

**IN THE DISTRICT COURT  
AT WELLINGTON**

**CIV-2016-085-000156  
[2016] NZDC 16576**

BETWEEN

PAOGO NOFOAIGA  
Appellant

AND

NEW ZEALAND TRANSPORT  
AGENCY  
Respondent

Hearing: 2 August 2016

Appearances: Mr M W Anderson and Ms R Stoop for the Appellant  
Ms S T A Ellis for the Respondent

Judgment: 2 September 2016

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**RESERVED JUDGMENT OF JUDGE S M HARROP**

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**Introduction**

[1] This is an appeal by Mr Nofoaiga against the decision of Mr Stewart Guy of the respondent NZTA to decline Mr Nofoaiga's application for a renewal of his passenger endorsement.

[2] Mr Nofoaiga, who is 59, has been a bus driver for many years. His passenger endorsement was renewed for 5 years in 2010, at which stage the respondent therefore accepted he was a fit and proper person to hold such an endorsement.

[3] The issue I have to decide on this appeal is whether as at the date of the hearing, 2 August 2016, he is a fit and proper person to hold such an endorsement.

[4] Mr Guy's decision that Mr Nofoaiga was not a fit and proper person to hold such an endorsement, made finally on 3 February 2016 was, as Ms Ellis put it in her submissions, because of his cumulative traffic history which demonstrated a

propensity to act with blatant disregard for transport laws and therefore with a cavalier attitude to matters of public safety as it relates to matters of transport.

### **Approach on Appeal**

[5] The approach to an appeal under s 106 of the Land Transport Act 1981 is not in dispute. In *Brown v New Zealand Transport Agency*<sup>1</sup> Judge Kellar noted at [32]:

“In summary:

- (a) The appeal is a re-hearing;
- (b) There is a wide discretion to accept evidence with consideration guided by relevance;
- (c) The standard of proof is the civil standard;
- (d) The statutory criteria is the essence of the appeal;
- (e) The court is necessarily constrained by the materials submitted to it;
- (f) In an unlikely situation of equipoise, the onus will be on the appellant;
- (g) The more important question, the more cogent the evidence will be expected to be;
- (h) However, in the end it is for the appellant authority to be satisfied of the applicability of the statutory criteria to the facts.”

[6] It is clear from the judgment of the Supreme Court in *Kacem v Bashir*<sup>2</sup> that my obligation on this appeal is to consider the merits of the case afresh and the weight given to Mr Guy’s reasoning is a matter for my assessment. His decision on behalf of the respondent is not binding on the Court but it is persuasive<sup>3</sup>.

### **Statutory Criteria**

[7] The Land Transport Act 1998 (the Act) and the Land Transport (Driver Licensing Rule) 1999 (the Rule) provide the regulatory framework governing

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<sup>1</sup> District Court Dunedin CIV-2010-012-808, 14 April 2011

<sup>2</sup> [2011] 2NZLR 1

<sup>3</sup> See *Taua v Director of Land Transport Safety* (North Shore District Court, CIV-2004-044-877, Judge Wilson QC, 4 June 2004)

passenger endorsements. Both require the holder of a P endorsement to be a “fit and proper person”.

[8] Clause 35 of the Rule sets out the criteria and procedure in relation to the fit and proper person test and provides that the respondent may take into account the factors recorded in s 30C, 30D and 30E of the Act.

[9] Section 30C contains both mandatory and permissive considerations. It provides:

“30C **General safety criteria**

- (1) When assessing whether or not a person is a fit and proper person in relation to any transport service, the [[Agency]] must consider, in particular, any matter that the [[Agency]] considers should be taken into account—
  - (a) in the interests of public safety; or
  - (b) to ensure that the public is protected from serious or organised criminal activity.
- (2) For the purpose of determining whether or not a person is a fit and proper person for any of the purposes of this Part, the [[Agency]] may consider, and may give any relative weight that the [[Agency]] thinks fit having regard to the degree and nature of the person's involvement in any transport service, to the following matters:
  - (a) the person's criminal history (if any):
  - (b) any offending by the person in respect of transport-related offences (including any infringement offences):
  - (c) any history of serious behavioural problems:
  - (d) any complaints made in relation to any transport service provided or operated by the person or in which the person is involved, particularly complaints made by users of the service:
  - (e) any history of persistent failure to pay fines incurred by the person in respect of transport-related offences:
  - (f) any other matter that the [[Agency]] considers it is appropriate in the public interest to take into account.
- (3) In determining whether or not a person is a fit and proper person for any of the purposes of this Part, the [[Agency]] may consider—
  - (a) any conviction for an offence, whether or not—

