

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 125
5526039

BETWEEN KEVIN HELLYER
Applicant

A N D GO BUS TRANSPORT
LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: Applicant in person
 Garth Bardsley, Advocate for the Respondent

Investigation Meeting: 5 August 2015 at Dunedin

Submissions Received: At the investigation meeting
 Further submissions 1 and 2 September 2015 from
 applicant and 2 September 2015 from respondent.

Date of Determination: 4 September 2015

DETERMINATION OF THE AUTHORITY

- A Kevin Hellyer was unjustifiably dismissed from his employment with Go Bus Transport Limited.**
- B Taking contribution into account Go Bus Transport Limited is to pay to Kevin Hellyer the following:**
- (i) The sum of \$4676.54 gross being reimbursement of lost wages under s 123 (b) of the Act.**
 - (ii) The sum of \$374.12 gross being reimbursement of holiday pay on lost wages under s 123 (1)(c) (ii) of the Act.**

- (iii) The sum of \$140.30 being reimbursement of the loss of the benefit of employer contribution to KiwiSaver under s 123(1)(c)(ii) of the Act.**
- (iv) The sum of \$4800 without deduction being compensation under s 123(1)(c)(i) of the Act.**
- (v) Interest is payable at 5% on the wages, holiday pay and KiwiSaver contribution from 3 February 2015 until the date of payment.**

C I have made some observations about the final pay which the parties may be able to resolve by agreement failing which either party may return to the Authority.

D I have reserved the issue of costs. I have set a timetable for Mr Hellyer to forward his previous advocate's invoice and for Mr Bardsley to respond.

Employment relationship problem

[1] Kevin Hellyer was employed by Go Bus Transport Limited (Go Bus) as a full time bus driver from 1 April 2014. Go Bus had acquired the trading assets of Mr Hellyer's previous employer, Invercargill Passenger Transport Limited (IPTL).

[2] Mr Hellyer was, at the time of his dismissal, the Branch President of the New Zealand Tramways and Public Passenger Transport Employee's Union (the union). Negotiations for a collective agreement were underway with Go Bus at the material time and Mr Hellyer was an employee representative at the collective negotiations. The collective agreement did not come into force until 8 April 2015. Mr Hellyer was party at the material time to an individual employment agreement with Go Bus.

[3] Mr Hellyer was dismissed from his employment with Go Bus on 12 August 2014 when he did not collect a \$2.90 bus fare from his wife and did not subsequently account for the fare. He says that the dismissal was unjustified and the outcome disproportionate to his action.

[4] In a letter dated 9 September 2014 Mr Hellyer's then advocate, Phillip de Wattignar, raised a personal grievance that Mr Hellyer had been unjustifiably dismissed and that his dismissal was an act of discrimination under s 104 of the Employment Relations Act 2000 (the Act) because he was Branch President of the union and involved as an employee representative in collective bargaining at the time of his dismissal.

[5] Mr Hellyer, although unrepresented when proceedings were lodged in the Authority, maintained a concern in his statement of problem that *my role as a union official seemed to come under scrutiny during the events and I have to raise the question did this cloud judgement. I would not like to think that I had been discriminated against because of my affiliation to the union.*

[6] I provided both parties before determining this matter with a copy of a recent Court of Appeal judgment dated 4 August 2015, *Andy Nathan v C3 Limited*¹ which is a case about discrimination on the basis of involvement in union activities. An opportunity for submission or comment was provided and Mr Hellyer made a comment and Mr Bardsley provided further submissions. I have had regard to that further information.

[7] Mr Hellyer seeks compensation in the sum of \$10,000 together with reimbursement of lost wages and benefits and reimbursement of costs incurred at an early stage of this matter.

[8] Go Bus says that Mr Hellyer was justifiably dismissed for allowing a passenger to ride without collecting the fare, not recording the passenger and not notifying operations and/or management of the incident. It does not accept and described as an absurdity in the statement in reply the allegation that it discriminated against Mr Hellyer because he was a representative of the union.

