

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 645
3140322

BETWEEN

YE LU
Applicant

AND

MANUKAU BUSES
LIMITED
First Respondent

MICHAEL HOOPER
Second Respondent

Member of Authority: Leon Robinson

Representatives: Applicant in person
Michael Hooper for the Respondent

Investigation Meeting: 22 July 2022 at Auckland

Determination: 9 December 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ye (Hugo) Lu (Mr Ye) claims that his summary dismissal was unjustifiable. He also claims he was unjustifiably disadvantaged by his employer's failure to provide him with an employment agreement.

[2] The parties were unable to resolve the problem between them by the use of mediation. Mr Ye now asks the Authority to find he has personal grievances and to resolve those grievances by granting him formal orders for reimbursement and compensation. He also asks for the imposition of a penalty.

The Authority's investigation

[3] Mr Ye's statement of problem alleged that Manukau Buses Limited was his employer. The statement in reply named the Second Respondent Michael Hooker (Mr Hooker) as the employer. At investigation meeting Mr Hooker confirmed that he personally was Mr Ye's employer. I find accordingly and he is joined as Second Respondent.

[4] For the Authority's investigation written witness statements were lodged from Mr Lu and Mr Hooper. Both witnesses answered questions under affirmation from me and each other.

[5] This determination has been issued outside the timeframe set out at section 174C(3)(b) of the Employment Relations Act 2000 (the Act), where the Chief of the Authority considers exceptional circumstances exist. As permitted under section 174E of the Act, not all the evidence or information received has been recorded. Rather, this determination makes findings of fact and law and sets out conclusions on the issues necessary to dispose of the Applicant's claims.

The issues

[6] Mr Ye was interviewed for a bus driver job on 8 November 2020. His application was successful.

[7] Mr Hooker says that Mr Ye was employed as a casual employee. He insists that he would not employ employees on a permanent basis because school bus drivers are not required for at least 12 weeks of the year during school holidays. Mr Ye denies that he was a casual employee.

[8] Despite what he now says Mr Hooker wrote a letter dated 9 November 2020 relevantly stating:-

This letter is to confirm that Ye Lu is permanently employed as a charter bus driver working a minimum of 30 hours per week at \$25.00 per hour.

The recipient of this letter is welcome to ring me to verify its authenticity.

[9] Mr Hooker says he wrote the letter at Mr Ye's urging solely for the purpose of assisting Mr Ye with his bank. Apparently, Mr Ye was refinancing at the time. The covering email states "I have attached a letter for your bank." It is most likely correct

that the sole purpose of Mr Hooker's letter was to assist Mr Ye with his refinancing. If Mr Hooker's evidence is accepted then his letter misrepresented the situation.

[10] The COVID-19 pandemic and lock downs meant that as a matter of fact there were long periods where Mr Ye did not work 30 hours per week. Mr Ye says he continued to ask Mr Hooker for more hours of work but without success.

[11] I accept Mr Ye did not force the matter about why he was not provided with 30 hours of guaranteed work each week. It may be that he recognised the uncertainty and disruption to business COVID-19 and lockdowns caused for business. I consider he acquiesced and did not seek to hold his employer to its strict contractual obligations.

[12] Mr Ye says he was assigned a bus registration ZHC178. He says that on 24 February 2021 he verbally reported to Mr Hooker that the bus was not driving as "smoothly as it should".

[13] On the afternoon of Friday 19 March 2021 Mr Ye was assigned to transfer about 45 school children passengers from Wynyard Quarter to James Cook High School, Manurewa.

[14] As he drove the bus uphill in slow traffic Mr Ye says it was necessary to shift to a lower gear and maintain the requisite pressure on the accelerator. He says that at that point he smelt a strong odour of burning smoke so he found a bay and managed to park safely beside the motorway on-ramp. He explains that immediately he turned on the hazard light, engaged the hand break and turned off the ignition. He then evacuated all passengers and after about 5 minutes the Police arrived and helped to settle the passengers. Later, he says he helped the Police set up traffic safety cones and provided all necessary details of the incident for the Police to record in their incident report.

[15] Mr Ye called Mr Hooker and reported the situation to him. Mr Ye denies any carelessness or negligence. He says the clutch failure likely occurred because the vehicle was old and some mechanical parts may have worn out. Mr Ye points to his experience and licensing as evidence of his expertise in assessing the situation.

[16] Mr Hooker adamantly believes that Mr Ye was riding the clutch while going up the Grafton motorway onramp. He is certain that the prolonged riding of the clutch wore it out thereby causing it to slip. He maintains that Mr Ye should have stopped the

bus but instead must have pushed down on the accelerator to get the bus to move over an extended period of time causing the clutch to slip so badly that the interior of the bus filled up with smoke.

[17] Apparently, passengers suffered from smoke inhalation and an ambulance was called. Mr Hooker says passenger safety is of paramount importance to him. He says it is simply untenable for him to employ a driver that puts his passengers in hospital. He ultimately concludes now that Mr Ye was not qualified to drive manual buses.

