

Attention is drawn to a  
non-publication order  
contained in this  
determination

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2021] NZERA 458  
3143845

BETWEEN JULIUS LLOYD-LONG  
Applicant  
AND AUCKLAND TRANSPORT  
Respondent

Member of Authority: Nicola Craig  
Representatives: Greg Bennett, advocate for the applicant  
Charlotte Parkhill and Stacey Fletcher, counsel for the  
respondent  
Investigation Meeting: 13 September 2021  
Submissions (and further information received): 2 August 2021 and at the investigation meeting from the  
applicant  
13 August 2021 and at the investigation meeting from  
the respondent  
Date of determination: 15 October 2021

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**DETERMINATION OF THE AUTHORITY**

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- A. Julius Lloyd-Long's application for interim reinstatement is declined.**
- B. A non-publication order is made.**
- C. Costs are reserved.**

## **What is the employment relationship problem?**

[1] Julius Lloyd-Long was a transport officer for Auckland Transport (AT or the organisation). AT is a Council controlled organisation responsible for the day-to-day activities that keep Auckland's transport systems flowing. Transport officers assist and guide members of the public using public transport.

[2] On 15 June 2021 Mr Lloyd-Long was dismissed for his dealings with a passenger. He challenges that dismissal along with other aspects of AT's treatment of him. Mr Lloyd-Long seeks reinstatement to his role on an interim basis until his grievance claims can be fully considered. AT strongly opposes interim reinstatement.

## **What was the Authority's process?**

[3] Mr Lloyd-Long initially provided a short affidavit in support of his application. AT then lodged affidavits from John Strawbridge (Group Manager: Parking Services and Compliance) and Logan Christian (Transport Compliance Manager). Given the opportunity to provide reply evidence a very lengthy affidavit from Mr Lloyd-Long, along with an affidavit from his wife Rebecca Lloyd-Long, were lodged.

[4] AT objected as those two affidavits contained new material about which it had not had the opportunity to provide evidence. There were also letters and emails of support from other transport workers which had not been provided in a sworn manner. Mr Lloyd-Long's representative referred to difficulties with obtaining evidence as Mr Lloyd-Long has a learning difficulty. The investigation meeting was adjourned to allow additional sworn evidence to be provided. A second affidavit from Mr Strawbridge was filed.

[5] A further request to lodge evidence from an additional witness Eric Watson, a union delegate, was made on the basis that this evidence was only recently discovered. The request was granted with limitations. AT was not satisfied that the limitations were complied with but ultimately agreed to go ahead without filing further evidence.

[6] The investigation meeting was held on 13 September 2021 to hear submissions. At that stage Auckland was in Covid-19 Alert Level 4 so the meeting was held by Zoom audio-visual link.

[7] The Authority also convened a Zoom meeting on 14 September 2021 where Mr Watson affirmed his affidavit and exhibits.

[8] In the usual way, I have dealt with this application for interim reinstatement on the basis of untested evidence and submissions. Disputed matters cannot be decided on the basis of such evidence.

[9] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions and specified orders made as a result.

### **Non-publication order**

[10] AT seeks a non-publication order regarding some limited aspects of the evidence in this matter. These are the name of the co-worker (whom I refer to as R) who is the subject of Mr Watson's evidence about an incident he was involved in, a sentence in Mr Watson's affidavit and the video of the incident with the customer.

[11] Mr Lloyd-Long did not object to the co-worker's name being the subject of an order. Regarding the video footage it is submitted that the order may be impracticable as the passenger has the footage and is not currently involved in this proceeding. However, there is no indication that the passenger had put the video on-line or published it in some other way so I do regard this as a significant impediment. Lack of awareness of any order could also be taken into account in determining whether a penalty should be imposed in the event that one was being considered.

[12] The Authority has the power to order that evidence before it is not to be published.<sup>1</sup> Although the presumption should be that proceedings are public I am persuaded that there are sufficient grounds on which to make orders in this case.

