

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 266
3092272

BETWEEN	WENJIE ZHAO Applicant
AND	PAVLOVICH COACHLINES LIMITED Respondent

Member of Authority:	Marija Urlich
Representatives:	Applicant, in person Bernard Pavlovich, for the Respondent
Investigation Meeting:	20 April 2021
Submissions:	At the investigation meeting
Determination:	21 June 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Zhao was employed by Pavlovich Coachlines Limited (PCL) as a bus driver from 8 July 2019 until his resignation effective 12 January 2020. He says events on 11 December 2019 when he was verbally abused by a passenger who also damaged his property were not appropriately or fairly dealt with by PCL, that he was not paid stress leave and reimbursed for the damaged items as agreed and was bullied and racially discriminated against at work. He also says he was not given fair notice of changes to his roster and he was humiliated by the treatment he received when he arrived at work at his usual time. He says PCL's actions have unjustifiably disadvantaged him in his employment and resulted in his unjustifiable constructive dismissal.

[2] Mr Zhao seeks remedies of compensatory damages for hurt feelings consequent to his disadvantage grievances and dismissal and recommendations.

[3] PCL denies Mr Zhao was unjustifiably disadvantaged or unjustifiably dismissed. It says personal grievances set out in a letter dated 21 December 2019 were not raised in time and it does not consent to their late raising. In respect of Mr Zhao's claim of unjustified constructive dismissal PCL says it was obliged to investigate the events of 11 December, Mr Zhao has overreacted to the investigation process and acted precipitately in resigning before that process was complete. It has paid Mr Zhao the stress leave and reimbursed the cost of the damaged items at claimed value, outcomes it says which could have occurred if Mr Zhao had participated in the investigation process. PCL says Mr Zhao was a valued and hardworking member of staff, it did not wish him to resign and tried to meet with him to discuss the outstanding issues after receiving his resignation.

The Authority's investigation

[4] The parties filed witness statements and relevant documents in accordance with timetabling directions. The Authority has heard evidence from Mr Zhao and on behalf of PCL:

- Bernard Pavlovich, Chief Executive;
- Frances Pavlovich, Contract Liaison Manager;
- Saif Al-Sultani, Network Operations Manager;
- Anand Muthy, Team Leader Operations; and
- Daren Oneroa, Network Monitor.

[5] The Authority was assisted by an interpreter of the Mandarin language.

[6] As permitted by s 174E of the Employment Relations Act 2000 (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. It has not recorded all evidence and submissions received.

Issues

- [7] The issues identified for investigation and determination are:
- a) Did Mr Zhao raise a personal grievance within the statutory 90 day period by letter dated 21 December 2019 for matters including bullying and unlawful discrimination on racial grounds?
 - b) If so, was Mr Zhao unjustifiably disadvantaged in his employment by the actions of the respondent as alleged?
 - c) Was Mr Zhao unjustifiably constructively dismissed on 30 December 2019 when he gave two weeks' notice of resignation?
 - d) If so, is Mr Zhao entitled to a consideration of remedies sought including:
 - i. Compensation pursuant to section 123(1)(c)(i) of the Act?
 - ii. Recommendations pursuant to section 123(1)(ca) and (d) of the Act?
 - e) If any remedy is awarded, should it be reduced (under s 124 of the Act) for blameworthy conduct by Mr Zhao that contributed to the situation giving rise to his grievance?
 - f) Is either party entitled to an award of costs?

Did Mr Zhao raise personal grievances by letter dated 21 December 2019?

[8] A personal grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance the employee wants the employer to address.¹ Section 115 makes further provision regarding exceptional circumstances under s 114(4).

[9] Mr Zhao wrote a letter dated 21 December headed "Raising a personal grievance" and marked private and confidential:

Dear Bernard Pavlovich

¹ Section 114(2) of the Act.

I am raising a personal grievance for discrimination, bullying, racial, threaten, Misconduct, unjustified, ect.

I believe I have a personal grievance because...I was by Pavlovich Coachlines company CEO discrimination, racial, unjustified, misconduct ect.(sic)

...