The events that led to the dismissal

Invitation to an investigation meeting 8 August 2014

[9] Mr Hellyer was invited by letter to attend a meeting with Kayne Baas, Depot Manager Go Bus Dunedin and Colin Abbis, Operations Manager Go Bus Dunedin on 12 August to investigate whether allegations of serious misconduct were correct. I

¹ CA 834/2013 [2015] NZCA 350

did not hear evidence from Mr Baas who was the decision maker in this matter. I understand he is no longer employed by Go Bus. I heard evidence from Mr Abbis who attended both meetings held with Mr Hellyer about the bus fare allegation and Go Bus human resource manager, Garth Bardsley. In the absence of any evidence from the decision maker Mr Baas I have placed significant weight on the notes taken during the investigation and disciplinary meeting which Mr Hellyer accepts as an accurate account.

[10] In the 8 August 2014 letter Mr Hellyer was advised that he was entitled to have a representative with him at the meeting and that if he was unable to provide a satisfactory explanation a subsequent disciplinary hearing could lead to disciplinary action including the possibility of summary dismissal without notice. The allegation was that on 5 August 2014 Mr Hellyer:

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.

[11] Mr Hellyer was provided with material relevant to the allegation. He received a copy of a report from a transport inspector, Angela Alexander. Ms Alexander in her report dated 5 August 2014 recorded that she had boarded the bus driven by Mr Hellyer that day at 14.16 hours. She was not wearing Go Bus company uniform. Along the bus route she observed three passengers boarding the bus and one of the passengers did not pay a fare. Ms Alexander in her report stated that the lady who did not pay a fare said something to Mr Hellyer and he smiled and motioned for her to sit down which she did. She recorded the time of this incident as approximately 14.34 hours.

[12] Mr Hellyer was also provided with a copy of his roster for the day, a copy of the route map for the time in question and card transactions by driver and date covering the period of time Ms Alexander rode the bus driven by Mr Hellyer. It appeared in all likelihood although not referred to in the letter that he received a copy of the Go Bus policy for cash handling.

12 August 2014 meeting

[13] Mr Hellyer did not take issue with the notes of the meetings which were subsequently typed up and provided to him after his dismissal. There is one odd feature of the notes for both the investigation meeting on 12 August and the disciplinary meeting on 14 August. It is that the inspector's report at the top of the notes did not relate to the incident in the report Mr Hellyer was handed with the letter of 8 August 2014.

[14] Mr Bardsley said that it related to another incident on 5 August which involved another bus driver observed by Ms Watson, the bus inspector. Having heard the evidence, although an unusual situation particularly as the report refers to Mr Hellyer by name, I accept that it was in all likelihood at the top of the meeting notes by mistake when they were typed up. There was no dispute that the focus of the investigation meeting on 12 August and then the disciplinary meeting on 14 August 2014 was on the incident in the inspector's report that had been provided to Mr Hellyer. I am not satisfied that this other matter formed part of the reason for the decision to dismiss and I could not be satisfied that it involved Mr Hellyer.

[15] Mr Hellyer admitted the matters set out in the bus inspector's report provided to him. He said that the lady who did not pay was his wife and that she kept her *go-card* in her wallet but had left that in her car on that day and had no money and *used her beguiling ways so I let her on the bus*. A question was asked of Mr Hellyer if he attempted to radio or call operations on his cell phone to inform them of the situation and he responded that he had made a *gut decision at the time and these were unusual circumstances*.

[16] The notes record Mr Baas making a comment *you 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*. Mr Baas recorded in the notes the company response to that claim was that all passengers must pay under the Go Bus policy and the only people to ride for free were Go Bus employees in Go Bus uniform.

[17] There was discussion about a previous family pass that was available with Mr Hellyer's previous employer IPTL. Mr Hellyer stated that *"five months ago we*

wouldn't have been sitting here would we?" and that the company had taken away the [family passes] which previously meant his wife could travel for free on the bus.

[18] Mr Abbis asked Mr Hellyer why he did not just print off a ticket and come back to the depot short, inform them of the situation and pay later. Mr Hellyer responded that he had just made a decision on the spot and he knew that he should not have done it.

