IN THE DISTRICT COURT
HELD AT ~~CHRISTCHURCH~~
NELSON

MA 21/99
58/99

IN THE MATTER of the Land Transport Act 1998

and

IN THE MATTER of an appeal pursuant to Section 106(1) of The Land Transport Act 1998

BETWEEN **PETER WASTNEY** of 26 Nile Street, Nelson

Appellant

AND **THE LAND TRANSPORT SAFETY AUTHORITY** of 7-27 Waterloo Quay, Wellington

Respondent

Hearing: 24 March 2000 at Nelson

Counsel: Mr P M James for Appellant
Mr Wilkin for Respondent

Judgment: - 6 APR 2000

JUDGMENT OF JUDGE A A P WILLY

A. Background

The appellant is a graduate registered engineer who has had 30 years experience in the New Zealand road transport industry. During that time he has held a variety of

responsible positions. His core business has for some time been the certification of motor vehicles for the purposes of:

(i) Vehicles which had been modified:

(ii) Low volume and heavy motor vehicles.

He has been engaged in this work since 1986. In 1999 Parliament changed the rules and on the 23rd February 1999 the appellant applied to be appointed under the New Rules as a low volume vehicle certifier in accordance with the Land Transport Rule: Vehicle Standards Compliance 1998.

By letter dated the 10th May 1999 the respondent by its "General Manager Operations" gave notice to the appellant that "subject to any submission" the appellant may make, he intended revoking the appellant's right to certify heavy motor vehicles and declined his application to become a low volume certifier. The appellant has appealed against both decisions pursuant to S. 106(1) of the Transport Act 1998. It provides:

*"106. **General right of appeal to District Court** –*

(1) Any person who is dissatisfied with any decision made under this Act by the Director in respect of the grant, issue, revocation, or suspension of a land transport document sought or held by that person may appeal to a District Court against that decision.

(2) The Court may confirm, revers, or modify the decsion appealed against.

(3) Every decision of the Direct appealed against under this section continues in force pending the determination of the appeal, and no person is excused from complying with any of the provisions of this Act on the ground that any appeal is pending.

(4) Even though an appeal under this section may have been determined in favour of the appellant, the Director may, subject to the like right of appeal, refuse to deal with in accordance with the provisions of this Act

the matter of the grant, issue, revocation, or suspension of the land transport document concerned on any sufficient grounds supported by facts or evidence discovered since the hearing of the appeal.

(5) Subsection (1) does not apply if a right of appeal to a District Court against the decision concerned is conferred by some other section of this Act."

B. Nature of the hearing

Both counsel are agreed that the section contemplates a hearing de novo. It is agreed that the Court is not constrained by anything said or done by the General Manager, and not being an appeal by way of rehearing there is no onus on the appellant to show that the decision is wrong. The Courts task is to decide on the evidence before it whether or not the decisions of the General Manager were proper in all the circumstances.

Given that agreement by counsel it is not necessary for me to consider any of the cases relating to the nature of appeals of this sort, I approach the matter de novo but relying on the evidence contained in the affidavits of the parties and the submissions of counsel.

C. The facts

In his letter of 10th May 1999 taking away the appellant's livelihood the respondent's authority gave as its reasons that the appellant had:

(i) Deliberately attempted to mislead the authority; and

(ii) Delegated his responsibilities in a way which:

"gives me no confidence that you would in future be able to comply with the conditions of any appointment as a certifier".

He therefore concluded that the appellant was not:

"a fit and proper person to be either appointed as a specialist certifier nor to remain as a certifier".

The appellant responded to this intimation by letter dated the 28th May 1999 putting up his side of the relevant events. The respondent considered what the appellant had to say and on 30th June 1999 wrote to him saying:

"I do not consider that you are a fit and proper person to be appointed as a specialist certifier or to remain as a certifier."

He revoked the appellant's subsisting authority to certify effective from 16 July 1999 and declined the appellant's application to be registered under the new Act effective immediately. This appeal followed.

D. The circumstances of the dispute

These are within a narrow compass, but have attracted an astonishing amount of paper. The respondent's affidavits in reply are 100 mm thick.

The events upon which the respondent relies for its decision are that the appellant certified 33 vehicles as complying with the relevant regulatory requirements. The respondent contends that this was done before the vehicle had been viewed by the appellant. The appellant agrees but says that he did not issue his certificate in respect of these vehicles until after he had viewed and physically inspected them. That is uncontrovertibly so, but what the respondent contends is that the certificates were dated the 27th and 28th February. The appellant admits this but says he dated the certificates at those times as had been his long established practice because that was when he began the certification process, not when it was complete.

The respondent sees something sinister in this because by operation of law the appellant's right to certify which under the previous legislation ceased at 5.00 pm on the 28th April 1999. Mr Wilkin its counsel submits that the appellant deliberately set about to deceive the respondent, the motor dealers, and the buying public that these vehicles were lawfully certified. And worse that he did this to obtain the $100.00 fee earned for each vehicle certification.

