

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2024] NZERA 212  
3253859

BETWEEN

VAN DAYS  
Applicant

AND

AUCKLAND TRANSPORT  
Respondent

Member of Authority: Eleanor Robinson

Representatives: Applicant in Person  
Ashleigh Inder, counsel for the Respondent

Investigation Meeting: 10 April 2024 by Audio Visual Link

Submissions and/or further evidence: 9 April 2024 from the Applicant and from the Respondent

Determination: 12 April 2024

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**PRELIMINARY DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The Applicant, Mr Van Days, claims that he was unjustifiably dismissed and unjustifiably disadvantaged after his position was made redundant following a restructuring process by the Respondent, Auckland Transport.

[2] Mr Days also claims that Auckland Transport has excluded his past service period in order to exclude it from a calculation of his redundancy compensation calculation.

[3] Auckland Transport claims that Mr Days was justifiably dismissed following a fair and reasonable restructuring process which resulted in the termination of Mr Days employment by reason of redundancy.

[4] Auckland Transport further claims that Mr Days employment with it was broken, and this impacted upon the redundancy compensation to which he was entitled.

[5] This preliminary determination addresses the issue of whether or not Mr Days' employment with Auckland Transport was broken, and if so, whether or not this would impact upon his claims.

## **The Authority's investigation**

[6] The investigation meeting took place by AVL. Mr Days and Ms Inder for Auckland Transport provided written and oral submissions.

[7] Further, whilst I have not referred to all the submissions made by the parties, I have fully considered them.

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

## **Background**

[9] Auckland Transport is responsible for all of Auckland's regional transport services with the exception of state highways. It is a CCO, that is, a company controlled by Auckland Council.

[10] Mr Days was employed by Auckland Council as a Senior Security Analyst from 9 January 2017 until 29 November 2019. He transferred to work at Auckland Transport as a security Analyst, commencing employment with Auckland Transport on 2 December 2019.

[11] Upon transfer to Auckland Transport, his employment was treated as continuous with his service at Auckland Council and his leave entitlements were transferred to Auckland Transport. This was confirmed in a letter from the then People Solutions Manager at Auckland Transport dated 31 October 2019:

As you are transferring from Auckland Council (or other CCO) Auckland Transport will regard all previous service as current and continuous. Your service date, annual leave (up to a maximum of one year's entitlement) and sick leave will be transferred to Auckland Transport. All other leave types will be paid to you by Auckland Council and will not be transferred to Auckland Transport.

[12] Mr Days was employed by Auckland Transport in the role of Security Architect from 2 December 2019 until 29 October 2021 (the First Employment Period). This period of employment ended when Mr Days resigned.

[13] At that time, Auckland Transport paid Mr Days all outstanding holiday leave entitlement in accordance with the legislative requirement to do so.<sup>1</sup>

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<sup>1</sup> Section 24 of the Holidays Act 2003

[14] Mr Days was employed by an unrelated company from 1 November 2021 until 26 August 2022. During that period Mr Days carried out no work for the benefit of Auckland Transport or Auckland Council.

[15] In March 2022 Ms Regine Deleu, the Head of Digital Architecture, contacted Mr Days to see if he would consider returning to work for Auckland Transport in a Security Architect role.

[16] On 26 July 2022 Mr Days received, via Auckland Transport's online recruitment portal, a letter offering him the position of Security Architect (the Offer Letter) and attaching Terms and Conditions and an employment agreement.

[17] The Offer Letter stated: "We have your start date as 12 September 2022 but please let us know if this doesn't work for you." It further stated:

Please take the time to read the terms and conditions attached below, we encourage you to seek independent legal advice if you wish before formally accepting the terms and conditions contained in this document. Once you are comfortable with the content and accept our offer please return your acceptance by 02 August 2022.

[18] In the attached Terms and Conditions letter it repeated the advice that Mr Days was entitled to seek independent advice about the terms of employment. Mr Days signed the Terms and Conditions letter on 26 July 2022.

[19] The employment agreement was also signed by Mr Days on 26 July 2022 (the Employment Agreement). It contained the following clauses:

**22 Redundancy**

22.2 Where your position is made redundant, you will be given 1 months' notice (or base salary in lieu) and you will be entitled to redundancy compensation of 8 weeks base salary for your first year of service and 2 weeks base salary for every year or part year thereafter to a maximum of 48 weeks base salary ...

