

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2019] NZEmpC 54
EMPC 251/2017**

IN THE MATTER OF a challenge to a determination of the
 Employment Relations Authority

BETWEEN YOON CHEOL HONG
 Plaintiff

AND AUCKLAND TRANSPORT
 Defendant

Hearing: 20-22 February 2019
 (Heard at Auckland)

Appearances: M W Ryan, counsel for plaintiff
 C Parkhill and S L Fletcher, counsel for defendant

Judgment: 10 May 2019

JUDGMENT OF JUDGE J C HOLDEN

[1] The defendant, Auckland Transport (AT), accepts that the plaintiff, Mr Hong, was unjustifiably dismissed by it from his position as a parking officer.

[2] The issues are whether Mr Hong also was unjustifiably suspended – and if so, whether that was once, twice or three times – and remedies.

[3] The most important issue for my determination is whether reinstatement, which is sought by Mr Hong, should be ordered. AT resists reinstatement, saying it is neither practicable nor reasonable.

[4] Mr Hong also seeks loss of earnings, compensation for humiliation, loss of dignity and injury to his feelings, interest and costs.

[5] In addition, Mr Hong says AT should pay a penalty of \$20,000 for breaching s 120(2) of the Employment Relations Act 2000 (the Act) because it failed to give him a written statement setting out the reasons for his dismissal within 14 days of his request for such a statement.

[6] In summary, and for the reasons set out in this judgment:

- (a) Mr Hong was suspended three times. The first two suspensions occurred without a proper process and were unjustifiable. The first did not cause any real disadvantage, but the second caused Mr Hong humiliation and distress.
- (b) Reinstatement is practicable and reasonable and is ordered.
- (c) Mr Hong is entitled to loss of earnings and compensation for humiliation, distress and injury to his feelings, for the second suspension and for the dismissal. But a deduction is allowed for contribution.
- (d) He also is entitled to interest on the loss of earnings, and costs.
- (e) No penalty is ordered.

Mr Hong worked for AT as a parking officer

[7] Mr Hong emigrated to New Zealand from South Korea over 25 years ago. He started working for AT as a full-time parking officer in April 2012 and held that position until he was dismissed on 24 February 2017.

[8] AT's parking officers are responsible for assisting and guiding members of the public in their parking decisions as they travel around Auckland. One of a parking officer's key functions is to issue infringement notices or tickets for some stationary

and moving vehicle offences. Parking officers generally work autonomously, although in some areas, which are regarded as high-risk, or at some times of the day, they work in pairs. They are expected to use their own judgement to determine what they ought to be doing in each individual situation.

[9] Parking officers are at risk of receiving abuse. Verbal abuse incidents are referred to by AT as “10/9 situations”. In addition to 10/9 situations, parking officers may be subject to immediate threats of physical violence and physical assault, referred to as “10/10 situations”. On average, parking officers used to experience four 10/9 situations a week and, before 2015, there was, on average, between six and ten 10/10 situations a month across all parking officers, which included a number of serious attacks. Understandably, AT is concerned to reduce the risk of abuse and takes a number of steps to do so, including providing parking officers with external counselling and training to deal with aggressive or confrontational members of the public.

[10] One way in which AT monitors the performance of parking officers is for their supervisors to accompany them and observe their work. Mr Hong’s supervisor observed him and other parking officers in his team, on the road, usually on a monthly basis. This involved shadowing the parking officers and providing them with feedback on their performance. During each of these monthly sessions, the supervisor completed written on-road assessments. Parking officers review their supervisor’s comments, make their own comments and sign the document. These on-road assessments are very much a snapshot in time; they show the performance of the officer on the day that the supervisor observed them, but they usually do not include general comments about their overall performance. A parking officer’s overall performance is assessed annually using AT’s performance and development plan process.

[11] Another tool AT uses to assess the performance of parking officers is the “mystery parker” scheme. Under this scheme, AT contracts with a third-party provider who engages people whose role it is to approach parking officers with perceived concerns and/or questions. The mystery parker then makes comments about the parking officer’s engagement and marks him or her generally under six headings:

- (a) Enhances Auckland City's Reputation;
- (b) Has Respect for People;
- (c) Is a Good Listener;
- (d) Manages Conflict Appropriately;
- (e) Provides Relevant, Accurate and Concise Information;
- (f) Has Good Knowledge of Legislation/Area/Situation.

[12] The parking officer of course does not know when he or she is engaging with a mystery parker. Mr Hong was assessed by a mystery parker approximately monthly, although, on some occasions, the mystery parker was unable to carry out his or her assessment. The grades a parking officer can receive from a mystery parker range from an A+ to a D. The aim is for all parking officers to achieve a 95 per cent rating. Mr Hong's performance and development plans for the 2014/2015 and 2015/2016 performance years show he achieved mainly A+, A and A- ratings, but in the 2014/15 year, he got one B and two B+ ratings, and in the 2015/16 year, he got a C+ and a C-rating. In the 2014/15 year Mr Hong achieved a 92.7 per cent rating and he achieved a similar rating in the 2015/16 year.