[18] On 6 April 2021 Mr Hooker wrote this email to Mr Ye:-

I realise I have not provided you with an Employment Contract for which I apologise.

I have attached a copy.

[19] The employment agreement stipulates

“The Employee will work on a casual ‘as required’ basis with no expectation of ongoing employment.”

[20] Mr Ye was informed there was no further employment for him by this statement in the email:-

The issue with the bus breaking down on the motorway was due to a burnt out clutch. I believe this was caused by incorrect operation of the clutch as you were travelling along incline very slowly in peak hour traffic. In my view you are not a suitable driver for manual buses and as all my buses are manuals, I am not able to offer you any further employment.

[21] Mr Ye regards the advice that Mr Hooker was not able to offer him any further employment as a dismissal. He goes further to claim that dismissal was unjustifiable.

[22] Mr Hooker says that in the same email he offered Mr Ye work in a bus with automatic transmission but Mr Ye rejected the offer. He says Mr Ye was not terminated from his employment, but rather, he resigned.

[23] Mr Hooker has a counter-problem. He claims half the cost of the replacement clutch \$3,537.93 together with half the cost of the fee to tow the bus back to the yard at \$870.00. Mr Hooker argues these expenses were completely avoidable and solely incurred due to Mr Ye misrepresenting himself as a driver that could drive manual buses.

[24] The issues requiring investigation and determination are these:-

- (a) was Mr Ye employed on a casual basis?
- (b) did Mr Ye excessively ride the clutch causing it to slip?
- (c) was Mr Ye dismissed on 6 April 2021 or did he resign?
- (d) if he was dismissed, was that dismissal what a fair and reasonable employer could have done in all the circumstances at the time as prescribed by the test of justification set out at section 103A of the Employment Relations Act 2000 (the Act)?
- (e) was Mr Ye disadvantaged in his employment by Mr Hooker's unjustifiable action in failing to enter into a written employment agreement with Mr Ye (s 103(1)(h) of the Act)?
- (f) is there blameworthy conduct on Mr Ye's part that requires a reduction in both the nature and extent of any remedies to be provided? &
- (g) if Mr Hooker is found to have acted unjustifiably (whether by dismissal or disadvantage) what remedies should be provided to Mr Ye:-
 - (i) reimbursement of lost wages (subject to evidence of reasonable endeavours to mitigate loss)?
 - (ii) compensation under s123(i)(c)(i) of the Act?
- (h) should a penalty be imposed for Mr Hooker's failure to provide Mr Ye with an employment agreement?
- (i) did Mr Ye's actions cause loss (replacement clutch and towing fee) to Mr Hooker for which he ought to recompense Hooker;
- (j) should either party contribute to the costs of representation of the other party?

A casual employment?

[25] The Trademe advertisement for Mr Ye's role makes no reference to casual employment. It expressly mentions part-time and full-time roles. So too the letter for Mr Ye's bank makes no mention of casual employment.

[26] I am not persuaded that Mr Hooker would write a letter that was materially false and misleading for a person he had only met. Mr Hooker elected not to provide Mr Ye

with an employment agreement. He said he forgot to do so. Had he done so the matter would be beyond doubt.

[27] I am persuaded that it is more likely than not that it was expected that Mr Ye would work 30 hours per week on a permanent basis.

[28] I tend to the view that Mr Ye was not employed as a casual employee but instead he was employed on a permanent indefinite basis, part-time at 30 hours week.

Did Mr Ye excessively ride the clutch causing it to slip?

[29] Mr Hooker vehemently believes that Mr Ye excessively rode the clutch of the bus so that it became sufficiently damaged that the interior of the bus began to fill with smoke. He believes the damage was caused by Mr Ye's incorrect operation of the clutch as he drove the bus up the onramp incline very slowly in peak hour traffic. Mr Hooker concluded that in his view Mr Ye was not a suitable driver for manual buses. He ultimately concluded that he was not able to continue to employ Mr Ye because his fleet of buses were all manual transmission and Mr Ye was not capable of driving manual buses.

[30] It is not for the Authority to find as a matter of fact whether or not Mr Ye excessively rode the clutch of the bus. Rather, the Authority scrutinises the process by which the employer came to its decision as the basis for the action it subsequently took.

[31] An employer must carry out a full and fair process gathering evidence that entitles it to believe on reasonable grounds that the alleged conduct occurred. It need not prove the conduct actually occurred; it need only have evidence entitling it to believe on reasonable grounds that the conduct occurred. The Authority scrutinises the quality of that investigation process.

Was the Applicant dismissed on 6 April 2021 or did he resign?

[32] Mr Ye regards the advice that Mr Hooker was not able to offer him any further employment as a dismissal. He goes further to claim it was an unjustifiable dismissal.

