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Hong v Auckland Transport (Auckland) [2017] NZERA 115; [2017] NZERA Auckland 115 (18 April 2017)

Last Updated: 30 April 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2017] NZERA Auckland 115
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: 6 April 2017

Determination: 18 April 2017

DETERMINATION OF THE AUTHORITY

A. The application by Yoon Cheol Hong for interim reinstatement

pending the Authority's investigation and determination of his

personal grievances is declined.

B. Costs are reserved.

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 was employed as a parking officer. He was part of a 168-member enforcement team employed by Auckland Transport to patrol city streets and issue infringement notices for vehicles parked illegally or breaking the rules about driving in transit and bus lanes.

[2] Mr Hong was dismissed because AT managers decided he had views that were contrary to their instructions and expectations of what he should do to deal with members of the public who became abusive after getting a ticket, and he had acted on those views.

[3] Mr Hong raised a personal grievance for unjustified dismissal. His grievance is to be investigated at an Authority investigation meeting scheduled for 29 and

30 May 2017. The investigation meeting is also intended to consider other grievances raised by Mr Hong. He raised three separate grievances of unjustified disadvantaged over how AT went about suspending him from work while it investigated its concerns that led to his dismissal. Mr Hong had earlier raised a grievance alleging unjustified discrimination after AT gave him a "nearly

met” job performance grading in September 2016. Mr Hong has sought remedies of an order for lost wages, compensation for distress caused by his dismissal and the alleged disadvantages, and for his reinstatement to a position as a parking officer.

[4] Mr Hong also sought an order for his interim reinstatement, pending the

Authority’s investigation and determination of his personal grievances.

[5] His application for that interim reinstatement order has been determined on the basis of evidence given by affidavit and after considering submissions provided writing and orally by Mr Hong and counsel for AT. The affidavits comprised one from Mr Hong (sworn on 27 February 2017), one from AT’s parking compliance manager Rick Bidgood (sworn on 24 March 2017), and a reply affidavit from Mr Hong (sworn on 30 March 2017). While affidavit evidence is accepted on an untested basis, some commonsense assessment of unanswered or disputed assertions in those sworn statements may be made for the purposes of considering an interim

reinstatement application.¹

[6] As permitted by [s174E](#) of the [Employment Relations Act 2000](#) (the Act) this written determination has expressed conclusions necessary to resolve the interim reinstatement application but has not recorded all evidence and submissions received.

Principles on interim reinstatement

[7] Whether or not to order interim reinstatement is determined by applying the law relating to interim injunctions having regard to the object of the Act.² The object refers to building productive employment relationships through the promotion of good

faith behaviour.³ The necessary analysis has three steps.

¹ *Wellington Free Ambulance Service v Adams* [2010] NZEmpC 59 at [17]- [18]

² [Employment Relations Act 2000, s127\(4\)](#).

³ [Employment Relations Act 2000, s3](#).

[8] In the first step Mr Hong must establish he had an arguable case for both aspects of his claim – that his dismissal was unjustified and then, if the Authority’s eventual determination agreed with that claim, that he would likely be reinstated on a permanent basis rather than receive only money remedies.

[9] In the second step the Authority must assess how best to regulate the positions of the parties until it had completed its investigation and determination of those substantive issues. That assessment is referred to as the balance of convenience. Factors for assessment included whether effective remedies were available to Mr Hong (other than interim reinstatement) and effects his interim reinstatement might have on AT and third parties.

[10] In the third step the Authority must take an overall or global view of the justice of the case and decide what should be done to attain that in the interim period. Strengths and weaknesses in the parties’ case are a factor to weigh in reaching that conclusion.

[11] An order for interim reinstatement may be subject to any conditions the

Authority thinks fit.⁴

Arguable case: unjustified dismissal

[12] The test for an arguable case concerns whether Mr Hong has some tenable (but not necessarily certain) prospect of success in his claim that he has a personal grievance for unjustified dismissal. The relatively low threshold of the test is usually met where applicants dispute the purported justification for their employers’ actions because, in a personal grievance application, the statutory onus is then on the employer to justify what it did and how it did it.⁵

[13] On the low threshold of that test AT conceded Mr Hong had a tenably arguable case about the justification for his dismissal. However AT submitted there was no such tenably arguable case Mr Hong would be awarded the remedy of reinstatement if the Authority were to find, after its substantive investigation, that his

dismissal was unjustified.