[19] The investigation meeting then adjourned so that Mr Baas and Mr Abbis would review the information and consult with human resources and contact Mr Hellyer if the matter was to be taken further.

[20] The matter then moved into a disciplinary process with the next meeting on 14 August 2014.

14 August 2014

[21] Mr Hellyer attended the meeting again with his representative Mr Muir. Mr Baas and Mr Abbis attended on behalf of Go Bus.

[22] Mr Hellyer felt that Mr Baas in his questions at this meeting lacked objectivity. A reading of the notes shows that the questions at the start of the meeting were more directed and focussed than those at the investigation meeting to clarify and get more information.

[23] Mr Hellyer was asked if his intentions were not to defraud the company out of money or to be dishonest and he had not followed training and called operations or printed a ticket and repaid the money later did he not go back to the depot and fill out an incident form or go to operations and tell them what happened and say that he wanted to be open and honest. I find that was an appropriate question. Mr Hellyer said he did not even think about it and that the run was very busy and it went right over his head.

[24] There was a question directed towards whether he understood that people could not travel for free and Mr Hellyer did accept that he knew that was *not part of the operation*. He said that they were exceptional circumstances with his wife. That was an appropriate question.

[25] There was a question about why Mr Hellyer thought the situation with his wife was different. Mr Hellyer said that it was a *line call* he made on the day and he would not make excuses. He said that he did not think about it, *it didn't even enter my head. It did not register as a major event that required incident report or phone call or whatever.* Mr Baas, the notes record, stated that it is a major event when talking about fare revenue and that it would have been easy to avoid the situation if Mr Hellyer's *intentions were pure.* Mr Hellyer acknowledged that.

[26] An adjournment was then taken. When the meeting resumed it was put to Mr Hellyer that Mr Baas did not believe this was a case of a one off mistake. Mr Baas mentioned *free travel and family passes having been discussed during the collective negotiations and the companies' position on the matter.* The notes record Mr Baas said *I can't help but think that this is not the situation that you have presented as you have plenty of opportunities on the day to rectify the situation and avenues open to you to not put yourself in this situation.* Mr Hellyer is recorded in the notes emphasising the situation with his wife leaving her wallet in the car and she had no choice. Mr Baas is recorded as stating that that does not mitigate the fact that you failed to charge the fare and Mr Hellyer agreed he was not disputing that.

[27] Mr Hellyer referred to a meeting he had had with Mr Abbis and Mr Baas on 2 July 2014 about fare handling and cash handling irregularities. He said that he has been very conscious and aware of what had been required since that meeting. Mr Hellyer in response to Mr Baas saying that he would have thought after that meeting over Mr Hellyer's *fare revenue shorts* that he would have been the last person to *have up here* with anything to do with money and fares as he would know how seriously the company takes it. The notes record Mr Hellyer agreed with that.

[28] Mr Baas from the notes then indicated his thinking was to move to terminate for serious misconduct. The notes record he wanted to provide this to Mr Hellyer in a letter to allow a further opportunity for him to come back with anything that could persuade him from taking that approach or any facts or evidence that might have been missed and alternatives to dismissal. Mr Hellyer did not want any further delay and although there was a further attempt to persuade him to take the time to respond he was quite insistent for an outcome. Mr Baas said that he wanted to make absolutely sure he had all the facts before he made a decision and Mr Hellyer confirmed that

there was nothing further to add and he had been upfront about everything and laid all his cards on the table.

[29] Mr Hellyer was then advised of the decision to terminate his employment and this was followed by a letter dated 15 August 2014 which contained the reasons for dismissal.

[30] Mr Hellyer was advised that his employment would cease on 14 August 2014 and that he would be provided with one week's notice from 14 August 2014 to 21 August 2014. This was with a view to his history which included that in all other areas of the job, Mr Hellyer was a good and competent employee.

The Issues

[31] The issues for the Authority to determine are as follows:

- i. Was Mr Hellyer unjustifiably dismissed?
- ii. Was Mr Hellyer discriminated against by virtue of his involvement in the activities of a union?
- iii. If Mr Hellyer was unjustifiably dismissed what remedies is he entitled to and are there issues of contribution and mitigation?
- iv. Was he correctly paid in his final pay?

