

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

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

**[2020] NZEmpC 44
EMPC 24/2019**

IN THE MATTER OF	a challenge to determinations of the Employment Relations Authority
BETWEEN	YOON CHEOL HONG Plaintiff
AND	CHEVRON TRAFFIC SERVICES LIMITED Defendant

Hearing: 7-9 October 2019, written submissions filed on 18, 21 and
31 October 2019
(Heard at Auckland)

Appearances: Plaintiff in person
G Pollak, counsel for defendant

Judgment: 15 April 2020

JUDGMENT OF JUDGE M E PERKINS

[1] These proceedings involve challenges to two determinations of the Employment Relations Authority (the Authority). The first determination is dated 14 January 2019.¹ The second determination relates to a costs award in respect of the proceedings in the Authority, which were concluded with the first determination.²

[2] In the first determination, the findings which the Authority made on the substantive issues were as follows:

¹ *Hong v Chevron Traffic Services Ltd* [2019] NZERA 14 (Member Campbell).

² *Hong v Chevron Traffic Services Ltd* [2019] NZERA 69 (Member Campbell).

- (a) Mr Hong was not a casual employee of Chevron Traffic Services Ltd (Chevron) and had a reasonable expectation of ongoing employment.
- (b) Mr Hong's application for penalties was declined.
- (c) Mr Hong was owed wages for public holidays, and Chevron was ordered to calculate and pay Mr Hong the outstanding arrears of wages for three public holidays during his employment and for an alternative holiday for having worked on a public holiday.
- (d) Mr Hong was not unjustifiably dismissed.

[3] In the costs determination, while Mr Hong was partly successful in the substantive proceedings, he was ordered to make payment of costs for \$3,000 to Chevron. This was a reduction from the normal daily rate to reflect Mr Hong's partial success.

[4] Even though the challenge is a de novo challenge seeking a rehearing of the entire matter, Mr Hong does not challenge the finding that he was not a casual employee. He does not challenge the findings in respect of holiday pay owing to him. The remedies which he seeks in his final pleadings before the Court are:

- a. That the plaintiff has a personal grievance for unjustified dismissal;
- b. That Chevron was in breach of duty of good faith for the purpose of s.4 of the Act;
- c. Penalty in the sum of \$20,000.00 for breach of duty of good faith under s.4A of the Act;
- d. Penalty in the sum of \$20,000.00 for breach of s.65(2)(b)(i) of the Act under s.135(1)(b) of the Act;
- e. Compensation in the sum of \$80,000.00 for humiliation, loss of dignity, and injury to feelings pursuant to s.123(1)(c)(i) of the Act caused by unjustified dismissal;
- f. Reimbursement for lost earnings and other money for 6 months from the date of dismissal under ss.123(1)(b) and 128 of the Act;
- g. Interest at the rate of 6% per annum calculated from the date of dismissal to the date of judgment;

- h. Costs;
- i. Setting aside costs determination of the Authority; and
- j. Any other and further order(s) Court deems just and fit.

[5] Mr Hong was employed by Chevron on 12 September 2017. He was dismissed on 7 June 2018. He was summarily dismissed as a result of incidents which occurred at the workplace on 25 May 2018.

[6] Mr Hong was employed by Chevron as a traffic controller. Chevron is a traffic management business providing traffic services to its customers. This includes the design and implementation of traffic management plans and providing staff to its clients for the purposes of directing traffic. The directing of traffic can occur at the scene of road works where opposing traffic needs to be confined to a single lane. The traffic controllers are stationed at each end of the works and manage the movement of traffic along the reduced carriage way in staggered groups. The traffic controllers need to work in close co-operation with each other by use of radio-telephones. When traffic is moving from one end of the works, opposing traffic has to be stopped at the other end or ends and vice versa. If traffic is allowed to proceed from all ends of the work at the same time, it will meet up and be unable to proceed further. There is also a strong element of danger if that occurs. In the case of Mr Hong, at the time in question in this proceeding, he was working at one of the ends of a three-way traffic control of works occurring at a T-intersection.

[7] The evidence against Mr Hong arises primarily from three of his fellow employees and a witness employed by the head contractor at the site. They allege that Mr Hong, on four separate occasions on 25 May 2018, failed to co-operate by radio-telephone with the other controllers and allowed traffic to enter the restricted area while traffic was still proceeding from the other ends. In addition, his fellow employees allege that Mr Hong, contrary to Chevron practice, had, on more than one occasion, alighted from Chevron vehicles from the wrong side of the vehicle into lanes where there was the potential for passing traffic. The requirement of Chevron for health and safety reasons was that employees had to alight from vehicles on the side away from passing traffic.

