

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 255
5647102

BETWEEN YOON CHEOL HONG
 Applicant

AND AUCKLAND TRANSPORT
 Respondent

Member of Authority: Robin Arthur

Representatives: Applicant in person
 Charlotte Parkhill and Rupert Gillies, Counsel for the
 Respondent

Investigation Meeting: 29 and 30 May 2017

Determination: 28 August 2017

DETERMINATION OF THE AUTHORITY

- A. The dismissal of Yoon Cheol Hong by Auckland Transport (AT) was within the range of responses open to a fair and reasonable employer in all the circumstances at the time. Mr Hong was not unjustifiably dismissed.**
- B. AT did not unjustifiably disadvantage Mr Hong in a performance grading assessment in 2016 or by his suspension during a disciplinary process in 2017.**
- C. Costs are reserved with a timetable set for memoranda to be lodged if a determination of costs is necessary.**

Employment relationship problem

[1] Yoon Cheol Hong worked for Auckland Transport (AT) from 10 April 2012 until he was dismissed on 24 February 2017. Mr Hong, known as Peter Hong at work, was employed as a parking officer in AT's 168-member enforcement team. AT parking officers patrol city streets and issue infringement notices for vehicles parked

illegally, breaking the rules about driving in transit and bus lanes or not displaying a current warrant of fitness and vehicle registration.

[2] Mr Hong was dismissed because AT decided he had views contrary to what he had been told to do, and was expected to do, if a member of the public became abusive after getting a ticket, and that he had acted on those views. AT considered his views, and what it believed he had done in some situations of being subjected to abusive comments, put him and others at increased risk of violent attack. As a result AT decided it no longer had confidence AT could safely employ him.

[3] Mr Hong raised a personal grievance for unjustified dismissal. He also raised three separate but related grievances alleging he was unjustifiably disadvantaged by how AT went about suspending him from work while it investigated the concerns that led to his dismissal. Those grievances have been investigated along with another grievance Mr Hong had raised in September 2016. The September grievance alleged AT managers and supervisors unjustifiably disadvantaged Mr Hong by deciding to give him a 'nearly met' grading in his annual performance assessment.

[4] Mr Hong sought three remedies for his grievances: firstly, an order requiring AT to reinstate him to a position as a parking officer; secondly, an order AT pay him lost wages; and thirdly, an order AT pay him compensation for distress caused by his unjustified dismissal and other disadvantage grievances.

[5] He had sought interim reinstatement until the Authority investigated and determined his grievance application but in April 2017 the Authority declined to make that interim order.¹

[6] AT's statement in reply denied all Mr Hong's allegations about treating him unfairly. If its actions were found to be unjustified AT nevertheless opposed the remedies sought, including reinstatement. AT said reinstatement of Mr Hong to a position as a parking officer was not reasonable and practicable.

The Authority's investigation

¹ *Hong v Auckland Transport* [2017] NZERA Auckland 115.

[7] Four witnesses gave sworn or affirmed evidence during the Authority investigation – Mr Hong and three AT representatives. They were AT parking services and compliance manager John Strawbridge, AT parking services manager Rick Bidgood, and AT parking supervisor Karan Paul. Mr Strawbridge was AT’s designated decision maker in the disciplinary process that ended with Mr Hong’s dismissal.

[8] At the close of the Authority’s investigation meeting AT’s counsel and Mr Hong made oral submissions on the issues for resolution, speaking to written synopses.

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

[10] The Authority has a discretionary power to take account of such evidence and information as in equity and good conscience it thinks fit.² In this case that discretion has been exercised in relation to hearsay evidence offered both by some AT witnesses and by Mr Hong about what they said various parking officers or other AT staff told them of their views or particular events. This determination has given little, if any, weight to such evidence. Prior to the investigation meeting each party had ample opportunity to arrange for direct evidence, in the form of witness statements that could be tested, from those people whose supposed comments or thoughts were the subject of that hearsay evidence. Determination of Mr Hong’s application was best made on the evidence of the witnesses present at the investigation meeting, tested by questioning, rather than second-hand tales that could not examine for reliability or credibility.

The issues

[11] The issues resolved in this determination are:

- (i) Was AT’s decision to dismiss Mr Hong for serious misconduct, and how the decision was made, what a fair and reasonable employer could have done in all the circumstances at the time; and

² Employment Relations Act 2000, s 160(2).

- (ii) Did AT unjustifiably disadvantage Mr Hong by:
 - a) Grading his performance in 2016 as having “nearly met” its standards; and
 - b) Suspending him from duties as part of its disciplinary process?

[12] Because of conclusions reached on those issues, it was not necessary to consider issues of remedies. Costs, if they are in issue, have been reserved for subsequent determination if necessary.

The statutory test of justification

[13] AT’s actions had to be assessed against the test of justification set by s 103A of the Act. What AT did, and how AT acted, must have been what a fair and reasonable employer could have done in all the circumstances at the time the dismissal and other actions in question had occurred.

[14] The statutory test considers how AT conducted its inquiry and made its decisions, firstly, that misconduct had occurred and, secondly, that Mr Hong should be dismissed for it.³ The test does not set a single standard for what a notional fair and reasonable employer could have done in the circumstances faced by the actual employer. It allows for a variety of ways in which a reasonable employer could have reached a fair result. The Authority’s review of the actual employer’s actions, against the objective standard of how a fair and reasonable employer could have acted, includes checking that AT met procedural requirements to give Mr Hong notice of allegations about his conduct, a real opportunity to refute those allegations and to genuinely consider any explanations he gave. Minor defects in that process may only be held to have made AT’s actions unjustified if such inadequacies resulted in Mr Hong being treated unfairly.⁴

[15] In the Authority’s investigation of whether the dismissal of Mr Hong was justified, AT had to prove to the standard of the balance of probabilities that it acted reasonably in what it did to try and work out the facts of what had happened, and then in making its decision that those facts warranted dismissal.⁵ The nature and quality of AT’s evidence about the reasonableness of its actions had to be commensurate with

³ *Air New Zealand v V* [2009] NZEmpC 45 at [36].

⁴ Employment Relations Act 2000, s 103A(3) and (5) and *A Limited v H* [2016] NZCA 419 at [45] and [46] and *Angus v Ports of Auckland Ltd* (No 2)[2011] NZEmpC 160 at [22]-[25].