Was Mr Hellyer unjustifiably dismissed?

[32] Section 103A of the Act provides the test of justification. That test requires the Authority to objectively assess whether the actions of Go Bus and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time Mr Baines was dismissed.

[33] There are four procedural fairness tests in s 103A (3) of the Act that the Authority must consider together with other factors that it thinks appropriate under s 103A (4). The Authority must not determine a dismissal to be unjustified if the defects in the process were minor and did not result in an employee being treated unfairly under s 103(5) of the Act. A fair and reasonable employer will comply with statutory good faith obligations.

[34] Procedural fairness under s 103A of the Act requires sufficient investigation of allegations, raising of concerns and giving an employee a reasonable opportunity to respond. The employer needs to genuinely consider that respond before dismissing or taking actions such as issuing a warning.

Reason for dismissal

[35] The reasons set out in the letter of termination dated 15 August 2014 were that Mr Hellyer knowingly and with intent allowed a passenger to ride without collecting the fare and knowingly and with intent did not record his wife as a passenger. It was further set out that he failed to notify operations or management of the incident and about the fare revenue. It was taken into account that there had been previous inconsistencies with fare revenue and fare policy and Mr Hellyer had been warned about the importance of following fare revenue policy at 2 July 2014 meeting although not in a disciplinary setting.

[36] One of the issues before the Authority is whether Mr Hellyer was discriminated against directly or indirectly because of his involvement in the activities of the union under s 104 of the Act. I shall go on to consider that. There is no direct reference in the letter of termination to any reason for dismissal being involvement in the collective bargaining but 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.

Could this type of conduct be serious misconduct?

[37] Go Bus must have trust and confidence in their bus drivers to deal properly with fares and cash. Whether conduct in any particular case is such to justify summary dismissal is a matter of degree and needs to be assessed with respect to each situation. The sort of conduct that may justify dismissal was described in *BP Oil NZ Ltd v Northern Distribution Workers Union*² as conduct that deeply impairs or is destructive of that basic confidence or trust that is an essential element of the employment relationship.

[38] Employees who deal with money need to act in way which is compatible with their obligations to their employer. Where there are deviations from normal

² [1989] 3 NZLR 580.

procedure they need to protect their employer and indeed themselves by being clear and transparent about what has happened.

[39] A failure to collect a fare and then taking no steps to set things right could be, in some circumstances, conduct that fundamentally impairs the trust and confidence Go Bus could have in an employee such as to justify dismissal. I shall consider whether a fair and reasonable employer could conclude that dismissal was the appropriate outcome in this case.

Procedural fairness

[40] Mr Hellyer's individual employment agreement did not contain any additional requirements to the procedural factors in s 103A (3) of the Act. Mr Hellyer admitted his actions and he was able to explain and had an opportunity to provide matters in mitigation of the action he took. There were adjournments taken and Mr Abbis said consideration was given to his explanations. Mr Hellyer was given an opportunity to take some time to make submissions as to penalty or provide further information but chose not to do so.

[41] One procedural issue that Mr Hellyer raised at the Authority investigation meeting was that his wife was not spoken to. Go Bus at the time of the disciplinary meeting had accepted that she was the passenger who was not asked to pay a fare and the explanation that she had left her wallet in the car with her go bus card in it. I do not find it was unfair for Go Bus not to talk to her in all the circumstances.

[42] I find that the process by Go Bus was what a fair and reasonable employer could have done in all the circumstances and met the requirements in s 103A (3) of the Act.

Substantive justification

[43] The main issue about substantive justification was whether a fair and reasonable employer could conclude that the failures on the part of Mr Hellyer were inadvertent/careless because he simply forgot or they were knowing and intentional. Mr Hellyer said as part of his explanation it went *right over his head you know it didn't register as a major event that required incident reports or phone call or whatever*. As to why he did not print off a ticket Mr Hellyer explained that *he just made a gut decision on the spot*. As to why he did not radio or otherwise call

operations he said *he made a gut decision at the time and these were unusual circumstances*. In explanation about why he did not fill out an incident report or go to operations he did not even think about it and at the time the run was very busy and it went right over his head as *it's ultra-busy*.

