

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2012] NZERA Wellington 129  
5369654

BETWEEN CAZNA WAAKA  
Applicant

AND CITY LINE (N.Z). LIMITED  
trading as VALLEY FLYER  
Respondent

Member of Authority: Michele Ryan

Representatives: Kevin O'Sullivan, Advocate for the Applicant  
Susan Jane Davies and Natalie Pilcher, Counsel for the  
Respondent

Investigation Meeting: 14 September 2012

Submissions Received: Written and oral submissions on the day of the  
investigation

Determination: 23 October 2012

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Cazna Waaka had been employed by City Line (NZ) Limited t/a as Valley Flyer for 13 years. Ms Waaka says she was summarily dismissed from her employment on 13 January 2012 following a verbal altercation with Valley Flyer's Regional Operations Manager. At the time of her dismissal she was employed pursuant to the Valley Flyer Tramways Union Collective Employment Agreement (2009-2012) as a bus driver.

[2] Ms Waaka says that Valley Flyer failed to follow the disciplinary process contained in her collective employment agreement and that it failed to conduct any process at all before she was dismissed. She says she was unjustifiably disadvantaged



and unjustifiably dismissed and seeks reinstatement, compensation for humiliation and distress, and reimbursement of lost wages.

[3] Valley Flyer is owned and managed by City Line (NZ) Ltd. Valley Flyer provides commercial bus services in the greater Wellington region.

[4] Valley Flyer agrees that Ms Waaka's employment ended summarily but submits that Ms Waaka repudiated her employment agreement and as a consequence the employment relationship came to an end. Valley Flyer denies that it dismissed Ms Waaka and says that in these circumstances Ms Waaka does not have any claims for a personal grievance.

### **The events leading to termination of Ms Waaka's employment**

[5] On Thursday 12 January 2012 Ms Waaka commenced working at 7.30am. During the early part of her shift she became aware that a member of her whanau had passed away that morning. Ms Waaka says she intended to advise Valley Flyer that she would take the second portion of her shift and the next 2 days off to attend the tangi, when she refuelled the bus at the Waterloo Depot.

[6] Prior to arriving at Waterloo Depot Ms Waaka stopped at Taita Railway Station scheduled bus stop where her two children, aged 5 and 11, were waiting with their father. Ms Waaka says that the father of her children told her he was unable to look after the children and they were placed on the bus.

[7] At 9.30am Ms Waaka arrived at the Waterloo Depot and parked the bus. She left the children on the bus and went to the office to discuss obtaining time off. Ms Waaka cannot recall if she left the bus engine running but says she would not normally do so.

[8] Whilst she was in the office Regional Operations Manager, Lori Bradley, visited the Depot. Ms Bradley says that as she drove into the yard she noticed two children inside a parked bus with the engine running. As she advanced towards the bus to speak with the children Ms Waaka approached her and stated "*sorry they are with me*". Ms Bradley inquired as to why the children were left unattended on the bus with the engine running. It is accepted that Ms Waaka responded "*well who else is supposed to look after my children then, eh?*". Ms Bradley advised that the children

should not be left on the bus and asked Ms Waaka to fill in an incident report when she returned from completing her shift.

[9] There is a dispute as to the chronology and substance of the exchange that ensued between Ms Waaka and Ms Bradley and in particular whether Ms Waaka swore at Ms Bradley before or after she was told to go home.

***Ms Waaka's account***

[10] Ms Waaka says that she attempted to explain her situation but Ms Bradley cut her off. Ms Waaka says that she endeavoured again to explain that she had no choice in the matter (as to the care of the children) but that Ms Bradley said "*that's not my problem, find someone else to look after your children or stay home and I want an incident report*".

[11] Ms Waaka states that she became frustrated that Ms Bradley was not listening to her and that at that point she raised her voice but says that she did not swear. Ms Waaka says that she replied "*fine then, I hope that you tell [the senior HR Consultant] that if she wants to discipline us drivers with high absences because we have to stay home to look after our children for one reason or another, then you tell me to stay home with them*".

