



representatives attended the investigation meeting and sought a direction to mediation. I declined that request because HCL would only attend mediation on employment issues at some indeterminate time in the future once it obtained crash investigation reports from the Police. I was not satisfied this was sufficient reason to delay investigation and determination of the employment relationship issues.

### **The issues**

[5] The issues for determination in this matter are:

- (i) Was Ms McLachlan a permanent employee of HCL rather than a casual employee or an independent contractor?
- (ii) Did HCL treat Ms McLachlan as a fair and reasonable employer would following the accident?
- (iii) Was Ms McLachlan dismissed and if so was that unjustifiable?
- (iv) If Ms McLachlan was unjustifiably dismissed, what remedies are required?
- (v) Should any costs be awarded to either party?

[6] Written witness statements were provided by Ms McLachlan, her daughter Becky Rossiter, and Bruce McKinnon who is a friend of Ms McLachlan and is a bus driver for another company. They each gave further oral evidence at the investigation meeting as did HCL's director Colin Hayward, his son Blake Hayward who also works for HCL, and Glen Craven, who managed another bus business owned by Colin Hayward and his wife Maxine. Oral closing submissions were provided by each party.

### **Ms McLachlan's employment status**

[7] I find that Ms McLachlan was an employee of HCL.

[8] She did not have a written employment agreement. She was paid a daily rate of \$150 with an overnight allowance of \$25 a night. She was paid monthly. Pay slips showing her PAYE deductions describe her as an employee and her occupation as a driver.

[9] Although her days of work varied according to the number of tour party

bookings HCL had for the bus she drove, this did not make the employment relationship casual only. Her timesheets show a regular pattern of work between 12 and 24 days for HCL every month, except two, between March 2007 and February 2008.

[10] Neither was the real nature of her relationship with HCL that of an independent contractor. Under the established legal tests Ms McLachlan's work as a tour bus driver for HCL was clearly controlled by the company, totally integrated with its work, and the pay and tax information shows she was not working on her own account. Part of the ongoing employment relationship included arrangements for Ms McLachlan to train to drive longer buses so that she could drive other buses in the HCL fleet.

**Was Ms McLachlan fairly treated following the accident?**

[11] Although Ms McLachlan's statement of problem did not raise a claim of unjustified disadvantage, the Authority may find a personal grievance of a type other than that alleged: see s122 of the Employment Relations Act 2000 ("the Act").

[12] Based on the evidence of Ms McLachlan, Ms Rossiter, Colin Hayward and Blake Hayward, I find that how HCL dealt with Ms McLachlan following the accident on 16 February 2007 was not what a fair and reasonable employer would have done in all the circumstances at the time.

[13] There was quite a lot of evidence from Ms McLachlan about how HCL treated her in the immediate aftermath of the accident. It is clear that at the time HCL had no health and safety plans or procedures in place to deal with the physical and emotional needs of a driver involved in an accident. Blake Hayward's evidence was that HCL has since included health and safety information in its drivers' manual.

[14] For the issues that need to be resolved in this determination it is sufficient to say that only minimal steps were taken to care for Ms McLachlan after the accident. She was collected from the scene of the accident by Blake Hayward and driven back to HCL's yard in Auckland. At the yard Colin Hayward checked her logbook (presumably to see whether she had not been driving longer than the permitted hours

at the time of the accident and he was satisfied she was not). He also asked if she needed something to eat.

[15] There was some confusion over whether HCL knew Ms McLachlan had received no medical attention at the accident scene. She talked to Police there but was not checked by ambulance staff. Although once back at the yard Colin Hayward did ask if she was “*okay*” and Ms McLachlan replied she was “*fine*”, a check-up should have been arranged. As it was, it was not until the following day that Ms McLachlan realised she was badly bruised in the impact and her daughter took her to a medical centre where she diagnosed with whiplash. Treatment costs were covered by ACC.

[16] HCL appears to have been given no consideration to the possibility that Ms McLachlan would be in shock after the accident. It made no arrangements to ensure she had access to any further medical or counselling assistance she might have needed. Some attempt to assess whether an employee needs such assistance after traumatic events in the workplace such as robberies, assaults or serious traffic accidents, including serious traffic accidents, can reasonably be expected from an employer. In the case of a bus company, its hazard identification process under the Health and Safety in Employment Act 1992 could reasonably be expected to identify the risk of serious traffic accidents and provide for suitable post-accident measures to minimise effects on drivers.

[17] By having no health and safety procedure in place to ensure some minimal post-accident care of Ms McLachlan, HCL did not do what a fair and reasonable employer would do. She was unjustifiably disadvantaged by that failure.