[44] Mr Hellyer's explanations were to the effect that he forgot about the situation after his wife got on the bus.

[45] From the notes taken at the time of the disciplinary meeting Mr Baas formed a view this was not simply a case of a one off mistake or forgetfulness to record a passenger and charge a fare. The notes record Mr Baas puts his thinking to Mr Hellyer about why he did not think it was a one off mistake including that there had been recent discussion during negotiations about free travel and family passes at negotiations and the companies position [not being in favour of that] and *I can't help but think that this is not the situation that you have presented*. Mr Baas goes on to say that there were plenty of opportunities on the day to rectify the situation and avenues open to him. Mr Hellyer's explanation was that his wife had forgotten her wallet and he then forgot about the matter. He suggested that he could have let her walk but agreed that there was still the issue of the failure to reimburse the fare.

[46] I accept that a fair and reasonable employer could have concluded there were options available to Mr Hellyer to address the issue of a passenger who did not pay and that the failure to issue a ticket in accordance with standard procedure meant that there was no record of the passenger travelling.

[47] As to knowledge about family members not being able to ride for free Mr Hellyer did not dispute that he knew from 1 April 2014 the staff/family bus passes that had existed and enabled free travel for designated family members when he was employed by IPTL were no longer valid. As part of the evidence provided at the Authority investigation meeting there was a copy of a message sent to all staff dated 28 March 2014 that staff passes were no longer valid from 1 April 2014.

[48] Mr Hellyer was given an opportunity to explain if he saw any difference about collecting a fare between an ordinary passenger and his wife. He did not suggest that he did.

[49] I find although there was no disciplinary action taken Go Bus could have regard to discussions with Mr Hellyer following some cash irregularities about the

importance of following fare and cash handling policies in early July 2014. I do record that Mr Hellyer took considerable issue with that meeting at which he said that he felt made to feel like a criminal.

[50] I have 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.

[51] A claim for discrimination has to be considered against s 104 (1) of the Act as follows:

S 104

Discrimination

(1) For the purposes of section 103(1)(c), an employee is discriminated against in that employee's employment 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 by reason directly or indirectly of that employee's [refusal to do work under section 28A of the Health and Safety in Employment Act 1992, or] involvement in the activities of a union in terms of section 107,—

- (a) refuses or omits to offer or afford to that employee the same terms of employment, conditions of work, fringe benefits, or opportunities for training, promotion, and transfer as are made available for other employees of the same or substantially similar qualifications, experience, or skills employed in the same or substantially similar circumstances; or*
- (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; ...*

[52] Mr Hellyer falls 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 as he was the Branch President of the union and a negotiator or representative of employees at collective bargaining within 12 months of his dismissal.

[53] Section 119 of the Act provides as follows:

Presumption in discrimination cases

- (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.*

[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.³

[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.

³ *McAlister v Air New Zealand Limited* [2009] NZSC 78 at [49]

[60] I then turn to whether Mr Hellyer would have been dismissed even if he had not been involved in union activities. Section 104 (1) (b) of the Act requires a comparison be made with other employees employed by Go Bus to drive buses. The appropriate comparator would be a Go Bus bus driver, not involved with union activities who like Mr Hellyer 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.

[61] Mr Baas did not give evidence but Mr Abbis said that in concluding the matter was not simply *a mistake* reliance was placed on the options available to Mr Hellyer such as issuing a ticket, using the radio or filling in an incident report and advising management or operations. He also said that for the 40 years he has been in the bus industry allowing a person to ride for free has been a ground for serious misconduct and dismissal without *any leeway*.

[62] Mr Bardsley in his additional written submissions on the point about whether Go Bus would have dismissed Mr Hellyer if he was not involved in union activities stated that Mr Hellyer admitted the allegations and showed intent to defraud the company of revenue and never took the options available to pay the fare or notify management/operations. He said in these circumstances the outcome is always dismissal.

