

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2019] NZERA 525
3050893

BETWEEN

MARK STUART HENDRY
Applicant

AND

TRANSPORTATION
AUCKLAND CORPORATION
LIMITED
Respondent

Member of Authority: Jenni-Maree Trotman

Representatives: Mark Hendry, Applicant
Fiona McMillan & Abigail Shieh, counsel for the
Respondent

Investigation Meeting: 14 & 15 August 2019

Submissions and further Information Received: 16 & 19 August 2019 from the Applicant
19 August 2019 from the Respondent

Date of Determination: 11 September 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mark Hendry is employed by Transportation Auckland Corporation Limited (NZ Bus) as a bus driver. The parties' relationship was relatively harmonious until January 2018 when Mr Hendry was issued with a verbal warning and later a final written warning for the same incident. Thereafter a number of issues arose that Mr Hendry claims have resulted in his employment being affected to his disadvantage. He has been away from work since November 2018. He claims lost wages and compensation for the hurt and humiliation he has suffered. His claims are denied by NZ Bus.

[2] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made but has not recorded all evidence and submissions received.

Process

[3] All meetings that were attended by Mr Hendry with NZ Bus at times relevant to this meeting were recorded by him. He provided the recordings and a typed transcript to the Authority that I have viewed. I have also viewed 6 eastlight folders of documents. Some of the documents provided included correspondence between NZ Bus and its lawyers. NZ Bus has waived privilege in relation to those documents.

[4] I was also assisted by written statements and oral evidence that were provided by Mr Hendry, Johanne Anderson, Gavin MacLeod, Scott Wilson, Koriri Mitchell, Debra Branch and Matthew Jackson. Andrew Gillanders was also summonsed by the Authority to provide evidence which he did.

[5] As indicated to the parties during the course of the investigation, where the witness statements, and the oral testimony provided by the witnesses, differed from the recordings or documents I have preferred the later.

The Issues

[6] The issues identified for investigation and determination are:

- a. Did Mr Hendry suffer an unjustified disadvantage to one or more of his conditions of employment?
- b. If so, what remedies should be awarded?
- c. If any remedies are awarded, should they be reduced for blameworthy conduct by Mr Hendry that contributed to the situation giving rise to his grievance?
- d. Should either party contribute to the costs of representation of the other party?

Background

[7] On 11 February 2013 Mr Hendry commenced employment as a full-time bus operator with Transportation Auckland Corporation Limited at its North Shore depot. On 10 August 2016 Mr Hendry transferred from the North Shore depot to the Auckland City depot.

The verbal warning

[8] On 22 December 2017, NZ Bus received a complaint from a member of the public against an operator who was later identified as Mr Hendry. The Complainant had been on her phone and had nearly caused a number of accidents when she veered across the road. Fearing for the safety of his passengers and others, Mr Hendry pulled his bus to the side of the road, placed it in park but with the engine still running, and approached the Complainant's vehicle. He proceeded to open her passenger door and told her "you know the reason why you can't stay in your lane is because you're too busy with your mobile phone". He then returned to his bus with the Complainant yelling and swearing at him to come back and close her door. The Complainant, whilst admitting that she had swerved in front of the bus, alleged that Mr Hendry had screamed at her and hit an object from her hands.

[9] On 8 January 2018 Mr Hendry was asked to complete a report of his account of events which he did. I have reviewed this report. In addition, he provided NZ Bus with a text message that he sent to a family member shortly after the incident that recorded what transpired together with an oral recording he made on his phone within 20 minutes of the event.

[10] The following day Mr Hendry met with Johanne Anderson, Mr Hendry's duty supervisor, to discuss the complaint and hear Mr Hendry's version of events. After hearing his explanation, Ms Anderson provided Mr Hendry with a verbal warning not to leave his bus to engage with members of the public. Ms Anderson said she recorded the verbal warning in the "Coach Conversation Register", a register that is available online to all of NZ Bus' managers and human resources. Ms Anderson also agreed to secure the CCTV footage of the incident.

[11] Thereafter Ms Anderson spoke with Andrew Gillanders, the Regional Operations Manager. They agreed that Mr Hendry should be provided with performance coaching and a meeting would be convened to discuss this. It was also

agreed that they would issue him with a letter that set out the verbal instruction provided at the time that Ms Anderson had issued him with the verbal warning.

[12] On 10 January 2018 Ms Anderson wrote to Mr Hendry inviting him to a performance meeting. The letter stated that the intention of the meeting was to ensure that “we have a shared understanding of the performance requirements and expectations of your position”. The letter expressly provided that the meeting was not a disciplinary meeting.

[13] Mr Gillanders explained, in response to questioning from the Authority, that performance coaching is not normally undertaken where NZ Bus had elected to proceed with a disciplinary process. He said up until that time Mr Hendry had no disciplinary action taken against him by NZ Bus, was a good operator, engaged with what he was doing, and NZ Bus had taken him on as a tutor to train new bus operators as he was scoring well in all important areas.

[14] On 11 January 2018 Ms Anderson wrote to Mr Hendry confirming the verbal instructions she had previously provided. This letter required him “not to leave your bus to engage with any members of the public be they motorist or pedestrians.” While Mr Hendry did not accept he had done anything wrong, he agreed to abide by NZ Bus’ decision.

[15] As far as Mr Gillanders, Ms Anderson and Mr Hendry were concerned the issue of the 22 December 2017 incident was at an end. Ms Anderson confirmed to the Authority that she still considers a verbal warning and performance coaching was the appropriate course for NZ Bus to take.

The final written warning

[16] Had no further action been taken by NZ Bus in relation to the 22 December 2017 incident, matters may well have ended there, and the parties may not have found themselves in the situation they are today. However, that was not to be.

[17] While Mr Gillanders was on annual leave his position was filled by Gavin MacLeod. Mr MacLeod reviewed the 22 December 2017 incident and decided that an investigation needed to be undertaken and disciplinary action taken against Mr Hendry if it were found that he had engaged in misconduct. Mr Gillanders said that

he reviewed his emails whilst he was away and was concerned with the action being taken by Mr MacLeod but did not interfere.

[18] On 23 January 2018 Ms Anderson responded to the complaint, advising the Complainant that NZ Bus was commencing an investigation. This triggered an email response from the Complainant. This email enlarged on her earlier complaint, now advising that she was “scared witless by this man” and that he “was violent and aggressive”. She advised she had been left “mentally traumatised” and went on to advise that she was afraid to drive, had missed work, lost money due to mental trauma, and was “seriously out of pocket and am now faced with paying for counselling too”. The Complainant threatened to go to the NZ Herald with her story.

[19] On 26 January 2018 Mr McLeod spoke with the Complainant. He said he took no notes of this conversation. That same day, NZ Bus wrote to Mr Hendry asking him to attend a formal investigation meeting with it on 30 January with regard to its concerns that he had:

left your bus and opened the door of another motorist’s vehicle before making physical contact with them in an incident on Queen Street on the 22nd December 2017.

[20] The letter went on to indicate that NZ Bus had concerns that Mr Hendry had potentially engaged in serious misconduct and it would be seeking his response at the meeting. It advised it “may decide to take disciplinary action which could result in an outcome ranging from a final written warning to termination of your employment.”

[21] The formal meeting did not proceed on this day but Mr Hendry met informally with Mr McLeod. During this meeting Mr McLeod requested Mr Hendry to stop researching the Complainant online. Through his searches of the Complainant’s Facebook page Mr Hendry had ascertained evidence that he considered showed that her statements were false and had been emailing this information to Ms Anderson in support of his version of events. Mr McLeod also indicated that the issue for NZ Bus was that Mr Hendry had left the bus and engaged with a member of the public. He confirmed he would be reviewing the video footage of the event as part of his investigation.

[22] On 31 January 2018 the investigation meeting took place. Present at this meeting were Mr Hendry, his Union Representative, an HR Manager and Mr McLeod. During this meeting the parties discussed the events that took place on 22

December. Mr Hendry was advised that NZ Bus would be preparing an investigation report and that he would be suspended on pay, in accordance with the terms of the Collective Agreement (CA), while that investigation was undertaken.¹

[23] On 31 January 2018 Mr McLeod spoke with the Complainant again. During this conversation she provided him with additional information. He said he took no notes of this conversation nor did he relay her comments, which included a new allegation that Mr Hendry had leaned through the door, to Mr Hendry for comment.

[24] On 8 February 2018 a disciplinary meeting was held. NZ Bus advised Mr Hendry that it considered his actions on 22 December amounted to serious misconduct and that it was issuing him with a formal warning that would remain valid for 12 months. This was later formalised in a letter that provided:

Your behaviour has been deemed to be in breach of the following:

NZ Bus Code of Conduct “we are respectful” and we “act professionally”.

NZ Bus Operator Manual 4.2 Keep Calm on the Road – “Try and remain calm when other drivers are driving irresponsibly”.

Duty of Care – Leaving your bus unattended with passengers on board to engage another motorist.