**Was Ms McLachlan dismissed, and if so, was it unjustified?**

[18] HCL denies dismissing Ms McLachlan. It says that following the accident it had no bus for her to drive and, when asked, told her so.

[19] I find there was a dismissal of Ms McLachlan from HCL’s employment and that the way this dismissal occurred was unjustified. On the basis of the following evidence and reasons I consider it was not what a fair and reasonable employer would have done in all the circumstances.

[20] On 19 February Ms McLachlan and Ms Rossiter visited the HCL yard. Blake Hayward accepts that when asked by Ms McLachlan about coming back to work he said words along the lines that he was “*sorting it out*”, he “*had a plan*” and was going to “*rearrange coaches and drivers*”.

[21] Two days later Ms McLachlan visited the yard again. Blake Hayward said he had not managed to “*sort anything out*” and suggested Ms McLachlan could get some driving work from a South Auckland company. He says at that time he was also attempting to “*dry hire*” another coach for Ms McLachlan to drive.

[22] On 25 February Ms McLachlan received a telephone call from her friend Mr McKinnon who has his bus at Auckland International Airport. In the course of conversation Ms McLachlan said she had heard nothing from HCL. Mr McKinnon said had seen Colin Hayward at the airport and would pass on a message that Ms McLachlan was trying to contact him.

[23] Shortly afterwards Mr McKinnon spoke with Colin Hayward. Mr Hayward recalls the conversation being at an awkward moment as he was trying to load a tour bus with luggage and passengers of a Korean tour party. Mr McKinnon says that Mr Hayward repeatedly told him in their brief conversation that Ms McLachlan “*did not work for Haywards*” and she “*was not employed by Haywards*”. Mr Hayward denies making this comment but I prefer Mr McKinnon’s evidence that he did say this. I do so because he used similar words in comments Mr Hayward accepts he did make in a telephone call with Ms McLachlan later that day.

[24] Ms McLachlan telephoned Colin Hayward after receiving a call from Mr McKinnon who told her what Mr Hayward had said. Mr Hayward accepts that he said to her during this call: “*No, we don’t have a job for you, what did you expect us to do, pull a coach out of thin air*”.

[25] Ms McLachlan then asked if someone would be in the yard so she could get pay owing to her. Colin Hayward said there would be someone there.

[26] The next day Ms McLachlan visited the HCL yard and talked with Blake

Hayward about getting her holiday pay. Colin Hayward says there was “*some conversation*” with Ms McLachlan about there being no work for her because he did not have a coach but there was “*nothing to say we were dismissing her for any reason*”.

[27] Ms McLachlan had prepared a typed letter in Colin Hayward’s name explaining that her coach had been in an accident that “*was in no way Lynne’s fault*” and it was uncertain if the coach could be repaired or replaced. It included this statement:

*Due to Lynne’s coach being out of action at this time, we are unable to provide her with any further employment as a tour coach driver and are unable to provide her with any certainty as to whether there will be any employment of this nature with us in the near future.*

[28] Colin Hayward signed this letter, dated 26 February 2008. He says he understood that Ms McLachlan would use the letter to get a benefit from WINZ or earnings compensation from ACC. He says that when Ms McLachlan left the yard he said to someone else: “*It looks like she’s gone to ACC and we’ll pay her first week and ACC will pay her from then on*”.

[29] Mr Hayward denies this amounts to terminating Ms McLachlan’s employment. I disagree. It is clear from the totality of his evidence that HCL made Ms McLachlan redundant at that time – which is a termination of her employment.

[30] I accept there were genuine reasons for ending the employment. HCL had tried to get a replacement coach but was not able to do so. Ms McLachlan was able to drive only one other bus in the HCL fleet at the time and that was in use by another driver for a four week period. Ms McLachlan was not yet trained to drive other available buses. For reasons beyond its control, that is the accident and damage to the bus, Ms McLachlan’s skills were surplus to the needs of HCL at the time, that is they were redundant. Those business difficulties have continued, according to Colin Hayward’s evidence, with HCL losing other tour party business because of the accident.

[31] However HCL made no proper attempt to consult Ms McLachlan about the situation or discuss alternatives with her. She was, understandably, left with the feeling that she had been abruptly cut off and left to her own devices.

[32] I accept that Mr Craven and Blake Hayward did attempt to canvas prospects for jobs with other companies that might employ Ms McLachlan. She did turn down some work on 23 and 24 February offered by Mr Craven. However she was still recovering from the shock of the accident at that time and it does not excuse the generally poor process followed by HCL in handling the end of her employment with it at that time. In all the circumstances I find the procedural flaws amounted to an unjustified dismissal.

