IN THE EMPLOYMENT RELATIONS AUTHORITY

[2019] NZERA 14
3031392

	BETWEEN	YOON CHEOL HONG Applicant
	AND	CHEVRON TRAFFIC SERVICES LIMITED Respondent

Member of Authority:	Vicki Campbell
Representatives:	Applicant in Person Garry Pollack for Respondent
Investigation Meeting:	17 October 2018
Submissions Received:	19 and 26 October 2018 from Applicant 24 October 2018 from Respondent
Determination:	14 January 2019

DETERMINATION OF THE AUTHORITY

A. **Mr Hong was not a casual employee and had a reasonable expectation of ongoing employment.**

B. **Mr Hong's application for penalties is declined.**

C. **Mr Hong is owed wages for public holidays. Chevron Traffic Services Limited is ordered to calculate and pay to Mr Hong the outstanding arrears of wages for public holidays not worked on 1 January, 6 February and 30 March 2018 plus payment for an alternative holiday for having worked on 2 January 2018 within 28 days of the date of this determination.**

D. Mr Hong's dismissal was justified.

Employment relationship problem

[1] Chevron Traffic Services Ltd provides traffic management plans and controls for road closures. Yoon Cheol Hong worked for Chevron as a traffic controller from 12 September 2017 until 7 June 2018.

[2] A traffic controller is responsible for managing the flow of traffic during road closures using stop and go signs.

[3] During the employment relationship Mr Hong raised three personal grievances. Chevron says the first grievance was resolved and Mr Hong was satisfied with the outcome. At the investigation meeting Mr Hong acknowledged the first personal grievance was resolved.

[4] The second grievance was raised after incident reports were submitted on 25 May 2018 and after Mr Hong was invited to a disciplinary meeting to discuss the incidents. The grievance relates to complaints that two of the employees working at a road closure on 25 May had used offensive language when speaking to Mr Hong through the radio telephone (RT). The second personal grievance has not formed part of this determination as it was not part of Mr Hong's claim in his statement of problem. Mr Hong has used the information set out in his second grievance to support his claim that dismissing him for serious misconduct was disparate treatment as neither of the two employees who used offensive language (which is classified as serious misconduct) were dismissed.

[5] The third grievance was raised on 1 June at the end of the first meeting relating to the allegations of serious misconduct. The issues contained in the third grievance are essentially allegations of breaches of legislation and the employment agreement. These issues were raised in the statement of problem and addressed through this process as alleged breaches and not as a personal grievance.

[6] On 25 May 2018 three incident reports were completed by the Site Traffic Management Supervisor (STMS) supervising a stop/go area where Mr Hong was

working. On the same day a client made a written complaint about Mr Hong's conduct which related to one of the incidents reported by the STMS.

[7] A disciplinary investigation was undertaken into the incidents from 25 May. This resulted in a decision being made to dismiss Mr Hong for serious misconduct. Following his dismissal on 7 June Mr Hong raised a fourth personal grievance relating to his dismissal.

[8] Mr Hong has asked the Authority to investigate and determine his grievances and has made applications for penalties for alleged breaches of statutory requirements and the employment agreement between the parties.

[9] During the investigation into Mr Hong's application a dispute arose about the true nature of the employment relationship. Chevron says the nature of the employment relationship was casual in that Mr Hong would work as required. Mr Hong says his employment was ongoing and he was told he would be given at least 20 hours work each week.

Issues

[10] In order to determine Mr Hong's claims I must determine the following issues:

a) What was the real nature of the employment relationship, casual or ongoing?

b) Did Chevron breach the Holidays Act 2003 and if so what if any penalties should be imposed?

c) Is Mr Hong owed arrears of wages for public holidays?

d) Did Chevron breach the Employment Relations Act 2000 (the Act) and if so what if any penalties should be imposed?

e) Did Chevron breach the employment agreement and if so what if any penalties should be imposed?

f) Was Mr Hong unjustifiably dismissed and if so what if any remedies should be awarded?

[11] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result. It has not recorded all evidence and submissions received.

Credibility

[12] At the commencement of the investigation meeting Mr Hong applied for all witnesses to be excluded until such time as they had completed giving evidence. He made his application on the basis that credibility of the respondent's witnesses would be an issue. The application was opposed by Chevron.

[13] After hearing from the parties and considering the application carefully I ordered all witnesses, except the main witness for the respondent and Mr Hong, to be excluded from the investigation meeting until they had given evidence.

[14] In submissions both parties have raised issues about the credibility of the evidence of each other. The evidence has been carefully evaluated and consideration has been given to how reasonable, plausible and probable the evidence is.

[15] Where the evidence between witnesses is not consistent I have made findings based on the balance of probabilities as to which version is more likely than not. I have been assisted in my evaluation and consideration of the evidence by taking into account the documents provided by the parties.

Casual or ongoing employment

[16] Chevron engages its employees under a variety of employment arrangements including permanent fulltime, permanent part time and casual to meet its obligations to its clients. Traffic management is a 24 hour, 7 day a week business. The extent of each job will vary and Chevron often does not know what work would be available for any given 48 hour period.