[13] The ratings from the mystery parkers feed into the parking officer's performance development plan and into the overall rating that a parking officer receives in his or her annual performance assessment. The overall ratings that can be received are "Exceeded", "Met", "Nearly Met", and "Below". Under the AT Collective Agreement, where it is identified that an employee is likely to receive a "Below" rating, he or she is to be advised orally and in writing of that in advance, to give the employee an opportunity to meet his or her objectives by the time of the performance review.

[14] At least in part because of the lower mystery parker ratings, Mr Hong's overall rating for both the 2014/15 and the 2015/16 years was "Nearly Met".

[15] The evidence of Mr Hong's supervisor, the monthly assessments, the mystery parker reports, and the performance and development plans for the last two full years of Mr Hong's employment provide a picture of Mr Hong's performance. Mr Hong met most of the performance measures for his role but had issues with how he related to members of the public, where his performance was quite variable. Several mystery parker reports and monthly appraisals record him as being pleasant and helpful, but other reports suggest that he needed to be friendlier and give more information to members of the public. In evidence, Mr Hong's supervisor said his concerns included:

- (a) Mr Hong did not always make eye contact with members of the public when he spoke to them.
- (b) His tone of voice could be seen as abrupt and confrontational. The supervisor acknowledged that this is just how Mr Hong speaks but says that his tone of voice could come across as harsh and abrupt.
- (c) Mr Hong sometimes did not willingly approach members of the public to communicate with them, for example, if they were having difficulty with a pay-and-display machine.

[16] By August 2015, Mr Hong's supervisor was finding it frustrating that Mr Hong's customer interactions were not improving as much as expected. He discussed this with his manager, Mr Bidgood, who advised him that he needed to work closely with Mr Hong to help him improve his skills, which the supervisor endeavoured to do. He also encouraged Mr Hong to attend external communications training, which Mr Hong did.

[17] Apart from the issues already outlined, the supervisor noted in Mr Hong's performance and development plan completed for the 2014/15 year that Mr Hong would tell members of the public who were being abusive that they are not to use offensive language in a public place and that it is a criminal offence. Mr Hong's supervisor told him that it was better for him to leave the scene and/or press the orange intercom button if he needed to. This is consistent with AT's position that parking officers ought not be making directive comments, as they may serve to escalate a

situation. Nevertheless, the supervisor gave Mr Hong a “Met” rating for this section of the performance and development plan.

Mr Hong attended a training workshop

[18] As at January 2017, Mr Hong was not on any formal performance management and had not received any warnings with respect to his work. There was no suggestion that his job was in jeopardy.

[19] On 24 and 25 January 2017, Mr Hong attended a training workshop facilitated by an external trainer. Mr Bidgood also attended that workshop. The workshop focussed on situational awareness, environmental awareness, self-leadership and basic communication. During the workshop, Mr Hong challenged the facilitator in what Mr Bidgood saw as an abrupt and hostile manner. Mr Bidgood recalls that Mr Hong expressed the view that he was entitled to tell members of the public to stop swearing at him and to advise them that it is against the law. The facilitator also found Mr Hong’s views and communication style concerning.

[20] It is the conduct at the workshop that precipitated matters with AT that ultimately led to Mr Hong’s dismissal.

Mr Hong was asked to go home

[21] On 26 January 2017, Mr Bidgood met with Mr Hong. Mr Bidgood and Mr Hong view the discussion that followed differently. Mr Bidgood says that, before he met with Mr Hong, he discussed Mr Hong’s conduct at the training session with his manager, Mr Strawbridge,¹ and had approval for Mr Hong be allowed to take a few days off to reflect on the training workshop and his actions. He then approached Mr Hong, he says, to discuss his taking some time off. He says that although Mr Hong initially responded in an aggressive manner, after Mr Bidgood explained he was not being suspended but rather that he could take the day off on full pay so that he could reflect on the training workshop, Mr Hong agreed to do so and thanked him for the offer, saying that Mr Bidgood was kind. Mr Hong says he had no option but to go

¹ The Parking Services and Compliance Manager and AT’s decision-maker in this process.

home and never agreed to it. He says he was simply told to go home and walk about in the park thinking about the last couple of days and then come back to work.

[22] This is the interaction that Mr Hong says is the first suspension. He claims that it was unjustifiable but also accepts that the impact was “neither here nor there”. In the event, he did go home that day and, following some pre-planned time off, returned to work on 31 January 2017.

There was an incident on Karangahape Road

[23] On 31 January 2017, when Mr Hong was on duty on Karangahape Road in Auckland Central, he had an incident involving a member of the public who Mr Hong had ticketed for illegal parking. The member of the public became abusive. Mr Hong used his orange intercom button to request Police assistance and later reported the incident using AT’s reporting system.

[24] The notes of the AT Comms operator who took Mr Hong’s call show that Mr Hong was urgently seeking assistance. From the notes, it appears that Mr Hong was quite frightened by the situation. Mr Hong’s report described the member of the public asking why he had been ticketed when he said he had just parked, with Mr Hong responding that he had observed the car parked there for at least eight minutes but that the member of the public could write in if he thought he had just parked there. Mr Hong said he advised the member of the public that he could not reverse the process.² Mr Hong went on that the member of the public became abusive but that he did not reply to the member of the public. Mr Hong reported that he started to move away towards Pitt Street, but was followed by the member of the public, who threatened to break Mr Hong’s neck. Mr Hong says he told the member of the public that he would call the Police. He then pushed the orange intercom button to request assistance. The Police quickly arrived and spoke to the member of the public and Mr Hong and Mr Hong was taken back to AT’s offices.

