**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**WELLINGTON**

WA 123/10
File Number: 5285700

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| | BETWEEN | John Joseph<br>Applicant |
| | AND | Wellington Combined Taxis Limited<br>Respondent |

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| Member of Authority: | Denis Asher |
| Representatives: | Peter Cranney & Anthea Connor for Mr Joseph<br>Blair Scotland for the Company |
| Investigation Meeting | Wellington, 1 June 2010 |
| Submissions Received | By 9 June 2010 |
| Determination: | 7 July 2010 |

## DETERMINATION OF THE AUTHORITY

### The Problem

[1] Did the respondent (the Company) breach Mr Joseph's employment agreement and unjustifiably dismiss him?

[2] Mr Joseph seeks reinstatement, unspecified compensation for hurt and humiliation, lost wages and costs. If he succeeds with his claim, is it practicable to reinstate him and what other remedies are appropriate?

[3] Subsequent mediation did not resolve the employment relationship problem.

**The Investigation**

[4] During a telephone conference call on 29 March 2010 the parties agreed to an investigation on 1 June. Timelines were agreed for witness statements and the provision of agreed bundles of documents.

[5] During the investigation the parties were unable to settle this matter on their own terms. Timelines were set in place closing submissions.

[6] All references to page numbers in this determination are in respect of the parties' agreed bundle of documents.

[7] From the evidence presented by the parties I am satisfied that the following are the key matters in their employment relationship problem.

**Background**

[8] Mr Joseph has worked in the taxi industry since 1956. He has been employed as a dispatch operator since 1996.

[9] Mr Joseph was employed at the Company's predecessor's Wellington shuttle control room from 1 December 2007.

[10] Of longstanding concern to the respondent and other taxi operators is the practice of 'feeding', i.e. the unauthorised diversion of work to a particular operator by a call centre of shuttle control room staff or deliberately diverting the flow of any job or work.

[11] By letter dated 15 February 2009 the Company advised staff and the applicant that, *"Feeding is the unauthorized diversion of work to a particular operator by a member of the Taxi Call Centre or Shuttle Control Room staff"* (page 38).

[12] Mr Joseph signed off that advice on 17 February.

[13] At the time of Mr Joseph's dismissal his other terms and conditions of employment were set out in a collective employment agreement (Wellington Combined Taxis and the Manufacturing and Construction Workers Union 1 October 2008 – 1 October 2009; attachment to statement of problem).

[14] Attached to the agreement are *"Company Rules"*. Serious misconduct provisions are set out on page 33 of the Company Rules. The list provided includes but is not limited to the following provision, at para 16:

*Feeding job to fellow drivers, meaning **deliberately** diverting the flow of any job or work.*

(emphasis added)

[15] It is agreed that on 25 September 2009 Mr Joseph was telephoned by a Company manager and told of complaints he was feeding jobs to drivers at the expense of others.

[16] It is also agreed that, without allowing the applicant any opportunity to comment, Mr Joseph was informed he was suspended on pay and should not come to work. The applicant says he was thereby unjustifiably disadvantaged.

[17] On 30 September Mr Joseph and his union representative met with Company representatives. Details of three complaints were put to the applicant. The meeting reconvened on 1 October; a fourth complaint was raised. By that time relevant audio tapes had been obtained; they were played and discussed.

[18] Mr Joseph returned to work on 2 October; the parties differ as to what if any oral terms accompanied his return.

[19] Another meeting was convened on 8 October: the applicant was advised the first and third complaints (allegations A & C) were upheld and he was summarily dismissed. The parties agree the applicant was shocked by the announcement. Mr Joseph says the dismissal caused him intense distress and financial hardship.

[20] By letter dated 30 November a grievance of unjustified dismissal was raised.

[21] By letter dated 25 February 2010 (page 241) Mr Joseph wrote to the respondent's chairman making, amongst other things, serious allegations about corrupt practices, in particular that he was under pressure from the fleet manager to feed jobs to his driver and others. The applicant also sought the restoration of his employment. Mr Joseph copies his letter to other parties. A resulting investigation by the respondent disclosed no evidence of corrupt practices. During the Authority's investigation Mr Joseph said he still stood by his allegations but confirmed he had elected not to take them any further. The respondent argues that, should the Authority find in Mr Joseph's favour, this behaviour means reinstatement is inappropriate, and any other remedies should reflect the same.