⁵ *Whanganui College Board of Trustees v Lewis* [2000] 1 ERNZ 397 (CA) at [20].

the gravity of its allegations about Mr Hong's conduct and the consequence of dismissal imposed on him.⁶

How the dismissal came about

[16] On 24 and 25 January 2017 Mr Hong attended an AT training seminar for parking officers. During a group discussion on dealing with abusive members of the public Mr Hong made comments about how he thought the scenario under discussion could be dealt with. At the invitation of the seminar presenter Mr Bidgood interrupted Mr Hong's comments and emphasized AT's preferred approach of using various 'de-escalation' techniques to manage members of the public who abused or threatened parking officers. The primary technique was described as 'detach and walk away'.

[17] Following that session of the seminar Mr Bidgood talked with at least four other people present about concerns he had about Mr Hong's comments. He talked to an AT trainer and another AT manager present at the seminar, the seminar presenter and Mr Paul. Mr Bidgood considered Mr Hong's comments had confirmed he would, while on patrol in the streets, sometimes challenge abusive members of the public rather 'detach and walk away'.

[18] The next day Mr Bidgood spoke to Mr Hong at the beginning of his shift and sent him home, on pay, for the rest of the day. For the days after that day off Mr Hong already had two days' annual leave booked followed by two rostered days off. This meant he did not return to work until five days later, on 31 January. During his shift on 31 January an incident occurred in Karangahape Road that led to Mr Hong calling for Police assistance. According to Mr Hong's report of the incident a man swore at him and threatened to break his neck after getting a ticket for parking in a loading zone.

[19] On 3 February Mr Bidgood gave Mr Hong a letter advising that AT was considering suspending him while it conducted a disciplinary inquiry. Mr Bidgood spoke briefly with Mr Hong who then left work and stayed away, on pay, until 9 February when AT representatives met with him to discuss the suspension proposal. AT's letter, signed by Mr Strawbridge, gave this reason for taking those steps:

⁶ *Ritchies Transport Holdings Limited v Merennage* [2015] NZEmpC 198 at [100] and [108].

We hold grave concerns in light of recent events that your refusal to follow lawful and reasonable instructions provided by us to you has placed your own health, safety and welfare together with some of the wider parking team at considerable risk which is completely unacceptable.

You claim the reason you refuse to demonstrate alternative and de-escalating behaviours are due to your very strong personal opinions that verbal abuse from the public “*is against the Human Rights Act*” and that you don’t have to put up with it. You provided us examples of how you address these situations including:

I have told people that they have to stop swearing at me as it is against the law and I will charge them for the offence.

No one can speak to me in such a manner and I will not tolerate it and as a person I have every right to respond. It is my right. This is mental abuse.

[20] On 9 February Mr Hong met with Mr Strawbridge, Mr Bidgood and an AT human resources manager. At the conclusion of that meeting he was suspended from work, again on pay. A letter sent to him on 13 February said he had referred to a ‘trigger point’ at which he would not observe de-escalation methods due to his own views on what was and was not tolerable. It said AT was not convinced Mr Hong would not be ‘triggered’ again by responses or bad language from members of the public. It said he could not be allowed to be at work while that matter remained unresolved because of “the potential for further incidents in which breaches may occur regardless of our clear instructions”.

[21] A second letter, also dated 13 February, advised Mr Hong of a disciplinary meeting to discuss his behaviour in dealing with members of the public. It said AT managers were concerned about the manner in which Mr Hong related to people, whether he used required “de-escalation and diffusing techniques” or responded in ways that made “inflammatory or potentially inflammatory situations” worse. The letter stated that a failure to demonstrate those behaviours would “likely result in an incompatibility with the role’s requirements together with the values and Code of Conduct that we expect all employees to demonstrate and abide by on a daily basis”. It referred to “a loss of trust and confidence” if AT substantiated Mr Hong’s failure to demonstrate those behaviours.

[22] The letter also described Mr Bidgood as being “aghast” at Mr Hong’s “abrasive and abrupt” tone in an “outburst” at the training seminar. It set out the following view of what AT considered Mr Hong had said and done:

Moreover it is our view that in choosing to act in a manner that is contrary to instructions provided to you, that you are in effect, failing to follow a lawful and reasonable instruction which is tantamount to serious misconduct.

We are disappointed that you say you are not willing to observe measures which we also regard as crucial to upholding our reputation as both fair and law-abiding in our approach to our customers and members of the public. We stress that using threats to ‘charge’ our customers or members of the public in relation to their behaviour forms no part of your role and you are not permitted to do so. Contrary to your assertions, we strongly disagree that this is your right and that it is your right to respond in the manner you see fit rather than as instructed.

[23] Mr Hong attended the disciplinary meeting on 22 February to respond to the allegations. The meeting then adjourned to 24 February at which time Mr Hong was told he was to be dismissed. He asked to be told the reason. According to a transcript made from a recording of the meeting Mr Strawbridge gave this answer:

I’ve got to be clear about this, we need to be confident as an organisation when we have our employees going out [into] the public that they are going to be safe and they are going to conduct themselves in a way that we are comfortable about. I can’t be confident after everything I heard and very much listening to you as well that I put you out into the public domain representing [AT], in good faith I can’t, I can’t continue to engage you on your role of parking officer.

The reason for your dismissal is that we lost trust and confidence in you to be able to perform your duties at a level we expect and very importantly we are very concerned about your safety in the public domain. That’s why. There are other contributing factors. But those are two principal reasons, your safety, compatibility to the job we need to do.

[24] AT told Mr Hong that a full response giving the reasons for his dismissal would be put in writing to him, but this was not done. When Mr Strawbridge was asked at the Authority investigation meeting what “other contributing factors” he was referring to on 24 February, he said those factors included his own observations of Mr Hong at meetings held in the disciplinary process and the information he received over the course of the investigation. That information included what Mr Bidgood said about Mr Hong’s conduct at the training seminar, Mr Strawbridge’s own observation of Mr Hong at a quarterly staff meeting on 14 September 2016, and what was said by an AT trainer and another AT manager in emails they wrote about the training seminar. Mr Strawbridge said he formed a very strong view from reading those emails that Mr Hong’s recollection of events was not in keeping with what actually happened.

“In all the circumstances”

[25] The statutory test’s reference to “all the circumstances at the time” means that the assessment of AT’s actions, in its disciplinary inquiry and what it did to reach the dismissal decision Mr Strawbridge announced on 24 February, should take account of the context or background to what happened.