² This is correct. Once a ticket has been issued by a parking officer, the parking officer cannot reverse the ticket. Rather, the process is that the member of the public may write in to AT to raise issues about the ticket.

[25] Mr Bidgood says that Mr Hong being involved in this incident brought home to him that the parking officer role carried with it significant risk. Mr Bidgood said he was genuinely worried about Mr Hong being out on the street, unsupervised, in light of the comments Mr Hong had made at the workshop.

Disciplinary process commences

[26] Mr Bidgood then spoke with Mr Strawbridge and suggested a disciplinary investigation be commenced. Mr Strawbridge agreed to that. A letter was prepared by AT dated 3 February 2017. That letter is headed up “PROPOSED SUSPENSION”. It said that AT had grave concerns in light of Mr Hong’s refusal to follow lawful and reasonable instructions and invited Mr Hong to attend a formal meeting the following Thursday 9 February 2017. The letter said that AT was proposing to suspend Mr Hong from his employment pursuant to cl 36 of the collective agreement.

[27] The letter then goes on:

Please note that you are not permitted to attend the workplace in any capacity until then, and only for the purpose of the meeting.

[28] Notwithstanding that clear instruction, Mr Bidgood gave evidence that, had Mr Hong wished to stay in the workplace, that would have been accommodated although AT would have placed him on different work, not including parking officers’ regular duties, which did not include interacting with members of the public.

[29] Mr Hong says that the letter of 3 February 2017 suspended him from that date until the meeting scheduled for the following Thursday. This is, he says, the second suspension.

A meeting took place on 9 February 2017

[30] The proposed meeting took place on 9 February 2017. Mr Hong attended on his own. Mr Strawbridge, Mr Bidgood and Ms Clifton, AT’s Employment Relations Manager, attended for AT.

[31] At the meeting, Mr Hong requested clarification of some aspects of the letter he had received. In particular, he wanted to know what the lawful and reasonable instruction was that it was alleged he had refused to follow. In response, Mr Bidgood said it was not to respond in an argumentative manner that could place him at risk with a member of the public; not to openly challenge a member of the public. Mr Bidgood pointed to Mr Hong's alleged statement at the training session that if he was challenged by a member of the public, he would respond because it was his right to do so as an individual and as a human being.

[32] Mr Hong referred to the incident on Karangahape Road where he had not engaged with the member of the public, and Mr Bidgood accepted that he had not done so. Mr Hong then, by way of illustration of an approach he uses, referred to an incident that had happened about two years earlier. This incident, and Mr Hong's reference to it, is relied on in AT's opposition to reinstatement. Therefore, I set out what Mr Hong is recorded as saying:

When I was clearing the clearway on Waterloo Quadrant ... A lady from the university came along and tow truck already lifted her vehicle and she was crying. At the time a gentleman in a suit came out from the High Court and he said, "these people are animals, these people are worse than worms". I could not move away from the situation because I had to finish the towing procedure. I said to him, ... "Do not use offensive language in public place." He said, "Animal is not offensive language, worms is not offensive language", I said to him, "Those are offensive language in this context. If you call human beings animals and worms that is offensive language. He backed away, "ok" and I finished the towing procedure.

[33] Mr Hong reiterated later that the phrase that he used when people abused him was "Do not use offensive language in public place".

[34] Later in the meeting, Mr Bidgood referred to the way in which Mr Hong had behaved during the training session, which Mr Bidgood described as:

... very loud, very abrupt, very short and sounded extremely argumentative.
... you openly challenged the trainer with regards to his viewpoint and [he] responded in a very low level easy demeanour and you still maintained in an elevated state.

[35] AT told Mr Hong that his attitude was “scary” for it and that it was concerned that, when Mr Hong’s trigger point was reached, he would react in an unacceptable way, which AT could not tolerate.

[36] Mr Bidgood again advised that the specific instruction that AT had given, which it said Mr Hong was refusing to follow, was not to respond in an argumentative manner, to remain calm, detach and walk away from the situation, rather than challenge the member of the public. Mr Bidgood said that, instead of using the phrase “Do not use offensive language in public place”, Mr Hong could say “I am sorry, sir your language is offensive to me today”.

[37] While Mr Hong maintained that his phrase was useful in de-escalating matters, later in the meeting, when Mr Hong was asking not to be suspended, Mr Hong said he would follow all and every reasonable instruction as he had always done and that he would change his phrasing to “Sorry, that language is offensive to me sir”. At the end of the meeting, AT took a break to consider the situation and, when the meeting resumed a few minutes later, it confirmed that Mr Hong was suspended from his position. The meeting of 9 February was followed by two letters both dated 13 February 2017, one confirming the suspension and the other inviting Mr Hong to a disciplinary meeting to be held later that week. The suspension letter confirmed AT’s concern that Mr Hong could be ‘triggered’ again based on the kind of responses he said he would give to members of the public if bad language is directed at him. The letter acknowledged that Mr Hong had said this would not occur again but said that AT thought that assurance was insufficient given “the regularity of the outbursts discussed”.