**Discussion**

[22] I readily accept the Company's stance that feeding and altering dispatch criteria and any other conduct that undermines equitable and agreed provisions for the distribution of work are serious issues for the Company and its drivers. That is because of the Company's co-operative and franchise structures: it is vital that drivers are allocated work equitably, on the basis of their queue position, and that there is no 'queue jumping', either by holding back operators whose turn it is to take the next job, or by giving that work to someone who is further back in the queue.

[23] Unlike the taxi system, the system for allocating work to shuttle vehicles (up to 11-seat vans) requires a large degree of manual operation. Shuttles operate on a 'line-up' basis. Shuttle operators call in on a radio telephone (RT) when they are 'clear' or available for work. They identify which of the four zones in the Wellington region they are in and are manually given a line-up, or queue, number by the shuttle dispatcher.

[24] The line up of available shuttles is displayed in the call centre on a magnetic board or *"marble"*. Each shuttle is allocated a coloured marble, based on the number of seats the shuttle has and the call-up sign of that vehicle. The marbles are lined up or queued in order of their priority for allocation of jobs.

[25] All RT transmissions and telephone calls are recorded in the shuttle call centre.

[26] The basis of Mr Joseph's dismissal is set out in the Company's letter of 16 October 2009 (from page 237). The author of the letter, and decision-maker, was Mr Kevin Dorgan, the respondent's support services manager. Mr Dorgan found proven two of four allegations in respect of *"… complaints from Shuttle owners regarding practices you have adopted while operating in the Shuttle Control Room"* (above). The first (allegation A) was that, on 23 August, Mr Joseph *"over-jumped"* shuttle 36 (above). The second (allegation C) was that shuttle 36 was not added to the line-up and was again *"jumped"* (above).

[27] In its submissions to the Authority received on 8 June 2010 the respondent reiterated the evidence of Mr Dorgan, that in dismissing the applicant he relied on the Company's letter to Mr Joseph of 15 February 2009 (page 38).

[28] In respect of allegation A, Mr Joseph originally advised the respondent that there was a job in the system at 1930 hours which he was holding for shuttle 36 as it was an 11-seat vehicle. Later, Mr Joseph advised 36 he had received a phone call from the customer requiring the job be set back to 2130 hours: the effect of the change was 36 missed out on work, i.e. was 'jumped'.

[29] The Company's investigation could not find a record of the phone call as claimed by Mr Joseph, and – as agreed by the applicant – the original faxed order clearly showed a booking for 2130. Later again into the respondent's investigation, the applicant said the call centre staff may have entered an incorrect time into the computer system. As is made clear in the letter of termination and at par 82 of Mr Dorgan's witness statement, the respondent's investigation confirmed their system did not allow it to determine if a job had been changed.

[30] In respect of allegation C, Mr Joseph said he had not heard shuttle 36's driver clear himself from his ferry job, and that he may have forgotten to move his marble. That explanation is borne out by the transcript of the radio exchange (see page 213). However, the respondent did not accept that explanation on the ground that the

applicant had allocated the shuttle a fresh position in the queue and, on the facts, found the allegation proven.

[31] In respect of all incidents, Mr Joseph denied he intentionally 'feed', or, as is strictly the case in these two situations, intentionally 'starved' a shuttle operator by failing to allocate work based on queue position. He also said he had difficulty, at the time of being interviewed by the respondent, recalling relevant events in respect of allegations that were then from 10 days to 5 weeks old.

[32] In respect of allegation A the applicant asked the rhetorical question, "*Why would I do that?*" (par 44 of Mr Dorgan's statement): the respondent correctly understood his response to be one of denying intentionally withholding a job from shuttle 36.

[33] Mr Joseph also said he had no problem with the driver of shuttle 36, and while he knew the drivers of other vans (that benefited from 36 being 'jumped') he did not socialise with them. There was no reason, the applicant said, why he would feed them or any other driver, over 36.

[34] Mr Joseph and his representative advised Mr Dorgan of a petition being circulated by the driver of shuttle 36 to have the applicant removed from his job. The applicant had not seen a copy of it but understood it sought his removal from his dispatcher position. Mr Dorgan investigated the allegation by checking with various managers who said they had heard nothing about it: Mr Dorgan concluded the respondent had not received any petition from shuttle operators and it therefore was not an issue (par 59 of his statement).