⁴ [Employment Relations Act 2000, s127\(5\)](#).

⁵ [Employment Relations Act 2000, s 103A](#).

[14] Although AT had conceded this first aspect, the elements of what was tenably arguable about the dismissal justification still had to be considered in some detail. This was necessary as the relative strengths of the parties’ cases on those points, as best they could be assessed at an interim stage, was a factor in later weighing where the overall justice lay during the interim period.

How the dismissal came about?

[15] Mr Bidgood's evidence identified the catalyst for the disciplinary process that led to Mr Hong's dismissal as being comments he said Mr Hong made during a training seminar for parking officers held on 24 and 25 January 2017. Mr Bidgood referred to an "outburst" by Mr Hong during a discussion on how to deal with or respond to members of the public who abused or threatened a parking officer. Mr Bidgood said Mr Hong had used the following words in describing his own experiences in the street:

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.

That language is against the Human Rights Act.

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.

[16] Mr Bidgood also said Mr Hong had referred to "trigger points" he reached when dealing with a customer that meant he "would not back down" and that he "would respond". It was not entirely clear from Mr Bidgood's affidavit or other documents whether those latter comments were said at the training seminar or only during subsequent meetings AT managers held with Mr Hong to discuss their concerns about what he said at the seminar.

[17] Mr Hong had a different description of what he had said at the training seminar. He insisted what he had said was:

What about responding by saying, "do not use offensive language in public place"?

[18] Mr Bidgood's affidavit refuted that description by Mr Hong. He deposed that, at the Authority's substantive hearing, other witnesses who attended the seminar would be able to confirm Mr Bidgood had correctly described what Mr Hong said.

[19] Mr Bidgood also deposed that AT's decision to dismiss Mr Hong could be

justified because of events both before and after that training seminar.

[20] The day after the seminar, Mr Bidgood arranged for Mr Hong to take the day off work. There is a dispute between the parties as to whether that paid day off amounted to a suspension, informally imposed, or was taken by agreement.

[21] On Mr Hong's next working day, which was 31 January 2017, he was involved in an encounter with a member of the public to whom he had issued a ticket. Police were called to attend the incident after Mr Hong had made an emergency assistance call to the parking officers' communications centre. Mr Bidgood's evidence was that Mr Hong, during his employment, had reported "an exceptionally high number" of instances where he was subject to verbal abuse and threats of physical violence by members of the public. There was said to be only one other parking officer who had reported more such situations than Mr Hong. Mr Bidgood referred to some reports from Mystery Parkers that described Mr Hong as "confrontational in his manner and deficient in basic communication skills". The Mystery Parkers are an anonymous review process used by AT to assess parking officers' interactions with the public.

[22] Mr Bidgood also said Mr Hong had not been willing to apply the guidance he was given in earlier training sessions and from coaching by his immediate supervisor, Marcus Straw.

[23] Mr Hong denied he had received any additional coaching from Mr Straw and said he was not notified of any concerns that his manager or supervisor had about his performance. He also said AT encouraged parking officers to report every verbal abuse incident to the health and safety personnel and to their supervisor. He said this reporting procedure was for the safety of other parking officers as well as him and he could not control the frequency of such incidents on the street. He said he felt AT did not like him reporting incidents as often and accurately as he did and AT was now using his reporting conduct against him. He also said he had not known the 31

January incident was considered by AT when it decided on suspending and dismissing

him. He said the incident happened without any fault on his part when a driver became angry and abusive at being ticketed by him for illegal parking. He said that, until he received a letter titled "proposed suspension" on 3 February 2017, he was not aware AT had any concern that how he carried out his work created risks to his safety or the safety of others.

[24] The 3 February letter, signed by AT parking services and compliance manager

John Strawbridge, gave this reason for considering his suspension:

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 wholly unacceptable.

