

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2019] NZERA 661
3038816

BETWEEN ANDREW GRAHAM
Applicant

AND DRIVETRAIN LIMITED
Respondent

Member of Authority: Nicola Craig

Representatives: The Applicant in person
Ashley Sharp, counsel for the Respondent

Investigation Meeting: 5 March 2019 at Tauranga
21 March and 20 May 2019 by telephone

Submissions Received: 5 June 2019 from the Applicant, no reply submissions
received
18 June 2019 from the Respondent

Date of Determination: 15 November 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Andrew Graham worked for Drivetrain Limited (Drivetrain or the company) as branch manager responsible for New Zealand sales and operations, based in Tauranga. He reported to the general manager of the Australian parent company Engenco. Drivetrain sells and services power train equipment.

[2] Drivetrain was contacted by a Tauranga real estate agency regarding a property which the agency believed Mr Graham had arranged for Drivetrain to rent. Engenco was not aware of Drivetrain needing or renting residential property. Mr Graham was suspended by Drivetrain

and then dismissed on 14 June 2018. Drivetrain had concluded that Mr Graham dealt dishonestly with the agency regarding the rental by indicating that Drivetrain was to rent the property. Drivetrain found that Mr Graham had breached the code of conduct and deliberately failed to abide by the company's reasonable instructions. Mr Graham says that he rented the property personally.

[3] Mr Graham claims that he was unjustifiably suspended and dismissed. Drivetrain considers that it was justified in both actions.

[4] Mr Graham initially sought urgency and interim reinstatement but the urgency application was declined as the statement of problem was filed some three months after Mr Graham's dismissal. The parties were referred to mediation which was unsuccessful. The application for reinstatement was withdrawn.

[5] An investigation meeting was held on 5 March 2019 in Tauranga. I heard evidence from Mr Graham, Ron Edwards (group manager, human resources and safety for Engenco) and Max Whitehead (employment relations consultant). I also heard evidence from an administrator from the real estate agency.

[6] As all the evidence was not completed, arrangements were made for the final witness to be heard by telephone on 21 March 2019. On that day Drivetrain and its representative as well as the witness, were connected with the Authority by phone but Mr Graham was unable to be contacted despite several attempts. The matter was adjourned. Mr Graham contacted the Authority and a further investigation meeting by phone occurred on 20 May 2019 when the real estate agent gave evidence.

[7] When I advised the Chief of the Authority that this determination would likely be issued outside the statutory three month period he decided, as permitted by s 174C(4) of the Employment Relations Act 2000 (the Act), that exceptional circumstances existed.

[8] As authorised by s 174E of the Act this determination has not recorded everything received from the parties but has stated findings and conclusions.

Issues

[9] The issues for determination are:

- (i) Was Mr Graham unjustifiably suspended by Drivetrain?

- (ii) Was Mr Graham unjustifiably dismissed by Drivetrain?
- (iii) If Mr Graham establishes a personal grievance claim, what remedies (if any) should he receive?
- (iv) Did Drivetrain breach its duty of good faith to Mr Graham and if so, should it be subject to a penalty?

[10] Less than a month before the March 2019 investigation meeting date Drivetrain indicated that it sought to pursue counterclaims and penalties against Mr Graham. The Authority noted that there seemed to have been awareness of this prospect for some time. The September 2018 statement of reply, filed before Drivetrain's current representative became involved, mentioned information becoming available which would be claimed as counterclaims "subject to another authority's possible legal actions under differing jurisdiction". No further details were provided. No further pleadings were filed and no counterclaims were mentioned at the case management conference.

[11] I was concerned that the further claims would necessitate additional witnesses and Mr Graham's claim would thus likely not be heard within the time allocated. I therefore declined to allow two of the counterclaim issues to be considered at March 2019 meeting. A third issue appeared to be overlapping or closely related to the reasons for dismissal and any contribution assessment so I allowed that matter to be included.

Initial communications between the real estate agency and Engenco

[12] I now turn to the events which lead the agency to contact Engenco. Mr Graham had been living in the rental property for about four months and difficulties had arisen. He had made claims regarding the property's facilities and council consent. The agency was having difficulties contacting Mr Graham about rent and power arrears. Drivetrain's name was on the tenancy agreement, as well as Mr Graham's name. The agency had understood Mr Graham was representing Drivetrain, which wanted to rent the property for a manager coming from Perth. Later the agency became aware that Mr Graham and family were living there.

