

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
OFFICE**

BETWEEN Gloria Haapu (Applicant)
AND Cityline (NZ) Limited (Respondent)
REPRESENTATIVES Paul McBride, Counsel for Applicant
Bernard Banks, Counsel for Respondent
MEMBER OF AUTHORITY Leon Robinson
INVESTIGATION MEETING 7 September 2006
8 September 2006
DATE OF DETERMINATION 14 September 2006

DETERMINATION OF THE AUTHORITY

The Authority determines that this employment relationship problem shall be resolved as follows:-

- A. Cityline NZ Limited is ordered to reinstate Gloria Haapu. This order shall take effect seven days from the date of this Determination to allow Cityline NZ Limited to facilitate Ms Haapu's return to work.
 - B. Cityline NZ Limited is ordered to pay to Gloria Haapu lost wages from 17 May 2006 less earnings of \$1,200.00, as reimbursement.
 - C. Cityline NZ Limited is ordered to pay to Gloria Haapu \$5,000.00 as compensation.
 - D. The Authority recommends that Cityline NZ Limited attend to informing and educating its bus driver employees in relation to the issue of transfer tickets and recording such procedures in writing. The Authority further recommends that Cityline NZ Limited attend to informing and educating its bus driver employees in relation to the paper feed operations of its wayfarer electronic ticketing machines and recording such procedures in writing.
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The problem

[1] The applicant Ms Gloria Haapu ("Ms Haapu") says she was unjustifiably dismissed from her employment with Cityline (NZ) Limited ("Cityline"). Cityline says the dismissal was justifiable for the reasons it set out in a letter dated 17 May 2006: -

Termination of employment

I refer to the recent investigatory and disciplinary meetings we have had and write to confirm the basis of the final decision that was conveyed to you at our meeting on 17th May. Present at the meeting with you were Phil Griffiths, Corrina Rameka and Caz Waaka your union representatives and the Company's representatives Gavin Cook, Bill Chapman and myself.

The Company's concerns as previously stated in the letter of 26th April was that you have misused the "Transfer off" key an unusual amount of times, which the Company believes is one of potential serious misconduct.

The Company reviewed all the information gathered before and during the meetings, and offered the opportunity several times in this meeting for you to either provide or ask for further information; you declined the opportunity in both cases. Based on this information and evidence we did not accept your explanation that you couldn't remember pressing the "Transfer off" key, or there was a machine fault.

As discussed, the Company believes your actions were deliberate. We believe that you deliberately issued a "Transfer off" ticket of nil value and sold it for a cash fare to passengers and did not account for this revenue in your pay-ins, further more the amount of your pay-ins was noticeably less than other drivers on the same route on different days.

As a result, the Company believed your actions amounted to serious misconduct and the trust and confidence between the employer and employee has been broken; the decision was made on 17th May to terminate your employment for serious misconduct, effective immediately.

...

*Yours sincerely
Matthew Lear
Operations Manager*

[2] Ms Haapu also says that two warnings issued to her previously are also unjustified. Cityline disagrees and says its warnings were justified for the reasons it set out in written letters of 3 May 2006, but incorrectly dated 3 April 2006, as follows: -

The purpose of the meeting was to discuss the Company's concerns that on 6/4/06 you undervalued a ticket, taking a \$2 fare but only issuing a \$1 child's ticket.

Following an investigation into this matter and consideration of your explanation, the Company is now issuing you with a first written warning due to misconduct.

In order to ensure that this particular incident does not occur again, in future you should take more care in issuing the correct ticket, which is requested by the passenger.

We will arrange some wayfarer training with you to help you clarify any issues you may have.

And: -

The purpose of the meeting was to discuss the Company's concerns that on 8/4/06 you abandoned your bus in gear with the engine running.

Following an investigation into this matter and consideration of your explanation, the Company is now issuing you with a first written warning due to poor performance.

In order to ensure that this particular incident does not occur again, in future you should not abandon your bus, or leave it unattended with the engine running.

A senior driver will give you training and go through the correct procedure with you.

[3] Ms Haapu, through her union, lodged an application in the Authority on 28 June 2006. She asks the Authority to investigate these problems and resolve them in her favour by orders for reinstatement, reimbursement and compensation.

[4] The parties were unable to resolve the problem by the use of mediation.

[5] On the basis of Counsel's advice to the Authority, I am satisfied that Ms Haapu's adjudication for bankruptcy does not prohibit her from seeking the Authority's assistance.