Mr Hendry is deemed a good performer

[25] On 29 March 2018 Mr Hendry had his performance meeting with Ms Anderson. I have reviewed the transcript of that meeting that shows overall he was rated as a “good performer”. During this meeting Ms Anderson told him she considered he was very up to date with his hazard reporting and completion of forms for which he received an “outstanding” score. He also received an “outstanding performer” score for compliance with health and safety requirements. In terms of customer service Ms Anderson noted he was a “good performer”. In relation to attendance she recorded that this did not meet expectation.

Mr Hendry reports a health and safety concern

[26] On 10 April 2018 strong winds tore down around 10 metres of fibrolite sheeting from the upper part of NZ Bus’ depot walls. The debris landed in the entrance way of the depot and was driven over by buses entering the depot resulting in

¹ Collective Agreement, clause 47.9(d).

a large amount of dust. Mr Hendry was concerned that the fibrolite sheets contained asbestos and that white powder was coming off the sheets and being circulated around the depot. He raised his concerns with Ms Anderson and Jonathan Moss, the Health and Safety Officer.

[27] Receiving no response, and following advice from the former Depot Manager, Mr Hendry completed a Hazard Report on 12 April 2018. This was emailed to Ms Anderson that same day asking for the material to be cleaned up and was then sent to Mr Moss. Mr Hendry also spoke with Ms Anderson about his concerns.

[28] On 13 April 2018 WorkSafe arrived on site to inspect the workplace.

[29] On 18 April 2018 Mr Hendry contacted Ms Anderson again. He expressed concern that the white powder had gotten onto his shoes when he had to pass through the area that morning. He asked again what was happening with the clean-up. Ms Anderson responded advising that Mr Moss had the results and wanted to talk to him. She advised that she didn't think it was asbestos but hadn't been told either way. Mr Hendry queried why he could not be given a simple yes or no rather than talking to Mr Moss in person.

A decision is made to remove Mr Hendry's role as a tutor

[30] Around this time Mr Gillanders had a conversation with Ms Anderson about Mr Hendry's role as a tutor. He explained to Ms Anderson that tutors had to be role models for their students and he considered Mr Hendry "simply had too many disciplinary issues with NZ Bus for it to be appropriate to continue his role' as a tutor. He told the Authority that this understanding, together with his suspicion that Mr Hendry had made a complaint to WorkSafe about Asbestos, led him to the decision to stop Mr Hendry being a tutor.

[31] On or about 18 April 2018 Mr Gillanders issued instructions that Mr Hendry was not to be provided any more tutoring work, and he was to stop working with the student currently assigned to him. Mr Hendry heard about the removal of his duties from a Leading Operator. There was no meeting or discussion with Mr Hendry before his duties as a tutor were removed.

NZ Bus decides to investigate Mr Hendry's actions in reporting a health and safety concern

[32] On 20 April 2018 NZ Bus sent a letter to Mr Hendry inviting him to attend an investigation meeting with regards to “the company’s concerns about the recent asbestos situation you reported at the depot earlier this month”. The letter went on to advise that, depending on his responses, it “may be necessary to convene a formal disciplinary meeting, which may immediately follow the investigation meeting or may occur at a later date”. In terms of the specific concerns it said:

Our concerns are potentially misconduct and the purpose of the meeting is to investigate the matter further. The Company views this matter very seriously and may decide to take disciplinary action which could result in an outcome ranging from verbal counselling to termination of employment.”

[33] NZ Bus organised for Scott Wilson, the Regional Operations Supervisor, to conduct the meeting. Prior to the meeting Mr Wilson said he had a conversation with Mr Gillanders and another with Mr Moss. He said he was tasked with “finding what, if anything, Mr Hendry had done outside of the Health and Safety Policy”. Aside from a concern that Mr Hendry had reported the incident to WorkSafe, he said he knew of no other concerns. He said he was informed that Mr Hendry was on a final warning.

[34] On 30 April 2018 the investigation meeting took place. During this meeting Mr Hendry’s Union Representative sought clarity on the purpose of the meeting and particularly what it was that NZ Bus had to investigate. Mr Wilson told him that the purpose of the meeting was to investigate whether the actions Mr Hendry took were “correct and appropriate”. He advised that as Mr Hendry was on a final written warning, if it was discovered that he had done something wrong, termination was a potential outcome.

Mr Hendry raises a personal grievance

[35] Realising the implications of the final written warning to his future at NZ Bus, and believing it maybe trying to find reason to terminate him, Mr Hendry raised a personal grievance relating to the written warning that same day.

[36] On 4 May 2018 NZ Bus sent a letter to Mr Hendry advising that no further action would be taken in regards to its investigation into his health and safety complaint. However, in future, Mr Hendry was to communicate incidents in writing

to his duty supervisor rather than through email. Although not the usual process followed by drivers, Ms Anderson required him to complete a driver's report, have it stamped by the counter on the date it was provided and then hand it to the Duty Supervisor (herself).

No response to Mr Hendry's first personal grievance letter

[37] On 9 May 2018 Matthew Jackson, NZ Bus' HR Manager, acknowledged receipt of Mr Hendry's personal grievance. He advised Mr Hendry that he was in the process of getting up to speed, having just started with NZ Bus, and hoped to be in a position to provide a reply as soon as practicable.

[38] By 11 June 2018 Mr Hendry had not received a response. This was despite sending Mr Jackson several reminder emails.

[39] On 11 June 2018 Mr Hendry phoned Mr Jackson. As with other conversations, the conversation between the gentlemen was recorded and I have reviewed the transcript. Mr Hendry explained to Mr Jackson the effect that the written warning, and NZ Bus' failure to respond to his personal grievance, was having on his health. Mr Jackson told Mr Hendry that NZ Bus was committed to reviewing the matter.

[40] On 25 June 2018 Mr Hendry emailed Mr Jackson again. He referred to the lack of response and asked him to email this to him as he was away from work.

Mr Hendry is assaulted while driving his bus

[41] On 16 June 2018 Mr Hendry was assaulted by a member of the public whilst performing his duties as a bus operator. I have viewed the video footage of this incident. It shows the Assailant being asked by Mr Hendry to move his vehicle out of the bus stop. When he refused Mr Hendry was required to pull into the bus stop at an awkward angle. Subsequently the Assailant approached Mr Hendry's driver's window, spat in his face and struck him several times in the chest. Mr Hendry radioed in the incident, completed his run and then returned to the depot. He declined medical assistance and an offer to take him to A&E.

[42] Upon returning to the depot Mr Hendry was asked to complete an accident form and an incident form before going to the Police and the Doctor. He declined.

He said he was not in the frame of mind to complete paperwork at that time and just wanted to leave.

[43] At the end of their shift, the Leading Operators completed a shift report that addressed the incident. This was emailed to all of the duty supervisors. They also contacted Mr Moss, the Health and Safety Officer, and requested the CCTV footage of the incident.

Mr Hendry contacts NZ Bus with details of the assault

[44] On Sunday 17 June 2018 Mr Hendry emailed Mr Mitchell. Mr Hendry said he had been told that Mr Mitchell was his interim duty Supervisor while Ms Anderson was on leave. He provided him with a copy of correspondence from the Police confirming he had lodged a complaint, a copy of the Police report and advised:

Police have your contact details and will be after the footage from the bus.

They have referred me for victim support.

I can't take this recent endless cycle of incidents. Nor this apparent feeling that I somehow instigate them all

Constant traumatised feeling

The incidents at the depot this year have gone a long way to me losing confidence in how I present myself at work

Will send you my police report draft and video link

[45] Mr Mitchell viewed the Shift report on 18 June 2018. He said there was not often an assault of the severity discussed in the report and he had no experience dealing with incidents of that magnitude. He said at that point no one had told him he was acting as Mr Hendry's supervisor in Ms Anderson's absence. He said he therefore ignored Mr Hendry's emails and took no action to follow up with him to enquire as to his health or to ask him what had happened. He said he understood Mr Moss would have contacted him as he was the one who had been contacted by the Leading Operators after the assault.

[46] On 22 June 2018 Mr Hendry emailed Mr Mitchell a copy of the medical certificate issued by his Doctor.

[47] That same day, Mr Gillanders emailed Mr Mitchell requesting that he follow up on the video footage of the incident as well as asking Mr Hendry for a Work

Incident Report (WIR) and an incident report. He also asked him to ask Mr Hendry to meet with NZ Bus. Mr Mitchell prepared an email to go to Mr Hendry but it was inadvertently not sent.

[48] On 23 June 2018 Mr Hendry completed a request for sick leave.

Mr Hendry's Union Representative discloses confidential information to NZ Bus that leads Mr Jackson to form a negative opinion of Mr Hendry

[49] On 24 June 2018 Mr Hendry corresponded with his Union Representative. This Union Representative did not provide evidence and therefore I shall refer to him as Mr A. There can be no doubt that Mr Hendry did not intend his message to be seen by NZ Bus. The contents of the message could be viewed as derogatory towards Mr Jackson.