[13] Due to the arrears issues, the agent telephoned the Engenco CEO in Australia. The call was a surprise, as he knew nothing the company leasing a residential property. He asked the agent to forward details of the tenancy reflecting Drivetrain as a tenant so he could follow up.

Documents from the agency

[14] The agent sent documents through, including a signed tenancy agreement dated 19 January 2018 (tenancy agreement A). Under “Tenant details” it lists:

Full name: DRIVETRAIN Power and Propulsion - Andrew Graham as Director

[15] Special conditions attached include a condition that “Drivetrain will take all responsibility for any and all issues with the employee tenant as may arise during the term of the tenancy”.

[16] Several other documents also refer to Drivetrain. A statement/invoice from the agency for the letting fee, as well as the agency’s tenant details form and rent summary, refer to the tenant as “DRIVETRAIN – Andrew Graham”. The agency’s bank statements show the payment of rent with the “other party name” being “Drivetrain Limited”.

Drivetrain’s initial investigation

[17] The company’s IT department also located emails between Mr Graham via his work email address and the agency, with Mr Graham emailing the administrator:

- (i) 27.12.17 – “I have a new branch opening ... and will be relocating a manager hence the company’s inquiry. Drivetrain is a stock market company in Aus and has been operating in NZ since 1995 and is in great financial position... Drivetrain would also hire a cleaning service twice a week to keep things mint.”
- (ii) 9.1.18 - email to agency attaching Drivetrain bills and bank account statement.
- (iii) 10.1.18 - “I spoke to him [the manager] yesterday and he has owned his home for 16 years so asked him to get some type of reference. Due to the time difference between us and Perth, there are some delays”.
- (iv) 16.1.18 – “... email me the invoice for the letting fee I will have accounts pay this today along with the \$750 in advance.”

[18] The administrator emailed back at points seeking information about the manager.

[19] Mr Graham was not a director of Drivetrain. There was no Drivetrain or Engenco manager being relocated to New Zealand.

[20] Drivetrain decided to investigate further, consider suspension and notify Mr Graham that it wanted to meet with him.

The suspension

[21] Drivetrain says that its actions in contacting Mr Graham about suspension did not proceed quite as initially intended, due to Mr Graham being out of contact. Mr Edwards reports that another Engenco manager tried to contact Mr Graham several times on Thursday the 7th and Friday the 8th of June 2018 about another matter but was unable to reach him. That manager eventually received an email from Mr Graham on Friday afternoon. Mr Edwards believes another Australian manager also unsuccessfully attempted to contact Mr Graham in this period.

[22] Drivetrain's advisor Mr Whitehead reports trying to phone Mr Graham on several occasions on 7 and 8 June without luck. There is a dispute about the number of calls to Mr Graham's cell phone, but Mr Graham accepts there was one call to that phone. Then at 5:10pm on 8 June Mr Whitehead emailed Mr Graham, attaching a letter from Mr Edwards. The letter included:

It has come to our attention that you have, without permission, leased a house in Papamoa in the name of Drivetrain Limited without our permission.

We are also informed that you have claimed to the letting agent and owner that you are a director of Drivetrain. We have also been provided the letting documents that are signed by you confirming the above allegations.

These are serious allegations that potentially go to the heart of your employment and relate to the fundamental relationship of trust and confidence between employer and employee. This situation is especially serious considering that you are the most senior employee in New Zealand.

[23] The letter went on to advise that given the seriousness of the allegations the company was proposing to immediately suspend Mr Graham on pay. He was given until Monday 11 June at 3:00 pm to provide any comments on the proposed suspension. Further, if there was no response or Drivetrain was not satisfied with the comments, it would suspend with immediate effect from 3:00 pm. The letter went on to state:

In the meantime, you are required, with immediate effect, to make arrangements for another staff member to ensure the workplace is managed and secure. You must remove yourself from the premises and not engage with any work or contact any customers or suppliers.

[24] Drivetrain proposed to meet to receive Mr Graham's explanation at 1:00 pm on Tuesday 12 June 2018. Mr Graham was encouraged to provide a written explanation before meeting, otherwise a verbal explanation on the day. He was also encouraged to bring a support person or representative to the meeting and it was noted that Mr Whitehead would attend the meeting by phone. The letter concludes:

Should we be dissatisfied with your explanation your employment may be terminated with immediate effect for serious misconduct.