[17] There is no definition in the Act of a "casual" employee. Cases on casual employment turn on their facts although the Court has identified some principles that may be applied:[1]

a) The substance of the employment relationship should prevail over the form of any agreement;

b) The distinction between casual and ongoing employment lies in the extent to which the parties have mutual employment-related obligations between periods of work;

c) If those obligations only exist during periods of work, the employment will be regarded as casual;

d) If there are mutual obligations that continue between periods of work, there will be an ongoing employment relationship;

e) Regularity of work and continuity of the employment relationship are indicative of ongoing employment as opposed to casual employment;

f) Where the conduct of the parties gives rise to legitimate expectations that further work will be provided and accepted, there will be a corresponding mutual obligation on the parties to satisfy those expectations.

Relevant terms of the employment agreement

[18] Chevron has been unable to provide me with a copy of the signed employment agreement between it and Mr Hong. A copy of an unsigned agreement has been produced. At the investigation meeting Mr Hong accepted the unsigned copy of the agreement provided to the Authority was the same as the agreement he had previously received via email, signed and returned to Chevron.

> **2 Hours and Place of Work**
> …

[1] *Bay of Plenty District Health Board v Rahiri* [2016] NZEmpC 67 at [46]; *Jinkinson v Oceana Gold* [2009] ERNZ 225.

> 2.2 The parties agree that the Employee is being employed on an as required basis, the Employee has no fixed hours of work, nor any minimum number of hours of work. The hours of work and days to be worked will be as agreed between the Employer and Employee from time to time.
>
> 2.3 The Employer agrees to provide reasonable notice to the Employee regarding when they will be requested to perform duties. The Employee will advise the Employer when they are available for work. The Employer is not obliged to offer work and the Employee is not obliged to accept work when offered. However, when work is offered and accepted it shall be on the terms outlined in this agreement.
>
> 2.4 Work may be scheduled on any day of the week, and at any time during the day or night. Except in exceptional circumstances, the Employer will provide a minimum of 12 hours' notice of the commencement of any period of work.
>
> **10 Termination**
>
> The Employee is employed as a "casual" and his/her employment will normally terminate automatically at the end of each period of work that he/she has been asked to and agrees to carry out. However, the Employee's employment may be terminated during a period of work and/or this agreement may itself be terminated in accordance with the following provisions of this agreement (or under general law).

[19] Schedule 2 of the Employment Agreement sets out the job description which describes the job title as "Casual Traffic Controller Roles TC/STMS/Truck Drivers"

Mutual obligations

[20] Copies of text messages sent between Chevron and Mr Hong show work was offered and accepted by text message. This was the method used to advise all employees of the time and location of work for each day irrespective of whether the employee had ongoing or casual employment. Mr Hong acknowledged at the investigation meeting that he was free to decline work and that he recalled doing so on one occasion.

[21] The practice set out above is consistent with the terms set out in the employment agreement where both parties agreed that Chevron did not have any obligation to offer work and Mr Hong was under no obligation to accept work.

[22] The only obligation on the parties was for Chevron to provide reasonable notice when requesting Mr Hong to work and for Mr Hong to advise Chevron when he was available for work.

How the relationship worked in practice

[23] The practice for engaging casual employees for each engagement requires Chevron to send a text message to an employee by 3.30 pm or 4.30 pm the day before work is required asking the employee if they are available to work. If a casual employee accepts an engagement there is still a possibility that up to 7 pm on any night work may be cancelled for the following day. Many variables impact on the amount of work available including weather, accidents or construction.

[24] I have reviewed the wage and time records including the timesheets completed by Mr Hong each week. Those records show Mr Hong worked regularly every week from the beginning of the employment relationship until its termination except the week ending 31 December 2017 when he was not available to work. The records show Mr Hong worked variable hours and on different days each week. Over the 37 weeks of his employment Mr Hong worked on average 3.6 days and 36 hours each week.

[25] On 15 April 2018 Mr Hong raised questions about payment for public holidays not worked. Earlier in the month Mr Hong had raised concerns about the conduct of another employee toward him. Mr Hong met with Mr Clarke on 20 April to discuss both of his complaints. I have been provided with handwritten notes taken for Mr Clarke during that meeting. Those notes show that at the end of the meeting Mr Clarke offered to change Mr Hong's employment relationship to permanent full time. The notes record Mr Hong declined this offer.

[26] At the investigation meeting Mr Clarke expanded on the notes saying he offered Mr Hong several options including for Mr Hong to become permanent full time, permanent part time, fixed term or have fixed contracted hours. Mr Hong denies he was offered all of these options. He told me he was only offered a fixed term agreement for six months.

[27] On the evidence available I cannot say with any certainty the exact nature of the offer made to Mr Hong. Mr Hong maintains he declined a six month fixed term agreement but that he always wanted at least 20 hours work each week.

[28] Mr Hong told me it was agreed from the outset that he would be given at least 20 hours work. In support of this assertion I have been provided with copies of text

messages sent between Chevron and Mr Hong in October 2017 and January 2018 in which Mr Hong seeks to work at least 20 hours each week.