[26] Two such circumstances seemed particularly relevant to what AT did in dealing with its concerns about Mr Hong. One was Mr Hong’s personality and characteristics. The other related to concerns Mr Bidgood held as a result of the experience he had directly with Mr Hong or due to reports from supervisors over a longer period about how Mr Hong carried out his duties.

Mr Hong’s personality and characteristics

[27] At the time of his dismissal Mr Hong was aged 60. He came to New Zealand from South Korea some 15 or so years earlier, in 1992. In Korea he had worked in banking but in Auckland he initially worked as an interpreter for Korean patients at Middlemore Hospital. He then studied law. He was admitted as a barrister and solicitor in the late 1990s and practised law until the latter part of the 2000s. He withdrew from legal practice after he and another defendant were ordered to pay \$85,000 in damages in a defamation case.⁷ The Court’s decision in that case said Mr Hong had been involved in what it called a “crusade on behalf of clients” against a company that he alleged had overcharged potential immigrants. He acted in cases against that company and its principal that reached as far as the Court of Appeal in 2001 and 2006.⁸ As early as 2001 Mr Hong’s approach to that litigation drew judicial criticism that he had been blind to procedural difficulties and persisted with untenable arguments.⁹

[28] Asked at the Authority investigation meeting about how he came to leave legal practice Mr Hong explained that, rather than pay the damages he was ordered to pay in 2008, he surrendered his legal practising certificate and applied for bankruptcy. He was unemployed from 2009 until 2012. Joining AT as a parking officer in 2012 was a return to the full-time workforce for him.

⁷ *Ahn v Lee & Hong & Lee* [2009] DCR 298 (25 November 2008).

⁸ *Hong v Wasan International Co Limited* (No 2) CA 132/01, 24 July 2001 and *Kim v Wasan International Co Limited* CA 39/06, 4 October 2006.

⁹ *Wasan International Co Ltd v Hong HC Auckland, 09/01, 6 March 2001 at [35]*.

[29] The way Mr Hong spoke, both in his mannerisms and his use of English, was the subject of repeated comment throughout the evidence and background documents available for the Authority investigation. His witness statements and written submissions showed Mr Hong was a sophisticated writer in English. His spoken English had strong Korean inflection and was less lucid. The comments made about how he spoke suggested some AT staff and members of the public found Mr Hong's style of speaking abrupt, staccato and difficult to follow. It was also clear some supervisors and managers had become exasperated at times by Mr Hong's persistence in pursuing particular points he considered important and by what they considered to be his abrasive manner in doing so.

Mr Bidgood's concerns

[30] Mr Bidgood's decision to initiate a disciplinary inquiry about Mr Hong's comments at the January training seminar was made in the context of longer running concerns he held about how Mr Hong interacted with other people, both within AT and out on the streets with members of the public.

[31] Evidence about those concerns came from five sources.

[32] Firstly, AT supervisors conducted a monthly on-road assessment (ORA) of each parking officer and recorded notes of their observations and guidance given to the officer. Mr Hong's ORA reports for the two year period from 7 January 2015 to 16 January 2017 were part of the evidence available for the Authority investigation. Notes made by his supervisor Marcus Shaw in those reports showed a particular focus on encouraging Mr Hong to have more interaction with members of the public (MoPs) by answering questions and explaining parking requirements. Mr Shaw's notes in his February 2015 ORA of Mr Hong included the following comments:

... Observed some good interactions with MoPs ... in saying that Peter still needs some work on how he deals with MoPs overall. His use of negative gestures, eg shaking of his head, facial expressions and raising his voice can invite a negative reaction from MoPs. Twice I had to intervene to deescalate a potentially negative situation. This could also be due to his incident with an aggressive MoP on Tues ... Peter had an incident Tuesday which was still playing on him, and could be reason for his sometimes negative approach to his enforcement/dealing with MoPs. He made a Police complaint against driver. ...

[33] In his July 2016 ORA Mr Shaw recorded that he “told Peter it was my expectation he would assist MoP with queries but to walk away if it got abusive or agitated”. Mr Shaw’s September 2016 ORA recorded further discussion on that issue:

... then discussed my approach with Peter. I again encouraged him to interact and assist with customers if they have any issues/struggles.

I asked him how he would approach a person struggling at a [Pay and Display] machine. He said “of course I would help them”. I said to him it is good to approach people and initiate conversation, he said he was equal as a citizen and shouldn’t be subservient to them. I told him it wasn’t about this it was about providing a service to customers and being a positive face for AT.

... Spoke with Peter today to let him know that unfortunately in this role people do get upset and may swear at him or be abusive towards him. This will continue to happen. We are trying to give tools and techniques to Peter to assist with this. Courses attended in past, conflict management, effective communication, monthly coaching. ...

[34] Secondly, Mr Bidgood also saw the “Mystery Parker” reports AT had commissioned an independent organisation to provide on each parking officer two or three times a year. Each such report provided comments on an interaction with a parking officer. The anonymous Mystery Parker commented on the officer’s presentation, tone of voice and respectfulness, listening and response to queries, and knowledge. An A grade was said to show exceptional good behaviour and a B grade competent behaviour while C and D grades were not satisfactory.

[35] Mr Bidgood was concerned about variation in the ratings Mr Hong got in those in Mystery Parker reports. Those ratings were an A minus in February 2015, a C+ in August 2015, a C minus in January 2016, a C+ in November 2016, an A minus in December 2016 and an A+ in January 2017. Mr Hong had complained about his C+ rating in August 2015. He said it made degrading comments about him. That particular report said Mr Hong had interrupted the parker and “seemed to take offence at a standard complaint”. It said he had not responded to the parker’s query straight away “but looked at me in silence for a few moments, making me feel uncomfortable as a customer”. By contrast the January 2017 report (with an A+ rating) included the following comments about the parker’s interaction with Mr Hong:

He was polite and spoke in a professional tone of voice as he greeted me with a smile upon approach. ... The officer maintained good eye contact throughout the conversation ... He gave me sufficient time to finish what I had to say without interrupting midway. He asked questions to clarify his understanding before giving me an appropriate answer to my query.