[50] Without Mr Hendry's consent, Mr A forwarded this message to Mr Jackson. Mr Jackson said, in hindsight, he formed a negative view of Mr Hendry from that point on.

[51] I also viewed another email that Mr A had forwarded to Mr Gillanders in January that year that relayed comments Mr Hendry had made about his Duty Supervisors. This email was marked confidential. Mr Hendry said he did not give Mr A permission to send this email. He also said he was not informed by either Mr A or NZ Bus that these emails had been sent. He did not discover they had been provided until later in 2018 following a general privacy request.

Mr Hendry follows up on non-payment of wages while on sick leave following his assault

[52] On 25 June 2018 Mr Hendry emailed Mr Mitchell asking him a number of questions. Particularly, what was happening with his pay that week, whether Mr Mitchell had secured the bus footage and had passed this on to the police, whether his assailant had called in about any damage to his vehicle and whether anyone had spotted any damage to his vehicles as he had taken photos that night and couldn't see any damage.

[53] On 26 June 2018 Mr Mitchell responded advising Mr Hendry that when ACC was involved, pay issues fall to the hands of Well NZ. He referred to an earlier email

and advised that filling out the forms is a necessary part of having ACC accepted and wages paid by Well NZ. In terms of his other queries Mr Mitchell advised the footage had been requested twice without any pages being uploaded for viewing, they had not heard anything from the Assailant, and no one had viewed any damage to the Assailant's vehicle.

[54] Contrary to these representations, the CCTV footage had been obtained by NZ Bus and was held by Mr Moss. In answer to questions from the Authority Mr Mitchell said he was told that the CCTV footage of the incident was not available. He said no one would tell him why despite his queries.

[55] Thereafter Mr Mitchell sent Mr Hendry a copy of the earlier email that he had inadvertently not sent to him on 22 June. This advised that NZ Bus had received an ACC injury claim form for the incident on 16 June and asked him to complete the attached forms. The email went on to advise that a meeting was also required to discuss the incident, as part of the standard procedure followed when processing an ACC injury claim.

[56] Mr Hendry responded on 27 June 2018. He expressed concern that Mr Mitchell had failed to send him the forms until his payday meaning he was not going to be paid. He reiterated that NZ Bus already had his ACC Claim/Well NZ Claim, the Police Report, his medical certificate, the Bus Camera Footage and his personal camera footage. He queried why he had to now complete the form when the information was contained in these documents. He went on to express concern as to why he was being called into a meeting to discuss his ACC Claim when this had not occurred previously when he had an ACC injury. He said he was prepared to meet with Mr Mitchell in a public area but not behind closed doors because it "gives me the shakes" and he was traumatised by the years' events. That same day he sent Mr Mitchell the completed incident report.

[57] On 28 June 2018 Mr Hendry emailed Mr Mitchell advising that he had completed the incident report and querying why he could not be paid. Mr Mitchell responded advising that as ACC was paid by the government, it required all the forms requested to be completed including a WIR form. He advised that when these requirements were met, these would be provided to WellNZ and ACC can be processed. Despite what he said in this letter, under questioning, Mr Mitchell

acknowledged that the completion of the WIR form was something that he should have done but, at the time, he didn't know this.

[58] On 29 June 2019 Mr Mitchell collated all of the reports and sent these through to Mr Moss for on-sending to WellNZ for processing of ACC.

The second personal grievance and the bullying complaint

[59] On 29 June 2019 Mr Hendry emailed Mr Mitchell advising that he felt he was being bullied. He reiterated that he had not received the necessary forms to obtain ACC cover until 10 days after the event, NZ Bus was saying it had lost the camera footage, and no one had followed up to see if he was okay after the assault. He said he felt that he was being forced back to work as he had had no income for two weeks. In a subsequent email he asked him to advise the procedure to lay a complaint over workplace bullying and intimidation.

[60] On 1 July 2018 Mr Hendry sent a 13-page detailed complaint letter that contained allegations of bullying to NZ Bus' Privacy Officer who is based in Wellington. The complaint addressed events from the time of his verbal warning in January 2018 up to the date of the complaint. Mr Hendry requested that an external independent assessment of his complaint be undertaken and asked for his complaint to not be passed to anyone at the Auckland City Depot as he "anticipate[d] filing a complaint like this will only make my work life harder at City Depot but I don't know what to do". Mr Hendry said he felt that his complaint fell within the definition of "overt bullying" particularly that he had had "unjustified threats of dismissal or other disciplinary procedures" and "punishment imposed without reasonable justification".

[61] On 2 July 2018 Mr Hendry filed an addendum to his personal grievance. The complaint related to the events following his health and safety complaint regarding suspected asbestos which culminated in the investigation meeting of 30 April. In addition, he complained about the removal of his role as a tutor, the events relating to the final warning and raised concerns about a negative work environment. He also complained of acts of bullying and requested and sought an external investigation of his complaints. His letter reminded NZ Bus that he was yet to receive a response to his first personal grievance that he sent on 30 April.

[62] That same day, Gordon Tait, NZ Bus' HR Manager based in Wellington, emailed Mr Gillanders and Mr Jackson expressing concern about Mr Hendry's situation. He stated that there were some lessons to learn but for now they needed to get the principles sorted. He said that Mr Hendry's duty supervisor needed to take accountability for the saga and develop a planned approach. In his assessment, he said the matter could end up with the Employment Relations Authority and NZ Bus "would not look good if this was the situation". He went on to set out the issues that needed to be resolved and indicated that Mr Hendry's Duty Supervisor needed to organise for him to be paid.

Mr Hendry returns to work and is placed on "special leave"

[63] On 3 July 2018, being the expiry of his medical certificate, Mr Hendry returned to work. He said he could not afford to remain off work any longer.

[64] At the end of his shift that day Mr Hendry was provided with a letter that advised NZ Bus wished to attend mediation. It went on to advise:

You have raised concerns with us about being in the workplace at this time and we encourage you to seek support and do not require you to be at work during the period between now and the date when mediation is set down. We will treat this period as special leave and you will be paid in full for the period between now and then. For the avoidance of doubt you are not suspended from the workplace however if you wish to return to work during this period, we will require medical clearance and a meeting to agree a return to work programme.

[65] On 4 July 2018 Mr Hendry responded to Mr Jackson's letter expressing stress at being placed on special leave and expressing concern about the financial implications of this. He followed this up with an email to Mr Jackson on 12 July saying that regardless of the outcome of mediation, it was important that NZ Bus make its own determination into the issues he had raised.

[66] On 13 July 2018 an exchange of correspondence took place between Mr Jackson, Mr Moss and Mr Mitchell where Mr Moss confirmed the location of the CCTV camera footage of the assault. Despite this, NZ Bus did not provide it to Mr Hendry until early 2019.

[67] On 16 July 2018 the parties attended mediation.

[68] On 18 July 2018 Mr Hendry emailed Mr Jackson, advising, at the beginning of a multi-page email:

I have been told I am to await notification from you to attend a medical assessment that you will appoint and I am to pass that assessment and return to work or at that point your payments to me for your imposed “special leave” will end.

Is that correct? Cos I am sitting here waiting and my wife wants me out of the house? This is not a relaxed time for me.

When and where do you want me to undergo medical assessment?

[69] Mr Hendry said he wanted to get back to work. He had only agreed to be on special leave until the mediation. NZ Bus was not paying him what he would ordinarily receive and he was under significant financial pressure.

[70] Mr Jackson said NZ Bus required Mr Hendry to remain on special leave due to health and safety concerns. He acknowledged there were no rules or policies in place for “special leave” and it was not an option agreed in the Collective Agreement.

NZ Bus considers its options to end the relationship with Mr Hendry

[71] On 19 July 2018 Mr Tait emailed Mr Gillanders, Mr Jackson and others recommending that NZ Bus engage legal assistance to determine appropriate options for both Mr Hendry and NZ Bus.

[72] On 25 July 2018 Mr Jackson emailed NZ Bus’ lawyers. This email, and the lawyer’s response dated 31 July 2018, was provided by NZ Bus to Mr Hendry following privacy requests. It was then produced by Mr Hendry in his bundle of documents provided to the Authority. Those parts of the email, and the letter, that included references to mediation were redacted but otherwise the email and the letter were complete. NZ Bus acknowledged it had waived its right to privilege in relation to the email and letter of response from its lawyers.

[73] Mr Jackson’s email of 25 July 2018 asked a number of questions including, if NZ Bus went down the path of medical retirement, whether it would be liable for constructive dismissal and what the risks were. It queried what would happen if the medical assessment said he was fit for work. Later in the email Mr Jackson recorded NZ Bus’ belief that the employment relationship was deteriorating and becoming untenable however it wanted to manage the risk and Mr Hendry’s wellbeing at the same time.

[74] Later that day Mr Jackson emailed Mr Hendry. He acknowledged his communications and advised that they were working through that information before

responding. He indicated that NZ Bus would be in a position to reply to him the following week but in the meantime would continue to pay his wages and he would continue to be on special leave.