[33] Mr Hooker points out that he offered Mr Ye work in a bus with an automatic transmission but says that Mr Ye rejected that offer. He says Mr Ye's employment was not terminated but instead, he resigned.

[34] Mr Hooker's email of 6 April 2021 clearly stated that because he considered Mr Ye unable to operate manual transmission buses, he was unable to offer him any further employment. Mr Ye was thereby dismissed.

[35] I have no doubt that Mr Ye was dismissed on 6 April 2021. The issue now is whether that dismissal was justifiable.

Was the dismissal what a fair and reasonable employer could have done in all the circumstances at the time?

[36] The law prescribes a test of justification in the Act. I now assess whether Mr Hooker's decision to dismiss and the way he acted in carrying out that decision meets the prescribed test of justification.

[37] As a matter of natural justice, an accused person is entitled to be heard in their defence. Mr Ye had a right to be heard. The right to be heard involves a right to know specifically what it is the person is accused of, together with an opportunity to be heard in their defence.

[38] I am not aware of any process by which Mr Ye was informed with sufficient particulars what it was he was supposed to have done which could lead to his dismissal.

[39] Further, I do not appreciate any opportunity extended to Mr Ye for him to offer an explanation to what his employer was thinking. Nor do I appreciate any unbiased open mind deliberation or consideration of any such explanation Mr Ye might have made. I am led to conclude that Mr Ye was not afforded any opportunity to respond to the very dim view Mr Hooker had of his driving or Mr Hooker's view that Mr Ye should be dismissed.

[40] Mr Hooker's dismissal of Mr Ye by email was perfunctory.

An unjustifiable disadvantage?

[41] Mr Ye also claims a personal grievance for unjustifiable disadvantage. He claims that Mr Hooker's failure to provide him with an employment agreement was an unjustifiable action that caused him disadvantage in his employment.

[42] I accept that the failure was an unjustifiable action and that it caused Mr Ye disadvantage in his employment.

The result

[43] For the foregoing reasons I conclude that Mr Hooker's decision to terminate Mr Ye's employment and how that decision was made and carried out, was not what a fair and reasonable employer could have done in all the circumstances at the time. I find that Mr Ye has a personal grievance for unjustifiable dismissal.

[44] I find too that Mr Ye has a personal grievance for unjustifiable disadvantage.

The resolution

[45] Mr Ye is entitled to formal orders to resolve the personal grievances I have found.

[46] I must first consider whether there was any blameworthy conduct on Mr Ye's part which contributed to the situation that led to the personal grievance I have found. Because I have found that Mr Hooker was not entitled to believe that Mr Ye damaged the bus, and in the absence of any compelling evidence I find that there was no blameworthy conduct on Mr Ye's part and therefore no basis to reduce either the nature or the extent of any remedies to be provided to him.

Reimbursement

[47] Mr Ye claims reimbursement of loss wages. He gives evidence that after he was dismissed, he was unable to find gainful employment until about one month later. I am satisfied that he must have been taking active steps to secure that employment and therefore I accept he acted to mitigate his losses.

[48] I am satisfied that Mr Ye has lost remuneration as a result of the personal grievances I have found.

[49] I consider Mr Ye ought to be reimbursed the sum of three months wages as reimbursement. **I order Michael Hooker to pay the gross sum of \$3,000.00 (Three thousand dollars) (\$25.00 x 30hours x 4 weeks) to Ye Lu as reimbursement and to do so within 28 days of the date of this determination.**

Compensation

[50] Mr Ye gives evidence that he was severely hurt and humiliated by his dismissal. He says his family and friends made comments that he may be a 'loser' because he was dismissed before he had completed one year of service. He says that in his culture this had serious emotional consequences.

[51] I am satisfied that Mr Ye has suffered hurt and humiliation, loss of dignity and injury to his feelings as a result of the personal grievances. Having regard to the nature of the personal grievances and the evidence given I make a global award for compensation. **I order Michael Hooker to pay to Ye Lu the sum of \$15,000.00 as compensation and to do so within 28 days of the date of this determination.**

The counter-problem

[52] Mr Hooker raises a counter-problem against Mr Ye. He claims half the cost of the replacement clutch in the sum of \$3,537.93 together with half the cost of the fee to tow the bus back to the yard at \$870.00.

[53] I do not accept Mr Hooker's assertion that the expenses incurred were completely avoidable and solely due to Mr Ye misrepresenting his abilities. That is because Mr Hooker did not carry out a full and fair investigation gathering evidence entitling him to believe on reasonable grounds that Mr Ye had caused damage to the bus.

[54] I am not persuaded that Mr Ye's actions caused direct loss to Mr Hooker's business and I decline to make any orders in respect of the counter-problem.

Costs

[55] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so Mr Ye may lodge and serve a memorandum on costs within 14 days of the date of this determination. From the date of service of that memorandum Mr Hooker will have 14 days to lodge any reply memorandum. I will not consider any memorandum out of time without leave.

Leon Robinson
Member of the Employment Relations Authority