

Reference No. HRRT 015/2018

UNDER THE HUMAN RIGHTS ACT 1993

BETWEEN MERVIN HILL

PLAINTIFF

AND PAVLOVICH COACHLINES LIMITED

TRADING AS URBAN EXPRESS

DEFENDANT

AT AUCKLAND

BEFORE:

Ms SJ Eyre, Deputy Chairperson

Ms DL Hart, Member

Mr IR Nemani, Member

REPRESENTATION:

Mr M Hill in person

Ms H Twomey and Ms H Bridgman for defendant

DATE OF HEARING: 6 to 8 July 2021

DATE OF DECISION: 17 September 2021

DECISION OF TRIBUNAL¹

[1] Mr Hill applied for a job as a bus driver with Pavlovich Coachlines Ltd trading as Urban Express (Pavlovich) in Auckland, but he was unsuccessful. Mr Hill claims he did not get the job because of his disability, which is discrimination and a breach of the Human Rights Act 1993 (HRA). Pavlovich denies any breach of the HRA and says Mr Hill was unsuccessful in his application for other reasons.

¹ [This decision is to be cited as *Hill v Pavlovich Coachlines Ltd* [2021] NZHRRT 43.]

BACKGROUND

[2] Mr Hill is an experienced bus driver.

[3] In March 2016, while Mr Hill was driving a bus, he had an altercation with school students. The incident resulted in him receiving a disciplinary warning from NZ Bus. Then in May 2016, while still employed by NZ Bus, Mr Hill was diagnosed with adjustment disorder with anxiety and depression. Mr Hill attributes the diagnosis to a number of instances of high stress in his life prior to May 2016 including personal circumstances and the incident that occurred in March 2016. In July 2016, Mr Hill again had a challenging interaction with a customer.

[4] In December 2016, after almost four years at NZ Bus, Mr Hill resigned from NZ Bus and decided to “look after” himself and he took active steps to recover from and manage his mental health and wellbeing.

[5] In May 2017 Mr Hill decided to return to bus driving. He chose to apply to Pavlovich for a number of reasons, including the fact he could walk to its Carr Road depot from his home, he could work broken shifts which he enjoyed, and Pavlovich had new buses. Mr Hill also considered this new role would provide him with an opportunity to move on from the “incidents at NZ Bus” and practice the coping mechanisms he had been working on while recovering from and managing his adjustment disorder.

[6] On 8 May 2017 Mr Hill walked from his home to Pavlovich’s Carr Road depot to apply for a role as a bus driver. He undertook and passed a test drive. Mr Hill then completed an application form and had an interview with Louise Henare, recruitment consultant for Pavlovich. Ms Henare and Mr Hill went through Mr Hill’s application form in the interview, discussing various parts of it. This included a discussion about Mr Hill’s medical history. Ms Henare made handwritten notes on Mr Hill’s application form and Mr Hill left the office with an understanding Ms Henare would contact him. Mr Hill described his mood at that time as being “in high spirits knowing I aced the interview”.

[7] After the interview Mr Hill followed up on his application regularly. This included follow up visits to Pavlovich on 12 May, 18 May and 2 June 2017. At the visit on 18 May 2017, the Human Resources Manager, Adrienne Stormont suggested to Mr Hill the possibility of him working at the Ranui depot instead of the Carr Road depot. On 20 June 2017, Mr Hill went to follow up again, but neither Ms Henare nor Ms Stormont were there, so Mr Hill phoned and emailed Ms Henare instead. Ms Henare responded by email the same day advising that she had not been able to obtain a reference for him, so required an additional referee from NZ Bus.

[8] Prior to this, Ms Henare had discussed with Bernard Pavlovich, CEO of Pavlovich, Mr Hill’s application given his previous incidents with customers. Mr Pavlovich had told Ms Henare that if a suitable reference could be obtained from NZ Bus, Mr Hill could still be employed. Mr Hill had provided two referees with his application, Mr Shyu Jose, his supervisor at NZ Bus and Trish Evers, the Human Resources Manager at NZ Bus. When Ms Henare rang Mr Jose, he refused to provide a reference. A message was left for Ms Evers, but she was never actually spoke to. Mr Hill was asked if he could provide a further reference and he again provided Ms Evers, but as she was the Human Resources Manager at NZ Bus and had oversight for over 2,000 drivers at NZ Bus, Pavlovich did not consider she would have sufficient knowledge of Mr Hill. Accordingly, as Pavlovich considered no suitable reference was available for Mr Hill, he was not employed.

[9] Mr Hill then complained to the Human Rights Commission on 24 July 2017. The complaint was not resolved.

MR HILL'S CLAIM

[10] Mr Hill filed this claim on 21 March 2018. He claims that Pavlovich breached HRA, s 22(1)(a) and (b) by refusing to employ him as a bus driver and offering him less favourable terms than other applicants. Mr Hill says these actions were because of his disability, which is a prohibited ground of discrimination under HRA, s 21.