[8] The traffic superintendent of the head contractor at the site, which was on Woodcocks Road north of Auckland, stated that, on 25 May 2018, he witnessed Mr Hong on at least three occasions directing traffic against the flow of traffic coming from the opposite direction. He stated in evidence that Mr Hong was clearly not listening on his radio-telephone, and his conduct on that day was dangerous and inexplicable. He stated that, on a previous occasion, he had seen similar incidents involving Mr Hong on a site on Moirs Hill, also north of Auckland. Mr Hong's fellow employees, who were also traffic controllers at the Woodcocks Road site at the same time, gave similar accounts of their experience with Mr Hong on 25 May 2018.

[9] When the traffic superintendent of the head contractor observed what was happening on the morning of 25 May 2018, he directed that Mr Hong be moved to another part of the site because of his serious safety concerns with the way Mr Hong was behaving. When similar incidents involving Mr Hong occurred in the afternoon, the traffic superintendent indicated that, from that point on, he did not wish to have Mr Hong back on the sites ever again. He considered that important health and safety issues arose, and any accidents would have been his responsibility as the supervisor.

[10] As a result of these incidents, the traffic superintendent of the head contractor made a written complaint and Chevron's own supervisor lodged incident reports, which were then investigated by senior management at Chevron.

[11] The investigation was conducted by Wayne Clarke, Managing Director of Chevron. After Mr Clarke and the Commercial Manager, Jordan Masters had carefully interviewed the employees and the traffic superintendent, Mr Clarke conducted two main meetings with Mr Hong to discuss the issues raised and to then consider all matters. Mr Hong was advised that he could have a support person present at the meetings. Mr Hong declined this invitation. He is legally qualified and had been admitted as a barrister and solicitor but does not have a practising certificate. He now describes himself as an employment advocate.

[12] The first of the meetings took place on 1 June 2018 and the second, when the dismissal occurred, on 7 June 2018. Mr Hong had previously raised personal grievances dealing with two matters. The first related to his allegation and complaint

that other staff had sworn at him while at the worksite. The second related to the issue of holiday pay. Mr Clarke dealt with the allegation of other staff swearing and reprimanded staff for swearing at Mr Hong. The holiday pay issue was resolved by the Authority's determination on 14 January 2019.³

[13] Mr Clarke had other managers attend the meetings with him. Mr Masters attended the meeting on 1 June 2018. Ryan Toki, Chevron's Northwest Depot Manager, attended the meeting on 7 June 2018 when the dismissal took place. Mr Clarke, Mr Masters and Mr Toki described how the meetings were conducted and what took place. They confirmed that Mr Hong refused to properly and reasonably engage at the meetings.

[14] Mr Hong responded to the reported incidents against him by complete denial and an allegation that there was a conspiracy between the other staff and the traffic superintendent of the head contractor to get rid of him. He spoke of the allegations as a "frame up". Mr Clarke stated that at the first meeting Mr Hong was aggressive towards him, spoke to him in an insulting way and raised allegations of racial bias. He stated that, at the first meeting, Mr Hong taunted him to try and get him to suspend him. He warned Mr Clarke of consequences if he was dismissed. Mr Clarke stated that, at one point, Mr Hong told him that he was not to speak while he saw Mr Hong's lips were moving. He stated that Mr Hong also spoke disparagingly about his fellow employees and alleged racial bias on their part. While Mr Hong totally denied that the incidents had taken place, he made a statement to the effect that, if such incidents occurred, they could not be regarded as serious misconduct justifying dismissal, as they were a regular occurrence. Mr Clarke's evidence as to Mr Hong's behaviour at the meetings is corroborated by the evidence of Mr Masters and Mr Toki.

[15] Mr Clarke stated in evidence that he was concerned at Mr Hong's attitude and his suggestion that these types of incidents were regular. He gave evidence of the high standards of health and safety adopted by Chevron both towards its employees and members of the public. Directing traffic into the face of oncoming traffic, Mr Clarke stated, had previously resulted in a death and Mr Hong's actions, as described by other

³ Hong, above n 1.

employees, which Mr Clarke believed, were, therefore, regarded very seriously indeed. Mr Clarke indicated that he had previously had respect for Mr Hong and indeed wanted to employ him on a permanent basis, which Mr Hong refused. He had placed Mr Hong in proper training for the job as a traffic controller. As a result of the incidents, and Mr Hong's reaction towards him at the meetings, he had lost trust and confidence in Mr Hong.