[25] A letter of 13 February from Mr Strawbridge, calling Mr Hong to a disciplinary meeting, elaborated on those concerns. It incorporated AT's description of some explanations Mr Hong gave during a meeting held on 9 February to consider his suspension during the disciplinary process:

As stated in our letter of 3 February 2017, your refusal to comply with our instructions regarding behaviours we expect you to demonstrate, have spent considerable time coaching you on, have invested in training for you and which we have articulated on numerous occasions both verbally and in writing, puts the health and safety and wellbeing of yourself and others at considerable risk which we consider to be wholly unacceptable.

We further consider that your refusal to do so based on personal views illustrates a complete disregard for this organisation's values and Code of Conduct which we further find unacceptable. Your ability to critically reflect on your own behaviour and to make the necessary changes is thwarted by your view of what you consider to be tolerable/intolerable. This is at odds with this organisation. Your position on this is both anticipated and required.

We remain concerned that you repeatedly refer to a trigger point in the behaviour of members of the public or customers that we consider to be inappropriate in a professional context and whilst representing this organisation.

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.

Whilst we have not made any decisions about the outcome of the above, you should be aware that one of the options open to us is termination of your employment. ...

[26] Mr Bidgood and Mr Strawbridge met with Mr Hong on 22 February to hear his response to AT's concerns and then again on 24 February to advise him of the disciplinary outcome.

Tenable arguments that the dismissal was unjustified

[27] Against that background there were three tenably arguable reasons AT's decision to dismiss Mr Hong, and how it was reached, may not have been what a fair and reasonable employer could have done in all the circumstances at the time.

[28] Firstly, if failing to carry out recommended techniques to 'de-escalate' conflict with angry people did amount to an unreasonable refusal to follow instructions, there was arguably insufficient evidence Mr Hong had, in fact, failed to apply those techniques.

[29] Secondly, other information appeared to have been taken into account in deciding to dismiss Mr Hong that, arguably, he was not told about or given a reasonable opportunity to comment on.

[30] Thirdly, the decision to dismiss him was arguably not made because of serious misconduct in a particular instance (or a likely series of instances) but rather because of what AT managers saw as on-going poor performance by Mr Hong. And, again arguably, he was not fairly on notice his managers held that view and was not given adequate opportunity to improve in light of it.

[31] Each or any of those reasons, if established to the balance of probabilities at the Authority's investigation meeting, would be more than minor defects in the process and have resulted in Mr Hong being treated unfairly.⁶ If that were so, the dismissal would be unjustified.

[32] Evidence about those tenably arguable reasons is touched on later in this

determination in considering the relative strengths of each party's case.

6 [Employment Relations Act 2000, s 103A\(5\)](#).

Arguable case: reinstatement practicable and reasonable

[33] Mr Hong also had to establish he had an arguable case that – if AT were eventually found to have unjustifiably dismissed him – it would be practicable and reasonable to reinstate him to his former position or one no less advantageous. In *Ashton v Shoreline Hotel* the Employment Court gave this guidance about the exercise of the discretion to award that remedy, which was also useful in considering the arguable case question in the interim period:⁷

The important criterion is that employees are entitled not to be deprived of their employment unjustifiably and when they have been they ought ordinarily to be put back, if that is their wish. That would be a proper exercise of a discretion conferred on the Tribunal for the benefit of employees unless there are features in the case or indications pointing in a contrary direction that outweigh the employee's right to have his or her job back. Factors that produce that result ought to be substantial reasons and not mere assertions by an employer that it does not want to be forced to employ the employee whom, it will be recalled, it should never have dismissed in the first place. Such an assertion, if anything, aggravates the injury and renders reinstatement an even more compelling imperative. That is so notwithstanding the alteration in emphasis on reinstatement in the current statute. While each case must be determined on its own facts, the statistics given above indicate that the Tribunal is not mindful to an adequate

degree that it is called upon to be the impartial referee in a playing field dominated by the goal of job protection. That goal is not attained by substituting a money judgment for the job. Unless the employee has done something to merit forfeiting his or her employment, or unless reinstatement is for other good reasons unjust, to award routinely compensation for the job loss instead of reinstating is to create a system for licensing unjustifiable dismissals.

