awarded Mr Hellyer holiday pay of 8 per cent of that sum of \$7,794.24 (being

\$623.54). The Authority would have required Go Bus to pay Mr Hellyer for lost KiwiSaver benefits of \$233.83. Finally, and before considering whether any of these sums should be reduced under [s 124](#), the Authority notionally awarded Mr Hellyer

\$8,000 for the non-financial consequences of his dismissal under [s 123\(1\)\(c\)\(i\)](#) of the

[Employment Relations Act 2000](#) (the Act).

[5] However, the Authority found that there was what it described as "blameworthy conduct" by Mr Hellyer which led to his dismissal.² It considered that Mr Hellyer was careless or negligent in not following any of the courses of conduct which could have allowed his wife to travel without the immediate payment of a fare and which would not have resulted in his dismissal. Accordingly, the Authority reduced all of its above remedies by 40 per cent so that its order for

reimbursement of lost wages under [s 123\(1\)\(b\)](#) was \$4,676.54; the holiday pay

reimbursement became \$374.12; the KiwiSaver contribution compensation was

\$140.30; and the [s 123\(1\)\(c\)\(i\)](#) compensation was reduced to \$4,800. Further, the Authority made an award of interest at the rate of 5 per cent per annum on its awards of reimbursement of lost wages, holiday pay and KiwiSaver contribution from 3

February 2015 when Mr Hellyer filed his statement of problem in the Authority, until the date of payment of that amount of interest to him. The Authority invoked cl 11 of sch 2 to the Act to do so.

[6] It is appropriate to examine more closely the Authority's reasoning on the question of union-association discrimination, as this underpinned its decision that Mr Hellyer was dismissed unjustifiably.

[7] From [50] onwards of its determination of 4 September 2015, the Authority recorded, after setting out s 104(1) of the Act, that it had:

... considered whether Mr Hellyer's involvement in collective bargaining as a staff representative in July 2014 influenced the decision to dismiss and whether he was dismissed in part for a reason directly or indirectly because of his involvement in the activities of a union.

[8] The Authority concluded that Mr Hellyer's role as Branch President of the New Zealand Tramways and Public Passenger Transport Employees Union (the Union) and negotiator in collective bargaining fell within the definition of "involvement in the activities of a union for the purpose of s 104" as defined in s 107

of the Act.³ The Authority then set out the presumptions in discrimination cases

contained in s 119.

[9] The Authority concluded:

[55] The first reference to Mr Hellyer's involvement in union activities occurred at the investigation meeting on 12 August 2014 where there was mention of Mr Hellyer being a union delegate and *in that role of all people you know you can't allow passengers to travel for free*. There was discussion at that meeting about Mr Hellyer having been present at negotiations when there was a claim for family passes and the company said no to that claim and that all passengers must pay under Go Bus Policy. There was mention again of the negotiations in the context of whether it was a case of a one off mistake on the part of Mr Hellyer. I find it likely that was in the context of recent clarification to Mr Hellyer of the need for all passengers to pay. Mr

Baas was present at those negotiations. Later evidence supports that Mr Hellyer was rather passionate during the collective negotiations about the claim for a family pass.

[56] The recent discussion at negotiations about family passes was not the only reasons that it was concluded there was no mistake or inadvertence on Mr Hellyer's because there was reference to him having other options such as issuing a ticket, using his radio or telling management or operations.

[57] I find that Mr Hellyer's presence at collective bargaining negotiations on 16 July 2014 as an employee representative when a claim for a family pass was discussed was a material reason though for concluding intentional rather than careless conduct. It does not have to be the only reason as long as it is a material part or ingredient of the making of the decision to dismiss.

[58] I find that Mr Hellyer was held to a higher standard and conclusions were drawn that he had not simply forgot and made a mistake because he was an employee representative at collective negotiations in mid July 2014 and from the notes, it was concluded, he had recent knowledge of the views of Go Bus.

[59] Mr Hellyer, I find, was dismissed in part directly or indirectly because of his involvement in the activities of a union which is a prohibited ground of discrimination.

(footnotes omitted)

[10] Turning to whether, in its assessment, Mr Hellyer would have been dismissed if he had not had this involvement in union activities, the Authority followed s

104(1)(b) of the Act, requiring a comparison to be made with other bus driver employees of the plaintiff who had not been involved in union activities but, like Mr Hellyer, had allowed a family member, without cash or other means to pay, to ride free, and had proffered the same explanation for doing so.

[11] Further, the Authority concluded that Mr Hellyer did not have an intention to defraud Go Bus of revenue but, rather, that he had been careless or neglectful in overlooking the requirements to take other steps which would have allowed his wife to have travelled without paying at the time of the journey. The Authority also said that it was required to consider whether, in these circumstances, Mr Hellyer's conduct so deeply impaired the confidence and trust that Go Bus was entitled to have in him, as to justify his summary dismissal.

[12] In doing so, the Authority analysed the outcomes for other employees who were observed by the same undercover inspector at about the same time and who had

not followed ticketing and cash handling procedures. Two others had received final written warnings on the basis that Go Bus concluded that they had not intended to defraud the company. The Authority concluded that these results were all obtained following "commendably thorough" investigations.⁴ The Authority concluded:

[66] Mr Hellyer's presence as an employee representative at collective bargaining formed part of the thinking of Mr Baas that Mr Hellyer's failure to take corrective action was not a one off mistake. It is referred to in reaching conclusions about intent. The decision to dismiss was made on the basis of knowing and intentional conduct.

[67] I accept that Go Bus takes ticketing irregularities very seriously. There were also other reasons for the decision to dismiss Mr Hellyer in that he had other options available that he failed to take. The discrimination under s 104 of the Act though flavours and taints the reasons for Go Bus concluding that the actions of Mr Hellyer were intentional and knowing to an extent that I am not satisfied that Mr Hellyer could still have been dismissed if his involvement in collective bargaining and particularly with respect to the claim for family passes had not been considered.

[68] I find under s 103A of the Act Go Bus is unable to justify the decision to dismiss because it was discriminatory in terms of s 104 of the Act. In *Nathan* it was stated that, *We also consider that in terms of s 103A a fair and reasonable employer could not justify dismissal if the decision made was discriminatory in terms of s 104.*

[69] The Court of Appeal in *Nathan* referred to the provisions proscribing discrimination for involvement in union activities in the Act reflecting the underlying policy of the legislation that participation in such activities should not be held against employees.

[70] Mr Hellyer has made out his personal grievance that he was unjustifiably dismissed and he is entitled to ... remedies.

(footnotes omitted)

Relevant facts

[13] The relevant facts are not, for the most part, controversial. The implications in law to be drawn from these facts are controversial. Mr Hellyer was an urban bus driver (which included ticket issuing/fare collecting) in Dunedin. He was employed originally by a company called Invercargill Passenger Transport Ltd (IPTL) which held a contract for the provision of city and suburban bus services in and around Dunedin. The terms and conditions of Mr Hellyer's employment with IPTL were

contained in a collective agreement between the Union and IPTL. IPTL had a

4 At [65].

longstanding practice of allowing immediate family members of its bus drivers to travel free on its bus services. It had issued passes, the production of which allowed family members to enjoy this perquisite of a driver's employment. This arrangement allowed employees to reduce what they might otherwise have spent on family transport, but at effectively no cost to the employer.

[14] As is now the case for urban public passenger transport throughout New Zealand, the Otago Regional Council put out for tender proposals for the continued provision of bus services in Dunedin. IPTL's contract was about to expire and Go Bus's tender to take over the services was successful. Before taking up its contract, Go Bus offered employment to IPTL's existing Dunedin bus drivers including Mr Hellyer. It did so on a series of identical individual employment agreements to tide itself over until a collective agreement could be reached between it and the Union, but which was only achieved after Mr Hellyer's dismissal. So, at the time of the events leading to, and of, his dismissal, Mr Hellyer was employed by Go Bus on an individual employment agreement. Family bus passes were discontinued by Go Bus.

[15] At all times material to this case, Mr Hellyer was the Dunedin Branch President of the Union, a senior office holder in the branch. Despite sustained requests in collective bargaining by the drivers and their Union (represented as a negotiator in 2014 by Mr Hellyer), Go Bus was adamant that free travel for immediate family members on Dunedin buses would not continue or resume. It both resisted including such provisions in individual employment agreements (and the later collective agreement) and also advised its staff on a number of occasions that there would be no more free travel for family members after its takeover of the services on 1 April 2014. Independently of his union status and involvement, Mr Hellyer was made aware, as a bus driver, of this change, as were his colleagues.