[12] Ms Waaka attests that Ms Bradley reacted by saying "*go home now*" and that she turned to walk away. Ms Waaka concedes that she became upset and swore and yelled "*fine then I will, you're a fucking bitch anyway*". She says Ms Bradley responded by walking back towards her and stated "*I would watch what you say to me if you want to keep your job*".

[13] Ms Waaka says that, regretfully, she then replied "*you can stick your job up your fucking arse*".

[14] Ms Waaka agrees she followed Ms Bradley into the office building and advised someone at the front desk that she would not be coming to work the following day. She returned to the bus shortly afterwards and drove the bus to the Stokes Valley depot and finished her shift.

[15] Ms Waaka says that Mr Kevin O'Sullivan, Secretary of the Wellington Tramways Union, contacted her the following day, 13 January 2012, and advised that Valley Flyer would not be conducting an employment investigation into the matter.

He told her she was going to be dismissed without any further process. She says she was shocked to hear that there would be no meeting with Valley Flyer to discuss the matter. Ms Waaka says that she had not ever been the subject of disciplinary action whilst employed by Valley Flyer but in her role as a union delegate with the Tramways Union for 10 years she says she had never known Valley Flyer to “*send people home and dismiss without meeting with the employee*”.

[16] On 17 January 2012 Ms Waaka received a letter from the Chief Operating Officer dated 13 January 2012, which was headed “*summary dismissal*”. Amongst other things, the letter included the following paragraph:

The Company considers your actions as gross misconduct that cannot be tolerated by the Company. Therefore the decision has been made to summarily dismiss you from your employment with Cityline (NZ) Limited effective immediately.

#### ***Ms Bradley’s account***

[17] Ms Bradley provided the Authority with a file note which she says she drafted 20-30 minutes following the verbal altercation with Ms Waaka. She states it is not an exact verbatim record of the exchange.

[18] The file note records that having asked Ms Waaka to fill in an incident report Ms Bradley turned to walk towards the depot building. Ms Bradley says that as walked towards the building Ms Waaka yelled “*you fucking bitch*”. Ms Bradley says she returned to Ms Waaka and said “*you are being inappropriate and you can go home, I’ll get your shift covered*”.

[19] The file notes further states that Ms Waaka then said “*you walk around thinking you are the big boss, well you are not. You are easily replaced and you will be gone tomorrow. I will make sure of it. You’re gone*”. Ms Waaka denies making this statement.

[20] Ms Bradley says she responded “*Caz, this is not my problem I am your boss and you are to go home right now, this is unacceptable and we will be having a meeting to discuss your behaviour. If you have issues with your children you need to sort them out but you cannot bring them to work*”.

[21] Ms Bradley says that she proceeded to walk back to the depot building and that Ms Waaka followed behind her and continued to yell at her. She says she entered

the building and went to the control room. She says Ms Waaka walked to the front counter and said "*Fine and I won't be in again tomorrow as I have to look after my kids*". Ms Waaka departed from the depot soon after and drove the bus to the Stokes Valley depot.

[22] Ms Bradley says she felt intimidated by Ms Waaka and described her behaviour as vicious. Ms Bradley drafted the file note which recorded her recollection of the exchange with Ms Waaka and later that day the file note was sent by email to National Human Resources Manager, Mr David Gould, who is based in Auckland.

[23] Mr Gould states if it had not been for the verbal altercation between Ms Waaka and Ms Bradley then the concerns as regards Ms Waaka's children having been left unattended on the bus would have been dealt with once an incident report had been filed. He says the matter may or may not have resulted in disciplinary action. Mr Gould described Ms Waaka's behaviour as "demonstrating a very high degree of insubordination" given that it was directed towards the most senior representative of the Operations team in the Wellington region.