[10] The letter goes on to set out the basis of Mr Zhao's concerns in the context of the passenger encounter of 11 December and subsequent events, much of which are covered in his subsequent personal grievance for unjustified constructive dismissal, including:

- Mr Zhao's return to the depot on 11 December and his discussion with Mr Anand that the control room staff had handled his calls poorly and that he understood he would receive paid stress leave for the following day;
- his discussion with Mrs Pavlovich on 16 December about reimbursement for the damage to his personal items by the passenger;
- his disappointment when he did not receive in his 18 December pay payment for a day's stress leave for 12 December or reimbursement for the damaged items;
- his discussion with Mr Saif on 19 December which he said was threatening and amounts to racial discrimination and unjustified misconduct; and
- the call later on 19 December from Mr Anand to set up a meeting the following day at which he told Mr Anand he did not wish to meet with PCL, that he felt he was being treated unfairly and was stressed.

[11] The letter concludes that Mr Zhao wished to have his grievance addressed by payment of unspecified compensation.

[12] The question for the Authority is whether Mr Zhao took reasonable steps to raise the 21 December personal grievances with PCL. Mr Zhao said he sent the letter to PCL.

[13] Mr Zhao was unable to explain to the Authority how he sent the letter to PCL and provided no evidence of its sending such as email or postal record. PCL says it did not receive the letter until many months later.

[14] There is insufficient evidence Mr Zhao sent the email to PCL on or about 21 December or within 90 days of that date. The letter was included in documents filed with the Authority and was subsequently sent to PCL but not within the 90 day statutory period.² Mr Zhao did not raise any concern with the Authority or PCL about this letter or communication of its contents. There is a suggestion in the evidence Mr Zhao provided the letter to mediation services along with his request for mediation assistance dated 21 December 2019. Given PCL's clear evidence it did not receive the letter until many months later it is unlikely mediation services on sent the letter to PCL. There was no general obligation for it to do so and there is nothing before the Authority to suggest Mr Zhao made such a request of mediation service. For these reasons the personal grievances raised in the 21 December letter were not raised with PCL within the 90 day statutory timeframe by that letter. Mr Zhao has not sought leave to raise these personal grievances out to time but for completeness, there is insufficient evidence to suggest any delay was occasioned by exceptional circumstances such as it would be just to grant leave.

Was Mr Zhao unjustifiably constructively dismissed?

[15] It is well established that an employee may be constructively dismissed by his employer when no explicit words of dismissal have been used. The Court of Appeal in *Auckland Shop Employees Union v Woolworths (NZ) Ltd* held that constructive dismissal includes, but is not limited to, cases where:

- (a) An employer gives an employee a choice of resigning or being dismissed.
- (b) An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.
- (c) A breach of duty by the employer causes an employee to resign.³

² The issue was raised during a case management conference held in June 2020. I am satisfied PCL did not receive a copy of the 21 December letter until after June 2020.

³ [1985] 2 NZLR 372, (1985) ERNZ Sel Cas 136 (CA)

[16] If the dismissal is caused by breach of duty the questions for consideration are whether the breach of duty by the employer caused the employee's resignation and if yes, whether the breach was of sufficient seriousness to make it reasonably foreseeable resignation would follow.⁴

[17] The Authority understands Mr Zhao to say PCL conducted itself in a manner that had a deliberate and dominate purpose of coercing him to resign. In the alternative, it is understood Mr Zhao says the third category applies and it was PCL's breaches of duty that caused Mr Zhao to resign. Specifically Mr Zhao says his job was made untenable by PCL:

- failing to support him during and subsequent to the 11 December event which damaged his trust and confidence that PCL would treat him fairly and reasonably;
- subjecting him to workplace bullying and racial harassment;
- failing to pay him on 18 December for a day's stress leave for 12 December and reimburse the cost of the damaged items;
- undertaking an investigation of the events of 11 December; and
- changing his roster without fair notice and humiliating him in front of his co-workers when he arrived at work at his usual time.

Did PCL set on a course of conduct with the dominant purpose of coercing Mr Zhao's resignation?

[18] There is no direct evidence of such a course of conduct. Mr Zhao invites consideration of the events over time which he says demonstrates a course of conduct. Those events are considered below individually and then in aggregate.

No investigation necessary?

[19] It is accepted the on-bus event Mr Zhao was involved with on 11 December was stressful and difficult. It is also accepted the control room did not handle Mr Zhao's call appropriately. Indeed PCL's investigation found this was the case and recommended the control room staff undertake further training and a procedure refresh.

⁴ *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers Industrial Union of Workers (Inc)* [1994] 2 NZLR, 415, [1994] 1 ERNZ 168 (CA) at [172].