[13] On an interim basis, until further order of the Authority, the following evidence is not to be published:

- (a) the name of the worker R;
- (b) the portion of the sentence in paragraph 15.0 in Mr Watson's affidavit beginning " as they..."; and
- (c) the video of the incident which resulted in Mr Lloyd-Long's dismissal.

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<sup>1</sup> The Act, Sch 2, cl 10.

## **What are the issues?**

[14] The issues for determination in this interim reinstatement matter are:

- (a) Is there a serious question to be tried, so does Mr Lloyd-Long have an arguable case for unjustified dismissal and for permanent reinstatement?
- (b) Where does the balance of convenience lie?
- (c) Where, standing back and considering the case, does the overall justice lie until the substantive matter is determined?<sup>2</sup>

[15] Although some factors are relevant under more than one head, I have focused my discussion in one area of the determination.

## **What was Mr Lloyd-Long's work history?**

[16] Mr Lloyd-Long was appointed to AT in August 2019. He has a history of being involved in security work and is also a boxer. He is also very tall, being referred to by some as a gentle giant.

[17] Transport officers complete training from AT which requires them to undergo and pass assessments prior to being recommended for an Enforcement Warrant issued by the Police.<sup>3</sup> A police interview is required. The warrant means officers have the ability to direct members of the public off public transport or not to board public transport. Warrant holders may also require the provision of information regarding fare evasion and issue infringement notices for those failing to provide evidence of a valid ticket.

[18] Mr Lloyd-Long received AT's induction and de-escalation training. During training he was identified as having a learning difficulty and extra assistance was provided.

## **What happened on the train on 8 April 2021?**

[19] Mr Lloyd-Long was working on a train on the Western Line. A passenger was on the train who all agree was known as a repeat fare evader. Mr Strawbridge acknowledges that he was a very difficult customer. The interaction between Mr Lloyd-

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<sup>2</sup> For example, *Brooks Homes Limited v New Tax Refunds Limited* [2013] NZSC 60, *Western Bay of Plenty District Council v McInnes* [2016] NZEmpC 36 and *Humphrey v Canterbury District Health Board, Te Poari Hauora O Waitaha* [2021] NZEmpC 59.

<sup>3</sup> Land Transport Act 1998.

Long and the passenger spread over some minutes with the passenger sitting in two different areas and then getting off the train.

[20] There is a video with sound taken by another passenger. However, this does not capture the entirety of Mr Lloyd-Long's exchanges with the fare evading passenger, starting only part way through their interaction.

[21] Mr Lloyd-Long describes his fellow transport officer as calling him to assist. The passenger seems to have been reluctant to have his AT Hop card properly checked, buy a ticket or get off the train.<sup>4</sup>

[22] Mr Lloyd-Long reports trying to get the passenger's bag to throw it through the open train door in the hope the passenger would follow and get off the train. He also says the passenger had blown his nose onto his AT HOP card and wiped it on Mr Lloyd-Long's face. Although there is some evidence from him suggesting this was later, at the investigation meeting it was accepted that this occurred earlier around the time of the bag incident. This would have placed it before or around the time the video started.

[23] The video starts with Mr Lloyd-Long and the fare evader seemingly in contact, possibly in the forearm area, with Mr Lloyd-Long standing and the passenger sitting. Mr Lloyd-Long says when he attempted to get the passenger's bag, the passenger grabbed the bag harder, causing Mr Lloyd-Long to over balance before recovering.

[24] At some point Mr Lloyd-Long says he noticed that the passenger was wearing an ankle bracelet indicating he was home detention or bail.

[25] The passenger is clearly being argumentative, verbally abusive and unhelpful. He moves seats. The passenger is not wearing a mask and refuses to do so when asked. Mr Lloyd-Long calmly asks for his HOP card to check that a fare had been paid. The videoing passenger also became involved in the discussion.