[63] Mr Hellyer admitted the conduct of allowing his wife to travel for free and failing to take corrective action. Mr Hellyer did not dispute during the meetings that there was no entitlement for family members to travel for free. His explanation for letting his wife on without paying was that there were exceptional/unusual circumstances and it was a call he made. He accepted that he should not have done it. He then said as to taking some steps to correct the situation – *with the benefit of hindsight which is always 20/20 at the time I didn't even think about it, it didn't even enter my head. At that time my run is very busy and it went right over my head as its ultra busy Kayne.*

[64] Mr Hellyer did not admit that he intended to defraud Go Bus of revenue. His explanation was one of carelessly overlooking the requirement to take other steps and his explanations needed to be considered and weighed by Mr Baas as to whether the conduct was deeply impairing to the confidence or trust which is essential in an employment relationship so as to justify dismissal.

[65] The importance of a conclusion whether there was intent to defraud the company of the fare can be illustrated by different outcomes for other employees who were also observed on 5 August 2014 by bus inspector, Ms Watson, not following ticketing and cash handling policies. Although not directly comparable with the situation of Mr Hellyer they both received final written warnings because Go Bus did not conclude they intended to defraud the company. Mr Bardsley refers to the lengths Go Bus went to in one of those cases to investigate the explanation of one of the employees in establishing that there was no intent to defraud rather a mistake. I accept there was a commendably thorough investigation.

[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 stated⁴ 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.⁵

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

⁴ At [35]

⁵ At [37]

Remedies*Lost wages*

[71] Mr Hellyer said that he has not been able to obtain employment since his dismissal and part of that he says is how his position with Go Bus ended. He said that he looked for alternative jobs and exhausted savings but did not enrol with Work and Income New Zealand for income support until January 2015 at his wife's insistence.

[72] Mr Hellyer has sought reimbursement of lost wages for 22 weeks from the date of dismissal to 13 January 2015 at 41.50 hours per week at \$15.50 and thereafter for 25 weeks at 32 hours per week. In total the claim under this head is \$26,551.00.

[73] Section 128 (2) of the Act provides that the Authority must whether or not it provides for any other remedies order the employer pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months ordinary time remuneration.

[74] The Authority may under s 128 (3) of the Act in its discretion order by way of reimbursement a greater amount than under s 128 (2).

[75] I am not minded in this case to order reimbursement in excess of three months. I note there was limited information about mitigation before the Authority and some delay in registering with the organisation that provides assistance for job searchers.

[76] Mr Hellyer received one week's pay in the sum of \$649.52 at the time of his dismissal.

[77] Subject to any contribution Mr Hellyer is entitled to reimbursement of lost wages at \$649.52 gross per week for a period of thirteen weeks from 14 August 2014 to 13 November 2014 less the sum paid for one week. That is the sum of \$7794.24 gross.

Holiday Pay

[78] Mr Hellyer is entitled to payment of holiday pay on the sum of \$7794.34 at 8% in the sum of \$623.54 gross.

KiwiSaver employer's contribution

[79] Mr Hellyer's payslip confirms that he received a contribution from Go Bus of 3% towards his KiwiSaver. I find that is a benefit he lost because of his personal grievance and he is entitled to the sum of \$233.83 for the period for which lost wages have been awarded.

Reimbursement of airfare

[80] Mr Hellyer said that he was required after his dismissal to cancel airline tickets for a planned October holiday and lost a deposit in the sum of \$500. This claim was made for the first time in the statement of evidence and there was no evidence to support it. I decline to order reimbursement of that amount.

Compensation

[81] Mr Hellyer said that he felt he had been a good employee up to that point and enjoyed the job at Go Bus. He said that he did not consider the action which he said was an error of judgment deserved an outcome of dismissal.

[82] He said that he had undergone substantial financial hardship since his dismissal because he has not been able to find other employment and in his written statement of evidence said that he had suffered a loss of confidence and an impact on his self-esteem to a significant degree. He said it had been a tough eleven months.

[83] I accept that Mr Hellyer suffered humiliation and loss of dignity when he was dismissed.

[84] Subject to any issue of contribution a suitable award under this head of claim would be \$8000.