[20] However, I am not persuaded it was unreasonable or unfair of PCL to investigate the events. The 11 December event involved health and safety risks to Mr Zhao and passengers and raised questions about how the events unfolded, including Mr Zhao's conduct, and the role of the control room staff in supporting and assisting Mr Zhao in a difficult and stressful situation. Evidence given on behalf of PCL that an incident of this nature needed to be investigated is accepted. The service offered by PCL and the duties undertaken by Mr Zhao are public facing and have inherent health and safety risks. It is reasonable for an incident where there is the potential for harm to passengers and a driver to be investigated.

[21] Also, and significantly, the investigation was in respect of concerns Mr Zhao had raised. This is clearly stated in the letters of 19 and 23 December. Mr Zhao had made clear his dissatisfaction with the control room's handling of his calls into and on his return to the depot. He told the control room, Mr Murthy, the trainer, Mrs Pavlovich and Mr Saif. Investigating these concerns was fair and reasonable.

Was PCL's investigation fair?

[22] In addition to saying no investigation was necessary Mr Zhao said he could not trust the investigation would be conducted fairly. It is understood he has reached this view based on PCL's conduct in not paying the stress leave and compensation for the damaged goods (a pair of glasses and a bottle of wine) when expected, not laying the police complaint as he expected and further, that the outcome of the investigation was predetermined. He also says during the course of the investigation process he was spoken to in an aggressive and bullying manner.

[23] I have considered the issues raised. I am not satisfied there was a reasonable basis for Mr Zhao to believe PCL's investigation into the 11 December events would not be carried out fairly.

[24] The letters inviting Mr Zhao to the investigation meetings stress the investigation is not disciplinary in nature.⁵ Notwithstanding, the letters include "only after the above decision is made will it be decided if any further action (including disciplinary action) needs to be taken." Is this caveat of possible future disciplinary

⁵ Letters dated 19 and 23 December 2019.

action unfair or demonstrates the outcome was predetermined? My view is no. The employer was entitled to form a preliminary view on the events to put to Mr Zhao and, consistent with its good faith obligations, obliged to include possible outcomes of the investigation.

[25] Two investigation meeting invitations were necessary because Mr Zhao did not attend the first meeting as agreed. On 20 December Mr Zhao attended the venue for the meeting scheduled for 3.45pm at 3pm. Because no one was there he left. Mr Zhao said he was tired after his shift, no one was present and he thought the meeting was not proceeding. Mr Zhao did not contact Mr Saif to say he was early to the meeting or that he wished to reschedule. There was no reasonable basis for Mr Zhao to believe the meeting would not proceed at the advised time. If the meeting time did not suit Mr Zhao he should have contacted Mr Saif to reschedule. This action has likely contributed to delay in the investigation.

Bullying and racial discrimination?

[26] There is insufficient evidence the conduct of the control room staff or the operation manager met the legal test for discrimination or bullying. These are serious allegations and would need to be supported by evidence of equal probative value. Mr Zhao's evidence of racial discrimination is based on calls he overheard in the control room during which he understood the control staff to offer more fulsome support to the calling in driver than he received. He puts this difference in treatment to the driver on the other end of the call being New Zealand born. In the absence of specific details to support these claims they do not succeed.

[27] The audio recordings of the 11 December calls from the bus to the control room and involving the police and the 27 December call with Mr Saif and the transcripts of those calls have been made available to the Authority. The recordings and transcripts do not reveal communication which could amount to bullying or discrimination on prohibited grounds. When this was put to Mr Zhao he said PCL had tampered with the audio recordings. This claim is not accepted. Mr Zhao provided no evidence to support this claim other than his recollection of the calls was different to that on the audio recording.

[28] I have also considered if the actions of the control room staff on 11 December have endangered Mr Zhao or otherwise breached any duty owed him under the terms of his employment agreement. Mr Zhao says, and it is accepted, he was shaken after the event and driving back to the bus depot was difficult. I have listened carefully to the transcript of the call. I am satisfied the control room have sought to ascertain from Mr Zhao that the disruptive passenger and other passengers were off the bus and that he was able to drive back to the depot and that Mr Zhao confirmed this was the case. While it may have been best practise to send a driver out to drive Mr Zhao and the bus back to the depot I am satisfied no duty owed by PCL to Mr Zhao was breached.

Failure to lay complaint with the police?