The legal principles

[6] The Authority scrutinises Cityline's decision to dismiss and issue warnings, in accordance with the statutory test of justification set out at section 103A of the *Employment Relations Act 2000* ("the Act").

The abandoned bus

[7] I refer firstly to the warning issued to Ms Haapu for abandoning her bus. This allegation was that on Saturday 8 April 2006, she had abandoned her bus while in gear, secured only by its handbrake, and with the engine running.

[8] This conduct was admitted by Ms Haapu and accepted by her when she discussed it with the Authority. She told the Authority she had left her bus unattended from 7.20 pm to 8.00 pm and also, that she had left her money tin on the bus, although hidden, while she attended to her personal needs.

[9] That admitted conduct is very serious conduct and Cityline was quite rightly concerned about issues surrounding the security of its property and public safety considerations.

[10] I do not criticise Cityline in any way for its decision to issue this written warning, and quite the contrary, consider Cityline was very generous indeed in electing to deal with the matter as it did, particularly having regard to incidental documentation issues.

[11] Ms Haapu considers that Cityline acted harshly because it ought to have excused her actions because of the situation she found herself having to attend to her personal needs. I do not agree, because I rather consider Ms Haapu did have it in her control to avoid the situation she found herself. I consider she ought to have sought her employer's assistance to better manage the situation and I do not accept that she was unable to or prevented from seeking that support.

[12] After a full and fair investigation, I am satisfied that Cityline was entitled to find misconduct. In relation to that misconduct, it chose to issue Ms Haapu with a first written warning. I must now separate out Cityline's decision to issue a warning and evaluate it against the statutory objective standard of what a fair and reasonable employer would have done in these circumstances.

[13] Interestingly, I conclude that Cityline's decision to issue Ms Haapu with a first written warning, was what a **more** than fair and reasonable employer would have done.

[14] Cityline's actions exceed the statutory standard - it satisfies the statutory test, and more in my assessment. Accordingly, in relation to this employment relationship problem, **I find that Cityline's actions in issuing Ms Haapu with a first written warning was not unjustifiable. I find that Ms Haapu does not have a personal grievance and there will be no formal orders.**

The under-value ticket

[15] I refer now to the warning given to Ms Haapu for issuing an undervalued ticket. This allegation was that on Thursday 6 April 2006, Ms Haapu had issued a child's ticket to an adult, taking an adult \$2.00 fare but issuing a \$1.00 child ticket.

[16] Cityline audit officer Ms Rosemary Horne ("Ms Horne") had prepared a report dated 6 April 2006. That report described her encounter of the same date with a passenger on a bus driven by Ms Haapu. Ms Horne's report stated (amongst other things):-

At the back of the bus a young lady gave me a \$1.00 child's ticket numbered 291981. She told me

- (1) She boarded the bus at Pomare.*
- (2) She asked for a ticket to the Hutt*
- (3) She gave the driver a \$20.00 note.*
- (4) She received \$18.00 change.*
- (5) She did not realise it was a child's ticket until I asked for I.D.*

Ms Horne's report also attached a signed statement from the passenger attesting to these facts.

[17] Ms Haapu's response to this matter was first set out in a written statement by her of 10 April 2006. She wrote: -

Report from Inspector R.Horne concerning undervalued ticket 06-04-06 sh 609# I was not aware passenger had received an undervalued until Inspector R.Horne brought it to my attention as the passenger did not come up and tell me.

[18] In meetings with Cityline, Ms Haapu continued to maintain she had made an innocent mistake. I am satisfied that at a disciplinary meeting held on 2 May 2006 in particular and others, she was provided an opportunity to respond to this allegation and explained that she had made a mistake.

[19] After considering the response, Cityline's Operations Manager Mr Matthew Lear ("Mr Lear") decided to issue Ms Haapu with a first written warning. I am satisfied that Cityline was entitled to find misconduct. I accept that there is nothing on the evidence gathered during that investigation which would entitle Cityline to regard that misconduct as wilful.

[20] I must now separate Cityline's decision to issue a warning and evaluate it against the statutory objective standard of what a fair and reasonable employer would have done in these circumstances. Whether wilful or not, I consider that Cityline is entitled to issue a warning to Ms Haapu in respect of it. It is entitled to put her on notice that such conduct is not acceptable and that any future repetition would render her liable for further disciplinary action.

[21] Accordingly, in relation to this employment relationship problem, **I find that Cityline's action in issuing Ms Haapu with a first written warning was not unjustifiable. I find that Ms Haapu does not have a personal grievance and there will be no formal orders.**

The transfer off key

[22] By its advice of 17 May 2006, Cityline confirmed its summary dismissal of Ms Haapu. It concluded that Ms Haapu had: -

deliberately issued a "Transfer off" ticket of nil value and sold it for a cash fare to passengers and did not account for this revenue in your pay-ins, further more the amount of your pay-ins was noticeably less than other drivers on the same route on different days.