[16] Go Bus's ticketing and revenue collection system for its Dunedin bus operations included the following elements. Drivers were issued with a cash float and a portable electronic module at the start of a duty and each bus had an electronic ticket issuing system into which the driver's module was linked. The company's electronic fare credit cards, linked to a pre-paid monetary credit in the holder's name, could be presented on boarding a bus for the purchase of a ticket. The

appropriate fare would be deducted from the pre-paid credit on the card and a ticket issued at the start of each passenger journey undertaken. Drivers also took cash for fares and issued tickets accordingly. As already noted, although it was not with her on 12 August 2014, Mr Hellyer's wife had purchased a Go Bus electronic card. This tends to indicate her acceptance (and probably thereby Mr Hellyer's also) of the need to pay for her bus fares and, thereby, their acceptance of the company's relinquishment of free travel for families of staff.

[17] All passengers were to pay for their journeys upon boarding a bus, and were to be issued with a ticket which showed details of the cash or electronic fare paid, the time of issue, the driver's duty and route number, and like information. At the end of each shift and upon returning to the bus depot, drivers were expected to reconcile the contents of their cash boxes and modules with the electronic summaries of tickets issued, the expectation being that this information would coincide. Any shortfall in cash received could require an explanation from the driver and could be deducted from his or her wages. Overpayments of cash fares were also noted and, if repeated, could be the subject of further training, but drivers were not entitled to keep these overpayments.

[18] Exceptions to what might be called the general 'no fare/no ride' rule required advice to, and the consent of, Go Bus management. This was either at the time that a passenger sought to board a bus without purchasing a ticket for the intended travel (either by radio telephone or mobile phone call to the company's 0800 number), or advice and explanation by a driver at the end of his or her shift when returning ticket/revenue reconciliations at the depot.

[19] So, unless a specific exemption was granted by Go Bus management on a particular occasion, its expectation was that every passenger journey would be paid for appropriately and that such payments would be reconcilable with the electronic ticketing records.

[20] On 2 July 2014 Mr Hellyer had met with Go Bus management representatives about his revenue collection generally which the company then calculated was short by \$473.90, although it is unclear over what period this deficit

had accumulated. Mr Hellyer explained that he had been paying in his cash takings "in the wrong order" and that "Colin [Abbis, Go Bus's depot manager] had spoken to [me] about this and that would be why". Kayne Baas, now Go Bus's Procurement Manager, disagreed, saying that there had been a manual check undertaken and that the machine printouts showed the same short or missed pay-ins. Mr Hellyer is recorded to have said that he did not know why that might have happened but that he was good with mental arithmetic. He is recorded as having declined further training on the cash machines and ticketing system. No one could say over what period these shortfalls had accumulated and the evidence is that it could have been over more than a few days or even weeks. On busy routes and days, drivers might expect to collect several hundred dollars in cash fares.

[21] Mr Baas's notes also record at this 2 July 2014 meeting that Mr Hellyer was asked whether he had ever "borrowed money from his cash box". Mr Hellyer is recorded as having said that he had done so once, and was then told that to do so was theft and that the money was not his to use.⁵ Mr Hellyer's explanation was that "It was only \$18.00 and [I] put it back that day". This explanation was not explored further at that stage. It was, however, to be important several weeks later when it came to Mr Hellyer's dismissal.

[22] It was only in evidence in this Court that the circumstance of this 'borrowing' emerged. Out on the road another Go Bus driver had a surfeit of \$2 coins and asked Mr Hellyer if he could exchange 10 of these for a \$20 note. Mr Hellyer agreed and the transaction of what Mr Hellyer assumed was the same amount of money took place between their cash boxes. In fact, Mr Hellyer said that the other driver had only given him \$18 in \$2 coins so that there was a shortfall of \$2. The important point is, however, that this 'borrowing' to which Mr Hellyer admitted was not an unlawful taking, or even a personal 'borrowing' of the money by him but, rather, it was (and was intended to be) an exchange of like for like between drivers' cash boxes, to which the company could have taken no reasonable objection. It is

regrettable that what was acknowledged by Mr Hellyer as 'borrowing' was not

5 Temporary removal of money but intending to return it is, in law, not the offence of theft or stealing – it lacks the essential ingredient to deprive the owner permanently of the money: see [Crimes Act 1961, s 219](#).

investigated further on 2 July 2014 by a few more questions which would have set Go Bus's mind at rest on that issue at least. Instead, he was criticised severely for what was said to have been "theft" of money, albeit even by Go Bus's account, only a borrowing of it. The evidence now establishes that it was not even a 'borrowing' of the \$18 but, rather, an inter-employee exchange of coins for a note.

[23] Mr Baas required Mr Hellyer to repay his July cash shortfall of \$473.90. Mr Hellyer agreed, but said that in view of his modest wages he could not afford more than a few dollars a fortnight. Mr Baas's response was, however, that it would have to be repaid "over at least two months" but I can only imagine that Mr Baas intended the opposite meaning: that is, within two months. Mr Hellyer agreed to repay the money, at least in principle.

[24] Mr Baas's notes then record:

I told Kevin that taking money from his till for any reason without managements direction/approval is theft and therefore serious misconduct. I told Kevin that we would give him a warning this time however if anything like this took place again he would face serious misconduct and if proven termination of his employment.

[25] Mr Hellyer acknowledged being told this.

[26] I interpose here to assess the justification for this warning for "theft" and serious misconduct. That foregoing statement by Mr Baas cannot, however, have been a correct assessment of the position in law, at least by a fair and reasonable employer. The accumulated shortfall in cash of \$473.90 could not have been what Mr Baas referred to as "taking money from his till for any reason" because Go Bus had not reached a conclusion that taking money from the till (borrowing or theft) was the explanation for the shortfall. The notes of this meeting show that Go Bus stopped short of attributing responsibility for this shortfall to Mr Hellyer's taking money from his till without permission. The warning for "theft" and "serious misconduct" can only, therefore, have related to what was described as the 'borrowing' of \$18 on one occasion from the till. This had, however, not been investigated by Go Bus, as it should have been, if it was to have reached a conclusion that this was theft and issued a final warning for serious misconduct in

respect of it. As I have already noted, when, apparently for the first time, Mr Hellyer was asked about the detail of this event when giving evidence, he gave the uncontradicted explanation of the exchange of coins for a note between drivers out on the road. Such conduct could not have amounted either to theft or misconduct and, indeed, if Go Bus had bothered to investigate this before issuing a very serious final warning for theft, it could only have upheld as acceptable Mr Hellyer's agreement to assist another driver to exchange coins for a note. Mr Hellyer did not clarify this misunderstanding by volunteering an explanation at the time (although he did so in court). Nevertheless, Mr Baas's final warning to Mr Hellyer for unlawful taking of money could not have been justifiable, either procedurally or substantively, and could not also have formed a valid reason for his subsequent dismissal.

[27] So it follows that an important part of the background information relied on by Go Bus in electing to dismiss Mr Hellyer subsequently, was seriously flawed. Although it might have been said for Go Bus that Mr Hellyer at least acquiesced in this serious error on the part of Go Bus, the plaintiff struck me as someone averse to controversy, disputation and confrontation, who was, if anything, overly ready to agree to proposals including paying from his own earnings substantial cash shortfalls for which responsibility had not been established, and generally for the sake of peace. At times Mr Hellyer appeared almost fatalistic and overly deferential, when faced with these accusations by more assertive Go Bus managers. This is consistent with Mr Hellyer's evidence that he was shocked and "gobsmacked" when he was informed of the July fare shortfall. Mr Baas's notes of the meeting confirm this acceptance and acquiescence on Mr Hellyer's part, but also that he 'pushed back' when accused of being a thief.

[28] As employer, the obligations of full and fair investigation of serious allegations rested with Go Bus and it was not for Mr Hellyer to establish his innocence. Although Mr Hellyer's conduct may have contributed to the situation that gave rise to his grievance, he was not responsible for it. The defendant was embarrassed about having accumulated a substantial but inexplicable shortfall, accepted very readily that he must have somehow been in the wrong, and agreed to repay it.

[29] Returning to the narrative, by mid-August 2014 when Mr Hellyer transported his wife on a scheduled bus service without charge, it was a little more than four months after Go Bus's operations began in Dunedin. As already described, Mrs Hellyer had left her electronic passenger card in their car, had no cash on her and, by Mr Hellyer's uncontradicted account to his employer, she persuaded him to let her on his bus without payment at that stage. An undercover bus inspector observed this and reported it to the company.