### **Issues**

[24] The issues for determination by the Authority focus on Ms Waaka's termination of employment as they relate to the altercation between Ms Waaka and Ms Bradley. It is apparent that Valley Flyer's concerns as to Ms Waaka leaving her children unattended on the bus were not raised with her in a disciplinary context and do not form the subject of determination beyond those events contributing to the factual matrix which led the conclusion of Ms Waaka's employment.

[25] The Authority is required to determine:

- Did Ms Waaka repudiate her employment agreement?
- If Ms Waaka did not repudiate her employment agreement, was she dismissed unjustifiably?
- Was Ms Waaka unjustifiably disadvantaged?
- Should remedies be awarded?

***Did Ms Waaka repudiate the employment agreement?***

*Repudiation, affirmation and cancellation of contract*

[26] The Contractual Remedies Act 1979 contains provisions which allow a party, in a limited set of circumstances, to cancel a contract. Section 7(2) provides, subject to the Act, that a party to a contract “*may cancel it if, by words or conduct, another party repudiates the contract by making it clear that he does not intend to perform his obligations under it, or as the case may be, to complete such performance*”.

[27] The ability of a party to cancel a contract is contingent on s.7(5) which provides “*A party shall not be entitled to cancel the contract if, with the full knowledge of the repudiation...he has affirmed the breach*”.

[28] A party affirms if, with full knowledge of the facts, he or she makes it clear by words or acts, or even by silence, that he or she refuses to accept the breach as a discharge of the contract<sup>1</sup>. The effect of s7(5) is that an affirmation of the contract is final, and the affirming party cannot subsequently change its mind and seek to cancel the contract at some later time in reliance of the affirmed repudiation.

*Valley Flyer’s position*

[29] Ms Waaka’s statement “*you can stick your job up your arse*” was not recorded in Ms Bradley’s file note, however during the Authority’s investigation Valley Flyer relied on that assertion as unequivocal evidence that Ms Waaka indicated that she no longer intended to be bound by her employment agreement. Valley Flyer submits that Ms Waaka’s conduct towards Ms Bradley repudiated her employment agreement.

[30] National Human Resources Manager, Mr Gould, gave evidence before the Authority. He says he became aware of the incident during the afternoon of 12 January 2012, when he received a draft letter written by an HR consultant, inviting Ms Waaka to a meeting the following day to discuss the incident and to comment on the possibility of suspension.

[31] Mr Gould says that having read the draft letter he requested a copy of Ms Bradley’s file note. On receipt of the file note he immediately telephoned

<sup>1</sup> See Burrows, Finn & Todd, *Law of Contract in new Zealand* (4<sup>th</sup> ed, Lexis Nexis Wellington, 2012) at p725, footnote 143, which refers to case law and texts which provide further analysis.

Ms Bradley to confirm the contents of the file note and to question her. At the end of the discussion Mr Gould advised Ms Bradley that there would be no need to formally investigate the matter any further.

[32] Mr Gould states that during his discussion with Ms Bradley he concluded that Ms Waaka's behaviour "...constituted gross insubordination. [Ms Waaka] had effectively brought her own employment to an immediate end through her own conduct and a formal investigation process and subsequent disciplinary proceeding would not alter the outcome".

[33] Valley Flyer submits that in circumstances where Ms Waaka had repudiated her employment agreement, it was entitled to cancel the employment agreement pursuant to s.7 Contractual Remedies Act 1979. Valley Flyer says cancellation of the employment agreement took immediate effect when Mr Gould telephoned the Secretary of the Wellington Tramways Union, Mr O'Sullivan, during the afternoon of 12 January 2012 to advise that Ms Waaka would not be afforded a meeting and that her employment had ended.

[34] Mr O'Sullivan represented Ms Waaka at the Authority's investigation and was not able to give evidence as to contents of the discussion between Mr Gould and himself.

[35] Mr Gould told the Authority that the letter of 13 January 2012 had erroneously described the termination of Ms Waaka's employment as a dismissal. Mr Gould stated that he became aware of the contents of that letter a day or so after it had been sent but acknowledged that no further correspondence was sent to Ms Waaka to rectify the purported mistake. In this respect Valley Flyer's position is that it had cancelled the employment agreement following her repudiation of it and that it did not dismiss Ms Waaka.