[34] That guidance was given at a time when – as now – the applicable legislation did not accord the remedy of reinstatement any primacy over the money remedies available to settle a personal grievance of unjustified dismissal.

[35] While reinstatement presently has no greater or lesser weight than other remedies, as the Employment Court observed in its decision in *Angus v Ports of Auckland (No 2)*, it may still be the most significant remedy claimed because of its particular importance to the grievant in a particular case. Whether an order for reinstatement should be made has to be examined on a case-by-case basis.⁸

[36] Having regard to the Court’s guidance and the statutory criteria, if Mr Hong were found to be unjustifiably dismissed, he should (having sought it) be awarded

reinstatement unless it was found – on the balance of probabilities – to be not

⁷ [1994] 1 ERNZ 421 at 436.

⁸ [2011] NZEmpC 160 at [61].

practicable and not reasonable to do so or because the remedy should be denied due to factors considered under the inquiry required by s124 of the Act (about contributing behaviour by the employee). However even a substantial level of contributory conduct may not disqualify a grievant from reinstatement, rather it could mean reinstatement might be the only remedy eventually granted, with monetary compensation cut or eliminated to reflect the requirements of s124 of the Act.⁹

[37] Assessing the reasonableness of reinstatement requires “a broad inquiry into the equities of the parties’ cases” and into the prospective effects of an order for reinstatement not only on Mr Hong and AT but also any relevant third parties. In this case such third parties could include other staff and the members of the public he

would interact with in the role of a parking officer.¹⁰

[38] Practicability concerns the prospects for successfully re-establishing the employment relationship. It involves the question of whether Mr Hong could be a sufficiently harmonious and effective member of the AT staff if he were ultimately reinstated to his former position (or a similarly advantageous one) as a parking officer.¹¹ Practicability, for this purpose, has been described in the following way:¹²

[P]racticability is not the same as possibility. ... Whether the [employer] has established on the balance of probabilities that it would not be practicable to reinstate [the dismissed employee] involves a balancing of the interests of the parties and the justices of their cases with regard not only to the past but more particularly to the future. It is not uncommon for this Court or its predecessor, having found a dismissal [was] unjustified, to nevertheless conclude on the evidence that it would be inappropriate in the sense of being impracticable to reinstate the employment relationship. Practicability is capability of being carried out in action, feasibility or the potential for the re- imposition of the employment relationship to be done or carried out successfully. Practicability cannot be narrowly construed in the sense of being simply possible irrespective of consequence.

[39] A real risk of reversion to dysfunctional relationships is a factor to weigh in considering the practicability of reinstatement.¹³ The affidavit evidence indicated that point was likely to be hotly contested. Mr Bidgood suggested Mr Hong’s supervisor

and at least some fellow parking officers had a dim view about working with Mr

⁹ *Angus v Ports of Auckland Ltd* [2011] NZEmpC 125 at [63]. See also *X v Auckland District Health Board* [2007] ERNZ

66 (EmpC) at [189] and *De Bruin v Canterbury District Health Board* [2012] NZEmpC 110 at [85].

¹⁰ *Angus v Ports of Auckland Limited* [2011] NZEmpC 160 at [65] and [68].

¹¹ *Northern Hotel IUOW v Rotorua RSA Inc* (1989) ERNZ Sel Cas 535, 540 (LC).

¹² *New Zealand Educational Institute v Board of Trustees of Auckland Normal Intermediate School*

[1992] NZEmpC 176; [1992] 3 ERNZ 243 at 286; as confirmed by the Court of Appeal in [1994] NZCA 509; [1994] 2 ERNZ 414 at 416.

¹³ *Edwards v Board of Trustees of Bay of Islands College* [2015] NZEmpC 6 at [288].