[29] I find it is more likely than not that there was no agreement for Mr Hong to receive a minimum of 20 hours work each week. Given Mr Hong's training and previous practice as a qualified lawyer it seems to me that if there was such an agreement he would have ensured it was reflected in the wording of the employment agreement before he signed accepting the casual agreement. It was not. The text messages I was referred to do not support Mr Hong's assertion. Rather they show a number of requests by Mr Hong for more hours and a promise by Chevron to find more hours if possible.

Conclusion

[30] Standing back and considering form over substance I find on balance that although Mr Hong's hours varied from week to week, there was a regularity of work and continuity of the employment relationship which created an expectation of work which strongly indicates ongoing rather than casual employment. Mr Hong was not a casual employee.

Holidays Act 2003 breaches

[31] Mr Hong claims Chevron failed to comply with ss 16, 28, 63 and/or 73(2) of the Holidays Act.

Sections 16 and 28

[32] Section 16 of the Holidays Act provides for an employee to become entitled to four weeks paid leave at the end of 12 months continuous employment. Section 28 of the Holidays Act allows an employer to regularly pay holiday pay with an employee's pay if the employee works on a basis that is so intermittent or irregular that it is impracticable for the employer to provide the employee with four weeks annual holidays.

[33] In accordance with the express terms of the employment agreement and in reliance on s 28 of the Holidays Act Chevron paid Mr Hong 8 percent in addition to his ordinary rate of pay each week. Mr Hong claims this was a breach of the Holidays Act because his work was not so intermittent or irregular that it was impracticable for Chevron to provide him with four weeks' annual holidays.

[34] I find on balance that at the outset of the employment relationship and as confirmed in the terms of the employment agreement the parties believed the employment relationship was casual and that the work available to Mr Hong would be intermittent and irregular. This was not the case in practice as I have already discussed above and Chevron has incorrectly paid Mr Hong's annual holiday pay because the circumstances in section 28(1) of the Holidays Act do not apply.

[35] However, Mr Hong's employment did not continue for 12 months or more and therefore he never became entitled to annual holidays under section 16 of the Act.

[36] On the termination of his employment Mr Hong was entitled to a payment equivalent to 8 percent of his gross earnings less any amount paid in accordance with s 28 of the Holidays Act.[2] I find Mr Hong has received full payment of his holiday pay entitlement.

[37] Mr Hong has failed to establish a breach of the Holiday Act as it pertains to Chevron's obligations under ss 16 and 28 of the Holidays Act.

Sections 63 and/or 73(2)

[38] Mr Hong claims Chevron failed to comply with s 63 of the Holidays Act which provides for entitlements to sick and bereavement leave. There is no dispute that the written employment agreement did not address sick and/or bereavement leave.

[39] Mr Hong did not raise any concerns about the lack of sick and/or bereavement leave clauses prior to signing the employment agreement. I find it is more likely than not that Mr Hong believed, as did Chevron, that at the outset of the employment relationship the relationship was casual in nature and Mr Hong may not meet the requirements of s 63 of the Holidays Act and so would not be entitled to sick or bereavement leave.

[40] In any event, despite the employment agreement not addressing these aspects of leave Mr Hong did receive paid sick leave in June 2018 as he was entitled to under the provisions of s 63 of the Holidays Act.

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[2] Holidays Act 2003, s 23.

[41] Mr Hong has failed to establish a breach of s 63 of the Holidays Act.

[42] Mr Hong also claims Chevron failed to comply with s 73(2) of the Holidays Act. Section 73(2) requires an employer to inform an employee at the time the employee enters into an employment agreement about his entitlements under the Holidays Act and that further information can be obtained from the union (if applicable) and the Ministry of Business Innovation and Employment (MBIE).

[43] I am satisfied Chevron has met its obligations under s 73 of the Holidays Act. The employment agreement sets out the arrangements for annual leave and payment for public holidays at clause 5. Further, page 11, under the declaration and confirmation of acceptance section, the employment agreement contains a statement advising Mr Hong that if he requires further information on his employment rights (employment rights include entitlements under the Holidays Act) that he can contact the Employment Relations info line. The 0800 contact number is also provided.

[44] Mr Hong has not established any breaches of ss 63 and/or 72 of the Holidays Act.

Employment Relations Act breaches

[45] Mr Hong claims that some of the terms of his employment agreement breach ss 65(2)(a)(iv), 65(2)(b)(i), 65(2)(b)(ii) and 64(3)(a) of the Act.

Section 65(2)(a)(iv)

[46] Mr Hong says his employment agreement did not contain any agreed hours or an indication of the arrangements relating to the times he was to work in breach of s 65(2)(a)(iv) of the Act.

[47] There is no dispute there were no specified hours of work agreed between the parties. This means the individual employment agreement must include an indication of the arrangements relating to the times the employee is to work.

[48] I am satisfied the indication of the arrangements relating to the times Mr Hong was to work were included in the employment agreement at clauses 2.2 and 2.4. These clauses confirm that Mr Hong's hours of work will be agreed from time to time

and that work may be scheduled on any day, at any time with at least 12 hours' notice of the commencement time.