#### *Determination*

[36] I am not persuaded that Ms Waaka's conduct is able to be regarded as a repudiation of her employment agreement. The type of conduct required to repudiate a contract must objectively and manifestly evidence an intention by the repudiating party that it no longer regards itself as bound by the terms of the contract.

[37] I find that while Ms Waaka's comments were extremely inappropriate, it is clear from the evidence available to the Authority that they were made in the heat of the moment and as a consequence, at least in part, to the personal events of the morning. Ms Waaka's conduct may have been sufficiently serious as to amount to a breach of her employment obligations but I do not accept that it was conduct of sufficient gravity, or of sufficient clarity to evidence a repudiation of her employment agreement.

[38] I also do not regard Valley Flyer's claim of repudiation allowed it to derogate from its obligations to act fairly and reasonably including an obligation to seek an explanation from Ms Waaka prior to reaching any conclusion as to whether repudiation had occurred or otherwise.

[39] It is apparent from the evidence that Mr Gould, having discussed with Ms Bradley her version of events, relied on that information solely to conclude Ms Waaka had repudiated her employment agreement. I do not consider that a fair and reasonable employer could reasonably form such a conclusion without further inquiry.

[40] Nor do I find that a fair and reasonable employer could have reasonably concluded on the information that was provided, that Ms Waaka's conduct was an unequivocal communication that she wished to terminate her employment agreement. Had Valley Flyer sought an explanation from Ms Waaka as to the meaning or cause of her statements to Ms Bradley, it is likely it would have become abundantly clear that Ms Waaka did not intend to terminate her employment.

[41] I find that Ms Waaka did not repudiate her employment agreement. If however I am wrong and Ms Waaka's behaviour did amount to repudiation of her employment agreement I find that Valley Flyer did not, as it has claimed, cancel the employment agreement pursuant to the Contractual Remedies Act.

[42] I consider that Ms Bradley's verbal communication at the end of the altercation, that Ms Waaka would be required to attend a later meeting, effectively affirmed the employment agreement and Ms Bradley did not regard Ms Waaka's behaviour as having terminated her employment. It was clear from the evidence that both Ms Waaka and Ms Bradley anticipated that there would be further discussions about the events which had occurred in the yard.

[43] As a consequence, even if Ms Waaka had repudiated the employment agreement, Mr Gould's claim that the employment agreement was cancelled when he spoke to Mr O'Sullivan is rejected on the basis that the ongoing existence of the employment relationship had been affirmed earlier in the day by Ms Bradley. I am also unwilling to accept an inference from Mr Gould's evidence that Valley Flyer's written advice to Ms Waaka on 13 January 2012 that she was summarily dismissed was mistaken and of no effect.

[44] I do not accept the proposition advanced by Valley Flyer that Ms Waaka's employment came to an end by reason of repudiation and subsequent cancellation of contract.

***If Ms Waaka did not repudiate her employment agreement, was she dismissed unjustifiably?***

[45] Valley Flyer submits that if Ms Waaka was dismissed then her dismissal was justified.

[46] Ms Waaka does not dispute that she swore at Ms Bradley or that her behaviour was likely to result in disciplinary action although she does not accept that she should have been dismissed.

[47] Valley Flyer is required to justify its decision to dismiss Ms Waaka according to the recent amendments<sup>2</sup> to s103A 'Test of justification' of the Employment Relations Act 2000 (the Act"). The Authority must consider and determine, objectively, whether Valley Flyer's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[48] The test requires two considerations, first, what the employer did (the substantive dismissal and the grounds for it) and, second, how the employer acted (the process leading to those outcomes)<sup>3</sup>.