[29] The next element of the course of conduct consideration raised by Mr Zhao is PCL's failure to lay a complaint with the police. Mr Zhao gave the police complaint reference number to his team leader and held a sincere expectation PCL would make such a complaint. However, Mr Zhao did not raise this expectation directly with PCL. If he had and PCL had unreasonably declined to assist him to lay a complaint that may have amounted to a breach but under the terms of the parties' employment agreement there was no obligation for PCL to lay the complaint and I am satisfied no action of PCL's prevented Mr Zhao from laying a complaint with the police himself.

Failure to pay the stress leave and compensation for the damaged items?

[30] Next is the failure to pay the stress leave and compensation for the damaged items in the next pay cycle. I am satisfied Mr Zhao was told by his team leader that he would be paid stress leave for 12 December and that it was a shock when he did not receive the payment as expected. It is accepted it was stressful and unpleasant for Mr Zhao to have to follow this up and it was a failure on PCL's part not to pay it in the pay cycle it was due.

[31] I do not accept PCL agreed to compensate Mr Zhao for the damaged items and failed to do so in breach of such an agreement. I have considered the contemporaneous documents and the witness evidence and find it is most likely Mrs Pavlovich told Mr Zhao to provide a list of the items and their value and compensation for their loss would be one of the issues for investigation.

[32] For completeness, subsequent to Mr Zhao filing his application in the Authority PCL has paid Mr Zhao for the day's stress leave and reimbursed him for the damaged items at the claimed rate.

Failure to advise of roster changes?

[33] Mr Zhao had worked at PCL for six months and during that time he not had a roster start time change. He was surprised when he attended work on 27 December at his usual time and was told he was late to work. He said he was abused for being late and found this humiliating. Mr Zhao did not raise any concerns about any such conduct directly with PCL prior to his resignation or during his notice period.

[34] PCL said the change in start time had been set out on the roster and a reminder message sent to staff including Mr Zhao. In evidence Mr Zhao said he had not seen the roster start time change. He accepted a text message advising of the time change had been sent to his mobile telephone but objected to work messages being sent to his private number. I accept Mr Zhao was not aware of the change in start time.

[35] The roster changes occurred due to the Christmas/New Year period. The start time changes were not targeted at Mr Zhao. They applied to a number of drivers. I accept it may cause embarrassment to be told one is late to work in a public manner and that this is how Mr Zhao felt however, I am not satisfied the comments made to Mr Zhao on his arrival to work amounted to a breach of the terms of his employment agreement so serious as to amount to bullying or harassment.

Mr Zhao's resignation and events during his notice period

[36] Mr Zhao tendered his resignation on 30 December by email sent to Mr Murthy, his team leader and to the human resource manager:

Please accept this as formal notification that I am resigning from my position as bus driver. With Pavlovich Coachlines Ltd. My last day will be 12 January 2020.

Thank you so much for the opportunity to work in this position for the past few months.

I wish the company continued success.

[37] Later that day Mr Zhao emailed Mr Murthy and the human resource manager thanking them for the opportunity to work with PCL with good wishes. There is no indication in these resignation communications or those that followed that Mr Zhao felt he was forced to resign.

[38] On 6 January the human resource manager emailed Mr Zhao asking him to meet with her to discuss his resignation and “I’m a bit concerned that you have made this decision while we are undertaking an investigation. The investigation is now complete and I would like to talk you through the findings and I am interested in your feedback.”

[39] On 9 January Mr Murthy wrote to Mr Zhao again asking him to extend his resignation to meet with him to discuss the investigation. PCL’s evidence was that in asking Mr Zhao to meet it hoped he would better understand and participate in the investigation process and might decide to continue his employment.

[40] Mr Zhao declined the request to meet and took sick leave for the last three days of his employment ending 12 January 2020. His advice of sick leave was accompanied by a further expression of thanks and best wishes to PCL.

Conclusion on course of conduct

[41] The evidence does not support a finding that PCL set on a course of conduct with a dominant purpose of coercing Mr Zhao’s resignation.

[42] PCL was entitled to investigate the events of 11 December and I find such an investigation was what a fair and reasonable employer could have been expected to do given the health and safety issues raised by the on-bus events of that day to Mr Zhao and passengers and the concerns Mr Zhao raised about the control room’s handling of his calls. Mr Zhao was not targeted by the roster changes and the comments made to him about lateness and the other interactions he has raised I find do not either individually or cumulatively amount to a course of conduct designed to coerce him to resign.

[43] It is accepted the control room could have better handled Mr Zhao's call and Mr Zhao should have been paid for a day's stress leave in the next pay cycle but these failures do not amount to a course of conduct set on to coerce him to resign.