[26] The fare evading passenger says he getting off at the next stop and moves to the door. He leans over, looking in his backpack. Mr Lloyd-Long follows him to the door. The passenger turns and pushes Mr Lloyd-Long's upper arm, in what looks like a jostling move, saying "wanker". As the passenger turns back towards the train door, Mr Lloyd-Long moves in with either open hand or a fist, hitting the side of the

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<sup>4</sup> The AT Hop card is a transport payment card.

passenger's head, resulting in a noise which sounds like the passenger jolting into the nearby train door, his baseball cap coming off and his shoe coming loose.

[27] In his first affidavit Mr Lloyd-Long says his reaction to the passenger was instinctive, with him fearful that the passenger would wipe mucus on him again. He refers to back handing the passenger and acknowledges that he hit him. In his second affidavit he says he struck the passenger to make sure he could not wipe mucus on him again, because it was "disgusting".

[28] It is not obvious from the video that the passenger wiped mucus on his Hop card nor touched his card on Mr Lloyd-Long's face shortly before Mr Lloyd-Long hit him. I make no decision at this point about whether that happened, but if it did it may have occurred earlier during the period before the video begins or shortly after it starts.

[29] There is a dispute about whether Mr Lloyd-Long reported the incident to his supervisor afterwards. He says he did and the supervisor told him not to (further) report the incident.

### **How did AT find out?**

[30] On 20 May 2021 another transport supervisor was approached by a member of the public whilst working on the Western Line. She was offered a video of the incident to send to her manager. She received it and sent it on to the area manager and Mr Christian.

### **What did AT do?**

[31] Mr Strawbridge from AT viewed the video and was very concerned that it appeared to show Mr Lloyd-Long:

- (a) (Earlier) push the passenger causing him to "be propelled" back into their seat; and
- (b) In a separate event a few minutes later, when the passenger's back was turned, hit the passenger with a clenched fist in the back of their head, causing the passenger to fall into the train door and hit his head.

[32] Mr Strawbridge concluded that on its face the video depicted Mr Lloyd-Long using inappropriate force towards a passenger on two separate occasions.

[33] On 27 May 2021 Mr Strawbridge wrote to Mr Lloyd-Long to say he had very serious concerns about the 8 April 2021 behaviour, appearing to involve two occasions of using inappropriate force to physically assault a passenger. The video clip was provided along with AT's Code of Conduct and Disciplinary Policy. Aspects of the organisation's code of conduct were identified. The possibility of summary termination of employment was mentioned.

[34] AT invited Mr Lloyd-Long to a meeting on 31 May 2021. The meeting was postponed as Mr Lloyd-Long's representative wanted witness statements to be obtained from people involved in the incident.

[35] Initially AT did not prevent Mr Lloyd-Long from working. However, Mr Strawbridge says that once it was evident that he was not going to be able to get an initial mitigating response from Mr Lloyd-Long, he decided to consider suspension.

[36] On 31 May 2021 Mr Strawbridge proposed via email a temporary paid suspension for the duration of the investigation. Feedback was sought. Mr Lloyd-Long's representative sent several emails indicating that Mr Lloyd-Long was acting in self-defence as the passenger had wiped mucus on Mr Lloyd-Long before the force was used. In addition it was said that hitting the passenger was no more than a normal person would do in the circumstances.

[37] The suspension was confirmed in writing.

[38] A meeting was held on 3 June 2021 between Mr Lloyd-Long, his wife, his representative, Mr Strawbridge and two other AT employees. Initially Mr Lloyd-Long's representative was unwilling for him to speak until the witness statements were provided. The video was then watched. On Mr Lloyd-Long's behalf it is indicated that he had had mucus put on him and he reacted in self-defence.

[39] AT started a disciplinary process and notified Mr Lloyd-Long that he invited to a formal disciplinary meeting.

[40] A disciplinary meeting was held on 11 June 2021 between Mr Strawbridge, two other AT representatives, Mr Lloyd-Long, his wife and his representative. Mr Strawbridge indicated that he had lost trust and confidence in Mr Lloyd-Long's performance of his duties and that his behaviour presented a serious risk to the public, his colleagues and himself. Mr Strawbridge indicated at the meeting that there was no

evidence of mucus being put on Mr Lloyd-Long's face. The preliminary view that the actions constituted serious misconduct and summary dismissal was proposed.