- (i) the conviction was in a New Zealand court; or
  - (ii) the offence was committed before the commencement of this Part or corresponding former enactment; or
  - (iii) the person incurred demerit points under this Act or a corresponding former enactment in respect of the conviction; and
- (b) the fact that the person has been charged with any offence that is of such a nature that the public interest would seem to require that a person convicted of committing such an offence not be considered to be fit and proper for the purposes of this section.
- (4) Despite subsection (3), the [[Agency]] may take into account any other matters and evidence as the [[Agency]] considers relevant.”

[10] Given that the passenger endorsement sought to be renewed by Mr Nofoaiga relates to a bus ie a large passenger service vehicle there are additional criteria set out in s 30E.

[11] Section 30(E) provides:

**“30E Additional criteria for large passenger service vehicles**

Without in any way limiting the matters that the [[Agency]] may have regard to under section 30C(2), when the [[Agency]] is assessing whether or not a person is a fit and proper person in relation to any passenger service involving the use of large passenger service vehicles, the [[Agency]] must consider, in particular,—

- (a) any history of serious behavioural problems that indicate a propensity for violence:
- (b) any offending in respect of offences of violence or sexual offences:
- (c) any offending in respect of major transport-related offences, particularly offences relating to safety or to road user charges.”

[12] Although in setting out his decision Mr Guy erroneously referred to s 30D, which contains additional criteria to be considered in relation to small passenger service vehicles, a matter on which Mr Anderson made several submissions, I put this point to one side since it is clear that the primary and mandatory consideration in s 30C is to consider the interests of public safety. There is no doubt that this is what Mr Guy did and his conclusion was based on concern about public safety rather than

on other criteria mentioned in s 30D. I accept Ms Ellis' submission that the legislation provides the respondent with a wide discretion, the exercise of which is underpinned by the mandatory consideration of public safety.

[13] Ms Ellis' submitted, correctly, that this is not a judicial review and that any purported errors in Mr Guy's decision-making process are not the focus; I must consider the matter afresh. I also accept her submission that the fitness and propriety assessment must be made in relation to this case and that there is little assistance to be gained from other cases.

### **Mr Nofoaiga's traffic and criminal history**

[14] Ms Ellis helpfully summarised Mr Nofoaiga's traffic and criminal history at paragraphs 33 and 34 of her submissions. She noted that over a 20-year period Mr Nofoaiga had committed 25 traffic offences or infringements. In summary these were as follows:

[15] There were ten occasions exceeding the posted speed limit, three of which occurred while he was driving a bus;

[16] On 3 March 2015 he was convicted and sentenced for driving while suspended after he was caught by police driving on 19 February 2015 in breach of a demerit point suspension imposed on him on 4 January 2015 and served on him on 9 February 2015. The demerit points resulted primarily from speeding infringements but the last infringement was on 2 November 2014 for failing to produce a current log book on demand, a requirement of his employment as a bus driver.

[17] In addition there were six infringements for breaches of various traffic regulations namely failing to stop at a stop sign, a driver or passenger not wearing a seat belt, using an unlicensed vehicle, no warrant of fitness, cutting a corner in a 50km area and driving with a smooth tyre. There were also seven parking-related offences.

[18] Mr Nofoaiga also has a conviction dated 3 March 2015 for failing to answer police bail on 26 February 2015. That offending was while he was facing the charge of driving while his license was suspended.