[75] On 31 July 2018 NZ Bus' lawyers wrote to NZ Bus. Relevant to this investigation was the following advice:

NZ Bus consider its options for ending employment as set out below and in light of the risks identified. At this point, termination for medical incapacity would be legally unjustified because of the terms of the collective agreement and termination after a disciplinary process for the 16 June incident carries high legal risk. If employment is not terminated for either of these reasons, subject to medical clearance, Mr Hendry would likely be able to return to work. In that case, NZ Bus would monitor Mr Hendry closely.

[76] The letter went on to outline three options for ending Mr Hendry's employment. The first was that NZ Bus could initiate a disciplinary process in relation to the incident on 16 June in that "his actions could be seen as a breach of his final warning because he left his bus to engage with a member of the public and/or did not follow other protocols." However, it cautioned that a dismissal on this ground

would be difficult to sustain ... if legally challenged because of the delay in investigating and because, on the facts we are aware of, Mr Hendry's actions probably do not amount to serious misconduct. It is also possible that if the dismissal was found to be unjustified, the remedy of reinstatement may be ordered by the Authority.

Of course, NZ Bus may be prepared to take a risk and commence a disciplinary process with a view to terminating Mr Hendry's employment and/or putting pressure on him to reconsider his employment.

[77] The second option was to terminate on the basis of medical incapacity. The letter went on to discuss the process and then advised:

... it may well be that the medical practitioner will certify Mr Hendry as being fit for work immediately or after a certain time or after taking medication. In that event, he will be able to return to work at some point and NZ Bus would need to closely monitor his actions.

[78] The third option was "to make an offer to Mr Hendry that includes termination of employment in return for a payment. If an agreement is reached, this option would provide finality".

[79] In response to questioning from the Authority, Mr Jackson said that around this time he had a conversation with Mr Gillanders and Mr Gillanders' manager where they confirmed that they wanted to terminate Mr Hendry's employment. He said

from the point of receiving the lawyer's letter on 31 July "steps taken were to try and terminate [Mr Hendry's] employment based on the options provided". In response to a re-examination question as to whether there was a decision made to pick a path to end Mr Hendry's employment, Mr Jackson responded "No, but I was exploring each of the options put forward to us for termination".

NZ Bus replies to Mr Hendry's personal grievance

[80] On 8 August Mr Jackson asked Ms Anderson to summarise what was said at the meeting with her and Mr Hendry about a verbal warning. She replied:

The verbal warning was just that I (being new) didn't know we had to have a verbal warning written down & advised him not to interact with members of the public, when this failed a lawful instruction was dictated by Gary & Andrew which was typed up by me and then issued. I do not have a copy of the verbal warning.

[81] Notwithstanding this email, and Ms Anderson's Coaching Conversation Notes being available to Mr Jackson that showed she had issued a verbal warning, on 13 August Mr Jackson responded to Mr Hendry's personal grievances on behalf of NZ Bus. In response to his claim regarding the written warning, NZ Bus responded:

Although Jo Anderson (Duty Supervisor) spoke to you informally about your conduct and wrote to you about what to do in future, we do not accept that you were issued with a "verbal warning" or any disciplinary sanction prior to the warning of 9 February 2018.

[82] The letter went on to acknowledge Mr Hendry's complaint of bullying and advised that NZ Bus had appointed someone to conduct the investigation. As that person did not provide evidence I shall refer to her as the Investigator. The letter also noted a requirement for Mr Hendry to be medically examined by a doctor and an assessment undertaken as to his fitness for work. He was advised that once NZ Bus received this opinion as to his fitness for work they would discuss the next steps with him.

NZ Bus appoints an investigator

[83] On 15 August Mr Hendry received a call from Mr Tait. I have reviewed the transcript of that conversation. Mr Tait advised Mr Hendry that the Investigator had been appointed. In answer to queries from Mr Hendry, Mr Tait told him that the Investigator had "no association with the company", was "completely independent" and had "never had any contact with NZ Bus in the past".

[84] On 15 August 2018 Mr Hendry wrote several emails to Mr Jackson raising concerns about the payments he was receiving “while I remain in this exile you have forced upon me”. He maintained that the payments “continue to fall below my usual earnings” and were “choking me financially”. He said he felt NZ Bus was doing this as “a way to punish me” and to keep him stressed with a view to making him unfit for work. He said he felt this was on-going bullying and said he could not “withstand this kind of financial pressure [and therefore] need to come back to work now regardless of any other concerns”. He asked Mr Jackson to provide him with the address of their medical provider so that he could go there that day and be back at work the next day. He also made several phone calls to Mr Jackson. He received no response.

Mr Hendry discovers the Investigator has connections to Mr Jackson and NZ Bus

[85] Over the weekend that followed, through independent research, Mr Hendry became aware that the Investigator was Mr Jackson’s business partner. Searches of the Companies office website revealed the Investigator was a joint director and shareholder of a business with Mr Jackson. Mr Hendry also viewed a photograph that the Investigator had liked on Facebook of Mr Jackson and Ms Anderson that was taken at the NZ Bus Depot. Mr Hendry said that when he asked the Investigator about this she told him that she had been working at the Depot helping Mr Jackson. Mr Hendry felt the engagement of this Investigator, and the misleading statement made relating to her being independent, was a breach of good faith and raised this with Mr Jackson and others within NZ Bus on the morning of Monday 20 August.

[86] During the investigation meeting, Mr Jackson confirmed that the Investigator had been working for NZ Bus, in the HR Department, at the time Mr Hendry had raised his first personal grievance and in the time that followed. He further acknowledged she was his business partner. He said Mr Tait was aware of all of this as he had discussed it with him before the Investigator had been appointed and Mr Tait was also involved with the Investigator’s invoicing. In response to questioning as to the Investigator’s knowledge of NZ Bus’ desire to terminate the relationship with Mr Hendry, Mr Jackson said “I am not aware if she knew about our objective to terminate but she is a senior HR consultant so could have drawn that conclusion based on the sheer volume of information when we were going through the complaint”.

[87] Later that morning Mr Hendry was contacted by an occupational therapist who advised him that she had been asked by NZ Bus to have a meeting with him to discuss

how she could assist in planning a safe and sustainable return to work. Mr Hendry responded advising that NZ Bus was not returning his calls, advising of his discovery of the Inspector's lack of independence, and asking that she speak with NZ Bus first. He reiterated that he "desperately need to get my income up" and that he felt he was "being financially choked into submission".

Mr Hendry objects to the Investigator

[88] Over the days that followed Mr Hendry sent many more emails to NZ Bus in an attempt to obtain a response. He asked them why they were not treating him in good faith, or with honesty and respect. He recorded his feelings that he was worth "no respect at all" and stated that he "thought you people were better than this".

[89] On 20 August Mr Jackson responded reiterating that the Investigator had been appointed and if Mr Hendry did not assist her then she would proceed based on his written complaint. He also expressed concern about being sent emails late at night and instructed Mr Hendry to only send emails during office hours, Monday to Friday. He was informed that any breach of that instruction may result in disciplinary action.

[90] On 24 August Mr Jackson wrote again to Mr Hendry advising:

Your email confirms that you will not be dealing with [the Investigator] in her investigation of your bullying complaints. We take this as confirmation that you do not wish any information regarding yourself to be provided to [the Investigator]. On that basis [the Investigator] will continue with her investigation as best she can based on your complaint. [210]

[91] Mr Hendry objected strongly to the stance taken by NZ Bus. A review of his emails show that he was becoming increasingly upset. He was sending multiple emails, which at times extended over several pages, as he tried to reiterate his concerns. His emails advised that "I forbid you to give any of my personal information to [the Investigator]" and noted that he thought "an important step forward would [be] for you to adhere to the NZ Bus Code of conduct and refrain from harassing, bullying and mental torturing me". He advised that he had made a complaint to the Privacy Commissioner about NZ Bus' failure to respond to his privacy information requests and advised he considered their response to be further acts of bullying and those actions were resulting in a decline in his mental health.

The Investigator is instructed by NZ Bus to proceed with her investigation

[92] Notwithstanding Mr Hendry's objections, NZ Bus instructed the Investigator to proceed with her investigation.

[93] On 4 September 2018 the Investigator issued her report. This concluded Mr Hendry had not been bullied. While she was not tasked with providing recommendations, her report concluded with the following recommendation:

Mr Hendry has in his complaint document repeatedly described his lack of faith in NZ Bus and describes the relationship as having been destroyed for him by the companies alleged actions. It is difficult to see how the relationship can be repaired under these circumstances as it is likely in the opinion of the investigator that Mr Hendry may continue to find the actions of NZ Bus unreasonable despite what others in the same circumstances may find.

While the investigator has failed to find bullying in all instances or has been unable to provide opinion due to the constraints of the investigation, it would appear that Mr Hendry is currently suffering physical and mental distress. It is recommended that NZ Bus work with Mr Hendry to see that he has access to physical and psychological support and that any return to work does not occur until both his physical and psychological state improves to the satisfaction of duly qualified medical professionals.