Section 65(2)(b)(i)

[49] Mr Hong claims clause 5.2 of the employment agreement is contrary to s 49 of the Holidays Act and is therefore a breach of s 65(2)(b)(i) of the Act which prohibits employment agreements from containing anything contrary to law. Section 49 of the Holidays Act sets out the payment requirements for an employee who does not work on public holidays.

[50] Clause 5.2 of the employment agreement states that as Mr Hong is a casual worker he will not normally be entitled to a paid holiday on any public holiday or to an alternative day off if he works one of the days.

[51] This statement is contrary to the requirements set out in s 49 of the Holidays Act. However, at the time the employment agreement was offered and accepted the intention was that Mr Hong's hours of work would be such that he would not "normally" be entitled to the payments described in s 49. The use of the word "normally" indicates an intention that circumstances may arise where Mr Hong may become entitled to payment. In fact that is what happened. While he was still employed Mr Hong received payment for two public holidays after he raised the matter with Chevron.

[52] Mr Hong has failed to established a breach of s 65(2)(b)(i) of the Act.

Section 65(2)(b)(ii)

[53] Mr Hong claims clause 10 of the employment agreement is inconsistent with the requirements of the Act and is in breach of s 65(2)(b)(ii) of the Act which prohibits employment agreements from containing anything inconsistent with the Act. Clause 10 of the employment agreement deals with termination of employment.

[54] It is unclear from his statement of problem, evidence and submissions how clause 10 is inconsistent with the Act and I am unable to take this issue any further.

Section 64(3)(a)

[55] Mr Hong claims Chevron failed to provide him with a signed copy of his employment agreement as soon as practicable after requesting it and that was a breach of s 64(3)(a) of the Act.

[56] On 31 May, during the disciplinary investigation process relating to the 25 May incidents Mr Hong requested a copy of his signed employment agreement. He asked for it to be emailed to him that day if possible. Chevron undertook to scan and email the agreement that afternoon and asked Mr Hong if he still had the copy Mr Hong had brought to the previous meeting.

[57] Mr Hong repeated his request for a copy of his signed employment agreement on 1 June. Mr Clarke understood Mr Hong already had a copy of his employment agreement and in response to Mr Hong pointed out his understanding and indicated there was no need to provide an additional copy.

[58] Mr Clarke had reached this understanding because at the meeting he had with Mr Hong on 20 April, Mr Hong had a copy of his employment agreement with him and referenced it a couple of times during the meeting.

[59] Section 64(1) requires an employer to retain a signed copy of the employee's employment agreement or the current terms and conditions of employment that make up the employment agreement. In this case, I find it is more likely than not that Mr Hong had a copy of a document that set out the current terms and conditions of employment that made up his employment agreement.

[60] He does not deny he had a copy of the agreement with him at the meeting on 20 April and in his email to Mr Clarke on 1 June Mr Hong alleges various breaches of the Act and Holidays Act and makes specific reference to clause numbers from his employment agreement including 5.1 and 5.2. In order for him to have referenced these specific clauses, I find it is more likely than not that he had access to the employment agreement, albeit an unsigned one.

[61] Mr Hong has established a technical breach of s 64 by Chevron however, I am satisfied the substantive purpose of this section has been met and no penalty is warranted.

Breach of the employment agreement

[62] Mr Hong says that when he was dismissed it was done in breach of clause 10.1 of the employment agreement. Clause 10 of the employment agreement deals with its termination in the following relevant terms:

> **10.1 Notice**
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> Either party may terminate the employment be giving 2 weeks' notice in writing to the other party (which may expire after a period of work has ended). The Employer may at its discretion make payment in lieu of the employee working for all or part of the notice period or the balance of the period of work (whichever is shorter).
>
> **10.2 …**
>
> **10.3 Termination without Notice**
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> The Employer may terminate the employment without giving notice in the event of:
>
> - Serious misconduct by the Employee.
> - Incidents of less serious misconduct by the Employee that warrant termination without notice due to repetition or in combination with other conduct (with or without prior warnings).
> - Unsatisfactory performance following a period allowed for improvement.
> - Intervening events that prevent the Employee from carrying out his/her duties satisfactorily and the situation appears likely to continue for a prolonged period.
> - All other circumstances in which employment may be terminated without giving notice.
>
> Serious misconduct includes (but is not limited to) the matters listed in the Code of Conduct).

[63] After his dismissal Mr Hong requested payment of two weeks' notice pursuant to clause 10.1 of the employment agreement. This request was declined. Mr Hong says he was dismissed by Mr Clarke on 7 June for incidents that occurred on 25 May and this did not constitute summary or instant dismissal.

[64] Mr Hong was dismissed for serious misconduct. Under the agreed terms of the employment agreement at clause 10.3 Chevron was entitled to terminate his employment without giving notice.

[65] Chevron has not breached the terms of the employment agreement between it and Mr Hong.