[19] The respondent's essential submission is that while one or even several of these factors might not be a sufficient basis for a conclusion that Mr Nofoaiga is not a fit and proper person, the cumulative effect is significant and justifies that conclusion. Ms Ellis submitted these were not isolated incidents and his driving history demonstrates a propensity to act with blatant disregard for transport law and therefore with a cavalier attitude to matters of public safety as it relates to matters of transport. Ms Ellis submits that the various fines and demerits points imposed on Mr Nofoaiga have not acted as a deterrent. Warning letters sent to him in 2005 and on 20 August 2013 that his demerit point status put him at risk of having his license suspended did nothing to modify his behaviour. Further, when his licence was suspended Mr Nofoaiga drove in breach of that, so even the imposition of a period of suspension did not stop him offending. The respondent submits that any one of these consequences would alert a reasonable and prudent driver to modify their behaviour. The fact that they did not modify Mr Nofoaiga's behaviour justifies the conclusion that he is not a fit and proper person to hold a P endorsement.

[20] For Mr Nofoaiga, Mr Anderson noted that in the past ten years Mr Nofoaiga has only exceeded the speed limit on five occasions and that in other cases drivers at risk of losing their passenger endorsement have received warning letters giving them an opportunity to change their behaviour, an opportunity not a forwarded to Mr Nofoaiga. I place no weight on this because I accept Ms Ellis' submission in response that Mr Nofoaiga must be taken - warning or not - to have known he was required to act responsibly and to be a fit and proper person. Further he has clearly been warned in relation to his demerit point status and that did not prevent or deter his offending so it seems unlikely that if he had received a warning from NZTA he would have behaved differently. In my view if Mr Nofoaiga had received a warning letter and then committed further infringements that would have been an aggravating feature of this case. It does not however follow that the fact that he did not receive a warning letter is somehow a mitigating factor.

[21] I propose to consider the various aspects of Mr Nofoaiga traffic history under each type of offending or infringement and in that context I will discuss the explanation given by Mr Nofoaiga in his affidavit in support of his appeal and the submissions made by Mr Anderson about each type of offending.

[22] I repeat at the outset that the question to be answered is whether, as at 2 August 2016, Mr Nofoaiga is a fit and proper person to hold a passenger endorsement. He has been such a person for many years and was seen as such by the respondent in 2010 when his endorsement was renewed for five years. Under clause 70 of the Rule the respondent may renew such an endorsement for a period of either one year or five years. In renewing it in 2010 for five years the respondent must be taken to have accepted that Mr Nofoaiga's history at that point did not require the shorter renewal of one year although I note from Mr Guy's affidavit that when endorsements are issued for five-year periods they are nonetheless reviewed annually.

[23] While I accept that in assessing the position as at 2 August 2016 I may and indeed should, as Mr Guy did, take into account the whole of Mr Nofoaiga's history and consider its cumulative effect, it is the events since the 2010 renewal which are logically the particular focus since these were self-evidently the primary reasons why the respondent found that Mr Nofoaiga, having been a fit and proper person to hold the passenger endorsement in 2010, was no longer such a person in late 2015 and early 2016.

### **Exceeding the speed limit**

[24] Mr Anderson notes that in the last 10 years Mr Nofoaiga has only exceeded the speed limit on five occasions. Of these, since 2010, there have been three incidents on 7 March, 3 July and 28 October 2013. These involved exceeding the speed limit in a 50km per hour area by 12 to 16 kilometres. I note too there was a failing to stop at a stop sign on 5 November 2012 which is arguably more serious from a public safety perspective than the speeding incidents. Mr Nofoaiga does not recall anything in particular about the incidents but notes that the occasion where the speed limit was exceeded by 16 kilometres occurred at 5.37am when there would be

little traffic around. Mr Guy considered this showed that Mr Nofoaiga thought it was acceptable to speed at that hour of the morning but I accept that the risk to public safety would undoubtedly have been less at that hour.

[25] There is no doubt that speeding offences do give rise to a public safety risk and the combination of the three incidents in 2013 and the failing to stop at the stop sign, especially against the background of infringements in earlier years, certainly raises a serious question about whether Mr Nofoaiga is a fit and proper person to hold a passenger endorsement. That especially applies where one is considering the driver of a large passenger vehicle the mere size of which means the consequences of speeding or other driver fault are self-evidently more likely to result in death or serious injury to those outside the vehicle. Further, given the passenger capacity of a bus and the fact that seatbelts are usually not available, unsafe driving puts many more people at risk, by comparison with a taxi.