[30] When Go Bus took this matter up with Mr Hellyer two or three days later at a meeting convened for the purpose of investigating this irregularity, Mr Hellyer readily admitted to his breach of the company's rules requiring payment for a ticket, then (before the passenger's journey began) or later. He had no excuse other than forgetfulness to offer for having done so and conceded that, in retrospect, he could and should have taken any one of a number of steps to avoid what the company categorised as his defrauding it of

revenue of \$2.90. The easiest of these steps could have been, in the circumstances, to have issued his wife with a ticket and made up the shortfall in cash revenue at the end of the day from his own pocket, or even have requested that this be deducted from his wages. The other alternatives available to him in this situation, including seeking guidance from the depot manager by radio telephone, were not pursued by him at the time. Mr Hellyer's explanation for his default was essentially that he overlooked complying with Go Bus's procedures, and forgot to remedy that oversight. He said that, while on a busy schedule, he put it to one side to deal with later, and then forgot to do so.

[31] It is necessary now to examine more closely the detail of the interchanges between Mr Hellyer and Go Bus management at the meetings between them that lead to his dismissal, and to address the evidence, especially, of Mr Baas who was, in essence, Go Bus's investigator and decision-maker in these matters. It is unnecessary to describe the sequence of meetings that were held and other communications between the parties because the mechanics of these met what I will call the 'how' test of s 103A (how a fair and reasonable employer could have proceeded in the circumstances). Rather, it is what it concluded, and why, that are really in issue in this case.

[32] Of particular importance to the decision of the case is the evidence of what was said by both Mr Hellyer and as, if not more, importantly, Go Bus managers in the company's investigation of its allegations of serious misconduct by him. That is because, in Mr Hellyer's case, the company took into account improper discriminatory considerations in deciding to dismiss him and that, absent these, he says that a fair and reasonable employer in all the circumstances could not have dismissed him. The company's case is that his dismissal is justifiable even if these allegedly discriminatory elements had been present but, as it says, were not taken into account by it. There are also associated allegations of disparate treatment of other drivers, caught by the same undercover inspector, that need to be addressed in the contexts of alleged discrimination and disparity of treatment.

[33] As did the Authority Member, I find persuasive the contemporaneous records made of the company's two investigation meetings, as a consequence of which Mr Hellyer was dismissed. That is especially where there is inter-party conflict and ex post facto explanations and rationalisations of what the company managers did and said, and why. That is especially where these differ from the contemporaneous notes of those conversations. I have also had, albeit belatedly, the evidence of Go Bus's most significant witness and decision-maker, Mr Baas, who (remarkably) did not give evidence to the Authority.

[34] Starting with relevant background, Go Bus has what it describes as a policy of "zero tolerance for dishonesty" by employees and, in particular, by drivers who conduct financial transactions with passengers, albeit in most cases very small-scale transactions. Go Bus's policy in these matters is that if there is any element of doubt about an employee's alleged dishonesty, the benefit of that doubt should go to the employee. It is Go Bus's case that dismissal is the inevitable consequence of proved dishonesty in relation to fare revenue by an employee. It follows logically that this benefit of the doubt should, and will, mean that employees benefitting from that doubt will not be dismissed, at least for a transaction which may breach the employer's protocols for dealing with money but in which there is doubt about whether the employee was motivated by dishonesty and, in particular, by personal gain. As Go Bus's depot manager, Mr Abbas, said in evidence, to dismiss an

employee for dishonesty (as occurred in this case) requires an "open and shut case"

of serious misconduct involving dishonesty.

[35] When Mr Hellyer was questioned initially about his wife's free ride and about his knowledge of the company's position that it would not allow free family member travel, the meeting notes confirm his account that the depot manager, Mr Baas, said to Mr Hellyer:

... being a union delegate, of all people you know that you can't allow passengers to travel for free, that you were at the negotiations when the union claimed that they wanted family passes ...

[36] Mr Baas then recorded, in the notes that he took at that meeting, that he had reiterated during the collective negotiations that all passengers must pay fares and the only free riders would be Go Bus employees wearing the company's uniform. Mr Baas said this was a requirement of the Regional Council and that breach of it could put Go Bus's contract with the Council in jeopardy, even if Go Bus had wanted to agree to the Union's claims for this perquisite.

[37] The next relevant record is Mr Baas's letter to Mr Hellyer of 8 August 2014

notifying him of a meeting he was to attend on 12 August 2014:

... regarding a serious misconduct allegation that on Tuesday 5th August

2014 you:

- Knowingly and purposely failed to issue a ticket for a passenger
- Knowingly and purposely failed to record and collect a fare for a passenger
- Failed to follow correct procedure around the sale of cash fares

and ticketing

[38] Although these were listed separately as breaches of Go Bus's procedures, they involved essentially one transaction affecting one passenger on one trip.

[39] There was a second inquiry meeting conducted by the company on 14 August

2014. Amongst the notes of this meeting made on behalf of the company is a reference to Mr Baas saying that "... free travel and family passes having been discussed during the collective negotiations and the [company's] position on the matter."

[40] The foregoing documentary evidence, corroborative of the defendant's, discloses that Mr Hellyer's impugned conduct was referred to several times in relation to his collective negotiating role on behalf of the Union. This relates to what Go Bus said must have been Mr Hellyer's heightened awareness of the company's policy not to continue free riding by family members. As will be seen, however, the viva voce evidence of Mr Baas, in particular, also confirmed the significance of that attribution of Mr Hellyer's actions to his union role in bargaining.

[41] Useful also in determining what occurred immediately before Mr Hellyer's dismissal is the written record of the termination of his employment and the reasons for that, signed by Mr Baas on 15 August 2014. These reasons included:

- You did knowingly and with intent allow a passenger to ride without collecting the due fare (this you have admitted and is not in dispute),
- You did knowingly and with intent fail in your duty to record a passenger (this you have admitted and is not in dispute),
- You failed to notify operations [and/or] management of an incident on your bus and in regard to fare revenue (this you have admitted and is not in dispute),
- This behaviour follows on from previous [inconsistencies] with fare revenue and fare policy where you were warned on the 2nd of July about the importance of following fare revenue policy (this you have admitted and is not in dispute),

[42] Mr Baas's written communication confirming dismissal continued:

This decision has not been taken lightly. I do understand that in all other areas of the job you're a good and competent employee and that has only made the situation harder. I have told you previously that I had hoped that there would not be any further issues around fare revenue; unfortunately this has not been the case.

In the absence of any extraneous cause and even bearing in mind your employment history our trust and confidence in you as an employee has been eroded and we cannot continue to employ you as a member of our team.

...

Your employment with Go Bus Transport Limited will cease on Thursday the 14th August 2014 ... You have been provided with one [week's] notice from the 14th August to the 21st August 2014 ... The Company does not require you to work for the duration of the Notice Period. ...

[43] Go Bus's case was that because Mr Hellyer offered no explanation to the company, or at least no acceptable explanation, for not collecting a fare from his wife, and from Mr Hellyer's recent history of cash issues, the company assumed or

inferred that this constituted dishonesty on his part. It concluded that Mr Hellyer's was an "open and shut case" of attempting to defraud the company of the revenue it collected on behalf of the Otago Regional Council. According to Mr Abbis, a finding of dishonesty "always triggers" a dismissal, as it did in the defendant's case.

[44] It is also part of Go Bus's case that two other Dunedin drivers who faced an investigation following the same undercover inspector's activities, on the same day as Mr Hellyer's, were not dismissed. It said this indicated not only that Mr Hellyer was not treated disparately but, also, its strict policy of dismissal in cases of dishonesty or fraud. Go Bus had doubts about the dishonesty of these other employees, and gave them the benefit of those doubts: its assessment was that their cases were not open and shut cases, to use Go Bus's terminology.

[45] Some of the relevance of the employer's statements about Mr Hellyer's union involvement related to an issue that was not ever in contention: that was his awareness at the relevant time that employees' families could no longer travel free on buses. However, I have concluded that the union activity information to which Go Bus had recourse, and on which it relied, had another significance in its investigations and decision-making process. That was the plaintiff's application and use of this knowledge to found its crucial determination of whether Mr Hellyer's admitted ticketing irregularities, were dishonest and/or fraudulent. As the plaintiff put it, the significance to it of Mr Hellyer's union activity was that his ticketing irregularities were not an innocent or one-off mistake. That was because of what it assessed was his familiarity with its rules which, in turn, was for Go Bus reinforced by his familiarity with the issue of family passes as a result of his union activities.