[36] Thirdly, Mr Bidgood said Mr Hong reported an exceptionally high level of incidents of verbal abuse and threats of physical violence by members of the public. Since AT's inception in 2011 only one other officer had reported more such incidents. Mr Bidgood considered this was consistent with some of the Mystery Parker reports that he said found Mr Hong "confrontational in his manner and deficient in basic communication skills".

[37] Fourthly, Mr Bidgood was concerned at Mr Hong's behaviour at a meeting of parking officers on 14 September 2016. The meeting was a quarterly update meeting attended by around 240 AT staff. The Police district commander was a guest speaker at that meeting. Mr Hong questioned the commander on Police procedure for dealing with parking officers' complaints about abusive members of the public. In doing so Mr Hong talked about a particular incident in which he had been involved and referred to mental harm resulting from such events. Mr Strawbridge had chaired that meeting. In his oral evidence at the Authority investigation Mr Strawbridge said he had intervened after a few minutes and asked Mr Hong to sit down. Mr Strawbridge said he was embarrassed for the commander. He considered Mr Hong showed little or no respect by suggesting parking officers were not supported by the Police and "the tenor" of how he spoke to the commander.

[38] As a result of what Mr Hong said at the 14 September staff meeting Mr Bidgood held a formal meeting with him on 27 September. In a letter calling him to that formal meeting Mr Bidgood said Mr Hong's remarks on 14 September could damage AT's standing with the Police. He referred to a previous instance of Mr Hong saying abuse from the general public caused mental harm. He also said he had ongoing concerns about Mr Hong's communication abilities in the workplace and how that impacted on his role when addressing members of the public.

[39] An email note Mr Bidgood sent AT's employment relations manager after the 27 September meeting described it as a "relatively good meeting". He noted Mr Hong had said he felt AT "trained, coached and supported him effectively" to deal with situations of threatened or actual physical assault. However Mr Bidgood also wrote "that was a little too easy and had a feeling of 'lip service' attached to it". Asked at the Authority investigation meeting what that comment meant, Mr Bidgood said he considered Mr Hong would say one thing but do something different.

[40] The fifth source of Mr Bidgood's concerns about Mr Hong's conduct arose from an instance where he considered Mr Hong was rude and abrupt to two managers from AT's property department. The managers met with parking officers to talk about furniture for new facilities being completed in 2017. During that discussion Mr Hong spoke about a previous issue regarding the type of furniture available in the officers' break area. This was an issue Mr Bidgood considered had been adequately dealt with some months earlier. He said Mr Hong's comments were loud, short and sharp. Mr Bidgood said he was very embarrassed by Mr Hong's behaviour and he had to apologise to the visiting managers for how Mr Hong spoke to them.

Flaws in AT's investigation

[41] Against that background the evidence available for the Authority's investigation disclosed three significant flaws in AT's disciplinary inquiry about Mr Hong's conduct. They were:

- (i) Mr Bidgood's multiple roles as witness, as manager presenting information against Mr Hong, and then helping Mr Strawbridge as decision maker to assess the credibility of differing accounts of what had happened, including Mr Bidgood's own account.
- (ii) Inadequate evidence to support one conclusion about what Mr Hong had said at the January training seminar.
- (iii) A failure to take more formal steps to address concerns about Mr Hong's conduct or behaviour at an earlier stage.

[42] Those flaws are addressed under the following three headings.

(i) Mr Bidgood's role as witness, "accuser" and evaluator of evidence

[43] Mr Bidgood described his role in the disciplinary meetings as "the accuser" while Mr Strawbridge, with the assistance of an HR advisor, was the decision-maker. Mr Bidgood said his involvement in that role was "to present the facts as I had them and question accordingly and present them to [the HR advisor] and [Mr Strawbridge]".

[44] However Mr Bidgood was also both a witness to various events that were in issue in the disciplinary process and was then involved in Mr Strawbridge's evaluation of the relative credibility of what Mr Bidgood and Mr Hong had said about

what happened. As a witness Mr Bidgood provided his account of what he said had occurred on occasions such as the January 2017 training seminar, the September 2016 staff meeting and other interactions with Mr Hong. This included relaying views of others such as Mr Hong's supervisors and what had been said to him by other parking officers about Mr Hong. The transcripts of the disciplinary meetings with Mr Hong on 9 and 22 February showed Mr Bidgood did put much of that information to Mr Hong during those discussions. However, following those meetings, Mr Bidgood then talked with Mr Strawbridge about Mr Hong's responses. This included considering whether what Mr Hong said was reliable and accurate compared with what others, and particularly Mr Bidgood, said about what happened.

[45] This involvement with Mr Strawbridge's evaluation of the evidence was unfair in a sophisticated organization with the resources of AT. Mr Strawbridge was an experienced and senior manager. He also had the assistance of an HR advisor available to him to carry out that evaluation. He did not need and could not fairly have Mr Bidgood, who was both witness and (in his own words) "accuser", then involved in evaluating the reliability of what Mr Bidgood said compared with what Mr Hong said. AT had the capacity available to it to keep the roles clearly and fairly separate. Its failure to do so compromised AT's ability to establish that it had acted reasonably in sufficiently investigating the allegations and genuinely considering Mr Hong's explanation.¹⁰ It resulted in an unfair conclusion about one important aspect of what Mr Hong was alleged to have said or done.

(ii) Evaluating the evidence of what Mr Hong said at the January seminar

[46] The importance of a fair and clear separation in Mr Strawbridge's evaluation of differing accounts was illustrated by the dispute over whether Mr Hong had said he told members of the public he would "charge" them for abusive or racist comments. Mr Bidgood's account was that Mr Hong said so at the January training seminar and that others had also told Mr Bidgood they had heard Mr Hong make similar comments on other earlier occasions.

[47] The importance of this point was twofold.

[48] Firstly, if Mr Hong were established to have admitted to making such

¹⁰ Employment Relations Act 2000, s 103A(3)(a) and (d).

comments to members of the public, it would amount to bizarre and confrontational behaviour. Parking officers had no legal authority to ‘charge’ anyone. To threaten a member of the public with such a ‘charge’ could make a confrontation worse.

[49] Secondly, Mr Strawbridge came to the view that Mr Hong was not truthful or accurate in his description of various events, partly because he believed Mr Bidgood’s account of what words Mr Hong used at the January training seminar and did not believe Mr Hong’s denial that he used those words in that way. If that conclusion about the reliability of what Mr Hong said was unfairly reached, it could then unfairly taint Mr Strawbridge’s assessment of the rest of what Mr Hong said.