Contribution

[85] The Authority must under s 124 of the Act reduce the remedies that would otherwise be awarded if it considers the actions of an employee's contributed towards the situation that gave rise to the personal grievance. I find that there was blameworthy conduct on the part of Mr Hellyer. He acknowledged that he had probably made the wrong decision and allowed his wife to travel for free on his bus.

He knew that that was not permitted by Go Bus. I accept that there were some unusual circumstances but the knowledge that he was not entitled to provide free rides for family members placed a greater onus on him to make sure he put things right.

[86] I do not conclude on the balance of probabilities that Mr Hellyer deliberately make a decision not to tell someone at Go Bus about the situation or to not reimburse the fare. I conclude that he was careless or negligent and forgot about the matter. He could have taken steps though to make that less likely. I refer particularly in that regard to the issue of a ticket. Mr Hellyer said that there was something dishonest in issuing a ticket for someone who he knew would not pay a fare. A ticket would have established evidence of a passenger riding the bus and a shortfall which would have prompted him to recall and make good the fare.

[87] The above remedies are to be reduced by 40%. I make the following orders taking contribution into account:

- (a) I order Go Bus Transport Limited to pay to Kevin Hellyer the sum of \$4676.54 gross being reimbursement of lost wages under s 123 (b) of the Act.
- (b) I order Go Bus Transport Limited to pay to Kevin Hellyer the sum of \$374.12 gross being reimbursement of holiday pay on lost wages under s 123 (1)(c) (ii) of the Act.
- (c) I order Go Bus Transport Limited to pay to Kevin Hellyer the sum of \$140.30 being reimbursement of the loss of the benefit of employer contribution to KiwiSaver under s 123 (1) (c) (ii) of the Act.
- (d) I order Go Bus Transport Limited to pay to Kevin Hellyer the sum of \$4800 being compensation under s 123 (1) (c) (i) of the Act.

Interest

[88] I exercise my discretion and order interest be payable in accordance with clause 11 of schedule 2 of the Employment Relations Act 2000 at 5% per annum being the rate prescribed under the Judicature Act 1908 on the awards made for

reimbursement of wages, holiday pay and the KiwiSaver contribution from 3 February 2015 when the statement of problem was lodged with the Authority until the date of payment.

Final pay issues

[89] Mr Hellyer raised two concerns about his final pay which I will address. The first was that he was not paid for lost time to attend the investigation and disciplinary meetings. Mr Bardsley helpfully looked into that matter and agreed that there was about a payment owed of \$8.00. There was no comment received by Mr Hellyer about this so I will simply reserve for either party to return to the Authority about this if required within five days of the date of this determination otherwise payment should simply be made.

[90] The second matter was that a deduction was made in the final pay of \$209.22. Mr Bardsley said that this represents shortages in banking which Mr Hellyer was responsible for under clause 7 of his employment agreement. Clause 7 is a general deduction clause.

[91] The Employment Court judgment in *Jonas v Menefy*⁶ concerned a deduction made for damage Mr Jonas caused to a gate and a general deductions clause in the employment agreement was relied on. Judge Ford stated at [62] that the provisions of the Wages Protection Act 1983 are mandatory and an employer must pay the entire amount of wages to a worker without deduction unless the worker consents or in certain circumstances there is an overpayment. It was also stated that the employer consistent with good faith obligations under the Act must, as a minimum, consult with the worker before making any deductions. Judge Ford stated that it may be no deduction can be on the basis of a general clause without the worker's express consent but that was not the way the matter in front of him was argued.

[92] I am not satisfied that the general deduction clause without as a minimum consultation with Mr Hellyer about the reasons why can be relied on as authority to make the deduction. Mr Bardsley may like to consider this and if agreement cannot be reached either party may return to the Authority about this matter.

⁶ [2013] NZEmpC 2013

Costs

[93] Mr Hellyer seeks reimbursement of costs he incurred earlier when he engaged an advocate. He will need to provide the Authority and Mr Bardsley with the invoice he received by 18 September and Mr Bardsley will have an opportunity to respond by 2 October 2015.

Helen Doyle
Member of the Employment Relations Authority