[49] In its recent decision *Angus and McLean v Ports of Auckland Limited*<sup>4</sup> the Employment Court made it clear that recent statutory amendments to s.103A as they

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<sup>2</sup> Section 15 Employment Relations Amendment Act 2010

<sup>3</sup> *X v Auckland District Health Board* [2007] ERNZ 66

<sup>4</sup> [2011] NZEmpC 160

relate to ss.(3), reinforce the importance of procedural fairness when an employer contemplates a decision to dismiss or disadvantage an employee.

[50] Not only must the decision to dismiss be based on reasonable grounds but the way the employer undertook to make the decision must be fair.<sup>5</sup>

[51] Valley Flyer did not initiate or engage in any of the statutory minimum procedural requirements set out at ss.103(3)(b)-(e). I do not accept Mr Gould's explanation that Ms Waaka's behaviour was such that it "*disentitled her to a meeting*" or that "*nothing [Ms Waaka] could have said or done subsequently could have restored [the employment relationship]*". The importance of procedural fairness is described by Megarry J in *John v Rees* as follows:<sup>6</sup>

*It may be that there are some who would decry the importance which the Courts attach to the observance of the rules of natural justice. 'When something is obvious', they may say, 'why force everyone to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start.' Those who take this view do not, I think, do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in any event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded an opportunity to influence the course of events.*

[52] It is clear from the evidence, at least on the grounds of "*how the employer acted*", that the procedure which Valley Flyer undertook to dismiss Ms Waaka was unjustified. I also do not find that the defects to Valley Flyer's procedure were minor. It may have been that having heard and considered Ms Waaka's explanation Valley Flyer may have proceeded to dismiss Ms Waaka in any event, but Valley Flyer's decision to disallow Ms Waaka an opportunity to explain were not the actions of a fair and reasonable employer.

[53] As regards to the requirement for substantive grounds to dismiss, on the information provided I accept that there may have been some basis for Valley Flyer to reasonably conclude that dismissal was an option available to it, however it is difficult

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<sup>5</sup> *NZ Food Processing IUOW v Unilever NZ Ltd* [1990] 1 NZILR 33,

<sup>6</sup> [1969] 2 All ER 274 (Ch), at p402

to see how Valley Flyer could have reached a fair and reasonable conclusion on this matter without speaking to Ms Waaka first.

[54] In all the circumstances I find Ms Waaka was unjustifiably dismissed and has a personal grievance.

***Was Ms Waaka unjustifiably disadvantaged?***

[55] Ms Waaka has made a claim for an unjustifiable disadvantage. She states that Valley Flyer did not follow the 'Procedure' contained at Schedule 1 of the relevant collective employment agreement, which provides for a process Valley Flyer is required to undertake when it wishes to raise concerns of a disciplinary nature with an employee.

[56] It has already been established that Valley Flyer did not make any inquiry into Ms Waaka's conduct or follow the statutory minimum requirements of procedural fairness. In this regard it is also clear that Valley Flyer did not follow its contractual processes as they relate to investigation of behaviour that is a concern for Valley Flyer and possible disciplinary consequences.

[57] I accept Ms Waaka's evidence that she had anticipated she would be required adhere to the terms contained at Schedule 1 of her employment agreement and attend a disciplinary meeting and have an opportunity to "*tell [her] side of the story*". Ms Waaka was not afforded that opportunity and I find she was significantly disadvantaged in this respect. Ms Waaka has a claim for an unjustified disadvantage.

**Remedies**

[58] Having found that Ms Waaka's was unjustifiably disadvantaged and unjustifiably dismissed I turn to remedies. Ms Waaka seeks reinstatement to her position, reimbursement for lost wages, compensation for hurt and humiliation and costs.

### ***Contribution***

[59] In considering Ms Waaka's entitlement to remedies for her is unjustified dismissal the Authority must apply s.124 of the Act, which requires that remedies are to be withheld or reduced where there has been contribution or fault on the part of the employee.