[50] Three emails written by people present at the seminar provided some near contemporaneous accounts of their views of what Mr Hong said there. Mr Bidgood asked those three people to send him emails about it. One was from an AT trainer and one from an AT health and safety manager, both sent the day after the seminar. The third was from the seminar presenter, an external training provider. His email was sent three days after the seminar.

[51] Mr Strawbridge and Mr Hong both saw those first two emails during the disciplinary process. The presenter’s email was not shown to Mr Strawbridge or Mr Hong. Mr Strawbridge said he had not seen it until papers were being assembled, months later, for the Authority investigation. Mr Bidgood had however referred to the presenter’s views during the disciplinary meetings on 9 and 22 February.

[52] The health and safety manager wrote that Mr Hong had expressed strong views about dealing with verbal abuse from the public. She said “the example Peter gave of how he would respond was to make threats of legal action against the person”. Her description of what was said about legal action differed from Mr Bidgood’s account that Mr Hong had said “I will charge you with an offence”. It did not refer to who Mr Hong had said would take the legal action.

[53] The trainer’s two-and-a-half page email referred to an example Mr Hong gave at the end of the second day of the seminar as showing “he feels the need to reply in a personal way, and will do so, in line with his personal opinion people should not treat him this way”. She continued with the observation that the way he spoke was “way below average”. She said he was:

... hard to understand, or to follow – not only for me but for others. It is not his volume of his voice but how he pronounces words, in a sort of dialect and it comes out in sort of brackets with pauses in between. Me personally – I often can only follow three or four out of eight words and have to guess what the sentence really means. Observing him I cannot escape the nature of his communication can be an invite for aggression from customers”.

[54] As vehement as her lengthy critique of Mr Hong was, it did not describe him as having said he would ‘charge’ anyone.

[55] The seminar presenter’s email similarly said Mr Hong “does not seem open to feedback or change of attitude on some of these more conflictual issues, nor to align with AT norms of behaviour in aggressive customer conversations”. It said Mr Hong’s viewpoint was that verbal abuse from drivers, especially derogatory name-calling entitled him to “retort to these people with various statements and occasional threats, such as legal prosecution by the police, which some customers would find provocative. This apparently gets him into trouble on the streets at times”.

[56] The key point here was that the seminar presenter recalled Mr Hong referring to prosecution “by the police”, not him personally ‘charging’ anyone.

[57] According to a transcript of the 9 February meeting Mr Hong gave the following response when Mr Bidgood made the allegation Mr Hong used the words “I will charge you” when speaking at the seminar:

Can I say now. How can I charge someone? This “I will charge you” is made up by you. This sentence, this English phrase is not familiar to me at all. I am a barrister and solicitor of the High Court of New Zealand. How can I charge someone. Even a ten year old boy or a girl going to primary school would know that only police can charge someone ...

[58] In closing submissions AT said the key question was whether Mr Hong told the truth when he denied saying he had told people he would charge them when they swore at him. It said the evidence of Mr Bidgood and Mr Paul was “broadly consistent” with a conclusion Mr Hong was not telling the truth. It also said the three emails from other participants, referred to above, were contrary to Mr Hong’s version of events. This was not a compelling submission for three reasons.

[59] Firstly, Mr Paul’s evidence did not really corroborate the evidence of Mr Bidgood. Mr Paul could not recall the words Mr Hong had actually used, remembering only “general remarks”. He could also not accurately remember on which of the two days at the seminar Mr Hong had made the comments that were said

to have caused such great upset.

[60] Secondly, none of the three emails from other participants corroborated the actual words Mr Bidgood said Mr Hong had used.

[61] Thirdly, the question for resolution by the Authority was not to establish the truth as to what Mr Hong did or did not say at the seminar, and what that might suggest about what he had said or would say in situations on the street with members of the public. Rather, what needed to be determined was whether AT's evidence had established, to the necessary standard, that it acted reasonably in reaching the conclusion it had about what Mr Hong said.

[62] Faced with conflicting evidence from Mr Hong and Mr Bidgood, Mr Strawbridge had come to a firm view that Mr Hong did not give a true account of what he said at the seminar. Because Mr Bidgood had assisted Mr Strawbridge in making that assessment and reaching that conclusion, AT had not established it acted reasonably in how its decision-maker had done so.

(iii) Failure to address concerns earlier

[63] What Mr Hong said at the January seminar, and how he said it, could not have been a great surprise to Mr Bidgood and other supervisors and manager present. There was at least a two year history of Mr Hong raising his views that interactions with abusive members of the public in the streets caused mental harm to parking officers and such people should be challenged about what they said. He had raised those issues with his supervisor, Mr Strawbridge, as was evident from the content of the ORA reports. In the 9 February disciplinary meeting Mr Hong also referred to earlier discussions he had with another manager about telling people not to use offensive language. His account was that other manager had told him AT could not stop him saying that but it would be better if someone "in authority such as the police" did so rather than Mr Hong. Mr Bidgood was also directly involved in the September staff meeting where Mr Hong had raised that issue and the meeting he then held to discuss his concerns about what Mr Hong said to the senior Police officer at the staff meeting.

[64] The evidence of Mr Bidgood and Mr Paul also suggested other parking officers and supervisors had expressed concerns about how Mr Hong dealt with

members of the public. Despite those long standing concerns AT had not put in place any formal performance management process in which Mr Hong was squarely told his job could be at risk if he did not make changes to his interactions both within AT and outside in dealing with members of the public. He had been given no written warnings or otherwise been put on notice of disciplinary consequences until he was given the proposed suspension letter on 3 February 2017.

[65] Questioned on this point at the investigation meeting Mr Bidgood said he preferred to take a ‘coaching’ approach to such issues rather than use formal performance management steps. He pointed to other examples whether concerns about parking officers’ performance had been successfully addressed by coaching. He said Mr Strawbridge had endeavoured to provide Mr Hong with such help. However it was also clear Mr Bidgood was aware, and had been for some time, that ‘coaching’ were not sufficient to address and change Mr Hong’s entrenched views.