[46] The employer's reliance on that union activity to confirm his awareness of the rules would not have disadvantaged Mr Hellyer. He acknowledged from the outset, freely and repeatedly, that he was aware that his wife was not entitled to travel free on the plaintiff's buses as she would have been a few months previously. However, the question of his intentions and motives, and whether these were dishonest or fraudulent, was a disputed question at all stages of Go Bus's inquiries and decision-making. Go Bus's conclusions about this were influenced by Mr Hellyer's union activities.

[47] There was a significant reliance by the plaintiff on the allegedly dishonest or fraudulent nature of Mr Hellyer's breaches of

ticketing procedure. This was confirmed by Go Bus's witnesses in evidence at the hearing. However, the letter confirming his dismissal, written at the time of it, contains no reference at all to such serious considerations.

[48] It is also insufficient to say, as Go Bus's witnesses did, that Mr Hellyer's refusal or failure to communicate with his depot supervisor, when faced with his wife without money for a ticket, was fraudulent or otherwise dishonest. That is because Go Bus's procedures allowed for a number of subsequent opportunities to deal with that situation. Mr Hellyer could have waited justifiably until a period of down-time between trips. He could have explained the situation to a supervisor at the depot, even on the following day, because his evidence was that there was no supervisory staff still working when he cashed up at 6 pm, or he could even have issued his wife with a ticket but subsequently asked for the equivalent fare to be taken out of his wages. Go Bus acknowledged these alternatives through witnesses giving evidence, which contradicts its conclusion of dishonesty based on the events that occurred on the bus.

[49] Those are significant factors because, on Mr Hellyer's unchallenged evidence, he allowed his wife to board the bus, intending to deal with the absence of a fare at a later stage. He says that because of the busyness of his duties, he subsequently forgot to rectify the position within a reasonable time of this having arisen, that is on the same or the following day. This explanation was not accepted by Go Bus. On the contrary, it concluded that Mr Hellyer had intended all along that no fare would be paid for his wife's trip. This amounted, in the plaintiff's assessment, to fraudulent or other dishonest conduct (theft) resulting automatically in the defendant's dismissal.

[50] Go Bus's Mr Baas in particular concluded that Mr Hellyer had achieved a personal financial gain, having permitted his wife to travel without paying a fare which either she or he would have had to pay. Go Bus's loss was not, therefore, of money that had been paid. Rather, it was the loss of an opportunity both to collect a valid fare for passing on to the Otago Regional Council and, potentially if this had

been discovered, putting its contract with the Council at risk by failing to ensure that all available fares were collected and passed on. That was so even although the cost to Go Bus/the Council of conveying Mrs Hellyer was minimal. Mr Baas concluded significantly that Mr Hellyer's union role in bargaining meant that his was unlikely to have been an innocent mistake. Go Bus used this consideration to reinforce its conclusion of theft or other fraudulent misconduct by Mr Hellyer.

[51] That position, adopted by Mr Baas on behalf of Go Bus, is illustrated in the following passages of evidence he gave to the Court:

59. I explained that we were going into a disciplinary meeting for serious misconduct. That from the evidence and from what had been said, that I did not believe this was simply a case of a one off mistake, that we had discussed free travel and family passes during the negotiations and the company's position on this matter and that I did not accept Mr Hellyer's explanation because he had plenty of opportunities on the day to rectify the situation and avenues open to him not to put himself in this situation.

...

68. I therefore explained to Mr Hellyer [at] the conclusion of this meeting that this was black and white, and that without come credible information we were simply relying on his word that this type of behaviour

would not happen again. I also said that unfortunately, given his history it would be irresponsible for me to rely on that. I had lost trust and confidence

in Mr Hellyer and I believe that he gave his wife a free ride on the bus with

no intention to repay it. I don't accept that he just forgot about it, because it was obvious from his argument about this at the union negotiations that he was very aware about this policy and that it was not acceptable to GBT.

69. My conclusion was that Mr Hellyer had defrauded the company of revenue. He knew that we did not allow the family of staff members to travel for free. He chose to wilfully ignore that rule. Nothing about his actions subsequent to that suggested that he had any intention to repay the money or to be transparent about what he had done. I could not trust him given that he had not drawn the situation to the company's attention in one of the many ways available to him.

[52] Later, in cross-examination on this issue and after Mr Baas had agreed that Mr Hellyer's explanation had been that "he didn't think about it", he was asked the following questions by Mr Cranney, counsel for the defendant, and gave the following answers:

Q. Now that's not black and white is it? That's putting an issue of grey into the equation isn't it?

A. Not – no I don't believe so. He may have said that but that doesn't

necessarily make it true and a lot of people will often bring grey into

a situation where there is no grey. To be perfectly honest with you, you have to recall that we spent a lot of time explaining to Mr Hellyer about the reason why people can't ride for free and Mr Hellyer robustly tried to argue this point over two days [during collective bargaining]. So Mr Hellyer understood I would say more clearly than any other driver in our organisation what the requirements were and that was hammered home over two days.

[53] Referring to the negotiations over two days in collective bargaining referred to by Mr Baas above, Mr Cranney asked:

Q. So that was a big factor in your mind then?

A. The fact that we'd gone to the 8th degree, 10th degree to explain to Mr Hellyer our policy and the reasons behind it. I would say that it was definitely something that entered into my mind as to whether or not Mr Hellyer was aware at the time that the decision he was making was fraudulent.

...

Q. And part of your reasoning for dismissing him was that you couldn't rely on his word that this type of behaviour would not happen again.

A. That's correct.

Q. And you say that the reason for that is given his history.

A. That's correct.

[54] Mr Baas then confirmed that the "history" was the events of the 2 July 2014 meeting about discrepancies between Mr Hellyer's cash payments-in and his electronic ticket records. In relation to this Mr Baas said:

Then, also, the fact that he had had it explained to him during the [collective bargaining] negotiations where he raised it on several occasions over those two days, he had Go Bus's side as to why we could not possibly allow people to travel for free. Yet he had chosen to ignore those two occasions [including the 2 July meeting] where we tried to give him every benefit of understanding how serious it was to adhere to that particular policy.

[55] Mr Cranney then broke his questions down into the two separate categories dealing with, first, the 2 July 2014 meeting and, second, the earlier collective negotiations. Mr Baas confirmed that the 2 July 2014 meeting was about discrepancies between the amounts of cash that had been paid in and the electronic records but that it was not about dishonesty on the part of Mr Hellyer. The witness said:

... I didn't believe necessarily that his intention on that particular occasion was to defraud the company; ... I'm a firm believer that we need to give every opportunity to our employees to understand that

just because they're on the hook for amounts that are outstanding when it comes to their cash box, that they can't just use that money freely for their own private use and that they needed to accept and understand the policy around that particular area.

...

A. I did not believe that his intentions on that occasion were to defraud the company and I had not had any other major issues with Kevin before that, that would lead me to believe that. So I did give him the benefit of the doubt on that occasion as I would have done with other employee in that first instance and in the same circumstances.

...

A. ... when he left my office on that day my honest opinion was that I

would never see Kevin Hellyer again over any discrepancies to do with fare revenue or fare policy, ...

[56] So, whilst, in Mr Baas's view, Mr Hellyer had breached Go Bus's policy before 2 July 2014, this had not then been done dishonestly or with fraudulent intent. As he explained:

... The policy is very clear that drivers cannot use the money from their cash box. As I said the issue that I have is, it's one of those situations where you don't want to throw the baby out with the bath water. Drivers sign up to the fact that any shortages in their cash takings are their responsibility. They are on the hook for that money. ... I've learnt over many years not to just assume that people understand that particular part of the policy and decide to ignore it.

[57] Mr Baas confirmed that, apart from these two "historical" matters, there was nothing else in the past employment relationship (including with IPT in which Mr Baas was also in a managerial role) that gave any indication of a dishonest or fraudulent intention on Mr Hellyer's part. He was "otherwise a good employee". Mr Baas confirmed that the two historical events just summarised, including the collective negotiations, were the only considerations that he (and Go Bus) took into account in determining that it would be "irresponsible for me to rely on your undertakings that this type of behaviour won't be continued in the future."