Arrears of wages

[66] Mr Hong claims he was never paid for public holidays he did not work when the day would otherwise be a working day for him. Section 49 of the Holidays Act requires employers to pay an employee who does not work on a public holiday where the day would otherwise be a working day for the employee. Mr Hong claims he is owed wages for the following public holidays and seeks an order requiring payment and a penalty to be imposed on Chevron for its failure to pay:

- Labour Day – Monday 23 October 2017
- Christmas Day – Monday 25 December 2017
- Boxing Day – Tuesday 26 December 2017
- New Year's Day – Monday 1 January 2018
- Day after New Year's Day – Tuesday 2 January 2018
- Auckland Anniversary – Monday 29 January 2018
- Waitangi Day – Tuesday 6 February 2018
- Good Friday – Friday 30 March 2018

[67] Mr Hong raised concerns in April 2018 about payment for public holidays. As a result of raising his concerns Chevron advised him it would reconcile all of the public holidays from the date of his employment.

[68] On 27 April Mr Hong was advised that Chevron had calculated his entitlement to payment for unworked public holidays on the basis of whether he had worked on the day in each of the four weeks immediately preceding the public holiday. Using this calculation Chevron concluded Mr Hong was only entitled to payment for Easter Monday and ANZAC Day.

[69] Section 12 of the Holidays Act provides a list of factors to take into account to determine what would otherwise be a working day. This list of factors includes:

a) The employee's employment agreement;

b) The employee's working patterns;

c) Other relevant factors including whether the employee works for the employer only when work is available, the employers rosters and other

similar systems and the reasonable expectations of the parties that the employee would work on the day concerned;

d) Whether, but for the public holiday, the employee would have worked on the day concerned.

[70] While the factors include the use of work patterns, the Act does not limit this assessment to only four weeks prior to the public holiday. All of the factors must be taken into account and as observed by the Court of Appeal the factors are very open-ended and flexible.[3]

[71] Mr Hong does not dispute that his days and hours of work were contingent on there being work available and he himself being available to undertake the work. I have taken this into account in my determination of whether he should have received payment for the unworked public holidays.

Labour Day – Monday 23 October 2017

[72] Based on the documents provided to me I have concluded that Monday 23 October would not otherwise have been a day of work for Mr Hong. His working pattern in each of the weeks preceding 23 October does not indicate any regularity such that he could have a reasonable expectation he would have worked on 23 October but for the public holiday.

[73] Mr Hong's claim in respect of Labour Day 2017 is declined

Christmas Day and Boxing Day – Monday 25 and Tuesday 26 December 2017

[74] In one of his text messages Mr Hong advised Chevron that he would not be available over the Christmas period. This means Mr Hong would not have otherwise worked on the days concerned or have had a reasonable expectation that he would have worked on Christmas Day and Boxing Day 2017. His claim in respect of these two days is declined.

New Year's Day – Monday 1 January 2018

[3] *New Zealand Fire Service Commission v New Zealand Professional Firefighters Union* [2007] 2 NZLR 356 (CA) at [12].

[75] By 1 January 2018 Mr Hong's work patterns showed an increase in the regularity of Monday work. It is conceivable that had it not been a public holiday Mr Hong would have worked the day and had a reasonable expectation of working.

[76] Mr Hong is entitled to receive payment for 1 January 2018.

Day after New Year's Day – Tuesday 2 January 2018

[77] Mr Hong worked for 1 hour on 2 January. Under the Holidays Act he was entitled to payment at time and a half for the hour worked plus an alternative holiday to be taken at a later date. Mr Hong's work patterns show that he regularly worked on a Tuesday and he would have had a reasonable expectation that if not for the public holiday he would have worked the day.

[78] Mr Hong is entitled to receive payment for the alternative holiday having worked on the public holiday on 2 January.

Auckland Anniversary – Monday 29 January 2018

[79] Despite an increase in the regularity of working on a Monday leading up to Christmas 2017 the work pattern in December 2017 and January 2018 does not show any regularity of work being undertaken by Mr Hong on a Monday. I find Mr Hong has not established that he could have a reasonable expectation he would have worked on 29 January but for the public holiday.

[80] Mr Hong's claim in respect of 29 January 2018 is declined.

Waitangi Day – Tuesday 6 February 2018

[81] Mr Hong's work patterns show that leading up to 6 February working on a Tuesday was reasonably regular and he would have had a reasonable expectation that if not for the public holiday he would have worked the day.

[82] Mr Hong is entitled to receive payment for 6 February 2018.

Good Friday – Friday 30 March 2018

[83] The records show Mr Hong worked irregularly on a Friday, although the records show he worked on the three Fridays immediately prior to the public holiday and on the Friday after the public holiday.

[84] Based on the records I find Mr Hong would have had a reasonable expectation that if not for the public holiday on 30 March he would have worked the day.

[85] Mr Hong is entitled to receive payment for 30 March 2018.

Conclusion

[86] Mr Hong is entitled to payment for public holidays not worked on 1 January, 6 February and 30 March 2018. He is also entitled to receive payment for an alternative holiday for having worked on 2 January 2018.

[87] Chevron is ordered to calculate and pay to Mr Hong the outstanding arrears of wages for public holidays within 28 days of the date of this determination. I reserve leave for the parties to return to the Authority in the event that they are unable to agree on the correct calculation of holiday pay for the four days.