[35] An interview with the driver of shuttle 36 disclosed he had strong views of the applicant. Amongst other things he said:

a. *that he and* (Mr Joseph) *have a long standing history from about 8 or 9 months ago*;

b. *that continuing to work with John Joseph dispatching on shifts … is practically impossible with* (the applicant) *continuing to disadvantage* (the driver) *monetarily*; and

*c. John Joseph's general demeanour is stressful, unprofessional and at times rude and highly offensive. Behaviour includes racial remarks yelling and screaming on radio at drivers.*

(pages 206 & 207)

[36] In the same interview Mr Dorgan did not inquire of the driver as to the alleged petition. The reason he provided the Authority was a concern if he did so it might provoke a petition.

[37] Mr Joseph first saw the interview notes with the driver of shuttle 36 after his dismissal. During the Authority's investigation, the applicant repeated his position that he had no issue with that driver.

[38] Mr Dorgan said he did not provide the notes to Mr Joseph as they *"had no part in my decision-making"* (oral evidence). I have some difficulty with that claim because of the disturbing strength of the criticisms of Mr Joseph expressed by the driver of shuttle 36: they are complaints I expect would normally be reported to the respondent in their own right, e.g. racial remarks, yelling and screaming at drivers over the radio. However, there is no evidence of these matters having been reported to the Company, or of the Company investigating them following its interview of the driver of shuttle 36, even though the latter is on record as saying that continuing to work with the applicant was *"practically impossible"* while acknowledging his intentions to minimise Mr Joseph's role *"would break the rules"* (page 207). Mr Dorgan was unable to offer an alternative and the minute records the matter, at the conclusion of the meeting, remaining unresolved.

**Findings**

[39] In determining this matter, and in respect of s. 103 A of the Employment Relations Act 2000 (the Act), I apply the observation of the full Employment Court, set out at para [37] in *Air New Zealand Ltd v V* (2009) 9 NZELC 93,209 and 6 NZELR 582, namely that the Authority is required to objectively review all the

actions of an employer up to and including the decision to dismiss, against the test of what a fair and reasonable employer would have done in all the circumstances.

[40] I am satisfied Mr Joseph was unjustifiably dismissed for the following reasons.

[41] The Company's investigation disclosed no evidence of the applicant *"**deliberately** diverting"* (emphasis added, page 33, collective agreement, attachment to statement of problem) the flow of any job or work.

[42] The transcript of the relevant radio traffic (pages 212-214), as confirmed by the parties to the Authority's investigation having the opportunity to listen to a recording of the radio traffic, disclosed no evidence of the applicant deliberately diverting work, nor of Mr Joseph having other than a professional demeanour in his radio work.

[43] In respect of allegation A, I am satisfied a fair and reasonable employer would not conclude – on a balance of probabilities basis – from the evidence before it that Mr Joseph was responsible for the driver of shuttle 36 being jumped. That was because the respondent's investigation established it could not rule out Mr Joseph's claim of the time being entered incorrectly into the computer system, and there was no other evidence of animus on the applicant's part such that he would deliberately divert work.

[44] In respect of allegation C, at best the evidence before the employer disclosed an error by Mr Joseph – *"I don't remember that"* (page 213); but it is not evidence of deliberately ignoring the availability of shuttle 36.

[45] The task undertaking by Mr Joseph is a complex one involving putting jobs from phone calls into a computer, clearing fax and emails, constant monitoring of the radio telephone system and providing jobs to drivers. He would make and take dozens of calls in any working day, often under various pressures. I do not understand the respondent to be arguing that employees do not make mistakes from time to time, or that every mistake amounted to a deliberate diversion of work. As the

Company Rules make clear, errors and mistakes do not typically amount to serious misconduct but instead may be regarded as less serious misconduct (page 36).

[46] What was clearly contemplated in this instance, whether the wording set out in the letter of 15 February 2009 was relied on by the responding (page 38), or the wording set out in the Company Rules (page 34), was that Mr Joseph 'jumped' other shuttles, i.e. deliberately disadvantaged shuttle 36.

[47] In *Honda NZ Ltd v NZ (with exceptions) Shipwrights etc Union* [1990] 3 NZILR 23; [1991] 1 NZLR 392; (1990) 3 NZELC 98,130; (1990) ERNZ Sel Cas 855 the Court of Appeal upheld, amongst other things, the Labour Court's earlier finding on the application of an appropriate standard of proof: namely, if a serious charge provided justification for a dismissal, the evidence in support of it needed to be as convincing in its nature as the charge was grave.