The disciplinary meeting proceeded

[38] In its letter inviting Mr Hong to a disciplinary meeting, AT described its concern as the manner in which Mr Hong related to people and its fundamental requirement that Mr Hong utilise all that he had learnt regarding de-escalation and defusing techniques, active listening and engaging in behaviours that are in accordance with the processes and procedures designed to enhance his safety and wellbeing and the safety and wellbeing of those he is on duty with and his other colleagues. In

addition, AT said that it required Mr Hong to understand barriers to communication and to be active in overcoming those barriers in a rational and soothing manner which resists and refrains from a loss of self-control and/or which exacerbates inflammatory or potentially inflammatory situations by responding angrily, emotionally, threateningly or aggressively. It went on that a failure to be able to demonstrate “these behaviours” would likely result in an incompatibility with the role’s requirements together with the values and code of conduct that AT expects all employees to demonstrate and abide by on a daily basis.

[39] AT referred to the communications training that Mr Hong and Mr Bidgood had recently attended and alleged that Mr Hong’s refusal to comply with AT’s instructions regarding behaviours AT expected him to demonstrate, and on which it had spent considerable time coaching Mr Hong, put the health, safety and wellbeing of Mr Hong and others at considerable risk, which AT considered to be wholly unacceptable.

[40] At the disciplinary meeting held on 22 February 2017, Mr Hong’s conduct at the training session was raised, as was an incident that Mr Bidgood said had taken place about two years earlier involving a mystery parker. Mr Bidgood also referred to the way in which Mr Hong had responded to him. All these matters were said to have given rise to a concern as to how Mr Hong would react to the public. The expression “Do not use offensive language in public” was again discussed. Although Mr Hong defended his use of that phrase, he again said that he would change it to the phrasing AT found acceptable.

[41] Nevertheless, AT continued to express grave concerns about Mr Hong’s manner in the role. Then, when Mr Hong asked how he could show a willingness to grasp instructions and change AT’s perception of him, Mr Bidgood responded “You can easily change my perception by changing your manner - what I’ve experienced in recent times is your inability to communicate”. Notwithstanding the ongoing discussion about what Mr Hong might do in the future, AT came back to its concern about him saying that it was his right to respond in a manner that he saw fit and to tell people to stop swearing at him as it is against the law, rather than following AT’s instructions not to respond.

[42] The meeting concluded with AT advising Mr Hong that it would communicate with him before close of business the following day.

[43] In the event, the next meeting was on Friday 24 February 2017, at which Mr Hong was dismissed. The reason given for his dismissal was that AT had “lost trust and confidence in [him] to be able to perform [his] duties at a level [AT] expect and very importantly [AT was] very concerned about [his] safety in the public domain”. In dismissing Mr Hong, Mr Strawbridge said there were other contributing factors, but those were the two principal reasons: Mr Hong’s safety, and his compatibility to the job. Mr Strawbridge also confirmed that the dismissal would be on one month’s notice.

[44] Mr Hong raised a personal grievance almost immediately, claiming that the dismissal lacked both substance and procedural fairness. It was, he said, unjustifiable. He sought reinstatement along with \$30,000 as compensation for humiliation, loss of dignity and injury to his feelings.

[45] He also requested reasons for his dismissal in writing. These were not provided by AT within the 14 days stipulated in s 120 of the Act; it seems the raising of the personal grievance and Mr Hong’s subsequent filing of a statement of problem in the Authority distracted AT from its usual processes. Reasons were included in AT’s amended statement in reply, filed in the Authority a month after reasons were sought.

AT accepts dismissal was unjustifiable

[46] Although AT succeeded in the Authority, the Authority Member raised some concerns with the process that AT had followed.³ AT now accepts that two of those concerns were such as to make the dismissal unjustifiable. Those concerns were:

- (a) Mr Bidgood’s multiple roles as witness, as manager presenting information against Mr Hong, and then helping Mr Strawbridge as decision-maker to assess the credibility of differing accounts of what had happened, including Mr Bidgood’s own account; and

³ *Hong v Auckland Transport* [2017] NZERA Auckland 255 at [41].

- (b) a failure to take more formal steps to address concerns about Mr Hong's conduct or behaviour at an earlier stage.

Mr Hong suspended three times

[47] AT accepts that, when deciding whether to suspend an employee, an employer must comply with the rules of natural justice and, in order to meet the test of justification as set out in s 103A of the Act, must follow a fair and reasonable process. AT also had to comply with the applicable collective agreement.

[48] A suspension occurs when an employee is prevented from working and is sent away from the workplace, but his or her employment remains on foot.⁴

[49] Clause 36 of the collective agreement permitted AT to suspend an employee being investigated for alleged misconduct, but only after discussing the proposal with the employee and considering the employee's views.

[50] The rules of natural justice also mean an employee generally ought to be told a suspension is being contemplated and the reasons why and given an opportunity to be heard before a decision is made.⁵ These expectations are flexible, taking into account the surrounding circumstances. Ultimately, the test in each case is the fairness and reasonableness of the employer's conduct.⁶ The surrounding circumstances can include immediate safety issues as well as the length of the proposed suspension. But natural justice almost always requires some consultation before the decision to suspend is made.