[11] Mr Hill's opening submissions indicated that as well as claiming a breach of HRA, s 22 he was also claiming Pavlovich breached the Employment Relations Act 2000, s 4 and the Human Rights Commission's A-Z Pre-Employment Guide. However, as this Tribunal only has jurisdiction to hear claims under the HRA, Mr Hill's claim was necessarily restricted to the scope of his originally filed claim, which was a claim under HRA, s 22.

[12] Mr Hill filed his claim seeking \$338,000 for loss of wages for 10 years and damages for hurt and humiliation, loss of dignity and injury to feelings of \$20,000. At the hearing Mr Hill changed this and instead sought compensation for 13 weeks' loss of income, expenses associated with obtaining his Class 4 driver's licence and \$40,000 damages for hurt and humiliation, loss of dignity and injury to feelings.

THE LEGAL FRAMEWORK

[13] The HRA sets out in s 21 prohibited grounds of discrimination, one of which is disability. Adjustment disorder with depression and anxiety is a disability. The HRA also specifically states the different settings where it is unlawful to discriminate against someone by reason of one of the prohibited grounds of discrimination.

[14] Section 22 states that in the employment setting, it is unlawful to discriminate against an employee or an applicant for employment where that person is qualified, as detailed below:

Discrimination in employment matters

22 Employment

(1) Where an applicant for employment or an employee is qualified for work of any description, it shall be unlawful for an employer, or any person acting or purporting to act on behalf of an employer,—

(a) to refuse or omit to employ the applicant on work of that description which is available; or

(b) to offer or afford the applicant or the employee less favourable terms of employment, conditions of work, superannuation or other fringe benefits, and opportunities for training, promotion, and transfer than are made available to applicants or employees of the same or substantially similar capabilities employed in the same or substantially similar circumstances on work of that description; or

(c) ...

by reason of any of the prohibited grounds of discrimination.

[15] To determine whether the refusal to employ Mr Hill or offer him less favourable terms was by reason of a prohibited ground of discrimination, the Tribunal must decide whether Mr Hill's disability was a material factor in Pavlovich's refusal to offer Mr Hill work or to offer him less favourable terms.

[16] Mr Hill is required to prove his claim to the standard of the balance of probabilities. That means that he must prove that it is more probable than not that the actions he complains of occurred and that they were in breach of the HRA.

ISSUES

[17] It is undisputed that Mr Hill was qualified for the position he applied for and was unsuccessful in obtaining. Accordingly, the remaining issues the Tribunal must consider to decide Mr Hill's claim under HRA, s 22 are:

[17.1] Was Pavlovich's refusal to employ Mr Hill because of his disability?

[17.2] Did Pavlovich offer Mr Hill less favourable terms of employment because of his disability?

[17.3] If Pavlovich has refused to employ Mr Hill or offered him less favourable terms of employment because of his disability, what is the appropriate remedy?

WAS MR HILL REFUSED EMPLOYMENT BECAUSE OF HIS DISABILITY?

[18] Mr Hill claims he was refused employment because of his disability, namely adjustment disorder with anxiety and depression. Mr Hill explained to the Tribunal that he formed the view he had been discriminated against because Ms Henare's demeanour and facial expressions in the job interview changed when she realised he had answered yes to question 10. Mr Hill described Ms Henare as looking "taken aback".

[19] Question 10 on the application form is set out in full below. Mr Hill's answers were handwritten on the original and then Ms Henare's answers were handwritten underneath Mr Hill's answers on the application form. These comments are also recorded below:

(Application form) 10. Do you now, or have you in the past suffered from any form of mental illness?

Y/N

If you answered yes, please give a short explanation.

(Mr Hill) Yes - Diagnosed with adjustment disorder after first incident (05/05/2016)

(Ms Henare) - Medication for six months. Now medication free and medically cleared for the last two months.

[20] There is no dispute between the parties about the details recorded on the application form above and the fact the form also recorded Mr Hill was involved in two incidents with passengers and had received a warning from NZ Bus in relation to the first incident.

[21] Mr Hill claims his disability was the reason why he was not employed by Pavlovich. However, the only evidence he has been able to point to that could arguably support this conclusion is the fact question 10 was asked and his recollection that Ms Henare looked "taken aback" and her demeanour changed when discussing his response to this question.

[22] Mr Hill's observation of Ms Henare's expression and demeanour was first mentioned in response to questions by the Tribunal in the hearing, but it is inconsistent with Mr Hill's earlier statement of evidence and statement of claim which record that he

“left her [Ms Henare’s] office in high spirits knowing I aced the interview and that I can start with Urban Express soon”. Given the difficulties in accurately interpreting subtle changes of demeanour or expression, particularly when relying on memory from four years earlier, the Tribunal cannot place any weight on the suggestion that Ms Henare’s demeanour and expression at the interview were evidence of discrimination. Mr Hill’s original evidence is considered to be a more accurate description of how the interview proceeded, namely that Mr Hill felt he had “aced” the interview and accordingly did not have any concerns about demeanour or expression.