Hong. His supervisor was said to have been frustrated at Mr Hong’s resistance to coaching. Other officers were said to have expressed reluctance to work alongside him if AT decided to have him work with a ‘buddy’ or ‘chaperone’. Mr Hong, on the other hand, described himself as well regarded by other officers and having good working relationships with them. He said they knew he had legal training and often asked him for advice. He also disputed that he failed to deal well with people who were angry, and potentially violent, over being issued a ticket. He said no member of the public had made a complaint about his conduct during his five years of service.

[40] An assertion that reinstatement was not practicable or reasonable simply because Mr Bidgood, or other relevant AT managers, declared they still had no trust and confidence in Mr Hong would not be sufficient to deny him the remedy of reinstatement if his dismissal by AT was found to have been unjustified.¹⁴ If that point were reached, AT's evidence would need to have positively established the grounds for an on-going lack of trust or other grounds on which reinstatement should be denied as being unreasonable and not practicable.

[41] AT's submissions pointed to the largely unsupervised role of its parking officers, when out in the streets, and the importance to their safety of the de-escalation methods they were trained to use. The high degree of trust required in the role, the believed level of non compliance by Mr Hong with those safety requirements, a resistance to further training, and his skill set not being transferable elsewhere in the organisation were all said by AT to be factors that would likely be found to make his reinstatement impracticable.

[42] However those points regarding Mr Hong's conduct had yet to be established by evidence tested in an Authority investigation. At best both parties' positions were arguable at this interim stage. There was a tenable, but not certain, argument that the reinstatement of Mr Hong could be found to be practicable and reasonable if AT were first found to have unjustifiably dismissed him.

Balance of convenience

[43] The balance of convenience concerns the potential effect on Mr Hong if he were not granted interim reinstatement compared to the potential effect on AT if

¹⁴ *Harris v The Warehouse Limited* [2014] NZEmpC 188 at [162].

interim reinstatement was granted.¹⁵ The period under assessment is from the date of this determination until Mr Hong's personal grievance claim is fully investigated and then determined by the Authority.

[44] From the parties' submissions about the factors to balance, the following were relevant to the assessment in this case:

(i) financial hardship

[45] Mr Hong's affidavits gave no direct evidence about the effect on him of being without his wages from AT in the interim period. Although the dismissal was for serious misconduct, he was paid one month's notice in late February. He had since applied for 21 jobs without success and was receiving an accommodation supplement payment from Work and Income. However he gave no information about what level of benefit he was receiving, what outgoings he had, who else might be relying on him bringing home that income, or what other assets or savings he was able to rely on meanwhile. He had applied for a legal aid grant to pursue his case in the Authority. As a matter of inference, being without his previous weekly wage must cause some inconvenience to him. Although AT had to carefully manage public funds and had tight operational budgets, it was better able to bear the burden if Mr Hong was reinstated to its payroll for the interim period. That factor favoured Mr Hong.

(ii) safety risks

[46] AT submitted there was a danger to Mr Hong, other parking officers and members of the public if he were reinstated during the interim period. When an incident occurs other parking officers in the vicinity may be called by radio telephone to go and help the officer who reports having trouble, so those other officers might face some risk if Mr Hong did not follow approved de-escalation methods for dealing with angry people. While AT's concern on this point relied on the assumption that its analysis and the evidential foundation for Mr Hong's dismissal was correct, there was some risk he could be involved in an incident with a member of the public that hurt him, another parking officer or even another member of the public who came to his aid in such circumstances. Mr Bidgood's evidence was that such incidents could have very serious consequences. He cited a 2014 attack in which a parking officer was

badly beaten and suffered a punctured lung, broken ribs, multiple cuts and bruises.

¹⁵ *Angus v Ports of Auckland Limited* [2011] NZEmpC 125 at [56].

The risks of such attacks cannot be eliminated. The officers are trained to use de-escalation methods to minimise the hazard. While the chance of such assaults exists for every officer every working day, on AT's argument, having Mr Hong working without applying those methods could be said to make those odds even more unfavourable. He had offered to use a different form of words to respond to any language that members of the public directed to him that he considered offensive. However, during the interim period at least, that change alone would not give a sufficient margin of comfort against the risk of violent attack that might otherwise have been avoided if AT's preferred de-escalation methods were used. For the interim period, this factor favoured AT.