[51] I do not accept that, when Mr Hong was asked to take a day off on 26 January 2017, there was the option that he remain at work. Mr Bidgood had Mr Strawbridge's sign-off on allowing Mr Hong to take time off to reflect on the workshop and his actions, and from there I find that AT was committed to that happening, whatever Mr Hong said. It was a suspension.

⁴ *Northern Butchers IUOW v Woolworths Supermarkets Ltd* (1986) 1 NZELC 95,148.

⁵ *Singh v Sherildee Holdings Ltd t/a New World Opotiki* EmpC Auckland AC 53/05, 22 September 2005 at [93].

⁶ *Graham v Airways Corp of New Zealand Ltd* [2005] ERNZ 587 (EmpC) at [104].

[52] However, I also accept that this short suspension did not disadvantage Mr Hong in any material way.

[53] The second suspension, which I find happened on 3 February 2017, is of more significance. Before Mr Bidgood met with Mr Hong to discuss that course of action, he had already spoken with Mr Strawbridge and confirmed with him that a disciplinary process should be commenced. The letter of 3 February was prepared before Mr Bidgood met with Mr Hong and, although headed up “PROPOSED SUSPENSION”, the content made it clear that Mr Hong was not permitted to attend the workplace in any capacity until the formal meeting of 9 February took place. Mr Hong was not given an opportunity to comment on the proposal that he not attend work pending the formal meeting before he was given the letter.

[54] Even in evidence, Mr Bidgood did not envisage a situation where Mr Hong continued in his role pending that meeting. Mr Bidgood spoke of a hypothetical situation, had Mr Hong insisted on wanting to stay at work, in which case Mr Bidgood said Mr Hong would have been placed on different work, which was not within his job description. That course is not open to an employer without the employee’s agreement.

[55] The process failings regarding the suspension on 3 February meant it was contrary to the collective agreement and unjustifiable. Mr Hong gave evidence that he felt cut off from his colleagues and stressed. He thought AT already had decided to dismiss him.

[56] The third, and formal, suspension occurred at the meeting of 9 February 2017. That meeting was wide-ranging, and Mr Hong had the opportunity to make representations, which were considered prior to the suspension taking place. The basis for the suspension was concerns over Mr Hong’s conduct. Although Mr Hong’s statement of claim asserts that the suspension on 9 February 2017 caused Mr Hong to be unjustifiably disadvantaged, that claim was not pursued with any vigour in submission. I do not find that the third suspension was unjustifiable.

[57] Mr Hong remained on full pay throughout his periods of suspension. However, he is entitled to compensation for the humiliation caused to him by the second suspension, which occurred without him having any real opportunity to respond, made him feel isolated and stressed, and fed into his feeling that dismissal was inevitable. In the circumstances, compensation of \$3,000 for humiliation, loss of dignity and injury to Mr Hong's feelings is ordered.

Reinstatement must be both practicable and reasonable

[58] AT opposes reinstatement on the basis that it is neither practicable nor reasonable because:

- (a) Mr Hong's views and behaviour regarding AT's de-escalation and conflict management strategies are fundamental and deeply held;
- (b) Mr Hong's disregard for, and failure to apply, the defendant's de-escalation and conflict management strategies:
 - (i) places him at risk of harm;
 - (ii) places other officers and members of the public at risk of harm;
 - (iii) means that AT would have to ensure that Mr Hong had another parking officer with him at all times, which is not an efficient use of AT's resources and would also place that parking officer at risk of harm;
- (c) AT has lost trust and confidence in Mr Hong.

[59] Safety is the key reason given by AT for reinstatement not being appropriate.

[60] Both parties gave extensive submissions on the issue of reinstatement, which were helpful.

[61] At the time Mr Hong was dismissed s 125 of the Act provided that, if an employee who is found to have a personal grievance seeks reinstatement, the Authority

may, whether or not it provides for any of the other remedies specified in s 123 of the Act, provide for reinstatement if it is practicable and reasonable to do so. This also applies to the Court on a challenge.

[62] From 11 December 2018, s 125 was amended to make reinstatement a primary remedy so, if a successful employee seeks reinstatement, the Authority or Court must provide for reinstatement wherever practicable and reasonable, irrespective of whether it provides for other remedies as specified in s 123.

[63] As Mr Hong's personal grievance proceedings were brought before the commencement of the amended s 125, they fall to be determined under the provision as earlier formulated.⁷

[64] As noted in *Angus v Ports of Auckland Ltd*, even when it is not the primary remedy, in a particular case reinstatement may still be the most significant remedy claimed because it is of particular importance to the grievant.⁸ A financial award often will not be an agreeable substitute for a position. The comment made by then Chief Judge Goddard in *Ashton v Shoreline Hotel*, although determined when reinstatement was a primary remedy, is still relevant.⁹ The Chief Judge confirmed that employment protection is the dominant goal of the legislation, and concluded:

That goal is not attained by substituting a money judgment for the job. Unless the employee has done something to merit forfeiting his or her employment, or unless reinstatement is for other good reasons unjust, to award routinely compensation for the job loss instead of reinstating is to create a system for licensing unjustifiable dismissals.