It is also argued that the ship on which these vehicles were being carried from Japan was not in New Zealand waters when the certificates were dated. That fails on the facts. The evidence shows it had docked at Auckland by the 27th February, and was therefore in New Zealand waters when the appellant dated the certificates.

In his dealings with the respondent both at an interview he was required to attend and in his correspondence, the appellant put forward his explanation which he considers justifies his procedures. At no time has he attempted to conceal his actions. In summary he says that he has always regarded the certification process as a continuum beginning with the request that he certify a particular vehicle and ending with the issue of his certificate after he has sighted and inspected the vehicle. It is not necessary that I rule on whether or not his procedures comply with the regulations. I am concerned with whether or not he is a fit and proper person to be appointed as a certifier under the new regulations and continue to hold his subsisting right to certify heavy vehicles.

In deciding that question I am prepared to assume without deciding that the procedure adopted by the appellant does not comply with the regulations as they existed on 27th and 28th February 1999. The questions then is does his possibly flawed understanding of the rules mean that he is not a fit and proper person to hold the office

of certifier. In deciding that questions the Court like the respondent must exercise a discretion. In doing that it is necessary to consider all relevant matters and to disregard the irrelevant, speculative and matters merely prejudicial. That negative duty has significance in this case. See Cannock Chase District Council v Kelly [1978] WLR, 1 at page 6.

The relevant considerations are:

1. The respondent and the Court are dealing with the appellant's livelihood. The licence to certify was something of value to him as Lord Denning said in R v Barnsley Metropolitan Borough Council ex parte Hook [1976] 1 WLR 1052, 1057:

"it was not to be taken away except for just cause and in accord with natural justice."

Absent "just cause" a licenceholder has a legitimate expectation that he will continue to exercise the rights allowed by the licence, and in this case an expectation that the new licence would be granted. Jim Harris Ltd v Ministry of Energy [1980] 1 NZLR 294. Such a legitimate expectation is an aspect of natural justice. Salemi v Minister of Immigration Land Ethnic Affairs (1977) 5L ALJR, 538.

2. The appellant was an appropriately qualified and highly experienced vehicle certifier. He had been doing the work for 13 years when the new regulations came into force. In that time there is no evidence of any proven complaint against him. I say proven because there is evidence on the respondent's file of allegations affecting the appellant's probity. I will deal with these separately.

3. The appellant's explanation of his procedures even if contrary to the regulations is not so improbable, or tainted with self interest, that it leads to an inference that he is dishonestly misleading the respondent for profit – the submission made on his behalf by counsel. To the contrary, even if wrong his modus operandi is internally consistent and cannot adversely affect the public interest by allowing certified but uninspected vehicles onto the market. This is demonstrably so because no certificate was released until the vehicles were inspected.

4. The respondent also relied on the fact that some of the vehicles certified contained defects which Mr Bell picked up on inspections. This is a valid consideration but as Mr Wilkin concedes would not on its own justify the loss of the appellant's privileges. That is a proper concession for counsel to make because not only are those allegations denied but the overwhelming theme of Mr Martyn's letters of 10th May and 30th June is that the appellant acted dishonestly not incompetently. Indeed he did not mention the matter in giving his final reasons for rejecting the appellant when he wrote on the 30th June.

The irrelevant considerations are:

(i) In assessing the inferences which can be drawn from the proposition that the respondent falsified these certificates for a profit of $2,300.00 this is so improbable when set against the proven facts it should be disregarded. Like all allegations of fraud (for that is what it is) it needs to be established, if not beyond reasonable doubt then to a degree commensurate with its gravity. Particularly as, if true it will expose the appellant to the risk of a criminal prosecution. When set in that context

and bearing in mind the appellant's experience, qualifications and record of service in the industry coupled with his inherently logical explanation for his actions it is an unacceptable allegation for a public officer to make. No fair minded person applying the rules of natural justice and exercising a discretion could make such a serious allegation against a citizen on such a flimsy basis.

(ii) The appellant obtained from the respondent two documents by resort to the Official Information Act. The appellant contends that these documents explain why "what on the face of it seems to be a reasonably innocuous disagreement about interpretation" resulted in the appellant losing his livelihood. Before dealing with these documents (Exhibits Q and R to the appellant's first affidavit) it is necessary to record that the respondent's counsel agreed that they were most unfortunate and should never have been written or disseminated. Counsel submits that there is no evidence that the respondent relied on them.

That is not so however. Mr Martyn who exercised the respondent's discretion agrees he was aware of these letters, and says:

"I gave very serious consideration to the matter of prosecution of Mr Wastney".