[16] At the second meeting on 7 June 2018, which was deferred for a day to enable Mr Hong to recover from sickness, Mr Clarke indicated that he had considered Mr Hong's reaction to the allegations carefully. Mr Hong was given another opportunity to respond but, again, simply denied the allegations, stating that he had nothing further to add. He kept asking Mr Clarke in a taunting way to dismiss him. Mr Clarke found the process of dismissing Mr Hong distressing. After hearing Mr Hong's response, he took an appropriate adjournment to gather his thoughts and consider the entire matter. When he returned to the meeting, he advised Mr Hong that he was being dismissed.

[17] Mr Hong appears to have immediately raised a personal grievance following the dismissal, and, on 8 June 2018, Mr Clarke set out a letter responding to the personal grievance and the reasons why he dismissed Mr Hong. That part of the letter of 8 June 2018 which sets out the reason for the dismissal reads as follows:

...

5. You have asked me to detail in writing the reasons for your dismissal. You have heard these already but for the record:
 - 5.1 The decision to terminate your employment without notice on grounds of serious misconduct was made following our investigation into the incidents that occurred at Woodcock's Road on the 25th of May 2018. I concluded that a serious misconduct occurred. Your actions also destroyed the trust and confidence that I had in you as an employee.
 - 5.2 Not only have you jeopardised the safety of those transiting through the stop/go point but your actions also jeopardised the trust that the client has in us moving forward and damaged our reputation with this very valuable client, potentially jeopardising our commercial position.
 - 5.3 Following my interviews with all crew members involved and having met with you on Friday the 1st of June and Thursday the 7th of June to discuss the incident I eventually concluded that your actions caused a serious and imminent health and

safety risk to all persons on site that day. Eventually I came to the view that your actions seriously endangered the health and safety of members of the public and our Chevron staff traveling through the Stop/Go operation.

5.4 In reaching this decision I considered the following factors:

- a. Your repeated denials of any wrong doing despite the statements of staff at the site and the statement of the client.
- b. Your explanation in our meeting on the 7th of June that the RT channel was busy due to Chevron staff involved in the operation using it rather than there being an RT failure of any kind.
- c. Your acknowledgement that your RT was working correctly, and you were able to make use of it [to] communicate to all crew involved in running the stop/go operation.
- d. Your inconsistent explanation of the use of the RT channel, Chevron staff who claim that you were not responding to the calls being made over the RT in order to keep the site safe.
- e. The inconsistency of your explanation that this incident did not occur alongside your statement that the incident could be explained by the above account.
- f. Your inability to give any further details to substantiate your claim that other staff had been guilty of the same offense.
- g. Your service with us.

6. I considered that your actions constitute serious misconduct warranting the immediate termination of your employment.

...

[18] Mr Hong's primary claim is that he was unjustifiably dismissed. In considering his claim, the Court applies the test of justification as set out in s 103A of the Employment Relations Act 2000 (the Act). The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. This case involves a summary dismissal of Mr Hong for serious misconduct.

[19] During the hearing, Mr Hong carried out a close and intensive cross-examination of the witnesses for the defendant. The witnesses did not resile from their

primary evidence. As a result of the approach which Mr Hong adopted, some inconsistencies in the evidence arose. Mr Hong then made an assessment in his submissions of those inconsistencies between witnesses to found his allegation that the incidents did not happen and have been fabricated to get rid of him. This was for the purposes of advancing his primary allegation that there was a conspiracy between the employer, the employees and the traffic superintendent. However, the issue is whether Mr Clarke reacted in a fair and reasonable way having regard to what faced him. In carrying out his investigation, Mr Clarke would not have been required to embark on the type of exhaustive scrutiny which Mr Hong subjected the witnesses to. Mr Hong relied upon previous decisions of the Court such as *C v Air Nelson Ltd* and *Gazeley v Oceania Group (NZ) Ltd*.⁴ However, the criticisms which were levelled at the nature of the employers' actions in those cases cannot apply to the employer in this case. Mr Clarke carried out a careful, reasonable investigation, and then Mr Hong was given the opportunity of responding to the allegations which had been made. Mr Hong chose to simply deny the allegations and, in addition to not properly engaging in the process, behaved in an offensive way towards Mr Clarke.

[20] Mr Clarke was faced with the following once he had completed his inquiries and interviewed Mr Hong:

- (a) Fellow employees of Mr Hong claimed that he did not comply with the requirements of a traffic controller by not keeping in contact by radio telephone, by allowing traffic to proceed into the controlled area of roading and failing to keep proper observation of what was happening at the site. This was a serious breach of Chevron's health and safety standards.
- (b) The traffic superintendent employed by the head contractor at the site observed the same behaviour by Mr Hong. In addition, he had observed similar behaviour by Mr Hong at another site on a previous occasion.