[65] Nevertheless, reinstatement must be both practicable and reasonable. Those are two separate requirements.

[66] Practicability is not given a narrow meaning. It means more than simply being possible. For reinstatement to be practicable, it must be capable of being carried out in action, be feasible, and have the potential for the re-imposition of the employment relationship to be done or carried out successfully. A wide range of considerations

⁷ Employment Relations Act 2000, sch 1AA cl 15.

⁸ *Angus v Ports of Auckland Ltd (No 2)* [2011] NZEmpC 160, [2011] ERNZ 466 at [61].

⁹ *Ashton v Shoreline Hotel* [1994] 1 ERNZ 421 (EmpC) at 436.

may be brought to bear on the question of practicability, including matters which, although they may not have formed reasons for the dismissal, are nevertheless germane to the prospects of a renewed employment relationship.¹⁰

[67] Looking at reasonableness, the Court needs 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, and in some cases, perhaps third parties who would be affected by the reinstatement.¹¹ In the context of a parking officer, those third parties conceivably could include members of the public. The Court must broadly inquire into the equities of the parties' cases insofar as the prospective consideration of reinstatement is concerned, and balance the interests of the parties and the justice of their respective cases.¹²

[68] AT accepts that, to rely on a loss of trust and confidence as a basis to refuse reinstatement, there must be more than just an assertion on its part that it has lost trust and confidence in Mr Hong. Here, it is asserting a loss of trust and confidence in circumstances where it accepts the dismissal was unjustifiable, in part because of a lack of formal steps to address Mr Hong's perceived unsatisfactory conduct and behaviour. That is certainly a difficult position to maintain.¹³ The loss of trust and confidence is, in many respects, a subjective notion in the sense that relevant people on each side assess and express whether they can trust the other or others in working relationships in the future. But those assessments must be viewed objectively and must be considered in light of the found or accepted unjustifiability of the dismissal.¹⁴

Reinstatement is important to Mr Hong

[69] Mr Hong gave evidence that he loved his job, and this is consistent with the statements he made to AT during the disciplinary process. He is in his early 60s and

¹⁰ *Association of Marine etc Engineers v Tasman Express Line Ltd* [1990] 3 NZILR 946 (LC) at 957; *New Zealand Educational Institute v Board of Trustees of Auckland Normal Intermediate School* [1994] 2 ERNZ 414 (CA) at 416-418; *New Zealand Educational Institute v Board of Trustees of Auckland Normal Intermediate School* [1992] 3 ERNZ 243 (EmpC) at 286.

¹¹ *Angus v Ports of Auckland Ltd*, above n 8, at [68].

¹² *Angus v Ports of Auckland Ltd*, above n 8, at [65].

¹³ *Wikaira v Chief Executive of the Department of Corrections* [2016] NZEmpC 175, [2016] ERNZ 779 at [222]; *Harris v The Warehouse Ltd* [2014] NZEmpC 188, [2014] ERNZ 480 at [162].

¹⁴ *Sefo v Sealord Shellfish Ltd* [2008] ERNZ 178 at [56]–[58].

currently would like to work until he is 65. He does not expect it to be easy to find suitable new employment.

Some of Mr Hong's views differ from those of AT

[70] I accept that Mr Hong has different views from AT on some matters, the most relevant of which is his view on parking officers' right to respond when people abuse them. He says that is a basic human right. AT's position is that it is better for parking officers to walk away from abuse and certainly that they ought not tell people what they may or may not do.

[71] Of course, employees are entitled to hold views that may differ from those of their employer, provided they nevertheless follow the employer's lawful and reasonable instructions.

Little evidence of disregard for, or failure to apply, AT's strategies

[72] AT submits that Mr Hong disregarded its de-escalation and conflict management strategies. A significant difficulty with this submission arises out of AT's acknowledged failure to take more formal steps to address concerns about Mr Hong's behaviour or conduct at an earlier stage. Effectively, this meant that Mr Hong did not know of AT's concerns and so did not have the opportunity to take them on board.¹⁵ As at January 2017, Mr Hong had not knowingly disregarded AT's strategies for de-escalation and conflict management.

[73] While AT argues Mr Hong should not be reinstated because of his failure to apply its de-escalation and conflict management strategies, the evidence of failure is not persuasive. It is unclear what, beyond the exchange at the training session, AT meant when it referred to "the regularity of the outbursts discussed" in the suspension letter. There were concerns about Mr Hong's engagement with the public, but those

¹⁵ The supervisor's comment in the context of the 2014/15 performance and development plan process that it was better to leave an abusive situation was not an instruction and did not signal a significant concern.

were not safety concerns, they centred on him not being as helpful and approachable as he might be.

[74] In evidence, Mr Bidgood referred to four examples of conduct of concern. The first was in 2014. The concern was not of an “outburst”, however, but that Mr Hong was not providing sufficient information to a member of the public when asked and that Mr Hong’s replies seemed to Mr Bidgood to be brief and his tone sharp. No disciplinary steps were taken.