### **Log book infringement**

[26] On 3 November 2014 Mr Nofoaiga failed to produce a current log book on demand and received 35 demerit points for this infringement. That was what led to his suspension. He says that he had simply forgotten his log book and left it in his car prior to starting work driving the bus. He did have with him a vehicle running timesheet used by the bus company and he had been completing that form. He showed it to the police but it was not accepted as sufficient. There is no suggestion that if he had had the log book with him it would have shown that he was driving outside the work time limits. He was certainly not charged with that offence.

[27] Mr Anderson submits that the offence is less serious for a relief bus driver working a normal shift compared with a long haul truck driver. I accept that point. This is not to say that it is not important for bus drivers to complete and carry their log books because that is what the law requires, and for good reason. The real question is whether on this particular occasion there is an underlying concern that the driver had been driving outside the work time limits and putting public safety at risk. Avoiding that risk is the underlying purpose of the log book obligations. If the police had had any concern about that in relation to this incident no doubt further

enquiries would have been made. Mr Nofoaiga did proffer the vehicle running timesheet which presumably supported his assertion that he had merely forgotten his log book and was not driving outside work time limits.

### **The suspension and the conviction for driving while licence suspended**

[28] In the context of this case I consider the log book infringement carries far greater significance than the level of fault would justify because of the series of events it set in train. Mr Nofoaiga had been warned on 20 August 2013 that his license was at risk of suspension and despite that he committed another speeding infringement on 28 October 2013. However, it was the log book infringement which was critical in triggering the suspension. Mr Nofoaiga had effectively been on notice that he needed to avoid any further speeding infringements but it was something quite unexpected, a log book offence carrying 35 demerit points compared with 20 for each of the speeding offences, which led to the suspension. Had he had his log book with him that day then there would have been no suspension, no driving while suspended conviction and no subsequent disqualification.

[29] As it was however, having been served with notice of suspension on 9 February 2015 Mr Nofoaiga drove in breach of it on 19 February 2015. He says that his wife was at the supermarket and asked him to collect her as she had a lot of groceries. His wife does not drive a car and neither does their daughter who was with his wife. Their older daughter who does drive was not in the Hutt Valley but in Wellington, and was not able to collect her. He made what he describes as a foolish decision to drive to the supermarket to pick her up. He accepts he should not have done this but candidly admits that “we were simply all too lazy to do otherwise”. He says he seriously regrets the offence and that he has clearly learnt his lesson. He notes that this offence has had far-ranging ramifications for him which has culminating in his needing to bring this appeal.

[30] Mr Nofoaiga pleaded guilty to driving while his licence was suspended at the Hutt Valley District Court and was convicted of that offence on 3 March 2015 and disqualified from driving for 6 months. No other penalty was imposed. He might be seen as fortunate that the disqualification did not run from the expiry of the

suspension on 9 May 2015 rather than from the date of sentencing, 3 March 2015. That may however have been a deliberate decision by the judge sentencing him and a reflection of the low level of gravity involved.

[31] I accept Mr Anderson's point that while this offence was undoubtedly an error of judgment and a deliberate breach of the suspension nevertheless Mr Nofoaiga has been punished significantly for it by way of the disqualification and the impact it undoubtedly it has had on his application for renewal of his passenger endorsement. I also accept that the point there is no suggestion that there was any risk to public safety in the driving on the day in question. However, as Ms Ellis submitted, that is not really the point; it is the attitude to compliance with the law which is revealed by this which is of particular concern.

#### **Breach of police bail**

[32] Also on 3 March 2015 Mr Nofoaiga was convicted of breaching police bail on 26 February 2015, in connection with the driving while suspended charge. He was convicted and discharged on that charge. Mr Nofoaiga says that he simply forgot to attend Court on Thursday 26 February 2015 and instead appeared at Court the following Tuesday, 3 March 2015. Again Mr Anderson submits and I accept that he has been punished for this error by way of his conviction. Contrary to Mr Guy's view, I do not accept it indicates an adverse aspect of his character which is relevant to the fit and proper person test.