[25] The letter did not enclose any documents.

Mr Graham's response to the letter

[26] Mr Graham says he was away over the weekend with his children and did not access his emails. Just prior to 9:00 am on Monday 11 June, Mr Whitehead phoned Mr Graham to let him know the email and letter were waiting for him and he was invited to a disciplinary meeting. Mr Whitehead said that Mr Graham was being accused of leasing a building in the company's name as well as falsely claiming to be a director. Mr Whitehead made reference to it being extremely bad. I note the two had dealt with each other several times previously when Mr Graham was representing the company.

[27] Mr Graham's response on the phone is noted in Mr Whitehead's email that morning to Mr Edwards as "I know what that's all about and it's bullshit", "I can explain that" and "I asked them to change that". Mr Whitehead took the latter reference to be to the tenancy agreement. Mr Whitehead told Mr Graham that Drivetrain had a copy of a tenancy agreement with his signature on it, and Mr Graham replied that he had "got that changed and [he] could prove that".

[28] Mr Graham says that he did not "really take it all in" when he got the letter. He also says that he did not know what the reference to a dispute with the property management company was. I found these pieces of oral evidence inconsistent with Mr Graham's actual responses to the letter, namely his communications that day with Mr Whitehead, as set out above and below.

[29] Mr Whitehead queried about tenancy or lease documents. Mr Graham responded that he had text messages telling the agency that he is not a director and to change the tenancy

agreement form. Further, the tenancy agreement is not in Drivetrain's name and he is happy to prove that tomorrow.

[30] Shortly after 9am he emailed through a letter from Tenancy Services¹ which showed that Mr Graham had lodged a bond with MBIE and showing no reference to Drivetrain.

[31] Mr Graham also sent Mr Whitehead an email that morning attaching a Tenancy Tribunal application form which is solely in Mr Graham's name. In the form Mr Graham named as landlord the agency which is identified as a "Property Management company" along with a company owning the property. Mr Graham sought an order terminating the lease, as well as damages.

[32] In addition Mr Graham emails those legal proceedings are "no doubt the reasons this has come up so they can force me to withdraw since it looks pretty clear I have lost my employment due to their lies".

[33] Mr Graham emails that he will go to a justice of the peace shortly to get his text message history signed as true which proves he told the agency that the tenancy was under his name only and that he was not a director. He goes on to say "[r]eally this is a complete joke and I look forward to tomorrow". Although texts were later provided they were not witnessed by a JP.

[34] At the investigation meeting Mr Graham gave evidence that due to having minimal time to provide feedback on the proposed suspension, it was impossible for him to seek advice and respond to the request to provide a written response before the meeting. However, he was able to ring Mr Whitehead and email him twice, attaching documents and providing responses before 3:00 pm.

[35] Despite receiving the 8 June letter, Mr Graham continued to work in the office for most of 11 June. He says that he only stopped around 4:00 pm when another staff member who had been talking to Australia said Mr Graham was suspended.

¹ Part of the Ministry of Business, Innovation and Employment (MBIE)

Representation

[36] Mr Graham says that on speaking to two different employment firms on Monday 11 June, it became clear that he wouldn't be able to engage anyone before the 1pm deadline on Tuesday. He did not consider that expectation to be realistic.

[37] However, Mr Graham acknowledged when questioned that at least one firm suggested that he went back to his employer about the time. One told him that he had the right to delay the meeting.

[38] At the Authority's investigation meeting Mr Graham said that he was confident he could (go to the meeting and) prove the allegation was incorrect. He said he thought he had nothing to fear. He also emphasised his experience in dealing with disciplinary processes as the employer's representative. I find that, knowing that he could seek to delay the disciplinary meeting, Mr Graham chose to attend the meeting alone, rather than further pursue the possibility of representation at that point.

Emails with agent

[39] Meanwhile Mr Edwards emailed the agent on 11 June 2018, advising that Mr Graham was claiming that he instructed that the lease be made out to him personally, rather than to the company. The email also referred to Mr Graham raising texts which he believed supported his view.