[75] The second incident was in a meeting with a District Commander, New Zealand Police in 2016 at which Mr Bidgood was concerned about Mr Hong’s manner in addressing the District Commander, which he says was forthright and abrasive. However, that behaviour was addressed by Mr Bidgood arranging for Mr Hong to meet with AT’s HR consultant with a view to him attending further training. It was not of sufficient concern to warrant performance management or a warning. It also did not involve on-the-road engagement with members of the public.

[76] The third occasion on which Mr Hong’s conduct raised concerns was at the training session in January 2017. Mr Bidgood’s evidence was that Mr Hong’s comments to the facilitator, and the way in which he made them, suggested that he was fundamentally unsuited to the role of parking officer and that he posed a potentially serious safety risk to himself and others. I accept that AT’s concern about the exchange at the training session may have had some validity, but it is hard to see how it could have justified dismissal.

[77] The fourth matter that was of concern to AT was the example Mr Hong gave of the events that took place outside the High Court two years earlier. AT says that its concern was that, in giving that example in the disciplinary process, Mr Hong did not accept that the way in which he spoke to the bystander amounted to behaviour that could have escalated a situation of conflict. While I acknowledge Mr Bidgood is experienced in de-escalation matters, that does not mean his view must be accepted without question. The engagement with the bystander outside the High Court may not have followed AT’s preferred practice, but I do not accept that the behaviour was at the level of concern now expressed. When Mr Hong referred to similar language in

his performance appraisal in 2015, his supervisor simply addressed the issue. He did not escalate matters, for example with formal performance management, or by putting Mr Hong under supervision and/or on restricted duties (which is now what AT says it would have to do if Mr Hong is reinstated). As noted, the supervisor gave Mr Hong a “Met” rating in the relevant part of the performance and development plan.

[78] The most relevant evidence of how Mr Hong might react in a situation of potential conflict was the Karangahape Road incident in January 2017, where Mr Hong did remove himself from the situation and call for assistance. But that incident, which followed the training session, did not seem to be received by AT as demonstrating that Mr Hong would act appropriately when faced with a difficult situation. Rather, AT seems to have held it against Mr Hong that he faced this situation at all, even though it is clear that parking officers can be confronted by members of the public as happened in that situation.

[79] In any event, while Mr Hong defended his use of the phrase in issue, during the disciplinary process and in Court, he also repeatedly accepted that he would stop using the imperative language he had previously used and would adopt the language Mr Bidgood had suggested was appropriate. That is, instead of telling members of the public to stop using offensive language, he would say that he found their language to be offensive.

[80] The other evidence that supports Mr Hong’s position that he would act in accordance with instructions is what happened with respect to the recording of interactions. In the course of a discussion AT and Mr Hong had about a mystery parker rating, it became apparent that Mr Hong had recorded some conversations with members of the public on his mobile phone. It appears that AT accepted that Mr Hong may have been advised to do this in the past, but it then advised him he was not to do it in the future. The evidence was he complied with this instruction.

Safety risk not demonstrated

[81] AT says that reinstating Mr Hong would mean it is faced with an employee it has deemed to be unsuitable and unsafe to work in his role. It says the risk associated with this goes beyond what AT can be expected to bear in equity and good conscience.

[82] It points to *Villegas v Visypak (NZ) Ltd* as a comparable case.¹⁶ In that case, the Court found that Mr Villegas had demonstrated a cavalier attitude to safety and that his attitude gave rise to considerable concerns about his willingness to accept instructions. He had previous warnings for safety-related issues.

[83] As already explained, those factors are not present here, and the level of risk claimed by AT was not demonstrated by the evidence.

Reinstatement practicable and reasonable

[84] Against that background, it is not objectively sustainable to say that AT has lost trust and confidence in Mr Hong.

[85] I accept that Mr Hong's supervisor at the time found Mr Hong at times challenging to manage, but this does not disqualify him from reinstatement. When it comes to the management challenges employees present, there is a continuum from those who require significant time and effort from their managers, through to those who are very much self-managing, with little need for oversight. It is not a barrier to reinstatement that Mr Hong may not be the easiest of employees to manage.

[86] In any event, he will have a new supervisor, as his previous supervisor has moved into a different role, and, after going through this litigation process, Mr Hong will have a clearer understanding of AT's expectations of him.

[87] There was no evidence of any difficulties between Mr Hong and other parking officers. The little evidence there was indicated mutual supportiveness. Nor was there evidence that his on-the-road engagements put other parking officers at risk.

¹⁶ *Villegas v Visypak (NZ) Ltd* [2010] NZEmpC 154, (2010) 8 NZELR 362.

[88] I also do not consider that members of the public will be adversely affected by Mr Hong's reinstatement. The complaints put in evidence did not raise safety issues; they seemed to be of the sort to be expected from people unhappy to receive tickets.

[89] In the circumstances, I find that reinstatement is practicable and reasonable.

[90] Mr Hong ought to have had the opportunity to demonstrate that he will follow AT's de-escalation and conflict management strategies. I see no reason why that opportunity should now be lost to him.

Mr Hong is entitled to loss of earnings

[91] AT accepts that Mr Hong is entitled to loss of earnings. But it argues that Mr Hong had failed to mitigate his loss because he applied for many jobs that he was not qualified for and did not apply for more suitable jobs.