[41] On 15 June 2021 AT confirmed in writing its decision to dismiss Mr Lloyd-Long. Mr Strawbridge refers to focussing his findings on the video footage and Mr Lloyd-Long's interactions with the customer prior to and when the customer attempted to leave the train. The conclusion drawn was the Mr Lloyd-Long had multiple opportunities to walk away from the situation, as outlined in AT's training but instead continued to engage twice with the customer. The second time Mr Lloyd-Long was concluded to hit the customer hard into the door of the train.

[42] AT concluded that Mr Lloyd-Long breached its code of conduct and core values, as well as failing to meet the high standards expected of a warranted transport officer.

[43] Mr Lloyd-Long's explanation about the wiping of mucus causing a self-defence reaction was rejected. Mr Strawbridge could not see evidence of mucus wiping on the video. The other transport officer was asked and did not see it nor hear any mention of it.

### **Is there an arguable case regarding unjustified dismissal?**

[44] AT did not concede that Mr Lloyd-Long had an arguable case for unjustifiable dismissal.

[45] It relies on the AT Code of Conduct serious misconduct definition includes acts that cause injury, physical assault and conduct bringing or having the potential to bring AT into disrepute.<sup>5</sup>

[46] The arguments for Mr Lloyd-Long focused on self-defence not being considered, or properly considered, and defects in the procedure used by AT. It was not argued that the conduct would not have been misconduct in the absence of a self-defence claim.

[47] For Mr Lloyd-Long it is argued that self-defence was not taken into account, with AT relying solely on its values and expectations. The self-defence argument appears to be based on Mr Lloyd-Long's fear that the passenger would try to wipe

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<sup>5</sup> AT Code of Conduct Policy, November 2019, Appendix 1, page 10.

mucus on him again. In his second affidavit Mr Lloyd-Long refers to not saying he was in immediate danger but wanting to make sure more mucus was not put on him.

[48] Mr Lloyd-Long alleges that Mr Strawbridge had predetermined that he was guilty, coming to the process with a closed mind. That is strongly rejected by Mr Strawbridge who gives evidence that he liked and respected Mr Lloyd-Long prior to this investigation.

[49] It is suggested that Mr Strawbridge should not have seen video before starting the process. However, given the lack of a written external complaint or internal referral someone needed to watch the video to decide if a process needed to be commenced.

[50] At this preliminary stage I cannot conclude that Mr Strawbridge acted unreasonably or in a predetermined manner by identifying that he was very concerned by what he had seen in the video.

[51] Numerous aspects of the procedure were identified as inadequate. Some of these arguments require a type of process which it is hard to see AT as being obliged to adopt there, in the absence of any requirement in its policies. It was argued that the investigator needed to have written terms of reference and should have spoken to Mr Lloyd-Long rather than that to be left to Mr Strawbridge.

[52] It was argued that AT did not meet its own policies by failing to appoint a separate investigator from the decision-maker. However, there is no obvious basis for a requirement that the roles be separated. No AT policies required these two roles to be separated. No specific case law was pointed to as requiring a separation.

[53] It is argued that Mr Lloyd-Long was not asked to comment during the video about what was happening. However, it is evident from the transcript of a recording taken for Mr Lloyd-Long at the 3 June 2021 meeting that Mr Strawbridge asked on several occasions for Mr Lloyd-Long to tell them what had happened. Mr Lloyd's representative Mr Bennett was the person who outlined what had occurred, rather than Mr Lloyd-Long. Mr Lloyd-Long explicitly identified that he wanted his representative to speak for him.

[54] Submissions for Mr Lloyd-Long included that there was an inadequate investigation, including because the passenger who took the video and his daughter were not interviewed. Potentially they could have provided evidence of whether and when the passenger wiped mucus on Mr Lloyd-Long.

[55] The other transport officer provided two different accounts of events. He may not have been shown Mr Lloyd-Long's statement and given opportunity to comment. The video may not have been shown to everyone spoken to.