[60] I find there is a causal connection between Ms Waaka's conduct towards Ms Bradley on 12 January 2012 and the situation that gave rise to her claim of unjustified dismissal. The Authority's investigation occurred 8 months after Ms Waaka's dismissal and in these circumstances I consider the contents of Ms Bradley's file note written almost contemporaneously at the time of the altercation as more accurate than that of Ms Waaka's recall of the exchange as recorded in her written statement and in her oral evidence. It was clear from the evidence that Ms Waaka made a number of extremely inappropriate statements to Ms Bradley and that these were made without provocation. I also accept on balance that Ms Waaka made threatening statements to Ms Bradley as to the longevity of her position. Ms Waaka also accepted that she made statements to Ms Bradley that were inappropriate and that disciplinary action was likely to occur as a result. I assess Ms Waaka's contribution to the situation that gave rise to her unjustified dismissal as 50 percent.

[61] As regards to Ms Waaka's claim of an unjustified disadvantage, there is no evidence to support a proposition that she contributed to Valley Flyer's omission to follow its investigation and disciplinary process contained at Schedule 1 of the collective employment agreement. I do not accept that Ms Waaka's contributed to the situation that gave rise to her unjustified disadvantage.

### ***Reinstatement***

[62] Ms Waaka seeks reinstatement. From 1 April 2011 reinstatement is no longer the primary remedy in proceedings for unjustified dismissal. In the recent decision of *Angus and McKean v. Ports of Auckland Ltd* [2011] NZEmpC 160 the Full Court held at [61]:

*Reinstatement is now no longer the primary remedy for unjustified disadvantage in, or unjustified dismissal from, employment. The remedy of reinstatement is available but now has no more or no less prominence than the other statutory remedies for*

*these personal grievances. That is not to say that in a particular case, reinstatement may not still be the most significant remedy claimed because it is of particular importance to the grievant. As in the past, the Authority and the Court will need to examine, on a case by case basis, whether an order for reinstatement should be made if sought.*

[63] Section 125(2) provides that the Authority may provide reinstatement if it is “*practicable and reasonable*” to do so. In *Angus and McKean*<sup>7</sup> the Court discussed the dual requirements of practicability and reasonableness at [68] as follows:

*As in other aspects of employment law, it is not a matter of laying down rules about onuses and burdens of proof but, rather, on a case by case basis, of the Court or the Authority weighing the evidence and assessing therefrom the practicability and reasonableness of making an order for reinstatement. The reasonableness referred to in the statute means that the Court or the Authority will need to consider the prospective effects of an order, not only upon the individual employer and employee in the case, but on other affected employees of the same employer or perhaps even in some cases, others, for example affected health care patients in institutions.*

[64] Ms Waaka gave limited evidence as to why she should be reinstated. She says that she was good at her job and that there is no ill feeling by her towards Ms Bradley. She says her behaviour on 12 January 2012 was a “*one off incident*” and it was her “*frustration that got the better of [her] on the day*”.

[65] Valley Flyer opposes reinstatement as unreasonable and impractical. Valley Flyer submits that Ms Waaka’s behaviour was a direct and threatening attack on its most senior representative of the Operations team in Wellington. Ms Bradley’s evidence is that the tone of Ms Waaka’s statement “*You are easily replaced and you will be gone tomorrow. I will make sure of it. You’re gone*” was particularly vicious and intimidating. Ms Bradley’s evidence is it would be extremely difficult to perform her managerial position when dealing with Ms Waaka and that regular contact with Ms Waaka would be unavoidable. Valley Flyer says there are no positions available for which Ms Waaka has an appropriate skill set which would remove her from contact with Ms Bradley.

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<sup>7</sup> [2011] NZEmpC 160

[66] Having assessed the evidence available and in consideration of the prospective effects of an order for reinstatement I do not consider reinstatement to be reasonable and practical. I find that Ms Waaka's behaviour had a significant negative impact on Ms Bradley and it is my assessment that Ms Waaka has sought to underplay the effect of her conduct. I do not consider there is a reasonable prospect that a sufficiently harmonious employment relationship built on trust and confidence can be restored between Ms Waaka and Ms Bradley. This view was reinforced by Ms Waaka's concession in evidence that she had "*seen managers come and go*" and over time she has become increasingly "*frustrated*" by management's decisions. I do not think it is reasonable or practicable to order Ms Waaka back into an employment relationship with the employer. I decline to make an order for reinstatement.