[48] As is made clear at par 100 of his witness statement, Mr Dorgan also relied on an earlier allegation of feeding made in respect of the applicant, but one that the respondent effectively confirmed at the time could not be held against Mr Joseph as its investigation disclosed *"there is a large degree of confusion as to what 'feeding' is"* (page 38). Notwithstanding that outcome, it is clear that Mr Dorgan improperly relied on that earlier, unproven, allegation in reaching a finding of serious misconduct.

[49] In brief, I am satisfied that the fair and reasonable employer contemplated by the Employment Court would not have found there was evidence such to conclude, on a balance of probabilities basis, that an employee with the record and experience of Mr Joseph deliberately jumped other shuttles in preference to the shuttle whose turn it was. Nor would it have relied on a previous, similar complaint having formally advised the applicant it was not pursuing the matter any further.

**Remedies**

[50] Mr Joseph seeks reinstatement. On the day of the investigation he sought 35 weeks lost earnings, less some earnings during that time, i.e. $30,968.76. In his counsel's closing submissions received on 9 June, the claim became one of lost wages to the date of his reinstatement.

[51] The applicant also claims compensation for humiliation and hurt of between $25,000 and $35,000, and legal costs of $7,500 plus GST.

[52] The evidence provided by Mr Joseph of the impact of his dismissal is powerful: advice of his termination reduced him to tears. It is agreed he was distraught (see para 19 above). Mr Joseph says he was humiliated by the way his career in the industry of over 50 years was brought to an end. He says he gets down when he sees friends on the street, as he cannot tell them what happened.

[53] Having regard to ss. 125 (2) of the Employment Relations Act 2000 (the Act) and the absence of any tenable issue as to the (im)practicability of reinstatement, including the absence of evidence such as performance issues and disciplinary warnings, I am satisfied Mr Joseph should be reinstated to his position. I do not accept that the allegations set out in Mr Joseph's letter of 25 February 2010 (page 241) are, as claimed by the Company, an insurmountable obstacle to the applicant's reinstatement. That is because Mr Joseph's letter should be read in light of the effect of his dismissal, and that all parties to the employment relationship can be expected to behave professionally and ethically.

[54] I am also satisfied that, given his efforts to mitigate his losses, it is appropriate to award Mr Joseph lost remuneration equivalent to 6-months wages: ss 128 (3) of the Act applied. I reach that conclusion because I accept it is inappropriate to award Mr Joseph all of the wages lost to the date of reinstatement, as sought in the applicant's submissions received on 9 June. That is because the applicant says he was unable to mitigate his losses other than by finding work for two months with another cab company because of the effect of worrying and being anxious about what happened to him with the respondent, but no medical evidence in support of this claim has been presented.

[55] I am satisfied much of Mr Joseph's hurt and humiliation will be addressed by his reinstatement, and that a monetary award of $11,000 will make up the balance.

[56] I am also satisfied that any disadvantage experienced by Mr Joseph arising out of his summary suspension is properly addressed by the remedies set out above.

**Contributory Fault**

[57] Other than an error of forgetfulness, the evidence before the Authority has disclosed no actions by the employee that contributed toward the situation giving rise to his personal grievance. That error does not warrant any reduction of the remedies provided above.

**Determination**

[58] I find in favour of Mr Joseph's allegation of unjustified dismissal and award the following remedies:

a. The applicant is to be reinstated no later than six weeks from the same date: during the interval the parties are to meet so as to make suitable arrangements for Mr Joseph's return. It may be desirable that, for their meetings, the parties seek the assistance of the Mediation Service;

b. Mr Johnson is to be placed back on the payroll from the date of this determination;

c. The respondent is to pay the applicant compensation for lost earnings equivalent to six-months wages. Leave is reserved for the parties to submit the quantum to the Authority if agreement is not forthcoming; and

d. The respondent is to pay the applicant compensation for humiliation and hurt of $11,000.

[59] As requested, costs are reserved. I note here that, subject to the parties' submissions, and as foreshadowed during the investigation, it took one day and – consistent with the Authority's normal approach, a contribution to fair and reasonable costs of $3,000 can be anticipated.

**Denis Asher**
**Member of the Employment Relations Authority**