[23] The handwritten notes by Ms Henare on the application form at question 10 do not reflect any discrimination either. They record that Mr Hill was “medication free and medically cleared for the last two months”, a fact which Ms Henare explained in evidence was her primary focus in discussing Mr Hill’s medical history to ensure he was medically cleared to drive, as required by his licence. After being satisfied that Mr Hill had medical clearance, Ms Henare stated that she did not consider Mr Hill’s medical history further.

[24] There is also no evidence in any of the communications surrounding Mr Hill’s application that Pavlovich had any concerns about Mr Hill’s disability or that it was a factor in the decision not to employ Mr Hill. The only email which touches on Pavlovich’s consideration of Mr Hill’s application was an internal email sent on 20 June 2017, from Ms Henare to Ms Stormont. The content of that email is set out in full below:

Hi,

Background on this person is he had an issue with an abusive passenger although he went through disciplinary at NZ Bus. Bernard reviewed and said if he references ok at NZ Bus he can be considered. The person he provided would not provide a reference.

Thanks

[25] There is no mention in this email of Mr Hill’s mental health, or anything to suggest discrimination. The focus is clearly on the incident with an abusive passenger and the need for a relevant reference.

[26] The matter of Mr Hill’s referees caused Mr Hill real concern and he questioned the Pavlovich witnesses extensively about this. In order for Mr Hill’s application to progress, Mr Pavlovich had made it clear to Ms Henare that Mr Hill needed a satisfactory reference. Mr Hill had provided contact details for two referees, however his direct manager at NZ Bus refused to provide him with a reference and the other referee Mr Hill provided was a human resources manager who was not Mr Hill’s direct supervisor. When asked for another referee, Mr Hill provided an alternate number for the previously provided human resources manager, Ms Evers. Pavlovich therefore concluded there was no suitable referee for Mr Hill, and he was not subsequently employed. There is nothing in this process which indicated a refusal to employ Mr Hill was by reason of his disability.

[27] Pavlovich has provided consistent evidence that Mr Hill was not employed because of the lack of a suitable referee. Ms Henare and Ms Stormont were extensively cross-examined by Mr Hill about this, but their evidence remained consistent and was also corroborated by the email dated 20 June 2017 and Mr Hill’s application form, where neither document recorded any concerns about Mr Hill’s disability. The Tribunal accepts Pavlovich’s evidence of why Mr Hill was refused employment.

[28] There is no evidence that proves to the standard of the balance of probabilities that Mr Hill was refused employment by Pavlovich by reason of his disability, being his

adjustment disorder with anxiety and depression. Accordingly, Mr Hill's claim under s 22(1)(a) cannot be successful and is dismissed.

WAS MR HILL OFFERED LESS FAVOURABLE TERMS?

[29] Mr Hill was asked in one of his follow-up visits to Pavlovich if he could work at the Ranui depot. Mr Hill was available to work at the Ranui depot, despite the inconvenience of it being further from his home but that position never eventuated, and the Ranui depot subsequently closed.

[30] Pavlovich acknowledges Ms Stormont asked Mr Hill if he was available to work at Ranui but notes this was not a formal employment offer. Mr Hill agreed that the suggestion of working at Ranui was not a firm offer, but he still considered he was being offered a less favourable term of employment, because of his disability.

[31] Mr Hill was not actually offered work at either depot, so there can be no finding that Pavlovich offered Mr Hill less favourable terms of employment, conditions of work or opportunities than those that were available to applicants or employees of the same or substantially similar capabilities to Mr Hill in the same or similar circumstances.

[32] Mr Hill's claim under HRA, s 22(1)(b) is therefore not proven. As Mr Hill has been unsuccessful in both parts of his claim of discrimination under s 22, the Tribunal does not need to consider the issue of a remedy, identified at [17.3] above.

ORDER

[33] The claim by Mr Hill against Pavlovich Coachlines Ltd trading as Urban Express is dismissed.

COSTS

[34] Pavlovich has indicated it wishes to be heard on costs. Unless the parties come to an arrangement on costs, the following timetable is to apply:

[34.1] Pavlovich is to file its submissions within 14 days after the date of this decision. Any submissions for Mr Hill are to be filed within the 14 days which follow. Pavlovich is to have a right of reply within seven days after that.

[34.2] The Tribunal will then determine the issue of costs on the basis of the written submissions without further oral hearing.

[34.3] In case it should prove necessary, the Chairperson or Deputy Chairperson of the Tribunal may vary the foregoing timetable.

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Ms SJ Eyre
Deputy Chairperson

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Ms DL Hart
Member

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Mr IR Nemani
Member