### ***Reimbursement for lost wages***

[67] Section 123(1)(b) provides that an employee dismissed unjustifiably may be reimbursed a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance. An employee is under a legal obligation to mitigate his or her loss if claiming lost remuneration<sup>8</sup>. In practical terms this means an employee should attempt to find alternative employment rather than rely on a perception that their losses will be entirely reimbursed.

[68] Ms Waaka has not received any earnings after her dismissal other than assistance from Work and Income. She says that after her dismissal she approached a friend who gave her an application form to apply for a position with NZ Post but that she abandoned that application as it requested her to provide a statement as to why she had left her previous employment.

[69] Before the Authority Ms Waaka acknowledged that Mr O'Sullivan had advised she seek alternative employment. However she also conceded that she had not done so as full time employment with Valley Flyer had prevented her from spending time with her children. She stated that her dismissal provided her with an opportunity to be with her children full time and on this basis she has not sought any alternative employment since her dismissal.

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<sup>8</sup> *Argosy Imports Ltd v Lineman* [1998] 3 ERNZ 967

[70] Ms Waaka made no attempt to mitigate her loss. I also consider that while it was open to Ms Waaka to decide to not pursue work so as to be with her children, the financial consequences of her decision should not rest with Valley Flyer. I regard Ms Waaka's active decision to not look for work effectively broke the chain of causation. Ms Waaka lost remuneration not from her dismissal but from her decision to not look for work<sup>9</sup>. In these circumstances I do not consider Ms Waaka is entitled to the benefit of reimbursement of lost wages and I decline to make an order in this respect.

***Compensation for unjustified dismissal***

[71] Although Ms Waaka gave modest evidence as to the effect her dismissal had on her, I accept that she was upset by her dismissal. It was apparent from the evidence provided by Ms Waaka and Valley Flyer that news of her summary dismissal was a source of gossip and speculation amongst Ms Waaka's colleagues which gave further cause to her distress. Pursuant to s123(1)(c)(i) I order to pay Valley Flyer to pay Ms Waaka the sum of \$8,000 as compensation for her dismissal with the sum reduced by 50% to reflect her contribution to the situation which gave rise to her unjustified dismissal.

***Compensation for unjustified disadvantage***

[72] Ms Waaka told the Authority that she was shocked to find out that Valley Flyer preferred Ms Bradley's version of events without any further inquiry with her and was unwilling to meet with her to discuss the exchange she had with Ms Bradley.

[73] I accept the inference from the body of Ms Waaka's evidence that she felt a considerable amount of injustice that Valley Flyer had unilaterally decided not to comply with the contractually agreed disciplinary process which Ms Waaka had, as an experienced union delegate, reasonably anticipated would occur, as was usual when Valley Flyer had matters of concern with an employee. I accept that Ms Waaka was considerably distressed by Valley Flyers actions in this respect and order Valley Flyer to pay \$6,000 as compensation for Ms Waaka's distress associated with this aspect of her claims.

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<sup>9</sup> Ibid

**Summary of Orders**

- A. Pursuant to s123(1)(c)(i) Valley Flyer is ordered to pay Ms Waaka \$8,000. as compensation for her unjustified dismissal, with this sum reduced by 50% in recognition of her contribution to the situation that gave rise to her unjustified dismissal.
- B. Pursuant to s123(1)(c)(i) Valley Flyer is ordered to pay Ms Waaka \$6,000. as compensation (without deduction) for her unjustifiable disadvantage.

**Costs**

[74] Costs are reserved.



Michele Ryan  
Member of the Employment Relations Authority