[66] In that context AT’s approach of addressing its concerns about how it believed Mr Hong carried out his duties as a safety issue, requiring urgent disciplinary action in February 2017, was of low credibility. Placing a safety label on the behavior was a short cut to performance management measures that gave a real opportunity to change or improve. A safety label does not exempt an employer from the obligation to act in a justified way to address long-standing concerns. Although AT’s evidence and submissions sought to dress its actions with the ‘hi-vis’ status of essential ‘safety’ measures to protect Mr Hong and others, the reality and substance of its concerns and decision were found in Mr Strawbridge’s reference to Mr Hong’s ‘compatibility’ with the role and what AT required of him in it.

Was AT’s finding of serious misconduct nevertheless justified?

[67] The flaws in AT’s actions, identified earlier in this determination, could render an employer’s findings of misconduct and its decision to dismiss unjustified. However the Authority’s inquiry does not end once procedural defects or other such flaws are found. The employer’s actions may nevertheless be found to have been within the range of responses open to a fair and reasonable employer if the same substantive decisions could have been reached by an inquiry conducted without those defects.

[68] In Mr Hong’s case this concerned whether AT could have reached the same

conclusion that he had not complied, and could not be relied on to comply, with its instructions about how to deal with abusive members of the public. For reasons that follow this was a conclusion reasonably open to AT.

[69] AT's allegation, made in its letter of 13 February, was that Mr Hong chose to act in a manner contrary to instructions given to him. It said this was, in effect, a failure to follow a lawful and reasonable instruction and amounted to serious misconduct. The allegation concerned both past conduct and what it considered he would continue to do in the future. It described him as having said he was not willing to observe measures AT regarded "as crucial to upholding our reputation as both fair and law-abiding in our approach to our customers and members of the public".

[70] There was no credible evidence that Mr Hong did not know about AT's preferred technique for dealing with abusive members of the public. He knew the policy was to 'detach and walk away'. One example of this requirement being made personally and unequivocally clear to Mr Hong was found in Mr Shaw's ORA for 21 July 2016. Mr Shaw's note recorded that he "told Peter it was my expectation he could assist MoP with queries but to walk away if it got abusive or agitated".

[71] It was also clear Mr Hong held strong views this approach was not always the right way to deal with such situations. He thought AT and the Police should do more about those situations because he considered such abuse could cause "mental harm" to parking officers. He raised that issue a number of times during his employment, most recently in the September 2016 staff meeting and then again in January 2017 during the training session about using de-escalation techniques.

[72] While Mr Hong disagreed that AT's preferred 'de-escalation' techniques were always appropriate for dealing with abusive people, AT could lawfully and reasonably instruct staff to routinely use the 'detach and walk away' approach. AT had decided it did not want parking officers engaging in arguments with abusive members of the public about what they said or how they acted. Other than seeking compliance with parking regulations, AT considered controlling bad behaviour by some members of the public was beyond its role. It also considered its policy minimised the risk of further verbal abuse and physical assault of parking officers.

[73] Mr Hong's answers to questions at the Authority investigation made clear he thought AT should more actively support parking officers laying complaints with the Police and AT should encourage the Police to do more to prosecute members of the public who made racist or other very abusive comments or threatened parking officers with physical assault. He estimated each officer would experience such incidents around twice a week.

[74] If that estimate were correct, such incidents would total more 1200 a year across the ranks of more than 150 parking officers. Even if only more serious incidents, such as the one Mr Hong reported in Karangahape Road on 31 January, were prosecuted by the Police, some hundreds of cases would then need to be pursued each year if AT agreed with Mr Hong's view of how to deal with such incidents. However AT did not want to commit the additional time of its parking officers that would be required for such a strategy. It did not want to be involved in such extensive litigation against some members of the public.

[75] While that was the background to the different views, the question for resolution was whether AT established it had reasonably concluded Mr Hong had failed to follow its instructions on this matter and would likely fail to do so in the future. Its evidence for that conclusion came directly from two examples Mr Hong gave during the disciplinary meetings.

[76] This was important because AT's allegations did not rely on any reports or complaints made independently by members of the public. Although AT investigated all complaints, they were a regular and inevitable aspect of a parking officer's role. Copies of complaints about Mr Hong provided for the Authority investigation gave a limited insight into other instances of conflict with members of the public. One complainant said Mr Hong was rude to have pointed his finger at her when she pulled into a disabled parking space on a busy street to let her husband, who was not disabled, get out of the car. Another driver complained she was waiting on a broken yellow line for cars ahead of her to move on in the street when Mr Hong knocked on her car door and told her she could get a ticket. She said she used her hands to indicate she did not intend parking there and Mr Hong had said to her, in "broken English", "no point finger me". In another instance, a parker complained Mr Hong was "rude and obnoxious" and "just out to make trouble" by giving her a ticket for parking her car, which had no registration, outside her own house. At the time of that

complaint Mr Hong's explanation was that the complainant told him she knew the mayor and would not be paying the ticket. He said the only comment he made to her was that knowing the mayor was not relevant.

[77] Although Mr Hong had reported many instances where he said he had been abused or threatened, there were no reported incidents of a member of the public physically assaulting him in his role as a parking officer. He had reported one incident where someone being removed from Sky City by casino security officers hit him. However he was a passerby at the time rather than dealing with that person as a parking officer.

[78] In the 9 February disciplinary meeting, to discuss his suspension, Mr Hong asked what lawful and reasonable instruction he was said to have refused to follow. According to the meeting transcript it led to the following exchange with Mr Bidgood. It included one example of how Mr Hong said he had dealt with a situation on the street:

Mr Bidgood: It is along the line, do not respond in argumentative manner, remain calm, project yourself in a calm, detaching and walk away from the situation. Do not challenge the member of the public verbally.

Mr Hong: Does your instruction include my not using the phrase: "Do not use offensive language in public place".

Mr Bidgood: If you want to use it, say, "I am sorry sir, your language is offensive to me today". That is a really calm way of dealing with the situation.

Mr Hong: I used similar language.

Mr Bidgood: The example you gave in the training session was followed up by "It is against [the] Human Rights Act".

Mr Hong: Human Rights Act?

Mr Bidgood: That's a challenge to the member of the public.

Mr Hong: It is a real situation. It happened only three months ago. Someone said to me "fuck you asshole" which reached my trigger point. I said "Do not use offensive language in public place". He said, "Really, I grew up hearing all of those stuffs, it is Kiwi language." I said, "No sir, using offensive language in public place can even become a criminal offence. Please do not use it." The same person came to me when I was writing a ticket around the corner and said, he googled it obviously,

“Hey you got all my vehicle details, I am sorry”. He said that. That was what happened. Human Rights Act? How can I use such a lawyer word in public place? It does not work at all.