⁴ *C v Air Nelson Ltd* [2011] NZEmpC27, [2011] ERNZ 207, (leave refused in *Air Nelson Ltd v C* [2011] NZCA 488, (2018) 8 NZELR 453); *Gazeley v Oceania Group (NZ) Ltd* [2013] NZEmpC 234, [2013] ERNZ 727.

- (c) Fellow employees of Mr Hong also observed Mr Hong's failure to alight from company vehicles on the side away from passing traffic in breach of the employer's rules.
- (d) Mr Hong's denial in the face of the allegations from four witnesses and his antagonistic behaviour towards Mr Clarke during the interviews.

[21] I am of the view that it would not be a reasonable assessment on Mr Clarke's part, having regard to the information which he had, to believe Mr Hong's assertions as to a conspiracy. The way Mr Hong acted at the meetings was contrary to good faith obligations to properly engage with Mr Clarke and be responsive and communicative.

[22] Having regard to the procedural requirements contained in s 103A(3) of the Act, Mr Clarke properly complied. He gave proper notice to Mr Hong and deferred the final meeting to accommodate Mr Hong's illness. Mr Clarke gave Mr Hong notice of the accusations against him and time to respond. He indicated at both meetings, which were conducted, that Mr Hong was entitled to have a support person if he wished.

[23] On any view of the situation facing Mr Clarke, the decision to dismiss summarily was a reasonable response in all the circumstances. The employees and the traffic superintendent gave him information in which they corroborated each other. He would have had no reason to doubt their evidence. There was no basis to conclude that there was a conspiracy. I do not accept Mr Hong's submission that there was a "frame up". That is also unlikely because of Mr Clarke's offer to Mr Hong of permanent employment which Mr Hong refused. Mr Hong did not dispute Mr Clarke's evidence in this regard. That would hardly be the action of an employer who was endeavouring to manipulate a dismissal. Mr Hong's behaviour at the meetings was also confirmed by two senior managers, and I have no reason to doubt their evidence. In my view the evidence against Mr Hong in this case was overwhelming. In the context of Chevron's operations and responsibilities to the public, Mr Hong's actions amounted to serious misconduct.

[24] I conclude that Mr Hong was not unjustifiably dismissed.

[25] Insofar as the claim for a penalty for breach of the duty of good faith is concerned, this relates to Mr Hong's allegations as to the behaviour of the employer, its employees and the traffic superintendent. It has been claimed for the first time in the challenge. The Court has no jurisdiction to consider Mr Hong's claim to a penalty under this head. Only the Employment Relations Authority has jurisdiction to consider a claim to a penalty in the first instance, and the claim must be initiated there. The Court would then only become involved if there was a challenge. In this case, Mr Hong did not make such a claim before the Authority and would now be well out of time to be able to do so. In any event, I am not prepared to accept Mr Hong's assertions that the employer in this case acted in breach of good faith. In fact, as I have held, quite the contrary is the case, and it is Mr Hong who breached such duties.

[26] Insofar as the claim for a penalty for breach of s 65(2)(b)(i) of the Act is concerned, this relates to Mr Hong's dispute with Chevron relating to holiday pay entitlements for casual workers. His allegation is that cl 5.2 in his employment agreement would be contrary to law. Mr Hong's holiday pay claims were resolved by the Authority in its determination. I agree with the Authority's determination that the breaches were inadvertent and arose from the misapprehension by Chevron that the employment relationship was casual in nature and its reliance on incorrect advice it received on how to calculate when payment should be made for public holidays. As the Authority Member stated in the determination, the breaches were not intentional. These provisions of the Holidays Act 2003 are notoriously difficult, and this is not a case where a penalty would be appropriate. Accordingly, Mr Hong's claims for penalties are dismissed.

[27] In conclusion, therefore, Mr Hong's challenges against the determinations of the Authority are dismissed in their entirety. The determination on costs was appropriate in balancing the respective outcomes and is confirmed. Costs in this challenge should follow the event. The costs categorisation under the Court's Guideline Scale is agreed at 2B. If costs cannot be agreed on this basis between the parties, then appropriate memoranda as to submissions will be required. Chevron will have 14 days from the date of this judgment to file any submissions in support of a

claim for costs. Mr Hong will then have 14 days thereafter to file any submissions in answer. The question of costs will then be dealt with on the papers.

M E Perkins
Judge

Judgment signed at 3.30 pm on 15 April 2020