Penalties

[88] Mr Hong seeks penalties for breaches of the Holidays Act and the employment agreement.

[89] Mr Hong has established to my satisfaction that Chevron breached s 49 of the Holidays Act when it failed to pay Mr Hong for four public holidays.

[90] Section 133A of the Act provides mandatory considerations for the Authority in determining an appropriate penalty, including whether the breach was intentional, inadvertent or negligent and the nature and extent of any loss or damaged suffered by the person in breach or the person involved in the breach.

[91] Orders have now been made for Chevron to make payment for the unworked public holidays and the alternative holiday. At the time Mr Hong raised this as an issue in April 2018 Chevron sought advice about the payment for unworked public holidays. Unfortunately the advice it received was not correct. Based on the advice

it received Chevron took steps in good faith to rectify the matter and paid Mr Hong for the days it believed were owed to him.

[92] I am satisfied the breaches were inadvertent and arose from the misapprehension by Chevron that the employment relationship was casual in nature and its reliance on the incorrect advice it received on how to calculate when payment should be made for public holidays.

[93] In the circumstances of this case I find the breaches were not intentional and a penalty is not warranted. Mr Hong's application for a penalty to be imposed is declined.

Unjustified dismissal

[94] On 25 May 2018 Mr Hong was working as a Traffic Controller at a road closure on Woodcocks Road. That day the STMS on site had cause to complete four incident reports after Mr Hong had allowed traffic to proceed from his stop/go point without waiting for traffic to be stopped from two other points of the road closure. The road had been closed to one lane which meant the traffic was travelling in both directions using the same lane.

[95] That same day Chevron received a formal written complaint from the Superintendent (client) of the construction work being undertaken at Woodcocks Road during the road closure. The client had witnessed Mr Hong's actions which were the subject of the incident reports.

[96] Mr Hong was dismissed on 7 June 2018 for serious misconduct based on the events of 25 May after Chevron reached a conclusion that the necessary trust and confidence in Mr Hong had been damaged.

[97] Chevron found Mr Hong's actions on 25 May had jeopardised the safety of the public transiting through the stop/go point and had damaged its reputation with its client. Mr Hong claims his dismissal was unjustified including that the dismissal was based on discrimination and disparity.

[98] Whether a dismissal was justifiable must be determined under s 103A of the Act which provides the test of justification. The Authority must objectively determine

whether Chevron's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[99] In applying this test, the Authority must consider the matters set out in s 103A (3)(a)-(d). These matters include whether, having regard to the resources available, Chevron sufficiently investigated allegations, raised the concerns with Mr Hong, gave him a reasonable opportunity to respond and genuinely considered his explanation prior to dismissal.

[100] The Authority must not determine a dismissal unjustifiable solely because of defects in the process if they were minor and did not result in Mr Hong being treated unfairly.[4] A failure to meet any of the s 103A (3) tests is likely to result in a dismissal being found to be unjustified.

[101] I am required to assess whether Chevron had, on the balance of probabilities, convincing evidence to show it had a reasonable basis at the time of the dismissal for believing serious misconduct had occurred.[5]

Events on 25 May

[102] While Mr Hong was working at the stop/go point on 25 May 2018 four incident reports were completed and submitted which stated Mr Hong had allowed traffic to enter into a one way area before traffic coming from the other direction had been stopped.

[103] At least one of the incidents were observed by the client who was present at the site on 25 May. The client was highly concerned about what he had observed at Woodcocks Road and wrote a formal complaint about Mr Hong advising Chevron that he did not want Mr Hong back on any site where his company was working. In his letter of complaint the client referred to another occasion when he had witnessed Mr Hong letting vehicles move against oncoming traffic at a previous work site to support his instruction that Mr Hong not be allowed on site.

[4] Employment Relations Act 2000 (the Act), s 103A(5).
[5] *Honda New Zealand Ltd v NZ Boilermakers Union* [1991] 1 NZLR 392 (CA) at 394.

Disciplinary investigation process

[104] Mr Clarke considered Mr Hong's conduct may amount to serious misconduct on the basis that his actions may have resulted in a serious accident and/or serious injury. On Monday 28 May Mr Hong received a text message from his manager telling him he wished to chat about the events from 25 May. During a brief telephone discussion Mr Hong was told about the incident reports and the client complaint.

[105] The call was followed by an email on 29 May from Mr Clarke inviting Mr Hong to attend a meeting the next day to investigate the incidents and the client complaint from 25 May. Mr Clarke attached two of the four incident reports and a copy of the client's letter of complaint.

[106] That same day Mr Hong raised his second personal grievance and commenced a period of sick leave.

[107] The meeting was postponed and took place on 1 June 2018. Notes from the meeting show Mr Hong denied the incidents happened and claimed the reports had been fabricated. Mr Hong was of the view that two of the workers, who were related, were "out to get him". The meeting ended after Mr Hong told Mr Clarke he had nothing further to add.

[108] During the meeting Mr Clarke enquired about the swearing Mr Hong had raised as a personal grievance on 29 May. The matter was discussed but no resolution was achieved.