[79] Earlier in that meeting Mr Hong also referred to the phrase about offensive language and gave a further example of using it. It was the example he said he had used during the comments had made at the January training seminar:

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

HR advisor: Do you understand that your role is not to tell people how they can and cannot behave? You are not permitted to do that. We don't want you to do that. You are risking someone smacking you in the head because that is what happens sometimes.

Mr Hong: In my experience ten out of ten they backed off when I say, “Do use offensive language in public place”. I have never been physically abused. Many of my colleagues were attacked physically by members of the public. I have never been physically attacked nor had any valid complaints for the last five years. Everyone has a trigger point as taught in the training session. Normally I do not use this phrase when someone say, for example, “fuck you, fuck you” I just ignore it. But when I cannot move away when someone really abuse me with bad language such as “gooks, go to China” combined with F words and A words, I say “do not use offensive language in public place”. This is my position. If you dismiss me because of my use of this particular phrase, “Do not use offensive language in public place”, then I will gladly defend it to the highest court in the country if I lose the case in lower courts. This phrase, when my trigger point is reached as taught in the training session I will use this phrase ...

HR advisor: What words did you use?

Mr Hong: Do not use offensive language in public place.

[80] Those two examples Mr Hong gave in that meeting established that he had acted in a way contrary to what AT wanted him to do in such situations and that he considered he should be permitted to continue to act as he did.

[81] The transcript of the 22 February disciplinary meeting showed Mr Hong said, several times, that he would rephrase what he said in such situations in the future. He said he would use the phrase “sorry, that language is offensive to me” rather than tell a member of the public not to use offensive language. From those exchanges Mr Strawbridge could have reasonably concluded Mr Hong would, on some occasions, continue to engage with abusive members of the public over the inappropriateness of their conduct rather than walk away. Given Mr Hong’s strongly-held views about whether disengaging was an adequate response, Mr Strawbridge could also have reasonably concluded Mr Hong would not necessarily restrict himself to the phrase he said he would use. It was an assessment reasonably open to Mr Strawbridge on the basis of Mr Hong’s self-reporting of what he had done in the past and listening to what Mr Hong said in the disciplinary meetings.

[82] As a result it was within the range of reasonable responses for Mr Strawbridge to conclude what Mr Hong deliberately did, and would likely continue to sometimes do, was contrary to instructions and was serious misconduct.

Was the decision to dismiss for serious misconduct reasonably made?

[83] A finding of serious misconduct did not make dismissal for it inevitable. AT also had to establish Mr Strawbridge then reasonably concluded the employment relationship was so damaged that dismissal of Mr Hong was warranted.

[84] In telling Mr Hong the reasons for his dismissal Mr Strawbridge said he had lost trust and confidence Mr Hong could perform his duties as AT expected him to do and referred to Mr Hong’s “compatibility” to the job. He appeared to be referring to the concept of incompatibility in employment law, a ground that may justify dismissal. Incompatibility justifying dismissal refers to situations where there has been “an irreconcilable breakdown in trust and confidence in the employment relationship”.¹¹ It may justify dismissal where, on a broad assessment of that

¹¹ *Reid v NZ Fire Service Commission* [1999] 1 ERNZ 104 (CA) at 107.

employment relationship:¹²

- the employer was entitled to conclude the employment relationship was irreparable; and
- the irreconcilable breakdown was attributable wholly or substantially to the employee; and
- the manner in which the employer carried out the dismissal was procedurally fair.

[85] Mr Strawbridge was not swayed by a statement Mr Hong made near the end of the 22 February meeting that he would “keep this job very quietly from now on”. His skepticism was not unreasonable given Mr Hong’s answer when asked at the Authority investigation meeting about what he would do if he was reinstated. He said he would be “a quiet person unless it affects the safety of me or the safety of other officers”. His answer indicated that Mr Hong still reserved, as he had done at the disciplinary meetings, what he saw as his right to act, on safety grounds, contrary to instructions such as the ‘detach and walk away’ approach. During his employment he had consistently maintained his view that AT’s approach caused mental harm while his preferred alternative of more police prosecutions would, eventually, create a safer environment for parking officers.

[86] In that light Mr Strawbridge had reasonably concluded AT could not have sufficient trust and confidence Mr Hong would act differently in the future, so the breakdown was irreparable. This was substantially attributable to Mr Hong. Even if some people might consider AT should have taken a different punitive or educative approach to members of the public making abusive or racist comments to its parking officers, it was not unreasonable for AT, as an employer and public agency, to have adopted the policies it had about how to respond to such behaviour. Mr Hong was solely responsible for his dogged pursuit of a different approach. It was his decisions about what he would do, as reported by him in the two specific instances he disclosed, that caused problems for him with his employer.

[87] AT’s decision Mr Hong had committed serious misconduct by failing to follow reasonable instructions did not result from the three flaws in its process identified earlier in this determination. It did not rely on the unsubstantiated allegation

¹² *Mabry v West Auckland Living Skills Homes Trust Board (Inc)* (2002) 6 NZELC 96,573 at [33]-[36].

Mr Hong had referred to personally ‘charging’ people or Mr Bidgood’s inappropriate involvement in assessing the evidence about that point. Rather Mr Strawbridge’s conclusions on it were the result of what he directly heard Mr Hong say about what he had done in the past and Mr Strawbridge’s assessment of what Mr Hong said about what he would do in the future. There was no procedural unfairness in how those conclusions were reached.

[88] The prospect that a performance management programme, if undertaken sooner, might have resulted in a different substantive outcome in Mr Hong’s employment needed to be considered broadly by standing back and looking at the situation overall, rather than analysing a series of individual events. In the context of all the evidence, and how Mr Hong conducted himself over several years, it could not confidently be said such a programme would have so altered his fundamental and deeply-held views and subsequent conduct as to result in a different, eventual outcome.

A justified dismissal

[89] Although there were some shortcomings in how AT investigated Mr Hong’s conduct, its decisions, that what he had done was serious misconduct and warranted dismissal, were ones a fair and reasonable employer could have made in all the circumstances at the time. Mr Hong was not unjustifiably dismissed.