#### **Breaches of various traffic regulations/parking**

[33] I accept as did Mr Guy that these traffic regulation breaches are in themselves relatively minor but I also accept that they support the contention that Mr Nofoaiga has a poor attitude to compliance with relevant transport laws. As to parking offences, Mr Nofoaiga says that while these relate to his car there is no evidence that they relate to him and that in any event they do not bear on driver safety. I do not consider they play a material role in determining the issue I have to decide.

## **Discussion and Decision**

[34] I accept that there are surprising and troubling aspects of Mr Nofoaiga's traffic infringement history. A reasonably prudent bus driver whose livelihood and the support for his family depended on his retaining his license would have ensured that he was not in a position where the respondent had any cause to change its mind about his fitness and priority to hold a passenger endorsement.

[35] Having acknowledged that and the undoubted presence of legitimate concern about public safety, on analysis and having regard to the passage of time I have decided that as at the date of the appeal hearing, 2 August 2016, Mr Nofoaiga is now (once again) a fit and proper person to hold a passenger endorsement.

[36] I note, as Mr Anderson highlighted, that notwithstanding the history over the last ten years of five speeding tickets, three parking tickets, one ticket for failing to stop at a stop sign, one infringement in respect of not using a seatbelt and one for failing to produce a log book, it is now some 34 months since Mr Nofoaiga's last speeding infringement and 18 months since the offences of driving while suspended and failing to answer bail. There have been no convictions or infringements of any kind since February 2015 although of course as a result of the disqualification and the declining of his renewal application the opportunities for driving have been much reduced.

[37] I consider that Mr Nofoaiga has been significantly punished, beyond the gravity of the offending, for both the log book infringement and the driving while suspended. Apart from the immediate consequences, he later had his application for renewal declined. The result of the latter was that despite being free of his disqualification from 3 September 2015 he has nevertheless not been able to drive a bus for the last year.

[38] While I also accept that previous sanctions have not had the deterrent effect one would have expected, nevertheless the more recent consequences, namely the sentence of disqualification and the removal of his passenger endorsement, have been in a different league.

[39] I have taken into account the general character references provided by Mr Nofoaiga, his assertion that he has learnt his lesson and that he respectfully asks the Court to give him another chance. Weighing everything up I am confident in concluding Mr Nofoaiga is now a fit and proper - and somewhat chastened - person to hold a passenger endorsement and that there will be no further infringements of any kind in the foreseeable future.

[40] Mr Nofoaiga should understand that it will be a matter for NZTA to decide whether his endorsement is now renewed for one year or five. It would be no surprise if the former period were selected and if so he would be required again to apply for renewal at the end of the one-year period. If there were any infringement during that period then the respondent would of course be entitled to consider that against the whole of the background so even a relatively minor infringement might well put him at risk of his application for renewal being declined. NZTA would be entitled to point to this decision as effectively having given him a chance, contrary to its view of his fitness and propriety, to show he is able to drive a bus without any infringement for a 12-month period, to show he has, as he claims, learnt his lesson. If that chance is not taken NZTA might well conclude renewal should be refused. I consider the considerable incentive to avoid that risk will assist to ensure Mr Nofoaiga does not put public safety at risk when he begins driving a bus again.

## **Result**

[41] I find that as at the date of hearing Mr Nofoaiga is a fit a proper person to hold a passenger endorsement and I therefore allow the appeal against the decision to refuse his application for renewal.

[42] I was asked at the end of the hearing to reserve costs. I do so. However my preliminary view is that costs should lie where they have fallen. That is because, despite the appeal having been allowed, there was clearly a proper foundation for Mr Guy's assessment as at the date of application for renewal in September 2015. It is largely the passage of time since the last speeding offence and the driving while suspended offence which has resulted in my taking a different view. If, despite that indication, Mr Nofoaiga wishes to apply for costs, submissions in support are to be

filed and served by 23 September 2016. Submissions in reply from the respondent are to be filed and served by 30 September 2016.

S M Harrop  
District Court Judge