Interviews with staff and client

[109] Between 30 May and 1 June Mr Clarke interviewed employees who had been working with Mr Hong at Woodcocks Road on 25 May and the client. He provided a copy of his interview notes to Mr Hong on 2 June including a copy of the notes taken at the interview with Mr Hong on 1 June. Mr Hong was invited to make any further comments on either the incident or the interview notes.

[110] During his interviews with the employees working with Mr Hong on 25 May Mr Clarke used the opportunity to ask questions relating to the complaint received from Mr Hong about swearing. Two of the employees acknowledged swearing at Mr

Hong. They both explained they had sworn out of frustration with Mr Hong's behaviour in ignoring them. They each told Mr Clarke Mr Hong was not communicating via the RT and was sending cars through the stop/go point when other vehicles were still travelling toward him.

[111] The STMS told Mr Clarke she had attempted to explain to Mr Hong during the morning on 25 May what was needed from him in order to run the site safely but he had walked off and refused to listen.

[112] Each of the employees acknowledged they had sworn at Mr Hong but also that they had apologised to him before the end of the shift. This information was included in the notes of the interviews sent to Mr Hong on 2 June.

[113] In his interview with the client Mr Clarke was told the client had witnessed three incidents while he was at the site. The first was when he was in his car while waiting in traffic, then twice more while he was at the site observing.

[114] There is some inconsistency with the report from the client. At the investigation meeting he told me he attended the site between 10 and 11 am. If that is the case then he could only have witnessed one of the incidents as the three other incidents did not occur within this timeframe. The client was standing with the STMS while he was observing the site. It is likely the STMS relayed to the client the first incident she had had with Mr Hong before the client arrived at the site.

[115] I find it is more likely than not that the client did observe at least once on 25 May Mr Hong sending traffic from his stop/go point when traffic was still coming toward him. The client confirmed in his interview with Mr Clarke his previous notification to Chevron, that he had observed similar failings by Mr Hong at a site at Moirs Hill. The client advised Mr Clarke that based on his observation at Moirs Hill and on 25 May and confirmed his instruction that he did not want Mr Hong back on any site where his company was working from that day forward.

Decision to dismiss

[116] Concurrently with communications between Mr Clarke and Mr Hong about the issues Mr Hong had raised on 1 June regarding various alleged statutory breaches, Mr Hong responded to Mr Clarke's 2 June letter and the interview records on 5 June. In his response Mr Hong denies he made any mistakes on 25 May and even if the

incidents did happen, his view was that sending vehicles from both sides of a stop/go operation would not be gross incompetence.

[117] A second meeting was scheduled to take place on 6 June. Mr Hong commenced a period of sick leave on 5 June and asked for the meeting to be adjourned. In response Mr Clarke asked Mr Hong if there was any reason why a final decision about the 25 May incidents could not be made.

[118] Mr Hong responded as follows:

> No, I do not know the reason.
>
> I hope you can make a decision because you have completed the investigation without convening any further meeting.
>
> I have no more to add in addition to what I have already said in my emails and during the first meeting on 1 June 2018.
>
> In my view, there is no point in convening another investigation meeting.
>
> If you think otherwise, when will it be the next investigation meeting?

[119] Mr Clarke responded by clarifying that while he had met with all the employees concerned including Mr Hong, he had not yet concluded the investigation and he was seeking Mr Hong's further input. He asked Mr Hong to confirm:

a) whether the investigation meeting should be closed or whether Mr Hong had further information to share;

b) whether Mr Hong accepted he was in a position to make a decision; and

c) If Mr Hong did not accept he was at the decision point, whether Mr Hong wished to make any further submissions either orally or in writing.

[120] Mr Clarke asked Mr Hong to confirm when Chevron could receive any submissions or when he would be available to meet.

[121] Mr Hong responded advising Mr Clarke he had no more to share, had no further submissions to make and that Mr Clarke could proceed to making a decision.

[122] Mr Hong returned to work from his sick leave on 7 June. While undertaking his duties in the yard he was invited to attend a meeting with Mr Clarke. At that meeting Mr Hong was asked again about the incident reports from 25 May including the condition of Mr Hong's RT. Mr Hong agreed the RT was working correctly. Mr Hong advised Chevron he had nothing further to add and asked for a decision to be made immediately.

[123] After a brief adjournment Mr Clarke advised Mr Hong that his employment was terminated without notice. The reasons for the dismissal were confirmed in writing on 8 June 2018.

[124] There is no dispute that Mr Hong was trained in the safety aspects of his role. After the first two incidents in the morning of 25 May the STMS spoke with Mr Hong and moved him to another point where he would have a better view of the traffic flows on Woodcock Road. Despite taking these measures Mr Hong allowed traffic to enter the road while other traffic was still moving toward him on two further occasions. Chevron's conclusion that this was a serious breach of its safety requirements and put the public at risk was justified.

[125] During the Authority's investigation process and in his submissions Mr Hong raised issues of inconsistency in relation to the client's evidence and the way the forms had been completed by the STMS. There is no evidence Mr Hong raised any of these issues during Chevron's disciplinary investigation process. Instead he relied on his denial that none of the four incidents happened at all, a stance he maintained throughout this proceeding.