[23] It explained its reason for believing that Ms Haapu had acted deliberately in that regard as follows: -

As discussed, the Company believes your actions were deliberate. We believe that you deliberately issued a "Transfer off" ticket of nil value and sold it for a cash fare to passengers and did not account for this revenue in your pay-ins, further more the amount of your pay-ins was noticeably less than other drivers on the same route on different days.

[24] The allegation is specified that Ms Haapu had *"misused the "Transfer off" key an unusual amount of times"*. That conduct was said to be serious misconduct. In its initial please explain letter dated 10 April 2006, the allegation was particularised thus: -

We are also investigating the mis-use of the "transfer-off" key, and the amount of times you have used this on your shifts, namely on 13/3/06, 18/3/06, and 3/4/06.

[25] Ms Haapu's initial written explanation was this: -

Report of mis-use of xfer off key. In reply to this some of them are from last month And it is hard for me to remember the incidents, and if they had been pointed out to me as they occurred. I may have been able to remember them all. I do know some instances where the ETM was not issuing tickets & Jim Puha had to swap ETM and controllers were advised of faulty ETM.

[26] There were four meetings held at which the allegations and Ms Haapu's responses were discussed. These were 12 April 2006, I find 13 April 2006, 20 April 2006, 2 May 2006 at which warnings were issued, and finally 17 May 2006 at which Ms Haapu was dismissed. The last two meetings were formal disciplinary meetings while the former meetings were "investigatory".

[27] Ms Haapu continued to maintain that she could not remember specifics but she did remember having ETM (electronic ticketing machine) problems over the relevant time.

[28] Ms Haapu was provided with a computer printout of the ETM transactions for each of the dates in question on 13 March, 18 March and 3 April 2006. The computer printouts do indeed show frequent instances of the issue of "transfer off" tickets by Ms Haapu.

[29] I accept the evidence that when the union organiser Mr Phil Griffiths directly asked if Cityline thought Ms Haapu had stolen from it, Mr Lear confirmed *"No, its just company procedure"*.

[30] At the final meeting of 17 May 2006, Cityline enquired about Ms Haapu's recent adjudication for bankruptcy. Naturally, her representatives challenged the relevance of that enquiry. Cityline explained the matter was relevant as it tended to show Ms Haapu had reason to take money or as Mr Lear puts it in his evidence *"money was an issue for her"*.

[31] I find too however, having seen and heard the witnesses, that Mr Lear declared at the final meeting held on 17 May 2006, that Ms Haapu was dismissed for theft. That of course was not the allegation put to her to answer and I find that Ms Haapu was actually dismissed for theft. There was however, no evidence of theft and Cityline was not entitled to reach that conclusion. Principally for this reason, **I find the dismissal is unjustifiable.**

[32] There are other reasons that I find Cityline's decision to dismiss unjustifiable. Although it maintained throughout its investigation that the allegation against Ms Haapu was that she had failed to follow procedure, I find that there was no clear procedure communicated to employees.

[33] Cityline confirms to the Authority there is no documentation relating to the procedure to be followed in relation to the issue of transfer tickets. Having heard from these witnesses, I appreciate there are various situations where transfer tickets may be issued either together with cash fares, or separately on their own. I conclude there are no known clear and communicated processes relating to the issue of transfer tickets.

[34] I also conclude that not all drivers are aware of procedures to clear paper jams. I seriously doubt whether drivers are trained or inducted to use interim waybills to clear any paper jams. That method appeared to me unknown to the drivers. So too in my assessment, does the "black wheel" or "knob" that Mr Lear and Mr Puha spoke of.

[35] As well, I consider that there was delay in putting the allegations to Ms Haapu, and in particular, the allegations relating to transactions on 13 and 18 March 2006. It was unfair to expect Ms Haapu to remember multiple transactions that occurred 23 and 28 days previously. It is more than likely that her explanation that she could not remember, given that delay, was correct.

[36] Cityline is able to access daily fare transactions from ETM modules. I have observed Cityline's careful security of those modules. It is a simple task to obtain information from those modules, and on a daily basis, and I see no systemic impediment that would have prevented it from raising any concerns with Ms Haapu as near as possible to when particular concerns arose.