[92] Applying for jobs for which he did not seem qualified does not go to a failure to mitigate. Indeed, the jobs that Mr Hong obtained after his dismissal were ones which, on their face, might not have looked to be obvious ones for him. His first job after his dismissal was as a traffic controller, and more recently he has been employed as a casual construction site labourer.

[93] Although AT suggested that, given Mr Hong's background, he might have been better applying for jobs in the banking or legal field, there was no evidence that there were appropriate opportunities in those fields not pursued by Mr Hong.

[94] Mr Hong started in the traffic controller role on 12 September 2017. Although that is more than three months after the end of his notice period, I consider he should be paid his loss of earnings (including benefits) up until then. He sought loss of earnings up until the date of reinstatement, but I am satisfied that there were other matters that have impacted on Mr Hong's earnings that break the chain of causation from his dismissal with AT.

Interest is due on the loss of earnings

[95] Mr Hong has been out of pocket and is due interest. That is to be paid on the full amount of his loss of earnings from 12 September 2017 until his loss of earnings is paid by AT and is to be calculated in accordance with Schedule 2 of the Interest on Money Claims Act 2016.

Mr Hong also is entitled to compensation for humiliation, loss of dignity and distress

[96] AT accepts that Mr Hong is entitled to compensation for the humiliation, loss of dignity and distress caused by his dismissal. It submits that the appropriate assessment of that compensation is in Band 2 in the ranges identified by Chief Judge Inglis in *Waikato District Health Board v Archibald*.¹⁷ It says compensation should not exceed \$25,000. Mr Hong now seeks \$50,000, placing him in Band 3, which applies to situations involving a high level of loss and/or damage.¹⁸

[97] Mr Hong gave evidence of the effect on him of his dismissal. He felt ridiculed and demeaned by what happened to him. This was compounded by his sense of injustice at AT not adequately explaining to him what he was said to have done and what instructions he was said to have failed to follow. However, there was little evidence of ongoing and/or significant psychological harm caused to Mr Hong. In my assessment, the appropriate level of compensation is \$30,000.

Mr Hong contributed to the situation that arose

[98] I accept that Mr Hong was argumentative at the training session. I also accept that, during the disciplinary process, he did not resile from his stance that his conduct was appropriate. His behaviour affected AT's view of how he would act if faced with a difficult member of the public and therefore contributed to the situation that led to his dismissal. Some reduction in remedies is appropriate.

¹⁷ *Waikato District Health Board v Archibald* [2017] NZEmpC 132 at [62].

¹⁸ *Richora Group Ltd v Cheng* [2018] NZEmpC 113, (2018) 15 NZELR 996 at [67].

[99] It is significant, however, that he was not given the opportunity to change AT's perception of how he would behave in a difficult situation, as are his repeated assurances during the disciplinary process that he would use language acceptable to AT in the future.

[100] In the circumstances, the compensation award for the humiliation, loss of dignity and distress caused by the dismissal is reduced by 15 per cent, bringing it down to \$25,500.

A penalty is not available here

[101] Mr Hong sought an order that AT pay a penalty for its failure to provide written reasons for his dismissal within the 14 days prescribed by s 120 of the Act.

[102] Section 133 of the Act gives the Authority (and Court) jurisdiction to deal with actions for the recovery of penalties under the Act for a breach of any provision of the Act for which a penalty is provided in the particular provision. No penalty is provided for in s 120 so there is no jurisdiction to order one here.

Outcome

[103] The determination of the Authority on the substantive issue¹⁹ and its determination on costs²⁰ are both set aside, and this judgment stands in their place.

[104] I have found that reinstatement is practicable and reasonable, and it is ordered. The order for reinstatement is to take effect 10 working days from the date of this judgment. That period gives the parties the opportunity to discuss the manner of Mr Hong's reinstatement, including at mediation if they agree. Mr Hong will appreciate that issues have arisen in relation to his performance in the parking officer's role, and that AT will be concerned to ensure that he follows its de-escalation strategies when dealing with members of the public.

¹⁹ *Hong v Auckland Transport*, above n 3.

²⁰ *Hong v Auckland Transport* [2017] NZERA Auckland 304.

[105] AT is to pay Mr Hong loss of earnings, including the value of any benefits, holiday pay and KiwiSaver, at the rate he was paid by AT at the time of his dismissal for the period from his notice expiring on 24 March 2017 until 12 September 2017.

[106] AT is to pay Mr Hong a total of \$28,500 as compensation under s 123(1)(c)(i) of the Act for his unjustifiable suspension causing disadvantage on 3 February 2017 and his unjustifiable dismissal on 24 February 2017, after deduction for contribution.

[107] AT is to pay interest on Mr Hong's loss of earnings from 12 September 2017 until the date the loss of earnings is paid. Interest is to be calculated in accordance with Schedule 2 of the Interest on Money Claims Act 2016.

[108] The parties are to endeavour to agree on costs, both for the Authority and the Court, noting that Mr Hong is in receipt of legal aid. If agreement cannot be reached, Mr Hong may file and serve an application within 20 working days of the date of this judgment. AT then has 15 working days to respond, and Mr Hong has a right of reply, which must be filed and served within a further five working days.

J C Holden
Judge

Judgment signed at 10.30 am on 10 May 2019