[58] Mr Baas accepted in cross-examination that there was "a difference between somebody forgetting to report something or somebody overlooking it, and someone deliberately not [reporting] it, not reporting something." He conceded that the same difference could apply potentially to Mr Hellyer if he had omitted to regularise his wife's free travel as a passenger on the one hand, and on the other, if he deliberately tried to defraud the company by doing the same thing. Mr Baas also accepted that

Mr Hellyer's explanation or defence was that he forgot about the matter. In

response, however, he continued:

... I did not agree that that was the case on this occasion given Mr Hellyer's in-depth understanding of the reason why his wife couldn't hop on the bus and had it been systemic, and this was the first occasion that we'd had this during the time that Go Bus had taken over, with approximately 120 odd employees, had it been systemic where a lot of people had made the same mistake and this had come to

my attention, I believe that there was a problem. We took every opportunity to advise people ... and it appeared to us that everyone else seemed to have been adhering to that. And as I say, given the fact that 1. I had given the benefit to Mr Hellyer to take time to understand our policy and the gravity around not following the policy; and 2. the fact that over two days [of collective negotiations] he robustly argued that his wife or family members should be able to ride the bus for free, and we explained to him over those two days until we were blue in the face that this wasn't under Go Bus's policy acceptable, and I even believe that at the end of that period of argument, [the company] had reiterated to the Union that they really needed to ensure that their members understood this because the company would not accept that behaviour and that it would be grounds for serious misconduct.

[59] The reference in the foregoing passage to two days of argument was to Mr Hellyer's involvement in collective bargaining on behalf of union members. It was not as Mr Baas said, that Mr Hellyer had argued for his wife and family to continue to have free passes: he had advocated on behalf of all union members that this privilege should continue.

[60] Turning to the letter given to Mr Hellyer confirming his dismissal, Mr Baas conceded that there was no express reference to dishonesty or fraud but said that this was what he had concluded and intended to convey by saying that he had "lost trust and confidence in Mr Hellyer".

[61] Later, in cross-examination, Mr Baas said:

My honest opinion was that he made a decision on that occasion that he knew that he should be collecting a fare, that he knew that we did not allow staff's family to ride for free and that he decided in defiance because of his opinion on that particular subject to ignore it and to effectively be dishonest in regards to follow company's policy.

[62] Mr Baas confirmed that his conclusion was not just that Mr Hellyer failed to collect a fare but decided to do so in deliberate defiance of the company's procedures and so defrauded it of the fare. He confirmed that if the company had not concluded

that Mr Hellyer had been dishonest or fraudulent, or even had he been given the benefit of the doubt on these issues, the defendant would have been warned but not dismissed.

Unlawful discrimination grievances – the statutory scheme

[63] If an employee has been discriminated against on one of the Act's grounds and has been dismissed or otherwise adversely affected in that employment, this constitutes a distinct class of personal grievance. Often, as in this case, if an employee is disadvantaged unjustifiably in employment by acts or omissions that include unlawful discrimination or is dismissed unjustifiably where unlawful discrimination is a contributing factor, then these other classes of personal grievance may co-exist with the unlawful discrimination grievance. Subject to ensuring that there is no double-recovery of remedies in such circumstances, it is possible, as is argued for by the defendant in this case, that an employee can have separate personal grievances both from unlawful discrimination and what might be called a common or garden variety unjustified dismissal. That is because, applying the s 103A tests of justification for dismissal (or disadvantage in employment), the Authority or the Court concludes that the employer's action in dismissing the employee was not what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred. A fair and reasonable employer will very rarely be able to justify a dismissal where the grounds for the dismissal amount to, or include, unlawful discrimination by the employer against the employee.

[64] The following is a summary of the relevant statutory scheme for unlawful discrimination grievances. These are defined materially under [s 103\(1\)\(c\)](#) as being:

... any grievance that an employee may have against the employee's

employer or former employer because of a claim—

...

(c) that the employee has been discriminated against in the employee's

employment ...

[65] [Section 104](#) ("Discrimination") defines the circumstances in which an employee is discriminated against in that employee's employment for the purposes of [s 103\(1\)\(c\)](#). In this case that is:

... if the employee's employer or a representative of that employer, by reason directly or indirectly of any of the prohibited grounds of discrimination specified in [section 105](#), or involvement in the activities of a union in terms of [section 107](#),—

...

(b) dismisses that employee or subjects that employee to any detriment, in circumstances in which other employees employed by that employer on work of that description are not or would not be dismissed or subjected to such detriment; ...

...

[66] Next, [s 107](#) ("Definition of involvement in activities of union for purposes of

[section 104](#)") provides materially that this means:

... that, within 12 months before the action complained of, the employee—

(a) was an officer of a union or part of a union, or was a member of the committee of management of a union or part of a union, or was otherwise an official or representative of a union or part of a union;

or

(b) had acted as a negotiator or representative of employees in collective bargaining; or

...

(d) had made or caused to be made a claim for some benefit of an employment agreement either for that employee or any other employee, or had supported any such claim, whether by giving

evidence or otherwise; ...

...

[67] Finally, [s 119](#) (“Presumption in discrimination cases”) provides as follows:

(1) Subsection (2) applies if, in any matter before the Authority or the court,—

(a) the employee establishes that the employer or the employer’s representative took any action or omitted any action as described in any of paragraphs (a) to (c) of section

104(1) in relation to that employee; and

(b) if it is a case where the employee alleges that the discrimination was by reason directly or indirectly of the employee’s involvement in the activities of a union, the

employee establishes that he or she was a person described in [section 107](#).

(2) If this subsection applies, there is a rebuttable presumption that the

employer or representative of the employer discriminated against the employee on the grounds, or for the reason, specified in section 104(1) and alleged by the employee.

[68] In this case there is no dispute that Mr Hellyer was an officer of a union or an official or representative of his union, and that he had acted as a negotiator or representative of employees in collective bargaining within 12 months before his

dismissal.⁶ Whether the [s 119](#) presumption applies is not really in dispute either. However, more fundamental is the question whether Mr Hellyer was dismissed in circumstances in which other employees employed by Go Bus as urban bus drivers were not, or would not have been, dismissed. The discrimination case turns largely on this [s 104](#) disputed question.

[69] Because, as I infer in this case and in many others, these provisions may appear to employers to be counter-intuitive and even contrary to workplace reality, it is important to set out not only the longstanding provisions in the statute, but also their context and purpose when interpreting and applying them.

Reasons for unlawful discrimination grievances and interpretation of the statutory scheme

[70] The Act and its predecessors have long recognised that unions of employees play an important and mutually beneficial role in employment relations between employers and employees in New Zealand. Union membership is beneficial not only to unions’ employee members but also to the interests generally of many employers. That is for a variety of reasons, including (but not exclusively):

- the ability to settle and negotiate terms and conditions of employment for large numbers of employees without the requirement to bargain individually with each of them;
- the ability to deal on day-to-day employment matters with a single body whose principal function it is to do so, rather than with numerous working employees;
- that union representation will often act as a filter and reality check for member employees who might otherwise act less than objectively and rationally towards to their employers; and

⁶ [Employment Relations Act 2000, s 107\(1\)\(a\)-\(b\)](#).

- the assertion of individual and collective employment legal rights can be difficult for individual employees even if completely justified, but more easily achieved through the collective fortitude of a union.

[71] Publicity about these beneficial elements of employee unionism is often much more muted than the periodic and strident criticisms of unions generally that still persist. However, these mutual benefits are nevertheless both present (and confirmed by many

employers in cases before this Court) and, more importantly for the purpose of this case, underpins the legislation governing these relationships.

[72] Reality is also that some employees who agree to accept union roles (as workplace delegates or otherwise in addition to their regular employment) do so at some potential risk to themselves and their current and prospective employment. Again although not universally or constantly, some elements of union-employer relations are conflicted and they are sometimes tense. These attributes of such relationships are usually temporary and around collective bargaining for collective agreements but, in some cases, there is an ongoing antagonistic relationship between a union and an employer. Experience tells us also that grudges can be and are sometimes borne after the resolution of a particular dispute and revenge exacted, but for reasons that are asserted to be un-associated with union conflict.

[73] For all of these real and pragmatic reasons, and to attempt to achieve a balance of power, the law has long protected, but not absolutely, the rights of union delegates and other employees involved with union activities. That protection is not boilerplated: it does not make any union member or representative employee bullet-proof. Rather, the philosophy of the legislation is to attempt to ensure that an employee's present or past union activities are not held against that employee but that he or she is to be dealt with, in relation to events which may bring about grievances, in the same way as would be an employee without those union activity connections. Applying s 5 of the [Interpretation Act 1999](#) ("The meaning of an enactment must be ascertained from its text and in the light of its purpose"), the prohibition on union activity discrimination is to be interpreted and applied through that philosophical hermeneutic.

[74] The Court of Appeal in *Nathan v C3 Ltd*,⁷ with which I deal subsequently, interpreted and applied the employment discrimination provisions in an international context, describing them "of considerable importance". These anti-discrimination provisions of the Act were said to reflect New Zealand's international obligations under ratified ILO Conventions including Convention C087 (Freedom of Association and Protection of the Right to Organise Convention)⁸ and Convention C098 (Right to

Organise and Collective Bargaining Convention).⁹ The Court of Appeal drew

particular attention to art 1 of the Right to Organise and Collective Bargaining

Convention 1949 which provides:

(1) Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.