[40] On the same day the agent responded by email, including her understanding that the lease was always to be with Drivetrain:

At the start Andrew was not going to be living on the property, it was to be rented by Drive Train for a manager he had coming from Perth, I was surprised when I visited the property to find Andrew living there, and asked why had we not been notified that he had moved in, he said his Manager found it too small so he [Mr Graham] decided to move in.

Disciplinary meeting on 12 June 2018

[41] Mr Graham attended the disciplinary meeting with Mr Edwards. Mr Whitehead also attended in person. Mr Graham now objects to not being informed in advance of Mr Whitehead's actual attendance. However, Mr Graham had dealt with Mr Whitehead previously. Mr Graham suggests that Mr Whitehead's physical presence indicated the meeting

was more serious than he anticipated. However, the 8 June letter does clearly state that if the company is not satisfied with Mr Graham's explanation he may be dismissed with immediate effect for serious misconduct.

Representation

[42] There is a dispute as to exactly what was said regarding representation at the start of the meeting.

[43] Mr Graham says that he explained he did not have the necessary time required to seek advice and engage a representative for the meeting so an adjournment would be "preferred". He says this was not accepted by Mr Edwards or Mr Whitehead so the meeting proceeded against his wishes.

[44] Mr Edwards says that at no stage prior or at the meeting did Mr Graham raise not having sufficient time to prepare. Nor did he state that he wished to have a representative present or would like an adjournment.

[45] Mr Edwards has a document described as a record of interview, taken from his notes. It begins:

RE:	Thank you for attending the meeting, did you bring an employee representative?
AG:	No I didn't have time, don't want an employee (<i>sic</i>) present, I am right to proceed.

[46] Mr Whitehead's notes have Mr Graham indicating that he was fine to proceed without representation. Mr Graham says to that he made notes after the meeting but he did not file them in the Authority.

[47] I conclude that Drivetrain raised the issue of representation and Mr Graham indicated that he was willing to proceed without having someone there. All those involved describe the meeting as fairly relaxed.

Documents

[48] Mr Edwards brought to the meeting two copies of a set of documents. He had the documents provided by the agency, what IT had located from Mr Graham's emails and what

Mr Graham had sent through to Mr Whitehead. The documents included the tenancy agreement and the agency's bank statements showing Drivetrain identified as the payer. The company confirmed to the Authority that despite that reference to Drivetrain, the company did not pay the rent.

[49] One copy of the documents was to show or give to Mr Graham. Mr Graham did not take the copy offered. Mr Edwards also had a list of questions to ask. Mr Graham says that he had not been given a copy of the questions and felt "ambushed and uncomfortable".

[50] Mr Graham accepted that he was not a director of Drivetrain Limited and said that he had never represented himself as such. Mr Edwards told him that Engenco's CEO had received a call from the agent as she had found the CEO to be the sole director of Drivetrain. Further, the agent supplied tenancy agreement A in Drivetrain's name, signed by Mr Graham.

[51] Mr Graham was shown tenancy agreement A. He replied this was the first document or version of the document and outlined the following:

- (i) He originally viewed the property with another staff member from the real estate agency. He had made it clear to her that the property was for him personally.
- (ii) The agency had populated the details on tenancy agreement A but he had filled in an online application which referred to the tenancy being for himself and his children.
- (iii) He had made it clear that his name only was to appear. When he received the tenancy agreement A and saw that his name was there as director, he emailed and texted the agent. He pointed to a text which included the following "Just want to be very clear that Drivetrain has nothing to do with the lease at all, can you please confirm this by reply text message please and make the original read this clearly". A reply reads "Yes the tenancy is in your personal name and not Drivetrain".²
- (iv) After receiving that message he signed the lease (tenancy agreement A).

² These texts are referred to in more detail below.

- (v) He was suing the owners and the agency due to difficulties with getting electrical and fibre connections to the property.

[52] As the meeting continued, Mr Edwards referred to Mr Graham having paid considerable attention to detail in tenancy agreement A, ticking paragraphs, striking out and initialling amendments and initialling at the bottom of the pages. Mr Edwards asked why then he did not identify the reference to himself as director and change that before signing. Mr Graham explained that he was in a hurry and relied on the text message that it was him personally.