NZ Bus refers Mr Hendry to a psychologist

[94] That same day Mr Jackson emailed Mr Hendry advising that NZ Bus was attempting to establish whether he was fit to return to work. He addressed concerns about rosters and concluded by advising that Mr Hendry was not "to attend work or the depot until such time as you receive medical clearance to be back in the workplace".

[95] On 4 and 7 September 2018 Mr Jackson wrote to Mr Hendry referring him to a Psychologist to enable NZ Bus to establish whether or not he was fit to return to work and, in particular, to assess his mental well-being. It advised that the reasons this was needed was because of the incident on 16 June 2018, the bullying complaint lodged on 1 July 2018 where he said he felt depressed and was a "nervous wreck" and a mess and that he needed psychiatric help, and lastly due to a recommendation made by the occupational therapist. He was told that until this medical assessment was undertaken he could not return to work. The letter went on to advise that failure to attend the medical assessment without good cause would result in NZ Bus commencing a disciplinary process.

Mr Hendry raises another personal grievance

[96] On 13 September a copy of the Investigator's report was provided to Mr Hendry. Following receipt of that decision, Mr Hendry raised a third personal grievance. This was 39 pages long. It contained details of a variety of grievances, some of which were repetitive of earlier grievances, but also addressed matters of concern from the time he raised his second personal grievance. This included how NZ Bus was conducting itself in terms of the investigation of his personal grievances and dealings with him, as well as him challenging being on special leave.

[97] In terms of special leave, Mr Hendry set out his concerns over a number of pages. He pointed out that he had not agreed to take special leave, there was no contractual right to place him on special leave and that he had done nothing wrong. He said that in terms of NZ Bus' claim that he did not feel safe at work, it was NZ Bus not paying him his ordinary wages that was causing him the most stress. He also pointed out that he was ready and willing to see the doctor they specified and expressed concerns that it had taken NZ Bus 2 months since mediation to arrange this.

[98] On 18 September 2018 NZ Bus responded advising, in summary:

- a. To the extent that Mr Hendry had claimed that the final warning constituted bullying, the claim was out of time and NZ Bus did not consent to Mr Hendry raising it out of time;
- b. In terms of the other allegations of bullying, the appropriate course of action was to investigate. NZ Bus had appointed the Investigator to conduct the investigation but as Mr Hendry had declined to co-operate, NZ Bus still needed to investigate his bullying complaint. It advised Ms Branch (NZ Bus' new HR Manager) had been appointed to be the Investigator.
- c. NZ Bus did not accept Mr Hendry had been disadvantaged by a breach of the NZ Bus Code of conduct or other NZ Bus Policy documents.
- d. The instructions issued by NZ Bus were lawful and reasonable and in accordance with its general right of direction.

NZ Bus requires Mr Hendry to return to work after he is deemed fit to work

[99] On 26 September 2018 the Clinical Psychologist engaged by NZ Bus to review Mr Hendry provided their report to NZ Bus. This report indicated “no current clinical diagnosis” and went on to advise that Mr Hendry was fit to return to work however, “given the present dead-lock between himself and his employer, these employment matters would presumably need to be resolved before this occurred.”

[100] Despite the Clinical Psychologist’s recommendation, NZ Bus took no steps to resolve the employment matters before Mr Hendry returned to work. Instead, on 7 October 2018, NZ Bus wrote to Mr Hendry, via his representative, proposing a return to work on 15 October 2018. The letter went on to note his concerns about bullying and to record that it had appointed an external investigator to consider these concerns but the extent to “which she could investigate was heavily constrained by the constraints you imposed regarding access to your personal information”. It went on to confirm that it had offered to undertake a further investigation using a different investigator (Ms Branch) provided Mr Hendry was willing to allow her to have more comprehensive access to information. It recorded that “to date you have not yet confirmed whether you will do so, but the offer remains available”.

[101] Mr Hendry did not receive this correspondence. On 15 October a further copy was sent to his representative. Ms Branch also tried to call Mr Hendry directly.

Mr Hendry returns to work

[102] On 5 November 2018 Mr Hendry returned to work. He was directed to undertake some refresher training and then commenced his usual role. No meetings were held with him to discuss his concerns until 19 November.

[103] On 19 November Mr Hendry met with Ms Branch and Ms Anderson. During that meeting he recounted the events over the previous year. Ms Anderson acknowledged that she did provide Mr Hendry with a verbal warning for the incident on 22 December 2017. From my review of the recording of this meeting, it was relatively harmonious and lasted over 2 hours.

[104] On 21, 22 and 23 November Mr Hendry emailed Ms Branch requesting copies of the information he had repeatedly requested from NZ Bus since June 2018 under the Privacy Act. He also phoned her several times. Ms Branch acknowledged to the

Authority that she had ignored his contact, saying that she did so because she understood all contact was to be with his Advocate.

The events on 23 November 2018

[105] On 23 November, having received no response from Ms Branch, Mr Hendry decided to go into the office and speak with Ms Branch about his privacy request. What transpired is in dispute. Ms Branch maintains that Mr Hendry confronted her in an aggressive manner, standing very close to her and breathing hard. She said that although she asked him to leave she could not get him out of the office and, at one point, was concerned that he was going to start behaving violently after he became agitated and began speaking loudly. She said she didn't want to respond to his queries because she didn't want to aggravate him.

[106] Mr Hendry denies this. He said he was upset that his privacy request had not been responded to and conveyed this to Ms Branch. He told her he felt he was being bullied and harassed by her and queried why she was not returning his calls. Ms Branch asked him to leave which he agreed to do. He then asked front counter whether he was to continue on with his shift. After speaking with Ms Branch the counter staff advised him that Ms Branch did not like being "put on the spot" but had advised he could continue with his shift if he wished.

[107] Having listened to the recording taken of the conversation on 23 November, I prefer Mr Hendry's account of the events on this day. Had he been in such a highly agitated and aggressive state as described by Ms Branch, and posed a threat to the safety of others, then it is more likely than not that Ms Branch would not have left the decision as to whether he worked that day up to him. It is also likely, if events occurred as Ms Branch portrays, that a disciplinary investigation would have been convened in the nine months that have followed. It was not.

NZ Bus requires Mr Hendry to take "special leave"

[108] On or about 26 November 2018 NZ Bus requested Mr Hendry to take paid special leave leading up to a planned second mediation. He agreed if they paid him his ordinary wages. Having not received a response he attended work on 27 November. He was told that all of his shifts were covered.

[109] Mr Hendry then met with Mr Gillanders. He reiterated that he did not want to take special leave as he could not afford to do so. Mr Gillanders agreed to discuss this with Ms Branch and revert back to him the following day.

[110] Mr Gillanders said he conveyed Mr Hendry's views to Ms Branch. He said she told him that due to Mr Hendry's aggressive and threatening behaviour on 23 November she was placing him on special leave and would not have him in the building. He said he was instructed that he was not to communicate with Mr Hendry any further and all communication was to go through Ms Branch. It was his understanding that Mr Hendry was placed on leave because of the events of 23 November.

[111] Mr Gillanders and Ms Branch confirmed that no steps were taken to investigate the events of 23 November before the decision was made to remove Mr Hendry from the workplace nor in the months that have followed.

Parties sign a Memorandum of Understanding

[112] On 21 December 2018 the parties executed a Memorandum of Understanding that included an agreement that Mr Hendry would "remain on special paid leave until he returns to work". In consideration of this agreement NZ Bus agreed to pay him an amount of \$1,281.79 (gross) per week. Records that I have viewed show that NZ Bus has adhered to this agreement.

NZ Bus decides to investigate incompatibility

[113] In March 2019 NZ Bus raised concern that Mr Hendry was incompatible with the workplace. It advised that it had appointed an Investigator to meet with witnesses of NZ Bus to see if they could provide examples of this. It indicated copies of their witness statements would be provided to him before he spoke with the Investigator.

[114] To date, Mr Hendry has been reluctant to meet with the Investigator because of the issues addressed in this determination. However, he has provided the Authority with his undertaking to do so following the issue of this determination should NZ Bus still wish to proceed with that course of action.

NZ Bus provides CCTV footage relevant to police prosecution

[115] On 2 April 2019 Mr Hendry received the CCTV footage of the incident on 16 June 2018.

[116] After enquiries made with the Police Mr Hendry discovered that the Police had not been provided with this footage. Email correspondence I have viewed from the Constable involved with that investigation records:

I will be escalating this with NZ Bus as clearly it is not acceptable that I didn't receive these months ago or even after a production order.

[117] The Police Constable subsequently advised in May and June 2019 that he had been in contact with NZ Bus and advised it of potential penalties of failing to comply with a production order. Its second reminder prompted the provision of the footage.

Human Rights Review Tribunal finds NZ Bus breached principle 6

[118] On 3 April 2019 the Human Rights Review Tribunal found that NZ Bus had breached Principle 6 – s 66(4) of the Privacy Act by failing to initially respond appropriately to Mr Hendry's request for personal information made on 16 August 2018.

The current position

[119] Mr Hendry continues to remain away from work. He reiterated to the Authority a desire to return to work as soon as possible.