(iii) cost of reinstatement

[47] If Mr Hong were reinstated during the interim period, AT said it would have to mitigate that risk by having Mr Hong work in a "chaperone" or "buddy" system with another parking officer. This would have the effect of decreasing the value of its operating costs in that period. Two officers working one area were not as cost-effective. Giving AT the option of interim reinstatement of Mr

Hong on a 'garden leave' basis would be to the same effect.

[48] A cost imposed by an exercise of the employer's own discretion would not normally weigh in its favour on the balance of convenience. However in this particular case, even if the potential risk was only speculative and the decision was made from an excess of caution, it would not be unreasonable to have Mr Hong

'buddied' or placed on garden leave. The likely cost effect favoured AT in the assessment of the balance of convenience.

(iv) other effects on third parties

[49] Mr Bidgood's evidence suggested Mr Hong's interim reinstatement might cause "an atmosphere of confusion" among other parking officers about AT's expectations about how they were expected to conduct themselves. It was not evidence that sat well with his other evidence about the training provided to officers and the unequivocal requirements to use the de-escalation methods. Both he and Mr Hong gave hearsay evidence about the state of Mr Hong's working relationships with other officers. No clear conclusions could be drawn from their conflicting accounts of other officers' opinions or likely response to interim reinstatement of Mr Hong. However the prospect of interim reinstatement, in the rare occasions it might occur in

AT, was a situation that a large organisation, with a sophisticated structure of management and human resource support, could be expected to handle.

(iv) minimal delay to substantive investigation and adequate remedies available

[50] If Mr Hong were found to have been unjustifiably dismissed, remedies of lost wages and compensation for distress would be available to him, subject to any appropriate reductions for contributory conduct, as well as the prospect of the reinstatement remedy. AT could not realistically claim no parking officer positions were available by the time of any such order. It had a large parking enforcement operation and was on notice soon after his dismissal of the prospect of such a remedy being sought.

[51] Realistically the determination of Mr Hong's substantive claim, after the late May investigation meeting, might be issued around late June. The delay between now and then is, by the standards of many other cases, minimal.

[52] Mr Hong was paid a notice period for much of March. A lost wages order from then to, say, late June for a period of around three-and-a-half months is well with the usual range for such awards. An award for an extended period, including assessed future loss, would probably need to be made under [s 128](#) of the Act. Given Mr Hong's age, 60 in June, he would likely have difficulty finding new, alternative employment easily and soon. The fact that he has a law degree but had been working in the very modestly paid role of a parking officer suggested he had already experienced some such difficulties.

[53] In the balance of convenience this factor favoured AT. Adequate remedies were available to Mr Hong under [s 123](#) and [s 128](#) of the Act, if a finding of unjustified dismissal was made and it were appropriate to award them. AT was undoubtedly able to pay even a large award.

[54] Assessing all those factors in relation to one another and the potential effects on both parties, the overall balance of convenience lay with AT in the interim period.

Overall justice

[55] Standing back from the evaluation of whether there was an arguable case and consideration of the factors in the balance of convenience, I have concluded that the overall justice of the matter, for at least the period until the substantive determination,

favoured declining Mr Hong's interim reinstatement. In reaching this conclusion it is important emphasise that, as yet, the evidence is untested. While broad impressions can be drawn from the affidavits and documents provided, any conflict in that evidence cannot be resolved at this early stage. That is the function of the Authority's substantive investigation meeting to be held in late May. This determination on the interim reinstatement application has not decided whether Mr Hong was unjustifiably dismissed or whether, if he was, he will be reinstated.¹⁶

[56] Mr Hong does have a strong case on some aspects of what may have amounted to his unjustified dismissal.