[56] Whilst some aspects of these investigation arguments suggest a requirement of a criminal standard of investigation, there is some room to argue that more was required of the investigation, particularly around the question of whether the passenger wiped mucus on Mr Lloyd-Long. At this stage I cannot be satisfied that any defects were minor and did not disadvantage Mr Lloyd-Long.<sup>6</sup>

[57] Disparity of treatment is argued. Mr Watson gave evidence of being assaulted by R during a meeting, with R grabbing his wrist, breaking the skin and shaking Mr Watson's hand violently. Mr Watson refers to R still working at AT despite the incident being reported to management and seemingly investigated.

[58] It is arguable that an assault on another worker can be seen as having sufficient similarity to an assault on a passenger to require consideration as part of whether there was disparity of treatment. Ultimately it may be that AT can establish that there were sufficiently different considerations between the situations but that is a matter for the substantive consideration.

[59] I conclude that there is an arguable case that Mr Lloyd-Long was unjustifiably dismissed. The claim is not at the level of being frivolous and vexatious.

### **Is there an arguable case for permanent reinstatement?**

[60] I now look at whether it is reasonable and practicable to reinstate Mr Lloyd-Long. Reinstatement has been returned to its previous status as a primary remedy.<sup>7</sup> This has an impact on how reinstatement is assessed.

#### *Reasonableness*

[61] In his affidavit Mr Lloyd-Long says he used "sufficient force" to stop the passenger from wiping mucus on his again and it was what a "reasonable person would have done". Mr Strawbridge and Mr Christian regard this view as fundamentally

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<sup>6</sup> The Act, s 103A(5).

<sup>7</sup> Section 125 of the Act.

incompatible with the transport officer role. Mr Lloyd-Long's view could be seen as surprising in light of the degree of force shown in the video.

[62] Mr Strawbridge has no trust and confidence in Mr Lloyd-Long, having concluded that he used unreasonable force against the passenger and continued to justify and defend his actions.

[63] Mr Lloyd-Long has had training which is designed to ensure that transport officers de-escalate rather than escalate situations. His approach to the disciplinary action and dismissal has been to indicate that he was defending himself in a situation where he feared having mucus wiped on himself again. On his behalf it was indicated during the process that his actions were those of a normal person in these circumstances. This gives AT little reassurance that Mr Lloyd-Long recognises that his approach was not the right one and that he would try to do something different in future.

[64] AT cannot stop particular people from getting on the train and transport officers must deal without notice with whoever arrives. AT sees it as unreasonable for Mr Lloyd-Long to be placed back in this environment without a recognition that his behaviour should be different in future.

#### *Practicality*

[65] This is a largely unsupervised role where transport officers have frequent interactions with the public. Some members of the public direct aggression at transport officers, particularly regarding fare evasion.

[66] There is limited ability for AT to oversee the work carried out by transport officers. Even if AT did increase the level of supervision it is concerned that that might not prevent further incidents. Mr Lloyd-Long was aware that he was being videoed at the time the final incident with the passenger occurred but that did not prevent him from acting as he did.

[67] A factor in terms of practicability is Mr Lloyd-Long's lack of a current Enforcement Warrant. The warrant is needed by transport operators to undertake their role. Mr Christian would have to confirm that he recommended Mr Lloyd-Long be issued with a warrant. Mr Christian says that he does not have the confidence in Mr Lloyd-Long after this incident to make that recommendation.

[68] Mr Lloyd-Long's only experience at AT is in the transport officer role and there is no evidence of other suitable roles being available.

[69] There is no evidence of Mr Lloyd-Long facing difficulty from co-workers if he returned.

[70] I have considered the submission for Mr Lloyd-Long that the situation here is similar to that in *De Bruin* where a nurse was permanently reinstated after an incident where he had slapped a patient.<sup>8</sup> The situations are not entirely similar. Mr de Bruin was a very experienced nurse who admitted that he had seriously erred when he slapped the patient as a reflex action after she had struck him and spat at him. Mr Lloyd-Long was a relatively new employee. He does not accept that he had behaved wrongly and is not apologetic.