Issue One: Unjustified disadvantage

The Law

[120] Under s 103(1)(b) an employee may commence a personal grievance claim while still employed or after the employment has terminated. This is if one or more of the conditions of employment has been affected to the employee's disadvantage by an unjustifiable action by the employer.

[121] The onus will initially be with the employee to establish that their employment condition(s) have been affected to their disadvantage. The burden then shifts to the employer under s 103A to establish that their actions, and how they acted, were what a fair and reasonable employer could have done in all the circumstances at the time

the action occurred. This will usually involve establishing that there was good cause for the employee's condition(s) of employment being affected, and that it was handled in a procedurally fair manner.

[122] Relevant evidence to be considered in an unjustified disadvantage grievance is not necessarily confined to events in the 90 days preceding the raising of the grievance.² That is because disadvantageous acts or omissions in employment frequently do not occur in isolation but as part of a continuum of conduct that needs to be understood to determine whether an employee has suffered an unjustified disadvantage within the 90 day period.

The disadvantage claims

[123] Mr Hendry was not represented for most of this investigation. His statement of problem, and amended statement of problem, contains an extremely large volume of material. His amended statement of problem was 37 pages long, he filed a reply to the Respondent's Statement in Reply that was 19 pages, his witness statement was 125 pages long and he filed 4 eastlight folders full of documents in support of his case. NZ Bus also provided extensive documents in support of its case that spanned, including the attachments to its Statement in Reply, to 3 eastlight folders.

[124] In these circumstances, and taking into account the Authority's objective to make a determination according to the substantial merits of the case, without regard to technicalities, I identified the disadvantages claimed by Mr Hendry to be:

- a. The final written warning;
- b. The health and safety (Asbestos) incident and the removal of Mr Hendry from his tutoring role;
- c. The assault and the events that followed (including placing him on special leave between July 2018 and November 2018)
- d. A failure by the Respondent to investigate his personal grievances
- e. Bullying

² Davis v Commissioner of Police [2013] NZEmpC 226 at [47].

[125] These issues were confirmed following discussion with the parties and recorded in a minute issued by the Authority.

[126] In an amended statement of problem Mr Hendry raised an issue of on-going bullying, alleging he had been in a “torturous limbo on special leave” and asked to be returned to work. He also alleged the new investigation that had been commenced by NZ Bus in March 2019, relating to an allegation of non-compatibility, was unjustified and was a further example of bullying behaviour.

[127] For reasons that will become apparent, if they are not already, I am satisfied that Mr Hendry has suffered a number of unjustified disadvantages to the terms and conditions of his employment. NZ Bus’ actions and how they acted were not what a fair and reasonable employer could have done in the circumstances known at the time.

The final written warning

[128] An employer who has elected to follow one course of action to the exclusion of another cannot later resort to that other unless exceptional circumstances exist.³ To do so would be inherently unfair and unjust and is not the type of conduct that a fair and reasonable employer would embark upon.⁴ In the present case I find, on balance, that no exceptional circumstances existed. The final written warning created a disadvantage to Mr Hendry’s employment and was unjustified.

[129] NZ Bus, through Ms Anderson, had already addressed and disciplined Mr Hendry for the events of 22 December 2017 prior to its commencement of a second investigation in late January 2018. It had issued him with a verbal warning for this incident following receipt of a detailed complaint, Mr Hendry’s written response, and after hearing from Mr Hendry. Ms Anderson had run the verbal warning past Mr Gillanders, who had recommended that her verbal instruction be put in writing, which she did, and it was agreed that he would undertake performance coaching.

[130] Ms Anderson confirmed during the Authority’s investigation that she still considers the verbal warning and performance management was the most appropriate course of action. Mr Gillanders agreed that based on the information he had at the time, a verbal warning was appropriate but said he was unaware if further information may have come to light subsequently that would have changed his view.

³ *Ashton v Shoreline Hotel* [1994] ERNZ 421 (EmpC) at [430].

⁴ *Service v Young Mens' Christian Association of Christchurch Inc* [2011] NZEmpC 8 at [62].

[131] The evidence was that the only information that came to light after the verbal warning was given was that contained in the Complainant's email of 26 January (relating to how the Complainant felt) and the conversation with the Complainant on 31 January 2018 where she told Mr MacLeod that Mr Hendry had "attempted to lean through the door". In terms of the later matter, there is no dispute that Mr Hendry was not told of this additional allegation at material times.

[132] For completeness, even if I had accepted that these matters constituted "exceptional circumstances" warranting the re-opening of the investigation I would still have found NZ Bus' decision to issue a final written warning was unjustified. This is because it failed to take into account relevant information put forward by Mr Hendry during the second investigation, and failed to undertake an investigation into other relevant information, before making its decision to issue a final written warning. For example:

- a. NZ Bus refused to listen to the recording Mr Hendry had taken within 20 minutes of the incident that provided contemporaneous details about what had happened.
- b. NZ Bus refused to review the Complainant's Facebook and Instagram posts that Mr Hendry had provided. I have viewed these posts. They call into question the matters raised by the Complainant in her email of 26 January. A fair and reasonable employer could not have concluded that these posts were irrelevant to its investigation without first reviewing them.
- c. NZ Bus failed to obtain the CCTV footage of the incident. Mr Hendry requested NZ Bus to review this footage as part of its investigation. This request was first made on 8 January 2018 and then subsequently on 30 January 2018. Both Ms Anderson and Mr MacLeod told Mr Hendry that they would request this footage and would review it. Both witnesses now say they could not review the footage because it had been wiped by NZ Bus. No documentary evidence was provided to me that any request had been made for this footage on the standard request form used by NZ Bus or, if it had, the response that was received. In light of this, it is more likely than not that NZ Bus did not make a request for this footage. This

footage was clearly relevant to the investigation and could have showed what occurred.

- d. NZ Bus failed to review its records to show the time Mr Hendry was away from his bus speaking with the Complainant. In response to questioning from the Authority Mr MacLeod said, in deciding to issue Mr Hendry with a written warning, he had relied on clause 47.6 (m) in the Collective Agreement. This clause defines serious misconduct as including “Abandoning a bus in service without good cause”. During the disciplinary meeting on 8 February there was mention by Mr MacLeod that leaving the bus running, with passengers on board, may be abandonment. In response to that question Mr A (the Union Representative) asked Mr MacLeod how long the bus had stopped for. Mr MacLeod said he did not know and would take a look. No records have been produced to show Mr MacLeod undertook that check before making his decision despite his agreement to do so. The amount of time Mr Hendry was away from his bus was clearly relevant to the issue of whether or not Mr Hendry had abandoned the bus.
- e. During the course of its investigation, NZ Bus advised Mr Hendry that it was relying on the NZ Bus Operator Manual that said he could not leave his bus unattended, with passengers on board, while the engine was running. Despite request, it didn’t provide the relevant clause to him. During the Authority’s investigation meeting NZ Bus’ witnesses initially maintained this same position, but later conceded the manual only prohibits a bus driver getting off a bus, while the engine is running, in the case of a “change over bus”. A change over bus is where one driver is leaving the bus and another driver is taking his place. This did not apply in this situation. Had NZ Bus reviewed the training manual prior to issuing Mr Hendry with the final written warning, it could have ascertained that the manual did not prohibit the activity that they alleged Mr Hendry had engaged in.

The Asbestos incident and the removal of Mr Hendry from his tutoring role

[133] NZ Bus’ decision to remove Mr Hendry from his tutoring role was not one that a fair a reasonable employer could have made in the circumstances. It was a knee

jerk reaction to WorkSafe attending site and Mr Gillander's mistaken view that Mr Hendry had not contacted anyone before allegedly going to WorkSafe. Mr Hendry has clearly suffered a disadvantage as a result of this unjustified action.

[134] At the time of making the decision, Mr Gillanders said he believed Mr Hendry had failed to follow the correct process when reporting a suspected health and safety risk. Mr Gillanders said he understood Mr Hendry had gone straight to WorkSafe with his concerns and had not reported the incident to his duty supervisor (Ms Anderson) or to Health and Safety (Mr Moss). In addition, he believed Mr Hendry had not completed a hazard report. His understanding was incorrect. Had he undertaken an investigation, he would have ascertained this to be the case. The uncontested evidence was that Mr Hendry had reported the incident to Ms Anderson, on multiple occasions both in writing and orally, and to Mr Moss. He had also completed a hazard report. There was no evidence that he had reported the hazard to WorkSafe.

[135] Mr Gillanders said, in deciding to remove Mr Hendry from his Tutor role, he also took into account that Mr Hendry had "had too many disciplinary issues with NZ Bus for it to be appropriate to continue his role' as a tutor. He said complaints they were receiving from the public about Mr Hendry's conduct were escalating and, in his view, Mr Hendry had gone from being a good operator with minimal complaints, with no emails to management, "to an on-going problem".