He goes on to say that:

"Although I considered the appellant's actions to be particularly blatant and serious the decision not to prosecute was finally made partly on the basis that revocation and refusal to appoint would have a more appropriate effect for some time and to that extent from practising within the Land Transport System"

The letters say:

"Exhibit Q:

Transport Safety Authority *Facsimile*

To: Jay Sodaaram
Of: LTSA H/O *Fax number: (04) 4948603*

From: Barry Crocker
Date: 10 March *Time:* *Number of pages including this sheet: 12*

Jay

Sorry I miss counted there are:

7 pages of LTSA 4085

1 page of confirmation from fax from VTNZ Nelson for sale of Book of 4085s from A94801 to A94850.

3 pages of the Fugaku Maru Manifest listing vehicle Ids.

You will note the vehicles are all for the one Dealer Storer Motors.

I believe now that Mr Wastney has been certifying all of Storer Motors Vehicles long distance for some time.

Regards."

"Exhibit R:

Transport Safety Authority *Facsimile*

To: Jay Somasundaram
Of: LTSA H/O *Fax number: (04) 4948603*

From: Barry Crocker
Date: 10 March 1999 *Time:* *Number of pages including this sheet: 13*

Jay

Well things are warming up a little.

Attached is:
A letter from a Customs Broker/Service agent giving all of Storer's vehicles and the value of these vehicles. They have very kindly identified the vehicles on the Fugaku Maru which ties up with the manifest faxed this morning. 8 pages.

A letter from the Lyttleton Port Co; Giving the times the Fugaku Maru tied up with copies of the signal tower log sheet. 3 pages.

1 4085 No; A94818.

I firmly believe that Wastney should be prosecuted also Storer Motors should be taken as well being an accessory. They are doing their best to get the these vehicles through the old system and I would just about bet that Storer has bought them at the Markets where they advise they have been in previous crashes.

Regards."

These are serious allegations not only of fraud, but fraud which affects the public safety. No factual foundation is provided in the letters to justify what, on the face of it, are absent justification or qualified privilege defamatory statements, both of the appellant and the car dealer named in the letters.

In the face of how Mr Martyn dealt with these allegations it is untenable for Mr Wilkin to submit that he was uninfluenced in his decision by Mr Crocker's views. To the contrary they formed an essential ingredient in his decision to cancel and refuse the appellant's certification. What is worse he took these allegations into account without referring them to the appellant and only at a time when the second of these documents had been unearthed with the help of the Official Information Act. Exhibit Q appears as Exhibit F to Mr Bell's affidavit but is far the more innocuous of the two. Finally one cannot overlook the fact that in acting as he did Mr Martyn avoided the alternative of prosecuting the appellant. This relieved him of having to disclose the existence of this material to the appellant, and the onerous responsibility of having to prove the allegations beyond reasonable doubt. When he does learn of these

allegations they are denied by the appellant. As he points out in his affidavit it is difficult to see how Mr Martyn could have considered the appellant's explanation with an open mind given his knowledge of Mr Crocker's allegations which he had from or about the 10th March. His clear duty as a public official changed with safeguarding the safety of the motoring public and those affected, was to investigate Mr Crocker's allegations and if satisfied these had substance to put them to the appellant, for his explanation, or else prosecute him. He did neither instead he relied on these (on the evidence in this case) unsubstantiated allegations as part of his reason for depriving the appellant of his livelihood. Such conduct does not meet in any way the requirements of natural justice and dealt with in this way cannot be a relevant consideration in the exercise of the discretion to cancel and or grant or refuse the certification rights sought.

E. The delegation point

This involved one vehicle in Greymouth. The appellant inspected it, found some defects, discussed them with an accredited warrant of fitness issuer in Greymouth and told him what he wanted done. The issuer notified the appellant that the work had been carried out. The appellant should have travelled back to Greymouth to inspect it. He didn't do so, taking the more pragmatic view that he could trust the issuer and no doubt wrongly gave his certificate. Mr Wilkin agrees that this although a breach of the regulation would not of itself justify the respondent's actions. Clearly it was a makeweight deserving no more than a warning and the concession is properly made.

F. Decision

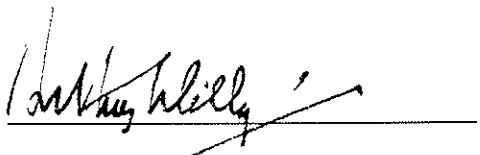
There was no lawful basis upon which the respondent acting on the grounds he did could have exercised his discretions to cancel the appellant's existing certification rights and refuse him the fresh right applied for, and I reverse his decision, by quashing it.

That may be enough to dispose of the matter. If not I will hear counsel on any other relief which may be sought.

G. Costs

The appellant seeks costs if successful. If no further relief is sought counsel may submit memoranda as to costs.

If no further applications are made and no costs memoranda received within 21 days of the issue of this judgment I will decide questions of costs without further reference to the parties.



A A P Willy
District Court Judge