(2) Such protection shall apply more particularly in respect of acts calculated to—

(a) make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership;

(b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours.

Union-association discrimination: the case law

[75] The most recent authoritative judgment on union-association discrimination is that of the Court of Appeal in *Nathan*.¹⁰ The judgment is, however, of limited use in this case because it turned on what the Court of Appeal found to have been the Employment Court's failure to address the claim of discrimination in Mr Nathan's case under s 103(1)(c) or s 104 of the Act. So the judgment of the Court of Appeal did not correct a substantive error but, rather, an absence of consideration of this law. The remission of the case to the Employment Court does not contain as detailed an

analysis of the law as it might have if there had been an error of commission rather

⁷ *Nathan v C3 Ltd* [2015] NZCA 350, [2015] ERNZ 61 at [36].

8. Freedom of Association and Protection of the Right to Organise Convention 1948 (No 87) (signed 9 July 1948, entered into force 4 July 1950), art 11.

9. Right to Organise and Collective Bargaining Convention 1949 (No 98) (signed 1 July 1949, entered into force 19 July 1951), art 1.

¹⁰ *Nathan*, above n 7.

than of omission. Nevertheless, there is some authoritative guidance in the Court of

Appeal's judgment.

[76] Having described s 119 of the Act as creating a rebuttable presumption in discrimination cases, the Court of Appeal wrote, after identifying the express references to the employee's union roles:¹¹

C3 was holding Mr Nathan to a higher standard than other employees because of these roles. Any doubt as to the relevance of this factor in C3's thinking was dispelled by the evidence of Mr Pritchard.

[77] The Mr Pritchard referred to by the Court was a witness for the employer who acknowledged that the grievant's union delegate and health and safety status was a factor or an additional factor which was taken into account in deciding to dismiss him. The defendant says that was the case here too, particularly by the significant involvement in decision-making of Mr Baas for Go Bus.

[78] The judgment of the Court of Appeal in *Nathan* confirmed the approach taken by the Supreme Court in *McAllister v Air New*

Zealand Ltd that the phrase “by reason ... of” in s 104(1) refers to a “material factor” in, or “ingredient” for, the adverse consequence of dismissal or disadvantage.¹²

[79] The Court of Appeal concluded that Mr Nathan had been dismissed “by reason directly or indirectly” of his “involvement in the activities of a union” as defined in s 107.13 This, in turn, established the s 104(1) test of the Act.

[80] Turning to s 104(1)(b) (whether the employer would have dismissed the employee even if he had not had the union-associated roles), the judgment of the Court of Appeal continued:¹⁴

... The correct approach to the interpretation and application of this “comparator” provision is explained by the Supreme Court in *McAllister* which was an age discrimination case where s 104(1)(a) was relevant. On s

104(1)(b) the Court said:¹⁵

¹¹ At [30].

¹² *McAllister v Air New Zealand Ltd* [2009] NZSC 78, [2010] 1 NZLR 153.

¹³ *Nathan*, above n 7, at [31].

¹⁴ At [32].

¹⁵ *McAllister*, above n 12, at [39].

We should add that it does not necessarily follow that, if para (b) had applied, the same comparator would be appropriate. In para (a) the comparison involves qualifications. In para (b) it involves types of work and there are no available checks and balances equivalent to ss

30 and 35. The comparator, as Mr Harrison QC [counsel for the appellant] put it, must allow the surrounding circumstances to work on both sides of the comparison. Having stressed the need for the comparator to be addressed to the context, we do not consider it is presently appropriate to pursue how a comparison might be made under para (b) as the selection of a comparator is driven in large measure by the particular circumstances and the manner in which an alleged discrimination occurs. The circumstances which may arise under para (b) are likely to be quite different from those in the present case.

[81] The Court of Appeal concluded that despite the employer’s assertion in evidence that Mr Nathan would have been dismissed even if he had not been a union delegate or representative, the Employment Court made no finding under s 104(1)(b) as interpreted in *McAllister*.¹⁶

[82] Pertinently, also, the Court of Appeal concluded:¹⁷

The fact that Mr Nathan’s personal grievance was a claim for unjustifiable dismissal under s 103(1)(a) did not mean that the Employment Court was precluded from considering the discrimination issue in the correct statutory context. A pleading point of that nature would be contrary to s 122 which expressly permits the Court to make a finding that a personal grievance is of a type other than that alleged. We also consider that in terms of s 103A a fair and reasonable employer could not justify dismissal if the decision made was discriminatory in terms of s 104.

Unlawful discrimination in this case?

[83] Turning to the facts of this case, the plaintiff’s witnesses say that the outcomes of Mr Hellyer’s indiscretion would have been no different had he not held the role that he did within the Union. The Court must, of course, be careful to assess the probable truth of that assertion and should not simply accept it uncritically at face value, made as it has been with the advantages of hindsight. That is particularly so where, as here, the case has already been the subject of decision after evidence

from most of the same persons and a finding by the Authority. Although there was

¹⁶ *Nathan*, above n 7, at [33].

¹⁷ At [35].

no express reference to this consideration in the letter sent by Go Bus to Mr Hellyer confirming his dismissal, as the Authority concluded at [36]:

... it is clear from the notes taken at the disciplinary meeting by the decision maker that this was referred to in relation to a preliminary conclusion this was not a one off mistake.

[84] Even more specifically at [55] the Authority referred to its factual finding that at the employer’s first investigative meeting on 12 August 2014:

... there was mention of Mr Hellyer being a union delegate and in that role *of all people you know you can't allow passengers to travel for free*. There was discussion at that meeting about Mr Hellyer having been present at negotiations when there was a claim for family passes and the company said no to that claim and that all passengers must pay under Go Bus Policy. There was mention again of the negotiations in the context of whether it was a case of a one off mistake on the part of Mr Hellyer. I find it likely that was in the context of recent clarification to Mr Hellyer of the need for all passengers to pay. Mr Baas was present at those negotiations. Later evidence

supports that Mr Hellyer was rather passionate during the collective negotiations about the claim for a family pass.

(original emphasis)

[85] The Authority's conclusion on this point was recorded at [57] of its

determination and following:

[57] I find that Mr Hellyer's presence at collective bargaining negotiations on 16 July 2014 as an employee representative when a claim for a family pass was discussed was a material reason though for concluding intentional rather than careless conduct. It does not have to be the only reason as long as it is a material part or ingredient of the making of the decision to dismiss.

[58] I find that Mr Hellyer was held to a higher standard and conclusions were drawn that he had not simply [forgotten] and made a mistake because he was an employee representative at collective negotiations in mid July

2014 and from the notes, it was concluded, he had recent knowledge of the views of Go Bus.

[59] Mr Hellyer, I find, was dismissed in part directly or indirectly because of his involvement in the activities of a union which is a prohibited ground of discrimination.

[86] Turning then to the next test to be applied under s 104(1)(b) (whether Mr Hellyer "would have been dismissed even if he had not been involved in union activities"), the Authority concluded at [60]:

The appropriate comparator would be a Go Bus bus driver, not involved with union activities who like Mr Hellyer, had allowed a family member without the immediate means to pay to ride for free and had the same explanation for failing to take corrective action that he forgot.

[87] The foregoing conclusions of the Authority may relate to the general question of whether Mr Hellyer was treated fairly and reasonably as compared to other employees who similarly misconducted themselves. However and pertinently, they may also inform the other elements of this discrimination question, whether union activity discrimination can be eliminated as "a material factor" or "ingredient" in the

action taken by the employer, Mr Hellyer's dismissal.¹⁸ The Authority examined the

cases of other employees who were observed by the undercover bus inspector on the same day to have breached ticketing and cash handling policies of Go Bus. The Authority described their situations as "not directly comparable" with that of Mr Hellyer, but did note that two other employees received final written warnings on the basis that Go Bus had not concluded that these other employees had intended to defraud the company of revenue, whereas in Mr Hellyer's case it did so conclude.¹⁹

Further and significantly in view of my conclusions also, the Authority concluded

that Mr Hellyer's union activity was referred to in Go Bus concluding that he did intend deliberately to defraud Go Bus of revenue, unlike the other two employees observed and investigated at the same time.