[37] Cityline's behaviour code obliged it to put any breaches of expected behaviour to Ms Haapu *"at the earliest opportunity"*. I do not accept that 10 April 2006 was the earliest opportunity it had to put allegations relating to 13 and 18 March 2006 to Ms Haapu. I note too, that Mr Lear was aware of those matters well before 10 April 2006 when he actually did

raise them with Ms Haapu. That was not fair to her and it prejudiced her ability to respond. It was also contrary to Cityline's contractual obligations owed to Ms Haapu.

[38] It appears that Ms Horne was alerted to the transactions of 13 and 18 March after events of 21 March 2006. When she made request for printouts of the week prior to 21 March 2006, she obviously would not have learned of 3 April transactions from that exercise. It is unclear how Cityline was alerted to the transactions of that particular date. It is clear however, they were first raised with Ms Haapu a week later.

[39] All these matters leave me with a view that it is unsafe to conclude Ms Haapu had committed serious misconduct. For the same reason, I am also not persuaded that the dismissal meets the standard which lawyers know as the *Honda* standard, that I accept is applicable.

Determination

[40] Separating out Cityline's decision to dismiss against the statutory objective standard of what a fair and reasonable employer would have done in these circumstances, for all the above reasons, **I find that Cityline's action in dismissing Ms Haapu was not what a fair and reasonable employer would have done. I find that Ms Haapu has a personal grievance and she is entitled to remedies in settlement of that grievance.**

Resolution

[41] Having made those findings and in considering both the nature and the extent of the remedies to be provided, I am bound by section 124 of the Act to consider the extent to which Ms Haapu's actions contributed towards the situation that gave rise to the personal grievance, and if those actions so require, to reduce the remedies that would otherwise have been awarded accordingly.

[42] I find that Ms Haapu did not contribute to the situation that gave rise to the personal grievance I have found. I consider it is unsafe to regard the undoubted frequent use of the "transfer off" key as blameworthy conduct which could constitute contributory fault. Nor do I consider that aspect of matters as requiring a reduction. As well, I regard this personal grievance as severable and independent from the situation that led to the warnings issued to Ms Haapu. For these reasons, I consider there is therefore no basis for reducing the nature and extent of the remedies to be granted to Ms Haapu.

[43] Ms Haapu wishes to be reinstated. That is the primary remedy that a successful grievant is entitled to. I see no impracticability to her reinstatement and consider it appropriate in this instance. **I order Cityline NZ Limited to reinstate Gloria Haapu. That order shall take effect seven days from the date of this Determination to allow Cityline NZ Limited to facilitate Ms Haapu's return to work.**

[44] Ms Haapu tells the Authority she was granted a WINZ emergency benefit from 30 June 2006 with her last payment the time of the Authority's investigation meeting. From mid May 2006 to mid July 2006 she cared for her sister and was paid \$150.00 per week for eight weeks.

[45] I make an assessment of the loss to Ms Haapu. I am required to make allowance for all contingencies which might, but for the unjustifiable dismissal, have resulted in termination of the Ms Haapu's employment. I do not consider that Ms Haapu's dismissal could be said to have been inevitable absent procedural irregularities because I have found she was actually dismissed for theft when that was not the allegation pursued against her and secondly, because I consider the evidence gathered is not sufficiently reliable to properly conclude serious misconduct.

[46] I am satisfied that Ms Haapu has lost wages as a result of the personal grievance I have found. **I order Cityline NZ Limited to reimburse Gloria Haapu lost wages from 17 May 2006 less \$1,200.00 for her earnings from caregiving.**

[47] I am satisfied that Ms Haapu has suffered hurt and humiliation, loss of dignity and injury to her feelings. She has suffered that injury as a result of the unjustifiable dismissal. Having regard to her evidence, her length of service and the nature of the personal grievance, I award her compensation of \$5,000.00. **I order Cityline NZ Limited to pay to Gloria Haapu the sum of \$5,000.00 as compensation.**

Recommendations

[48] I consider it appropriate to make recommendations with a view to avoiding similar employment relationship problems occurring in the future. I recommend that Cityline NZ Limited attend to informing and educating its bus driver employees in relation to the issue of transfer tickets and recording such procedures in writing. I further recommend that Cityline NZ Limited attend to informing and educating its bus driver employees in relation to the paper feed operations of its wayfarer electronic ticketing machines and recording such procedures in writing.

[49] I suggest too, that Ms Haapu would benefit from retraining.

Costs

[50] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Mr McBride is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Mr Banks is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination. I will not consider any application outside that timeframe.

Leon Robinson
Member of Employment Relations Authority