[136] At the time this decision was made, the only complaints raised with Mr Hendry were those contained in Coaching Conversation Register. This showed that in the 9 months prior to Mr Gillanders' making the decision to remove Mr Hendry from his role as a Tutor there had been no complaints received by NZ Bus about Mr Hendry, that had warranted him being spoken to, other than the incident on 22 December 2017. Had Mr Gillanders undertaken an investigation before making his decision, he would have ascertained this to be the case.

The assault

[137] There are a number of actions and inactions on the part of NZ Bus that could not be viewed, on the facts before me, as those of a fair and reasonable employer.

[138] First, an employer must be active and constructive in establishing and maintaining a productive relationship with an employee. This includes being

responsive and communicative. The evidence was that NZ Bus did not contact Mr Hendry for 10 days. This was despite Mr Hendry suffering what Mr Mitchell described as a severe assault while performing his duties and his email of 17 June advising he felt “traumatised” and had “lost confidence”. Mr Mitchell acknowledged this was not NZ Bus’ normal practice. NZ Bus’ failure to communicate led to a delay in Mr Hendry being paid his wages.

[139] Second, an employer has a duty not to mislead or deceive an employee. Mr Hendry repeatedly requested the CCTV footage of the assault. This was required by the Police to support charges against the Assailant. When the footage was not provided the Police dropped the charges. Contrary to representations made to Mr Hendry and the Police by NZ Bus, the CCTV footage had been obtained by NZ Bus and was held by Mr Moss. Email correspondence shows that Mr Moss, Mr Mitchell, and Mr Gillanders all knew this in July 2018. However, it was only after the Privacy Commissioner became involved that the footage was provided to Mr Hendry in April 2019 and to the Police in June 2019.

Failure to investigate bullying complaint and personal grievances in a timely manner

Failure to investigate personal grievances in a timely manner

[140] NZ Bus ignored and/or failed to respond to Mr Hendry’s first and second personal grievances until August 2018. This was 4 months after it had received his first personal grievance letter. It maintains this was due to a changeover of HR personnel. I do not accept this. Mr Jackson was working for NZ Bus at or about the time the first personal grievance letter was received and at the time the response was provided. NZ Bus’ actions were a breach of its duty to be responsive and communicative. Their actions led to Mr Hendry being required to stay away from work on “special leave” for a number of months.

Failure to investigate bullying complaint

[141] An employer’s failure to address bullying in the workplace may give rise to an unjustified disadvantage claim. This can be seen as an aspect of the implied and statutory duty to provide a safe workplace.⁵ For reasons that follow I find NZ Bus

⁵ *FGH v RST* [2018] NZEmpC 60 at [201].

failed to take all reasonably practicable steps to investigate Mr Hendry's concerns and to provide him with a safe workplace.

[142] First, NZ Bus approached the bullying investigation with a closed mind and did not appoint an external and impartial investigator as agreed.

[143] As outlined earlier, Mr Jackson said that around July 2018 he had conversations with Mr Gillanders and Mr Gillander's manager where they confirmed that they wanted to terminate Mr Hendry's employment. Mr Tait was also aware of these conversations. Mr Jackson said from the point of receiving the lawyer's letter on 31 July 2018 "steps taken were to try and terminate [Mr Hendry's] employment based on the options provided".

[144] It is more likely than not in these circumstances that NZ Bus set about engaging an investigator that would meet their objectives rather than one who would genuinely investigate. I am fortified in this finding by the following evidence:

- a. NZ Bus represented to Mr Hendry, both orally and in writing, that it would engage an independent external investigator. In answer to questions put to it by Mr Hendry during the conversation between himself and on 15 August 2018 Mr Tait advised him that the Investigator had "no association with the company", was "completely independent" and had "never had any contact with NZ Bus in the past".
- b. These representations were false.
- c. The evidence was that the Investigator was Mr Jackson's business partner and had been working for NZ Bus at the time Mr Hendry raised his personal grievance. Mr Jackson confirmed that he had disclosed to Mr Tait these details before the Investigator was appointed. He said Mr Tait was also involved with paying the Investigator's invoices prior to her appointment as the investigator.
- d. In terms of the investigator's knowledge of NZ Bus' plan to terminate Mr Hendry, Mr Jackson confirmed "I am not aware if she knew about our objective to terminate but she is senior in HR so could have drawn this conclusion based on the sheer volume of information when going through the complaint."

NZ Bus has taken no action to subsequently investigate

[145] On 18 September 2018 NZ Bus proposed that Ms Branch be appointed as the investigator. Mr Hendry did not agree that she was independent, due to her taking over from Mr Jackson. However, NZ Bus maintained that Ms Branch had been kept out of correspondence so that she would be independent. Even if this is what occurred, from 23 November 2018 Ms Branch could no longer be viewed as independent based on the events that took place on that day.

[146] NZ Bus has taken no steps to propose an alternative investigator, or to investigate Mr Hendry's concerns, in the nine months he has been away from work.

[147] I find the time taken to respond to Mr Hendry's personal grievances and his bullying complaints were unreasonable. NZ Bus could and should have acted quickly and effectively, consistent with the good faith provisions of the Act, found in s 4, requiring the parties to an employment relationship to be active and communicative in establishing and maintaining a productive employment relationship.

“Special leave”

[148] Two periods of paid leave have taken place during the ongoing employment relationship. The first period occurred from 4 July 2018 until 5 November 2018. The second period was from 23 November 2018 until now.

[149] There is no provision in the CA that provides for parties to be placed on special leave. In those circumstances “special leave” can only occur with the consent of both parties.

[150] NZ Bus maintains that both periods of paid leave took place with Mr Hendry's consent. Mr Hendry denies this.

The first period of special leave 4 July 2018 until 5 November 2018

[151] On balance, I find that Mr Hendry did agree to a period of special leave up to the date of the parties' mediation i.e. 16 July 2018. He acknowledged this in his witness statement. Thereafter however I accept his absence from work was without his consent. He has consistently maintained this position since the mediation and reiterated this position in his third personal grievance letter.

[152] While I accept NZ Bus was entitled to require Mr Hendry to be medically examined by a Doctor on his fitness for work, there was no contractual right for it to require him to remain away from work, without his consent, until this examination took place.⁶ NZ Bus' actions resulted in Mr Hendry suffering an unjustified disadvantage to his employment for the period from the day after the mediation (17 July 2018) to the date it notified him that he could return to work (15 October 2018).

The second period of special leave

[153] Following the conclusion of the Investigation meeting NZ Bus provided the Authority with a Memorandum of Understanding signed by the parties on 21 December 2018. This confirmed an agreement that Mr Hendry will "remain on special paid leave until he returns to work". No timeframe was specified but it can be implied that any return to work was to be within a reasonable time.

[154] A reasonable time has well and truly expired. A fair and reasonable employer could not rely on this agreement as justification for keeping Mr Hendry away from his workplace for 9 months in circumstances where there was no justification for doing so. Mr Hendry was medically cleared for work in September 2018.

[155] For completeness I did consider, but was not persuaded by, the concern raised by Mr Branch that NZ Bus has genuine health and safety concerns about Mr Hendry returning to work. None of the witnesses I spoke with, other than Ms Branch, expressed any concerns with their health or safety if Mr Hendry was to return to work. For example, Ms Anderson said that she could "absolutely work with Mark again". Mr MacLeod said he had no fears or preconceptions with dealing with Mr Hendry. The transcripts I reviewed showed Mr Gillanders repeatedly advising that he wanted to "sort this" out. Mr Jackson no longer works for NZ Bus. If Mr Moss has concerns about dealing with Mr Hendry, as Ms Branch said was the case, then Mr Hendry can be directed to deal with one of the other health and safety officers employed by NZ Bus. Ms Branch acknowledged this was possible.

[156] Ms Branch said Mr Hendry's duty supervisors were worried he might record them if he returned. While I do not condone Mr Hendry's behaviour in recording, and have indicated to him this may constitute a breach of good faith if it continues after the issue of my determination, in the circumstances that Mr Hendry was faced with it

⁶ CA, Clause 38.3.

is clear he felt that he did not have any other choice. He has undertaken to the Authority that upon returning to work he will not do so again without first obtaining permission. This should alleviate any concerns that his Duty Supervisors may have.

[157] Mr Hendry expressed a clear and unambiguous desire to return to work during the investigation meeting. In these circumstances, I direct NZ Bus to reinstate Mr Hendry to his role within 3 days of the parties' attending mediation.

Finding on disadvantage

[158] As foreshadowed earlier in this determination, I am left with no doubt that Mr Hendry has suffered multiple unjustified disadvantages to his employment. A fair and reasonable employer, in the circumstances known at the time, could not have concluded that a written warning was justified, that Mr Hendry's role as a training tutor should be removed or that he should be placed on special leave during the period 17 July 2018 through to 14 October 2018.

[159] A fair and reasonable employer could and should have undertaken a timely and impartial investigation into Mr Hendry's complaints, responded to his personal grievances within a reasonable timeframe, contacted him when he suffered a serious assault, and not misrepresented material facts to him. Had NZ Bus acted in this manner then it is more likely than not that the parties would not have found themselves in the position they are today.