[88] At one level, what may have appeared to be discrimination against Mr Hellyer by his reason of his involvement in union activities did not taint his dismissal. That was because one of the issues for which the Go Bus manager appeared to use union activity conduct against Mr Hellyer, was in fact one that was not in dispute at any time, certainly by the time Go Bus came to decide whether Mr Hellyer should be dismissed. That question was Mr Hellyer's knowledge of Go Bus's policy that free family bus travel would not continue after it took over operation of the Dunedin services. The events leading to Mr Hellyer's dismissal occurred several months after the family pass policy had changed. Those changes had been publicised among drivers and, as the Authority found, Go Bus had adamantly resisted re-introduction of free family travel during collective negotiations

in which Mr Hellyer participated as a representative of the Union.

¹⁸ See [78] above referring to *McAllister*.

¹⁹ See the Authority's determination, above n 1, at [65].

[89] At all times relevant to the events of this case, Mr Hellyer accepted that he was aware of Go Bus's policy. That was without reference to whether this was because of his role as an employee bus driver or whether he had come by this information as a result of his union activities. I infer from the evidence presented for Go Bus about the policy change that Mr Hellyer knew both that Go Bus would not permit free travel by family members and that there were a number of alternative ways of dealing with a passenger who did not have money or otherwise could or would not pay a fare at the start of that passenger's trip. Mr Hellyer was frank in his prompt and consistent admissions of this knowledge to Go Bus's management. His error, he said, was forgetting to do anything about his wife's unpaid bus trip, whether immediately out on the run by telephoning the depot to seek advice; or, more realistically in the circumstances, reporting the absence of the fare when he returned to his depot at the end of his shift and cashed up; or, most easily perhaps, by having paid the missing \$2.90 fare himself.

[90] However, that is not the end of the discrimination question. Even if the element of Mr Hellyer's knowledge of the prohibition upon free-riding by family members did not turn on his awareness of this from his union activities, the Court must nevertheless be careful to ensure that his union involvement was not a material factor or ingredient in his dismissal overall.²⁰ That included, crucially in this case, Go Bus's assessment of whether he intended to defraud it of revenue or whether he overlooked accounting for the unpaid fare. As

the case has now emerged, that turned out to be the most significant issue of alleged discrimination going to justification for dismissal.

[91] The case for the defendant engages the s 119 rebuttable presumption. In other words, Mr Hellyer has satisfied the Court that he was disadvantaged in his employment and/or dismissed from it, having, in the 12 months before those events, been an officer of a union or part of a union, and had acted as negotiator or representative of employees in collective bargaining. Not only has Go Bus failed to satisfy the Court by rebutting the s 119 presumption, but the documentary and viva voce evidence in the case satisfies me, as it did the Authority, that Go Bus relied, as

material factors or ingredients in its decision to disadvantage and/or dismiss Mr

20 See *McAllister*, above n 12.

Hellyer, on the fact that he had been involved in these union activities. To use the words of the Court of Appeal in *Nathan*, Go Bus thereby held Mr Hellyer to a higher standard than other employees because of those roles. If Go Bus had not relied on those unlawfully discriminatory considerations and treated Mr Hellyer as it would have another bus driver in materially similar circumstances, it could not have disadvantaged or dismissed him justifiably.

[92] I am satisfied from the evidence both that Mr Hellyer has a personal grievance under s 103(1)(c) in that he was discriminated against in his employment, and also that such discrimination tainted significantly Go Bus's conclusion that Mr Hellyer had acted dishonestly and fraudulently in failing to account for his wife's

\$2.90 fare. In this latter regard, a reasonable employer could not have reached the decision that Go Bus did about the seriousness of Mr Hellyer's conduct, in all the circumstances leading up to and at the time when it dismissed him. Go Bus could only reasonably have concluded that Mr Hellyer breached its fare payment policies but could not have concluded reasonably that he sought to gain financially from that breach, and in doing so acted dishonestly and fraudulently. Accordingly, and as acknowledged by Go Bus witnesses, it should have applied its 'benefit of the doubt' policy towards Mr Hellyer (as it did to other employees in similar situations) which would have warranted only a warning for this breach but not the defendant's dismissal. Mr Hellyer has a personal grievance for unlawful discrimination by Go Bus.

[93] That is not, however, the end of the case because Mr Hellyer has also invoked more general grounds of absence of justification including, in particular, disparity of his treatment as compared to other relevant employees and, more generally, that Go Bus could not, as a fair and reasonable employer, have dismissed him justifiably in all the circumstances, viewed objectively at the relevant time. It is, therefore, necessary to examine those issues.

Unjustified dismissal absent unlawful discrimination?

[94] Absent any element of unlawful discrimination, justification for Go Bus's

dismissal of Mr Hellyer must be established by reference to the criteria in s 103A of

the Act. Unlawful discrimination may well also provide grounds for a finding of unjustified dismissal (as the Authority found, and as the Court of Appeal confirmed in *Nathan*) but the s 103A tests can also be examined independently of the standalone discrimination grievance conclusion.

[95] Was Mr Hellyer's dismissal what a fair and reasonable employer could have done in all the circumstances and was the manner of his dismissal how a fair and reasonable employer in all the circumstances could have done so?

[96] Decision of this aspect of the case turns, first, on the fairness and reasonableness of Go Bus's conclusion that by failing to collect a fare from a non-fare-paying passenger, Mr Hellyer intended to defraud Go Bus or, more correctly, the Otago Regional Council (to whom Go Bus was responsible for payment of all fares received) of revenue of \$2.90. Alternatively, did Mr Hellyer commit serious misconduct in his employment by intentionally breaching Go Bus's requirements of its employees for fare collection and accounting?

[97] The importance of Go Bus's conclusion about Mr Hellyer's state of mind in relation to relevant events between 2 July and his dismissal is significant for a number of reasons. It is what, in its view, distinguished Mr Hellyer's case from that of other drivers who, at about the same time, were found to have breached company rules relating to fares. That was on the basis that Go Bus considered that these other employees did not have the same fraudulent intention at relevant times, as did Mr Hellyer, to deprive the company of revenue. Mr Hellyer's intention, in relation to the non-payment of fare incident, is crucial because, absent that intention, his misconduct could not have warranted dismissal but, rather, a formal warning and/or some other lesser sanction appropriate to an inadvertent failure to collect or otherwise account for a \$2.90 fare. Go Bus witnesses confirmed this outcome for other bus drivers was premised on an absence of dishonesty or fraudulent intention and would have resulted in a similar consequence for Mr Hellyer.

[98] As to the law on disparity of treatment in dismissal personal grievances, the

Court of Appeal's judgment in *Chief Executive of the Department of Inland Revenue*

v Buchanan (No 2) is the most recent authoritative statement of the law.²¹ The Court endorsed its earlier statement of the law in *Airline Stewards & Hostesses of NZ IUOW v Air NZ Ltd* as follows:²²

... if there is a prima facie case of disparity or enough to cause inquiry to be made by the Arbitration Court into the issue of disparity, the employer may be found to have dismissed unjustifiably unless an adequate explanation is forthcoming.

[99] This test was said in *Buchanan* to have been “refined” by the Court of Appeal in *Samu v Air NZ Ltd* where the *Airline Stewards* test was reproduced and the following added:²³

Thus if there is an adequate explanation for the disparity, it becomes irrelevant. Moreover, even without an explanation disparity will not necessarily render a dismissal unjustifiable. All the circumstances must be considered. There is certainly no requirement that an employer is for ever after bound by the mistaken or overgenerous treatment of a particular employee on a particular occasion.

[100] In *Buchanan*, the Court of Appeal adopted, at least implicitly a three-stage or three-issue test which had been applied in the United Kingdom in cases referred to by it. Those three steps were as follows:²⁴

(a) Is there disparity of treatment?

(b) If so, is there an adequate explanation for the disparity?

(c) If not, is the dismissal justified, notwithstanding the disparity for which there is no adequate explanation?

[101] It is, therefore, necessary to apply this three-stage or three-issue test to the factual circumstances of other identified Go Bus driver cases and Mr Hellyer’s.

[102] In one sense, Mr Hellyer was not treated disparately by Go Bus, as it asserts. He was dismissed, whereas other employees guilty of breaches of the company’s policies at about the same time, were only warned. The differentiation advanced by Go Bus was based on its conclusion that Mr Hellyer had acted dishonestly and

fraudulently, whereas other otherwise comparable employees had not.

21. *Chief Executive of the Department of Inland Revenue v Buchanan (No 2)* [2005] NZCA 428; [2005] ERNZ 767 (CA).

22. *Airline Stewards & Hostesses of NZ IUOW v Air NZ Ltd* (1985) ERNZ Sel Cas 156 (CA); [1985] ACJ 952 at 958.