### **Remedies**

[33] I need not consider Ms McLachlan's claim for lost wages because of my determination that her dismissal amounted to the termination of employment by redundancy for genuine business reasons. However remedies of compensation for humiliation, injury to feelings and loss of dignity need to be considered in relation to:

- (i) the unjustified disadvantage in how Ms McLachlan was treated by HCL after the accident; and
- (ii) the procedural flaws in how HCL carried out her dismissal for redundancy.

[34] This Authority cannot compensate Ms McLachlan for any emotional distress she suffered as a result of the accident on 16 February 2008. Such compensation is barred by the accident legislation. However she is entitled to be compensated for the distress caused by HCL's actions, or rather omissions, in not providing some reasonable level of care and attention for an employee who has been through an upsetting experience. Such compensation is for callous treatment by her employer, not the consequences of any personal injury suffered in the accident.<sup>1</sup>

[35] The distress experienced by Ms McLachlan has included difficulty sleeping and panic attacks. This has contributed to an initial lack of confidence in her abilities which affected her search for other work, although she has successfully returned to driving for another company.

[36] The loss of dignity and injury to Ms McLachlan's feelings caused by HCL's

---

<sup>1</sup> *Jack v Her Majesty's Attorney-General in respect of the Department for Courts* [2002] 1 ERNZ 720, 736 at [45] (EC, Goddard CJ).

unjustified actions should be compensated with an award of \$5000 under s123(1)(c)(i) of the Act. HCL is ordered to pay her that sum.

[37] No reduction of remedies is required for the extent to which any actions of Ms McLachlan contributed towards the situation that gave rise to her personal grievance. There was no evidence establishing blameworthy conduct by her.

#### *Holiday pay*

[38] Ms McLachlan's evidence was that she had not been paid holiday pay on her total earnings of \$27,667.75 during her employment at HCL. At eight per cent, she sought an order for HCL to pay her holiday pay of \$2,213.42.

[39] However a payslip for February 2008 shows a payment that Ms McLachlan has included in these calculations included holiday pay of \$1269 (gross). This should not be included in the calculation of any amount still owing.

[40] Blake Hayward presented calculations he prepared in July 2008 showing that Ms McLachlan was owed the sum of \$1034.35 (net) in holiday pay. However, due to what are alleged to be overpayments of days in 2007, he calculates that Ms McLachlan, on balance, has already been paid more than she is due in holiday pay.

[41] Because HCL had not provided wages and leave records requested by Ms McLachlan's representative, it has not been possible to independently cross-check these calculations against the company's records. However I do not accept that HCL is now entitled to recoup alleged overpayments of wages from holiday pay remaining due to Ms McLachlan.

[42] On the basis of the scant information available from HCL, I accept its calculation that Ms McLachlan remained entitled to \$1034.35 (net) in outstanding holiday pay. HCL is ordered to pay that sum to Ms McLachlan without deduction.

#### *Penalty*

[43] Ms McLachlan sought a penalty under the Holidays Act 2003 for HCL's

failure to pay all her holiday pay at the end of her employment and under the Employment Relations Act 2000 for not supplying wage and time records when requested.

[44] I accept such a penalty is warranted and set the amount of the penalty at \$500. The penalty is normally paid to the Crown Account but in this case I order HCL to pay the amount of that penalty directly to Ms McLachlan.

### **Costs**

[45] Having been successful in her claim, Ms McLachlan is entitled to a reasonable contribution to her costs of representation. Applying the notional daily rate routinely used in the Authority, I order HCL to pay to Ms McLachlan \$2070 as a contribution to her costs and expenses in bring her claim. This includes reimbursement of the fee of \$70 for lodging her claim in the Authority.

### **Summary of determination**

[46] Ms McLachlan was an employee of HCL. HCL's actions towards her following an accident on 16 February 2008 amounted to an unjustified disadvantage and an unjustified dismissal.

[47] HCL is ordered to pay the following amounts to her:

- (i) \$5000 in compensation for humiliation, loss of dignity and injury to feelings under s123(1)(c)(i) of the Act; and
- (ii) \$1034.35 in holiday pay; and
- (iii) \$500 as a penalty for not paying all her holiday pay at the end of her employment and not providing wage records when requested; and
- (iv) \$2070 as a reasonable contribution to her costs and expenses in bringing this claim.

Robin Arthur  
Member of the Employment Relations Authority