[71] My assessment at this interim stage is that Mr Lloyd-Long does not have an arguable case for permanent reinstatement.

#### **What is the balance of convenience?**

[72] I now move on to weigh the interests of Mr Lloyd-Long against those of AT, including a consideration of the adequacy of damages.

#### *Mr Lloyd-Long*

[73] Mr Lloyd-Long is concerned that the longer he is out of work the more difficult it will be for him to integrate back into the workplace. No particular problems with reintegration are evident. There appear to be a substantial number of transport officer roles. The work is done in pairs allocated in rather than as part of a large integrated team.

[74] Mr Lloyd-Long emphasises that his colleagues support his return to work although it is not obvious from their supporting material whether they know about the incident leading to his dismissal.

[75] Employment is an important factor for Mr Lloyd-Long. His whānau are on the cusp of financing and moving into their own home and reinstatement would make that an easier step to take. There is no evidence that that step would be prevented if he was not reinstated. Mr Lloyd-Long has another job and his losses can largely be

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<sup>8</sup> *De Bruin v Canterbury District Health Board* [2012] NZEmpC 110.

recompensed by damages. There is no question that AT could not meet any damages award.

[76] I take into account the likely time until this matter can be substantively heard and determined. That factor weighs in Mr Lloyd-Long's favour.

*AT*

[77] I now look at any detriment which AT could or would suffer if Mr Lloyd-Long is reinstated on an interim basis. I take into account that AT is a large organisation.

[78] AT is concerned about the prospect of Mr Lloyd-Long becoming involved in another violent incident. It cannot control who gets on public transport and requires transport officers to manage any confrontations appropriately.

[79] Particularly in the absence of Mr Lloyd-Long taking responsibility for his conduct and recognising any error, AT cannot be confident that repetition will not occur. It sees Mr Lloyd-Long's lack of insight as worrying. It is a matter of concern to AT and to the public at large that a transport officer may wrongfully use force against a member of the public.

[80] AT also raises the prospect of other staff becoming confused at what the acceptable standard of behaviour is, if reinstatement was granted.

[81] If reinstatement is ordered it would usually be on the basis of a return to actual work, rather than just to the payroll, with the employee able to perform the role.<sup>9</sup> Mr Lloyd-Long does not currently have an Enforcement Warrant, meaning he is unable to carry out the role. There is a risk that he may not be able to obtain another warrant. Mr Lloyd-Long has not undertaken any other roles at AT and the extent to which roles which he was able to perform are available is not explored in the evidence.

[82] If there are difficulties with Mr Lloyd-Long's warrant being re-issued, AT could face a situation of having to pay Mr Lloyd-Long on an on-going basis but without the benefit of his work. That loss would potentially be compensable under the undertaking.

*Conclusion on the balance*

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<sup>9</sup> *Pacific Blue Employment & Crewing Limited v B* [2010] NZEmpC 112 at [22]-[23].

[83] The balance favours AT. If the warrant is not renewed and Mr Lloyd-Long has to remain on the payroll there is little evidence that he is better off in that situation than he is currently, having obtained work elsewhere.

**Where is the overall justice of the case?**

[84] I now step back and ask myself where the overall justice lies. Mr Lloyd-Long has an arguable case for unjustified dismissal although my assessment at this early stage is that it would not be seen as strong. I have concluded that he does not have an arguable case for permanent reinstatement. The balance favours AT.

[85] Mr Lloyd-Long struck a passenger from behind and describes this in his second affidavit as the action of a reasonable person. I have considered the fact that Mr Lloyd-Long came across this passenger after this event and was able to avoid interaction with him. He says that other passengers are not at risk as this incident only occurred because the passenger wiped mucus on him. I am not persuaded that this swings the overall justice to Mr Lloyd-Long's favour. The overall justice favours AT.

[86] The interim reinstatement application is declined.

**Costs and next steps**

[87] Costs are reserved. An Authority Officer will be in touch with the parties regarding the next steps in this proceeding.

**Nicola Craig**

**Member of the Employment Relations Authority**