[53] Mr Graham was asked about his references to the company wanting to rent the property because a Drivetrain manager from Perth was coming to work in Tauranga and needed a place to stay. Mr Graham said that he “might have said anything to be honest to get the best deal”. He also offered an alternative explanation that he did not want someone he had a protection order against to find out about the lease and that person knew the agency. Further Mr Graham was asked about a reference in the email to the Perth manager having owned his own property for 16 years. Mr Graham looked at the email but did not comment.

[54] Mr Graham was asked why a Drivetrain bank account statement and phone and power invoices had been supplied to the agency. His response was that he did not know why he had sent them. Mr Graham was also asked regarding his email sending the lease through which says that he would “approve” the payment of \$750 and “get accounts” to pay it. No explanation was offered.

Close of the 12 June 2018 meeting

[55] At the end of the meeting Mr Edwards said that he was going to take the emails to show them to the agent and ask her about them. Mr Graham’s suspension was continued. He was asked to return his car and the keys to the company premises. His car was at home and so he was to take another staff member home to pick up the car. However, Mr Graham then left without taking the staff member with him. An hour later Mr Graham texted Mr Whitehead:

I have had a good think after our meeting and I’m going to engage an employment lawyer to handle this issue. This may take a few days to engage at best but I think I must now. Also the vehicle is part of my salary package so I won’t be returning it until I’ve had legal advice.

[56] No contact was later received by Drivetrain from a lawyer on Mr Graham's behalf. Mr Graham emphasised that he expected a response from Mr Whitehead. When questioned, he said he expected a response even if it was ok.

Further investigation

[57] On 13 June 2018 Mr Edwards met with the agent and a solicitor representing the property's owner. That day the agent emailed him advising that she had spoken to the administrator who indicated she had not seen or sent the texts which Mr Graham alleged were sent to him.

The messages from Mr Graham's phone

[58] The messages on 15 January 2018 begin with a message from a number identified on the phone by the administrator's name. She asks to be phoned urgently re the property address. The next text refers to Mr Graham as having been accepted as tenant and asking for a call back ASAP. Mr Graham responds including "[p]lease confirm the tenancy is approved for me personally and not Drivetrain? As I have explained Drivetrain is my employer only". The reply is "Yes lease is in your name only, employed by Drivetrain and not your employer". Mr Graham responds "That's cool. Please make sure lease reads the same".

[59] And then moving ahead to April, Mr Graham receives a text on Wednesday 18 April from the same contact asking him to give the sender a call to discuss his concerns outlined in his email.

[60] The administrator says that she did not receive the messages Mr Graham says he sent and only has a record of her messages from 15 January and 18 April 2018. She says she did not receive the messages about identifying Mr Graham as the lessee not Drivetrain or respond to any such messages.

[61] Mr Graham brought his phone to the investigation meeting and it showed the texts he indicated. A photo of the administrator's phone showed only the first and the last of the messages, thus none of the messages about Mr Graham being the tenant not Drivetrain. I was unable to resolve this inconsistency on the basis of the phone evidence and so must consider the credibility of the witnesses.

[62] I found the administrator's evidence to be more credible than Mr Graham's evidence. I have referred above to instances where his evidence at the meeting was inconsistent with evidence of his previous actions and messages. The administrator struck me as a reliable witness who had had little, if anything, to gain by giving inaccurate evidence. I therefore conclude that the administrator and Mr Graham did not have the email exchange alleged by Mr Graham.

Drivetrain's preliminary decision

[63] Drivetrain sent Mr Graham a lengthy letter on 13 June 2018. This informed him that the company did not consider his responses to its concerns to be satisfactory. Its preliminary view was that he had breached the company's code of conduct and knowingly and deliberately failed to abide by reasonable company instructions. He is said to have engaged in serious misconduct through dishonest dealings with the real estate agency and therefore conducted himself in a manner which is likely to be prejudicial to Drivetrain's interests and reputation. His conduct is described as being a serious breach of his obligation to act in good faith and as having violated the trust and confidence expected of a senior trusted employee.

[64] Drivetrain's specific concern is identified as relating to the tenancy agreement, the false representation of himself as a director, the company not having any business interests in the residential property and the provision of confidential company information in terms of the Drivetrain bank statements.