Did serious breaches of duty make it readily foreseeable Mr Zhao would resign?

[44] It is accepted the events of 11 December and subsequent were stressful for Mr Zhao and I am satisfied PCL was aware Mr Zhao had concerns about his interaction with the control room on 11 December. I am also satisfied PCL was aware Mr Zhao was finding the ongoing situation difficult – PCL's witnesses described Mr Zhao as angry and defensive. However, his actions in resigning before the investigation was complete were precipitate and the breach of duty which has been established, the failure to pay stress leave, was on balance not one of such seriousness as to make it foreseeable he would resign.

[45] For the foregoing reasons Mr Zhao's claim that he was unjustifiably constructively dismissed is not accepted.

Unjustified disadvantage

[46] Under s 122 of the Act I consider he has a personal grievance of a type other than that alleged.

[47] Given the findings above about non-payment of stress leave when it should have been paid I find PCL has acted in an unjustified manner towards Mr Zhao and that such action has resulted in a financial disadvantage and caused him consternation and stress.

Remedies

[48] Mr Zhao has established a personal grievance for unjustified disadvantage. He is entitled to a consideration of the remedies sought.

Compensation

[49] It is clear to the Authority Mr Zhao has found the events of 11 December and subsequent very stressful and difficult. He has a deep and profound sense of grievance.

[50] In respect of the claim Mr Zhao has been successful in I am satisfied he experienced harm under each of the heads in section 123(1)(c)(i). He is entitled to an award to compensate the humiliation, loss of dignity and injury to feelings consequent to his dismissal of \$3,000.00.

If any remedy is awarded, should it be reduced (under s 124 of the Act) for blameworthy conduct by Mr Zhao that contributed to the situation giving rise to his disadvantage grievance?

[51] There was no evidence that Mr Zhao contributed to his disadvantage in any way. On 11 December, before Mr Zhao left for the day Mr Murthy, his team leader did what was described as a well-being check. Mr Zhao said he was not capable of working his shift the next day. Mr Zhao said he needed to rest but did not want to use his own leave. That evening the team leader called Mr Zhao to check how he was feeling and told him he could take stress leave the following day. Mr Zhao did not attend work on 12 December and after that date resumed his usual duties. On 18 December payment for a day's stress leave was not included in Mr Zhao's wages. Mr Zhao queried this with his team leader who advised him PCL had decided not to forward the footage to the police at least until it had been reviewed by the CEO who would advise who was in the wrong and would then decide on payment. Mr Zhao and a representative of PCL had agreed he would receive a paid day stress leave on 12 December and that agreement was not honoured in the pay cycle in which Mr Zhao could reasonably have expected it to be. Mr Zhao has not contributed to this situation and when he sought to enforce the agreement was unreasonably rebuffed. No reduction of the above remedies should be made under s 124 of the Act.

Recommendations

[52] Mr Zhao seeks the Authority make recommendations under s 123(1)(ca) of the Act if satisfied any workplace conduct or practice are a significant factor in the personal grievance.

[53] On the evidence before the Authority it was not clear what policies PCL had in place applicable to the on-bus events of 11 December. It would have assisted Mr Zhao to have had the relevant policies clearly communicated to him, in writing, so he would be clear about what the investigation process was and what resources he could access

for support in this difficult situation. PCL is recommended to promulgate such policies to staff, ensure they are readily available and in the event of a discrete event provided to staff promptly and in an appropriate manner.

Filing fee

[54] The filing fee of \$71.56 is an amount Ms Zhao can reasonably recover from Pavlovich Coachlines Limited. Pavlovich Coachlines Limited is to pay the sum of \$71.56 to Mr Zhao within 21 days of the date of this determination.

Outcome

[55] Mr Zhao's claim for unjustified constructive dismissal is unsuccessful.

[56] Within 21 days Pavlovich Coachlines Limited is ordered to pay Wenjie Zhao the following sums:

- (i) \$3,000.00 for humiliation, loss of dignity and injury to feelings;
- (ii) \$71.56 to reimburse the Authority filing fee.

Costs

[57] Mr Zhao was self-represented and the Authority does not understand he has incurred any costs of representation in respect of this employment relationship problem.

[58] If this is not the case and Mr Zhao seeks a contribution to costs of representation or PCL wishes to raise an issue as to costs, within 10 days of the date of determination either party may request the Authority set a timetable for filing costs memoranda.

Marija Urlich
Member of the Employment Relations Authority