The “nearly met” performance grievance

[90] Mr Hong said he was unjustifiably disadvantaged when the overall rating in his performance appraisal was changed from having ‘met’ AT’s performance objectives to having ‘nearly met’ them. His supervisor made the initial ‘met’ assessment. A regional supervisors’ meeting on 2 September 2016 reviewed and then changed that assessment to ‘nearly met’ and the area managers later agreed to that decision.

[91] Mr Hong was disadvantaged by this change because a ‘nearly met’ rating meant his annual wage increase would be lower than parking officers with a ‘met’ rating. However his evidence did not establish the assessment was unjustified, that is that it was a decision that a fair and reasonable employer could not have reached.

[92] AT operated a moderation system so individual supervisor assessments were not the last word. The final assessment rating was unanimously agreed by the supervisors. Mr Hong had not established any irrelevant or unfairly considered information affected that decision.

The suspension grievances

[93] A clause in the collective agreement applying to Mr Hong's employment allowed for an employee to be suspended, on pay, from her or his duties when AT wished to investigate any alleged misconduct. The clause said this could be done after discussing the proposed suspension with the employee and considering the employee's views.

[94] Mr Hong raised three grievances about his suspension. He alleged AT unjustifiably disadvantaged him by suspending him three times – on 26 January, 3 February and 9 February 2017. AT said this mischaracterised what had happened and Mr Hong was only suspended once, on 9 February, after a fair process for which he was given time to prepare.

26 January

[95] On 26 January, the day after the seminar, Mr Bidgood asked Mr Hong to take the day off on pay. He did so because he was concerned about what Mr Hong had said at the seminar, was worried about the risk of some incident occurring on the street if Mr Hong was not acting in compliance with AT policy, and wanted some time to discuss what should happen with his own manager. His evidence was that Mr Hong agreed to the suggestion.

[96] There was no practical disadvantage to Mr Hong of getting a paid day off. It added an extra day to the two days of leave and two rostered days off he was already about to start. However he argued this was a de facto suspension and denied he agreed to take the day off.

[97] As a matter of likelihood Mr Bidgood's evidence on this point is preferred. The paid day off was taken by agreement. It was not an unjustified suspension.

3 February

[98] On 3 February Mr Bidgood met with Mr Hong. He gave him a letter setting out a proposed suspension and the reasons for it. The letter encouraged Mr Hong to get advice from his union or an employment advocate or a lawyer. It said the meeting to hear any submissions Mr Hong wished to make about the suspension proposal was to be held on 9 February.

[99] Mr Bidgood's evidence was that he also told Mr Hong he could take time off to prepare for the 9 February meeting and get advice. Mr Hong asked if he was being suspended and Mr Bidgood said he was not and it was only a proposal. Mr Bidgood said Mr Hong agreed to leave and return to work for the meeting on 9 February but as he left the office he loudly told other people he had been suspended. Mr Bidgood also said AT's normal practice when suspending a parking officer was to remove his or her computer access and take the officer's warrant card and badge. Mr Hong retained his access to AT's offices, computer access, badge, uniform and keys when he left work on 3 February.

[100] Mr Hong submitted the 3 February letter failed to identify any alleged misconduct. However the letter referred to Mr Hong's "refusal to follow lawful and reasonable instructions", which was a clear allegation of misconduct.

[101] He also submitted the letter had already implemented the suspension because it said he was not permitted to attend the workplace until "the meeting". However it was not clear whether that was a reference to the 9 February meeting about the proposed suspension or was meant to refer a subsequent disciplinary meeting that the letter said would be held once further allegations were put him.

[102] Even if there was an error in that aspect of the process, it did not result in Mr Hong being treated unfairly. If there were doubt on that point, Mr Bidgood's evidence that Mr Hong agreed to take that paid leave was to be preferred, as a matter of likelihood.

[103] Mr Hong had paid time off to seek legal advice, which he said he did from three different lawyers. He incurred no real disadvantage from having that paid time off provided to him. It was not an unjustified suspension.

9 February

[104] Mr Hong submitted his suspension after the 9 February meeting, confirmed in writing by letter dated 13 February, was an unjustified disadvantage because one of the reasons given for his suspension was about what he may or may not do in the future, not what he had already done. The letter referred to AT's concerns that de-escalation methods "described in numerous coaching and recent training will not be observed due to your own views on what is and is not tolerable". However the letter did refer to AT's allegation that Mr Hong had refused to comply with lawful and reasonable instructions about how he was to respond to abusive members of the public. It said "we have instructed you on the manner in which you are to respond (or not as the case may be) and ... you have refused to do so based on your personal beliefs which you described during a training course recently held". It was not unreasonable for AT to refer to prospective future conduct based on alleged past misconduct.

[105] Mr Hong also submitted Mr Strawbridge's evidence showed he had decided to initiate a disciplinary process on 26 January and then spent only a few minutes near the end of the 9 February meeting deliberating on Mr Hong's suspension as part of that process. Mr Hong said the decision to suspend him was therefore predetermined.

[106] Suspension was an option reasonably open to AT in the circumstances of its concerns about Mr Hong's conduct. He was given adequate notice of the meeting to discuss that proposed suspension and an opportunity to prepare for it. As the transcript of the 9 February meeting showed, Mr Hong engaged in a lengthy discussion with AT's representatives about the merits of suspension and the events that led to them beginning a disciplinary inquiry. The natural justice obligations were observed and there was no doubt that Mr Strawbridge held genuine concerns about the risks of Mr Hong being involved in further conflict with members of the public if he worked while the inquiry was underway. There were no available positions for office-based duties in the interim period that might have provided a viable alternative to suspension. He remained on pay throughout the suspension.

[107] Mr Hong suggested his suspension disadvantaged him by isolating him from the support of colleagues. However his evidence referred to receiving some messages from other parking officers during that period and there was no reason he could not

have telephoned or emailed workmates or arranged to meet them away from the AT office.

[108] In all the circumstances at the time, Mr Hong was not unjustifiably disadvantaged by his suspension from 9 February.

Costs

[109] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to resolve any costs issue, and an Authority determination on costs is needed, AT should lodge and then serve a memorandum on costs within 14 days of the date of issue of this determination. Mr Hong should lodge any reply memorandum within 14 days of the date of that service. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[110] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.¹³

Robin Arthur
Member of the Employment Relations Authority

¹³ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].