**38. Completeness**

This Agreement along with your letter of appointment replaces all previous written or oral agreements and understandings between the parties and constitutes a complete record of the Agreement.

[20] Mr Days said he reviewed the employment offer terms, printed, signed and scanned, and saved the signed Individual Employment Agreement on 26 July 2022, uploading it the following morning, 27 July 2022, via the Auckland Transport careers website offer acceptance workflow.

[21] Mr Days denied that there had been any discussions, arrangements, or negotiations on any of the employment offer terms provided in the Offer Letter, Terms and Conditions attachment or the Employment Agreement.

[22] Mr Days submitted that on 27 July 2022 he emailed Ms Sharma. In the email he stated:  
On a side note, I do have 2 prebooked leave commitments, as follows:

1. 20/10/2022 and 21/10/22 (2 days)
2. 2 30/11/2022 and 02/12/200 (3 days)

I would very much appreciate it if I could maintain the above prebooked leave.

[23] Ms Sharma responded to the effect that she was forwarding his leave request to Ms Deleu, who responded that same day, 27 July 2022, stating: “No problem with the holiday request from my side”.

[24] Mr Days commenced employment with Auckland Transport on 12 September 2022 (the second Employment Period).

[25] In April 2023 Auckland Transport commenced a restructuring process which resulted in the termination of Mr Days employment by reason of redundancy with his last day of employment being 30 June 2023.

**Does Mr Days have continuity of employment with Auckland Transport from 9 January 2017 until 30 June 2023?**

[26] Auckland Transport is a CCO of Auckland Council. Prior to Mr Days leaving his employment at Auckland Council and transferred to work at Auckland Transport on 2 December 2019 it had been confirmed by Auckland Transport that it would regard his service with Auckland Council as continuous with that at Auckland Transport.

[27] An External Employee Transfer Form was completed between Auckland Council and Auckland Transport. Mr Days employment was treated as continuous between the two entities and Mr Days’ accrued annual leave and his sick pay leave entitlements with Auckland Council were transferred to Auckland Transport.

[28] On 29 October 2019 Mr Days resigned from Auckland Transport. At that time his accrued annual leave entitlement was paid to him as statutorily required upon the ending of employment.

[29] I find that Mr Days’ period of employment with Auckland Transport ended on 29 October 2019 by reason of his resignation.

[30] During the intervening period after October 2019 and Mr Days rejoining Auckland Transport he worked for a third party employer. I find this situation differs from the first period of employment when Mr Days worked at Auckland Council and Auckland Transport because there was a complete severing of the employment relationship with Auckland Transport in October 2019 when he resigned and worked for another employer.

[31] In contrast to the position in December 2019, the third party employer was not a CCO and there was no continuity of employment during that period which encompassed almost 11 months.

[32] When Mr Days rejoined Auckland Transport I find it was as a new employee. This was indicated to him in both the Offer Letter and the Employment Agreement which provided him with encouragement to seek independent advice. It clearly set out at clause 38 of the Employment Agreement that it replaced “all previous written or oral agreements and understandings”.

[33] There is no indication in any of the documents that Mr Days’ first employment period with Auckland Transport would be recognised as continuous with the second period of employment with Auckland Transport

[34] Unlike the situation in transfer from Auckland Council to Auckland Transport, there was no External Employee transfer form completed because Auckland Transport regarded Mr Days a new employee.

[35] Whilst Auckland Transport honoured prebooked leave periods Mr Days had arranged before rejoining Auckland Transport, this is the action of a reasonable employer in respect of a new employee, and I find does not indicate any acknowledgement of continuous service.

[36] I determine that Mr Days’ first period of employment with Auckland Transport ended on 29 October 2021. The second period of employment with Auckland Transport commenced on 12 September 2022. There is no continuity of employment between the first and second periods of employment with Auckland Transport.

[37] This will have implications for any claims and remedies Mr Days can expect, should he be determined to have been unjustifiably dismissed and/or disadvantaged following the substantive hearing of this matter.

**Costs**

[38] Costs are reserved pending the outcome of the substantive investigation.

Eleanor Robinson  
Member of the Employment Relations Authority