[57] The evidence of actual instances of him acting in ways contrary to training and instructions in his dealings with members of the public seemed somewhat slight. The documents provided with the affidavits did not include the Mystery Parker reports and some notes on coaching sessions his supervisor was said to have made. Mr Hong accepted there may have been some complaints made during his five years of service about whether he had correctly issued some tickets but submitted there were none that showed unsatisfactory conduct by him in how he dealt with members of the public. AT appeared to rely solely, for such instances, on what Mr Hong himself said at the seminar about what he had done on a previous occasion or occasions in dealing with difficult members of the public. Apart from that alleged comment, the suggestion he had threatened to 'charge' members of the public with an offence if they swore at him was not established as having actually occurred. Mr Hong submitted his comment, different from Mr Bidgood's account of it, was merely a suggestion made in response to a scenario given by the trainer during the seminar. He did not accept he had recounted examples of what he had actually done in previous situations of dealing with

abusive members of the public.

[58] Mr Hong also appeared to have a strong case that some of the information relied on by AT managers in reaching their decision had not been disclosed to him for comment or explanation. This included the notion that, according to Mr Bidgood, Mr Hong's supervisor had considered resigning because he was so frustrated by Mr Hong's resistance to coaching; negative feedback in some Mystery Parker reports; and concerns that Mr Hong had made inappropriate comments to a visiting senior Police officer at an AT staff meeting. Some of these matters may have been covered in the

16 *Western Bay of Plenty District Council v McInnes* [2016] NZEmpC 36 at [4] and [5].

disciplinary meeting held with Mr Hong on 22 February. The meeting was recorded and both Mr Hong and an AT note taker made notes but neither those notes nor a transcript of the recording was in the parties' evidence lodged for the interim reinstatement application.

[59] There also appeared to be a strong argument that Mr Hong was dismissed for what AT managers saw as on-going poor performance by him, rather than a particular instance of serious misconduct. Poor performance in this case was not referring to his rate of work or ticketing but rather what was seen as persistent resistance to coaching about how best to deal with members of the public. Under a heading about the "incompatibility" of Mr Hong's actions with AT's values, Mr Bidgood's affidavit said Mr Hong had resisted learning and applying the de-escalation techniques "throughout" his employment. His managers had clearly considered his behaviour unsatisfactory over an extended period of time. However it was not clear that view had ever previously been squarely put to Mr Hong with clear advice of the improvement required, how it would be measured, and what would happen if he failed to make the required changes. 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 2017.¹⁷

[60] A weakness in AT's case was its apparent reliance on the safety-related nature of its concerns about how Mr Hong carried out his work. Such safety concerns may warrant disciplinary inquiry but do not, by themselves, trump the statutory requirement for an employer to establish it then acted justifiably in what it did and how it did it.

[61] The strength of Mr Hong's case was not as apparent in respect of his prospects for reinstatement, if found to have been unjustifiably dismissed. Much would depend on the evidence, once provided in full and tested, about what he had or had not done that contributed to the situation in which his grievances arose. However, as examples in the case law demonstrate, even substantial contribution may not negate the

practicability and reasonableness of the remedy of reinstatement.¹⁸

[62] A parking officer's position and work, conducted mostly alone in the streets

without direct supervision, requires a high degree of trust. Reinstatement may be

¹⁷ *Trotter v Telecom Corporation of New Zealand Limited* [1993] NZEmpC 152; [1993] 2 ERNZ 659 at 681.

18 *Angus v Ports of Auckland Ltd* [2011] NZEmpC 125 at [63].

neither practicable nor reasonable if the evidence established Mr Hong had, on the balance of probabilities, acted as AT managers feared or believed he had in his dealings with some difficult members of the public.

[63] Part of the assessment of the overall justice of the matter was the fact that reinstatement remained an open prospect if the evidence established AT's conclusions were unreasonably reached. The remedy was not lost or closed to Mr Hong if he were not reinstated for the interim period.

Order

[64] Mr Hong's application for interim reinstatement pending the Authority's

investigation of his grievances is declined.

Preparation for the substantive investigation

[65] Timetable directions for lodging witness statements and further relevant documents for the Authority's substantive investigation were confirmed at the investigation meeting held to hear submissions on the interim reinstatement application.

Costs

[66] Costs are reserved.

Robin Arthur

Member of the Employment Relations Authority