[65] Mr Graham's contentions are outlined in detail and other information is presented. So, for example, it is noted that Mr Graham reported there being two tenancy/lease documents for the property, one leasing to him as a private tenant. I note that this was not filed. The letter states that the agent and the property owner's solicitor said at the meeting on 13 June 2018 that there was only one document supplied, tenancy agreement A signed on 19 January 2018. No other documents were drafted in relation to the property.

[66] Tenancy agreement A is noted as showing attention by Mr Graham to fine detail; ticking off provisions and amending and initialling changes. Reference is made to Mr Graham's email stating "I have listed below some points in the agreement that I have either amended or require further detail on". There was no reference below to any concern about the lease being in the name of Drivetrain – Mr Graham or to him being identified as director.

[67] A response is provided to Mr Graham's suggestion that he had filed an online application identifying himself solely as tenant and during that process provided personal references, with Drivetrain only listed as the employer. The agent and the property owner's solicitor had told Drivetrain that Mr Graham never submitted an online application. This would normally have occurred but the agency acknowledged that due to time pressures they proceeded without this step.

[68] The issue of text messages was also canvassed with the agency recorded as denying sending or receiving the text messages about Mr Graham being the tenant.

[69] Drivetrain advised that its preliminary decision was to terminate Mr Graham's employment with immediate effect. He was given the opportunity to provide any further comments or information that may persuade the company otherwise within the next 24 hours. A deadline of 6:00 pm on 14 June 2018 was specified. The email was sent to Mr Graham's personal email address.

Receipt of the preliminary decision

[70] Mr Edwards says that he told Mr Graham at the 12 June meeting to keep himself available so the company could contact him. Even without that, Mr Graham was in the midst of a disciplinary process where serious allegations had been made and he knew Mr Edwards was over from Australia conducting that investigation. It was not unreasonable for Drivetrain to expect Mr Graham to be checking his emails and his phone on a regular basis.

[71] Mr Edwards texted Mr Graham on 14 June 2018 at 9:21am seeking confirmation that he had received the preliminary decision to terminate and that he had until 6:00 pm that evening to supply further comments or information that he wanted considered. At 2:03pm Mr Graham texted back saying that he had only just received the message but had not seen the letter but would check his email. He also communicated in some detail regarding company property, together with salary and expenses issues. There was no response on the issue of the preliminary decision and no effort to seek further time or to indicate that a lawyer would respond on his behalf.

[72] By letter dated 14 June 2018, Drivetrain, on the basis of no longer having the necessary trust and confidence in Mr Graham to allow him to remain in its employment, terminated his employment, effective immediately.

Does Mr Graham have a claim regarding the suspension?

[73] Drivetrain received information from the real estate agency which suggested that Mr Graham had misrepresented his role and/or pursued renting a residential property in the company's name. Documents were supplied to support the concerns raised. The issues were serious, going to honesty and integrity. Mr Graham was the New Zealand manager for the company. He had access to its bank accounts and held the company's chequebook. Senior Engenco staff had been unable to get hold of Mr Graham and this fed into Drivetrain's decision-making.

[74] The 8 June letter tries to cover both the obligation to give Mr Graham a chance to comment in advance on his suspension and Drivetrain's concerns about promptly removing him from the workplace and not allowing him to engage in any work, which looks effectively like suspension.

[75] Covering both bases could well potentially have been to Mr Graham's disadvantage, however, I am not satisfied, given the way events turned out, that it was. Mr Graham chose to comment promptly on substantive matters but not on the suspension. He was either not focused on or ignored the requirement to leave the premises immediately. It was not until late that afternoon when another staff member told him that he was not supposed to be there, that he left. Even the next day, Mr Graham was in his office doing things, according to Mr Whitehead.

[76] Drivetrain had sufficient reason to consider suspending Mr Graham. Its attempt to undertake interim measures prior to hearing his response on suspension was unsuccessful. Mr Graham chose not to comment on the suspension specifically although he commented promptly on the substance of the allegations. He did not leave until after the time specified for comment on suspension had passed. He was paid for the time he was suspended. I am not satisfied that he was disadvantaged.

Was Mr Graham's dismissal justified?

[77] Under s 103A of the Act I consider whether Drivetrain acted as a reasonable employer could have done in all the circumstances.