[126] Chevron conducted a full and fair investigation into the allegation that Mr Hong had put public safety at risk and had reasonable grounds to honestly believe his conduct amounted to serious misconduct. I am satisfied the investigation process was compliant with s 103A of the Act. Chevron raised its concerns with Mr Hong and gave him a reasonable opportunity to respond and considered his explanations.

Discrimination

[127] Mr Hong says he was discriminated against in his employment by reason of his involvement in the activities of a union. Section 104 makes it unlawful to

discriminate against an employee for their involvement in union activities.[6] Section 107 defines the activities of a union for the purposes of s 104 and includes where the employee has submitted another personal grievance to that employee's employer.[7]

[128] In *Hines v Eastland Port Limited* the Employment Court held there is no requirement for any union involvement for s 107(1)(e) to apply.[8] Where discrimination is alleged s 119 of the Act provides a rebuttable presumption that the employer discriminated against the employee.

[129] Prior to his dismissal Mr Hong had submitted three personal grievances as follows:

a) 10 April regarding workplace bullying;

b) 29 May 2018 regarding other employees' use of offensive language toward him; and

c) 1 June regarding alleged breaches of the Holidays Act and Employment Relations Act.

[130] Mr Hong says he was dismissed in circumstances in which other employees would not have been dismissed and because of the raising of these grievances.

[131] The first personal grievance raised on 10 April had been addressed and resolved. That means at the time the decision was made to terminate Mr Hong's employment two personal grievances remained open for resolution. As already noted in this determination Mr Hong has not pursued those grievances, preferring instead to raise the claims as issues of disparity and breaches of statutory provisions and the employment agreement.

[132] In his submissions Mr Hong refers to the evidence given by the client that he had previously breached safety requirements in a similar way at Moirs Hill. It was common ground that the last date Mr Hong worked at the Moirs Hill site was on 7

[6] Employment Relations Act 2000, s 104(1).
[7] Ibid, s 107(1)(e).
[8] *Hines v Eastland Port Limited* [2018] NZEmpC 79 at [131].

April. Although an incident report was completed for this incident no action was taken against Mr Hong at that time.

[133] Mr Hong submits that at that time he had not raised any personal grievances and therefore when he was dismissed on the basis of the four incident reports on 25 May the employer discriminated against him because between 10 April and 7 June 2018 he had raised personal grievances.

[134] I find the evidence establishes Mr Hong's dismissal was not because he had previously raised grievances, but was for the reasons set out in the letter dated 8 June 2018. The dismissal resulted from Mr Hong's failure to adhere to important safety requirements when operating as a traffic controller on 25 May 2018 and Chevron's subsequent loss of trust and confidence in him.

Disparity

[135] Mr Hong claims he was treated disparately by Chevron when he was dismissed for serious misconduct when other employees who committed serious misconduct such as bullying and/or using offensive language were neither dismissed nor disciplined. Chevron denies treating Mr Hong disparately. It says there has never previously been a situation similar to that in which Mr Hong found himself.

[136] In *Wikaira v Department of Corrections* the Court considered claims by Ms Wikaira that she had been disparately treated in relation to her dismissal.[9] The Court had evidence that other Corrections Officers had received a warning or had no action taken against them, in circumstances where they, like Ms Wikaira been discharged without conviction. The court held that the department's failure to differentiate Ms Wikaira's case from others of her colleagues for similar or more serious misconduct was so significant that it failed to justify the fairness and reasonableness of her dismissal.

[137] Mr Hong's complaints about being sworn at were followed up by Chevron and each of the employees was issued with written warnings about their conduct as part of a disciplinary process. Chevron recorded in the written record of interviews with its employees during its disciplinary investigation acknowledgements from two

[9] [2016] NZEmpC 175 at [214].

employees that they had sworn at Mr Hong on 25 May. The employees' also acknowledged that they had apologised to Mr Hong that same day and believed he had accepted the apologies. Mr Hong received copies of the interview records and did not raise any concerns or issues with the accuracy of the content of these statements during the disciplinary process.

[138] I am satisfied the disparity issue has been adequately explained by Chevron. The employees were, like Mr Hong, subjected to disciplinary action. Chevron was entitled to take into account the apologies rendered and apparently accepted by Mr Hong for the swearing incidents when determining an appropriate sanction. Chevron was also entitled to take into account the fact that the employees accepted they had sworn, whereas Mr Hong continually maintained that the four reported incidents on 25 May did not happen.

Conclusion

[139] Chevron has established on the balance of probabilities that dismissing Mr Hong was an action an employer acting fairly and reasonably could take. In all the circumstances dismissal was within the range of reasonable responses available to Chevron. Mr Hong's dismissal was justified.

Costs

[140] Costs are reserved. I am of a mind to let costs lie where they fall as both parties have had a measure of success and on that basis the parties are invited to resolve the matter of costs between them.

[141] If they are unable to do so both parties shall have 14 days from the date of this determination in which to file and serve a memorandum on the matter. Both parties shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[142] The parties could expect the Authority to determine costs, if asked to do so, on its usual "daily tariff" basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell
Member of the Employment Relations Authority