23 *Samu v Air NZ Ltd* [1995] NZCA 504; [1995] 1 ERNZ 636 (CA) at 639.

24 *Buchanan*, above n 21, at [45].

[103] That distinction, however, falls away in light of the Court’s decision that Go Bus could not have concluded, reasonably, that Mr Hellyer’s breach or breaches were committed dishonestly or fraudulently. In this sense, therefore, Mr Hellyer was treated disparately when compared to those other drivers who received at least the benefit of the doubt about the honesty of their intentions. This finding contributes to the Court’s overall conclusion that Mr Hellyer was dismissed unjustifiably.

[104] Mr Hellyer was also treated unjustly in that Go Bus took into account what it asserted was his better knowledge, as compared to other drivers, of its fare rules as a result of his participation in collective bargaining negotiations. Go Bus, in reliance significantly upon this additional knowledge, did not believe that Mr Hellyer had forgotten to comply with the rule. That was an improper consideration applied by Go Bus and amounted to an unlawfully discriminatory dismissal of him. It also constitutes an unjustified dismissal of him. That is for several reasons.

[105] First, Go Bus relied on the final warning that it had given to Mr Hellyer on

2 July 2014 for dishonest and fraudulent conduct arising out of what it calculated was a significant shortfall in his cash takings and/or his “borrowing” of money from his cash tray. Dishonest and fraudulent conduct amounting to theft could not, however, have been a reasonable conclusion reached by Go Bus in all the circumstances. There was insufficient investigation of how that significant shortfall came about. In any event, Go Bus reached no conclusion that this was brought about by dishonesty. It relied also on its erroneous conclusion that Mr Hellyer had once “borrowed” money from his cash box. A proper investigation of this incident, which Go Bus regarded as theft by Mr Hellyer, would have revealed that the defendant had in fact referred to an innocuous transaction between two drivers exchanging \$20 worth of coins for a \$20 note while out on the road.

[106] Mr Hellyer may have contributed to this erroneous but serious conclusion by Go Bus in that he did not enlighten it with the explanation that he made in court for what he referred to as a short-term “borrowing” from his cash box. However, neither did the company meet its responsibilities as a fair and reasonable employer by investigating further what it concluded was a very serious situation of theft or fraud. In these circumstances, on 2 July Go Bus could not reasonably have formally and

finally warned Mr Hellyer of serious misconduct and, therefore, could not reasonably have relied on that warning in reaching its decision to dismiss him several weeks later.

[107] Next, Go Bus did not comply with its own reasonable and self-imposed practice of giving the benefit of the doubt of dishonest intent to any driver in Mr Hellyer’s situation in August 2014 after having admitted to failing to account for a fare for his wife’s travel. Go Bus relied significantly on the twin factors of a previous (invalid) warning and on what it concluded must have been his knowledge of its rules as a result of his union involvement, to conclude that there was no reasonable doubt that Mr Hellyer had been a thief and a fraudster in failing to account for that \$2.90 fare. Had the benefit of the doubt been extended to him, as Go Bus ought to have done, the consequence to him would, at worst, have been a warning for non-compliance with fare procedures. These were the consequences to some other drivers investigated after reports from the same undercover bus inspector but who were given the benefit of the doubt about the honesty of their intentions.

[108] Although, with a couple of exceptions relating to the necessity for further questioning, there can be no real criticism of Go Bus's process of investigation and decision-making, the substantive decisions that it reached in that process were seriously flawed in several respects. They cannot be said to have been what a fair and reasonable employer could have decided in all the circumstances at that time.

[109] Accordingly, I conclude that the Authority reached the right decision about Go Bus's liability, albeit for some different and additional reasons to those in this judgment.

Remedies for personal grievances

[110] This challenge having been Go Bus's, seeking to have the Court overturn the Authority's determination and declare Mr Hellyer to have been dismissed justifiably, there was little attention paid by the parties to questions of remedy in the event, as has occurred, that the challenge is unsuccessful.

[111] No question of reinstatement in employment arises, and nor did it in the Authority. Mr Hellyer has moved away from Dunedin and has obtained other employment, albeit on a less secure and lower remunerative basis.

[112] Further, s 124 of the Act provides that the Court must reduce remedies to reflect culpable contributory conduct to the situation that gave rise to the grievance. This section is certainly engaged in this case.

[113] The Authority reduced the already modest remedies that it would have awarded to Mr Hellyer, by 40 per cent to reflect his culpable contributory conduct. That is a substantial percentage which might be seen as coming close to the position in which each party was equally culpable (that is a 50 per cent reduction).

[114] A significant element of the s 123(1)(c)(i) compensation ordered by the Authority was to reflect the consequences to Mr Hellyer of being wrongly branded by Go Bus as a thief and a fraudster. A combination of a misunderstanding of these seriously detrimental labels and of the egregiousness of serious misconduct to warrant them, brought about this very distressing consequence for Mr Hellyer. Monetary compensation for that and other s 123(1)(c)(i) consequences was set at a decidedly modest level by the Authority, even before any deduction was to be made under s 124.

[115] There are, therefore, to be two adjustments made to the Authority's remedies. Instead of a 40 per cent reduction in monetary remedies as directed by the Authority, there is to be a 20 per cent reduction to reflect fairly and properly Mr Hellyer's degree of responsibility for his conduct which gave rise to his grievance. Further, the Authority's notional award of s 123(1)(c)(i) compensation is to be increased from

\$8,000 to the sum of \$16,000 although this increased sum must itself be reduced by 20 per cent under s 124.

[116] Although the plaintiff has been unsuccessful in this challenge to the Authority's determination, it was a challenge by hearing de novo which has permitted the Court to increase somewhat the remedies to be paid to Mr Hellyer.

Section 183(2) means that this judgment sets aside automatically the Authority's determination and stands in its place.

Observation

[117] This has been an important case for both parties: for Mr Hellyer, because he lost valued employment after what was, by all accounts, an unblemished record as a Dunedin bus driver. He was wrongly branded a thief and a fraudster by Go Bus.

[118] Go Bus treats its revenue collection obligations seriously and expects, justifiably, its staff to do likewise. Its policy to give the benefit of the doubt to employees where there are suggestions of dishonesty and theft, is a good practice although in this case it reached the wrong conclusion about Mr Hellyer's actions. That wrong conclusion included Go Bus's reliance on Mr Hellyer's union activity to underpin its decision that he had, at all relevant times, intended to defraud Go Bus and the Otago Regional Council of \$2.90.

[119] Mr Hellyer is entitled to a public declaration that while he may have breached Go Bus's revenue rules by not accounting for the \$2.90 fare, he was not a thief or a fraudster as Go Bus had concluded.

[120] Likewise, Go Bus is entitled to an acknowledgement by this Court that its rules and processes for dealing with breaches of those rules are generally fair even if they were not applied properly in Mr Hellyer's case.

Summary of judgment

[121] It is appropriate, therefore, to summarise the remedies in Mr Hellyer's favour as follows:

(a) Compensation of \$6,235.39 for 12 weeks' wages (taking into account one week paid by Go Bus and as reduced by 20 per cent under s 124).

(b) Holiday pay of \$498.84 (based on 8 per cent of lost wages'

compensation and taking into account a 20 per cent reduction under s

124).

(c) The sum of \$187.06, being lost KiwiSaver benefits (which includes a reduction of 20 per cent under s 124).

(d) The sum of \$12,800 under s 123(1)(c)(i) (which includes a reduction of 20 per cent under s 124).

(e) Interest on the foregoing sums for reimbursement of lost wages, holiday pay and KiwiSaver benefits calculated at the rate of five per cent per annum from 3 February 2015 until the date of payment of

those amounts to Mr Hellyer pursuant to cl 14 of sch 3 to the Act.

Costs

[122] There was no costs award in the Authority, perhaps because Mr Hellyer was unrepresented there. He did, however, seek a contribution to his earlier advocacy costs in connection with his dismissal. He may renew this application now if he wishes to do so.

[123] The defendant is entitled to costs in relation to this challenge. Because the proceeding falls outside the scope of the Court's trial scale costs guideline, the benefits of that are not available to the parties unless they wish to have recourse to them. In any event, the parties should now have an opportunity to attempt to settle costs between them, but failing which the Court will determine that issue. The defendant may have until 31 January 2017 to either settle costs or apply for an order for these by memorandum. The plaintiff may then have until 14 February 2017 to

file any memorandum in opposition.

Judgment signed at 12.45 pm on 23 December 2016

GL Colgan
Chief Judge

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