[160] NZ Bus' actions cannot be considered as anything other than unjustified and a breach of its duty of good faith. While I have considered Mr Hendry's disadvantages separately, I consider they form a course of conduct such that, when determining remedies, it is appropriate that I consider remedies on a global basis.

Issue Two: Remedies

Lost wages

[161] Section 123(1)(b) of the Act provides for the reimbursement by NZ Bus of the whole or any part of wages or other monies lost by Mr Hendry as a result of his grievance.

[162] There are two periods of lost wages. Those incurred during the first period of "special leave" and those incurred due to the removal of Mr Hendry's role as tutor.

[163] In terms of the first period of “special leave”:

- a. Mr Hendry claims the difference between the wages he would have received if he had been working during the period he was on “special leave”, and the wages he was paid. I am satisfied that this is a loss that is attributable to his personal grievance.
- b. NZ Bus is ordered to pay Mr Hendry a sum representing the difference between the amount that he was paid during the period from 17 July 2018 to 15 October 2018 (being the date he was advised he could return to work) and the amount that he would ordinarily have earned during this period had he been working. Ordinary earnings are to be based on Mr Hendry’s average weekly earnings in the 12 months prior to 17 July 2018, including any allowances, and should take into account any increases in hourly rates and allowances during the latter period.
- c. The calculation of lost wages must include a deduction of 20% for contribution for the reasons set out later in this determination.

[164] In terms of lost wages arising due to the removal of Mr Hendry’s role as tutor:

- a. NZ Bus is ordered to pay Mr Hendry a sum representing the amount he ordinarily would have been paid had he continued to act as a training tutor from mid-April 2018 to the date of this determination. The amount payable is to be based on Mr Hendry’s average weekly earnings as a tutor in the 12 months prior to these duties being removed and should take into account any increases in rates that have arisen.
- b. No deduction for contribution is to be made from this figure.

[165] Payment of lost wages is to be paid within 14 days of the date of this determination.

[166] Leave is granted to the parties to come back to the Authority if they are unable to agree on the amount due to Mr Hendry.

[167] For completeness, no award of lost wages is made for the second period of special leave. This is because, pursuant to the Memorandum of Understanding, the parties agreed NZ Bus would pay Mr Hendry an amount of \$1,281.79 (gross) per

week while he was away from work from the date of the Memorandum. Records that I have viewed show that NZ Bus has adhered to this agreement.

Compensation for Hurt and Humiliation

[168] Mr Hendry gave detailed evidence of the impact that his personal grievance has had on him. He said he felt that NZ Bus “have pushed me past breaking point”, his work/home life has been “obliterated” and his marriage is “at risk of falling apart”. He feels he has lost the respect of his family and co-workers. He spoke of his loss of confidence and how he has isolated himself from his friends and his family.

[169] Mr Hendry has become so involved with this case that he works on it constantly to the exclusion of all else. His health has deteriorated to the extent that he feels compelled to constantly wash his hands. This has led to them bleeding and him having to wear rubber gloves. I understand that he has not been sleeping and has suffered immense stress from the financial pressure that he has been under.

[170] Notwithstanding the foregoing, Mr Hendry indicated to the Authority that he considers he will be able to move forward, and the impact of the disadvantages will be alleviated, once a determination has been given and he has been returned to the job that he loves.

[171] I am satisfied in all the circumstances that Mr Hendry has proven, on the balance of probabilities, that he has suffered humiliation, loss of dignity and injury to his feelings. I am satisfied that NZ Bus’ unjustified actions were material factors in the loss sustained by Mr Hendry.

[172] I consider the evidence warrants a global award of compensation under s 123(1)(c)(i) of the Act of \$25,000.

[173] Taking into account a 20% reduction for contribution, NZ Bus is ordered to make payment to Mr Hendry of the sum of \$20,000 under s 123(1)(c)(i) of the Act. Payment must be made within 14 days of the date of this determination.

Issue Three: Contribution

[174] Where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions

of the employee contributed towards the situation that gave rise to the personal grievance. If those actions so require, the Authority must then reduce the remedies that would otherwise have been awarded.⁷

[175] NZ Bus submits Mr Hendry contributed to his personal grievances in a number of ways. Having considered the submissions filed on behalf of NZ Bus I consider Mr Hendry's conduct did contribute to his personal grievance but not to the extent claimed by NZ Bus.

[176] Mr Hendry's feelings of being ignored, and his suspicions that NZ Bus was trying to end his employment, led him to recording conversations with NZ Bus (often without their knowledge), sending NZ Bus (and its legal representatives) many lengthy emails often repeating his concerns and often in the early hours of the morning, and making some negative remarks about NZ Bus representatives.

[177] The recordings cannot be viewed as contributing to his personal grievances. Either NZ Bus didn't know about the recordings at material times, or it did know but did not object. However, Mr Hendry's extensive and often repetitive email correspondence, and inappropriate comments made about some NZ Bus staff members, did contribute to the way in which NZ Bus has conducted itself. He must also take some responsibility for his actions on 22 December 2017 that led to disciplinary action being taken.

[178] I am satisfied that a reduction in the amount that I will award for lost wages for the period of first period of special leave, and for compensation under s 123(1)(c)(i) of the Act, is appropriate. I set this reduction at 20%. I am not satisfied that Mr Hendry contributed to the removal of his tutor role and therefore no reduction will be made.

Issue Four: Costs

[179] Mr Hendry was represented during the preliminary stages of the Authority's investigation process but has largely attended to all matters himself. This includes the case management conference, the preparation of the statements of problem, witness statement and his bundles of documents.

⁷ s 124.

[180] While I have been provided with an invoice for legal services rendered by Mr Hendry's Advocate, it appears to me that the costs charged relate primarily to the second mediation convened between the parties. I am not satisfied that an adequate basis has been made out for an award of costs incurred in relation to attendance at mediation.

[181] Mr Hendry has provided invoices that relate to expenses he has incurred in pursuit of his claim. Having reviewed these invoices I am satisfied costs associated with preparation of Mr Hendry's bundles of documents (\$539.91) and the transcription of the recordings of the conversations between the parties (\$970.32) are reasonably recoverable from NZ Bus. In addition, Mr Hendry has paid the Authority's filing fee of \$71.56.

[182] I order NZ Bus to pay the sum of \$1,581.79 to Mr Hendry within 14 days of the date of this determination.

Interest

[183] I consider it appropriate in the circumstances to order NZ Bus to pay interest on the monies that I have found payable to Mr Hendry for lost wages.

[184] As Mr Hendry's loss has occurred over an extended period, for ease of calculation, I order NZ Bus to pay interest on Mr Hendry's lost wages (including tutoring) from the date of his third personal grievance (13 September 2018) continuing until payment at the applicable rate of 5% per annum.⁸ Payment of this sum must be made within 14 days of the date of this determination.

Outcome

[185] The overall outcome that I have reached is:

- a. One or more of Mr Hendry's terms or conditions of employment were affected to his disadvantage by unjustified actions taken by NZ Bus.
- b. NZ Bus is to reinstate Mr Hendry to his duties as a Bus Operator within 3 working days of the parties attending mediation.

⁸ Judicature (Prescribed Rate of Interest) Order 2011 (SR 2011/177), Clause 4.

- c. NZ Bus is to pay Mr Hendry the following amounts within 14 days of the date of this determination:
 - i. Lost wages on the basis set out at paragraphs 163 and 164 of this determination.
 - ii. Compensation under s 123(1)(c)(i) in the sum of \$20,000 taking into account a 20% reduction for contributory conduct.
 - iii. Expenses associated with the conduct of this investigation in the sum of \$1,581.79.
 - iv. Interest on Mr Hendry's lost wages (including tutoring) from the date of his third personal grievance (13 September 2018) continuing until payment at the applicable rate of 5% per annum.⁹
- d. The parties are directed to attend mediation within 10 working days of the date of this determination.

Recommendations

[186] I make the following recommendations:

- a. NZ Bus should organise a mediation or facilitation between Ms Branch and Mr Hendry to address any on-going concerns that either of them may have about working with the other.
- b. NZ Bus should prepare a return to work plan that should ensure, once a period of retraining has been completed, that Mr Hendry is returned to working similar shifts to that which he was previously working.
- c. NZ Bus should reimburse Mr Hendry the sum of \$303.40 being the amount he paid for his P Endorsement Licence that it acknowledged to the Authority, through Ms Branch, that it was responsible for paying for.
- d. Mr Hendry should undergo the performance training that NZ Bus had envisaged when issuing him with the verbal warning in January 2018.

⁹ Judicature (Prescribed Rate of Interest) Order 2011 (SR 2011/177), Clause 4.

Any training should include what is and is not appropriate interaction with members of the public.

- e. Mr Hendry should not record his conversations with others without their prior consent. I note Mr Hendry has undertaken to the Authority that he will comply with this recommendation in respect of his future dealings with NZ Bus and its employees.

Jenni-Maree Trotman
Member of the Employment Relations Authority