[78] These were serious allegations. Did Drivetrain have reasonable grounds to believe, after a proper investigation, that Mr Graham had held himself out as a director and represented

that the company was intending to lease the residential premises for a manager being brought over from Perth?³

Reasons for dismissal

[79] Although there is only broad reference in the preliminary decision letter to the code of conduct and failure to follow instructions, the letter also clearly sets out the concerns about dishonest dealings with the real estate agency, namely that Mr Graham falsely misrepresented himself and Drivetrain and provided confidential company information without permission (the company's bank statements).

[80] These are consistent with the letter inviting Mr Graham to the disciplinary meeting which identified informing the agent that Mr Graham was a director of Drivetrain and signing letting documents to that effect.

[81] Mr Graham puts up a wide range of defences against Drivetrain's claim some of which have been set out above. In addition he refers to:

- (i) the tenancy agreement not being a lease as such;
- (ii) the Companies Act 1993 requiring a lease agreement to be entered into by way of deed and there being no deed; and
- (iii) a company not being able to be a "tenant" under the Residential Tenancies Act 1986.

[82] These arguments were rejected in submissions by Mr Sharp for Drivetrain as incorrect, as well as irrelevant. I do not need to make findings on those points in order to decide whether Drivetrain genuinely believed that Mr Graham has misrepresented himself.

[83] Questions about motivation were raised. Mr Graham was an undischarged bankrupt and Drivetrain considered this would have made renting property in his own name difficult. Mr Graham's evidence was that he has been able to rent properties, at least with a guarantor, which he had. The motivation he puts up is not wanting the person he has a protection order against knowing where he lived. He did not supply a copy of an order.

³ *Airline Stewards and Hostesses of New Zealand IUOW v Air New Zealand Ltd* [1990] 3 NZLR 549

[84] Mr Graham maintains that he did not represent that, on behalf of Drivetrain, he was looking to rent a property. However, the weight of the documentary evidence, as well as that of the administrator and the agent which Drivetrain had at the time, is against him:

- (i) 27 December 2017 email to agency “I have a new branch opening ... and will be relocating a manager hence the company’s inquiry. Drivetrain is a stock market company in Aus and has been operating in NZ since 1995 and is in great financial position... Drivetrain would also hire a cleaning service twice a week to keep things mint.”
- (ii) 9 January 2018 email to agency attaching Drivetrain bills entitled “Vodafone Account Drivetrain” and “Trustpower Bill Drivetrain”, as well as the company’s bank accounts.
- (iii) 10 January 2018 email “I spoke to him yesterday and he has owned his home for 16 years so asked him to get some type of reference. Due to the time difference between us and Perth, there are some delays”.
- (iv) 16 January 2018 – “... email me the invoice for the letting fee I will have accounts pay this today along with the \$750 in advance. ”.
- (v) Tenancy Agreement with the tenant’s full name as “Drivetrain Power and Propulsion – Andrew Graham as Director”, signed by Mr Graham.
- (vi) Bond lodgement form listing the tenant as “Drivetrain Andrew Graham”.
- (vii) Payments received into the agency’s bank account with the payer referred to as Drivetrain.

[85] There are a few references which suggest Mr Graham was personally renting but these are substantially outweighed by references to the company and its manager coming from Perth.

[86] Mr Graham says that he sent multiple emails out regarding properties with indications that the company was to rent. This evidence did not assist his credibility. Mr Graham admits there was no Australian manager who needed the house. However, on questioning he did not accept that there was anything wrong with what he had done. He did not accept that that was misrepresenting the situation.

[87] In response to Mr Graham’s statements to the agency, it generated a number of documents referring to Drivetrain, usually mentioned before Mr Graham’s name. For example, the letting fee invoice, the tenant’s details form and ingoing tenant checklist. The agency’s firm understanding was that Mr Graham was representing the company, as a director, and was renting the property on behalf of the company. Mr Graham may not have identified himself

explicitly as a director but he made it clear to the agency that the company was renting the property.

[88] I conclude, that subject to consideration below on whether the process was undertaken fairly, it was reasonable for Drivetrain to find that Mr Graham had held himself out willing and able to secure a residential tenancy in the name of Drivetrain, whereas he intended the property for own benefit. His misrepresentations included statements about the Perth manager and the company hiring a cleaner for the property.

[89] Drivetrain's code of conduct emphasises integrity and specifically requires honesty from employees⁴. Further, employees are not permitted to disclose any confidential information not already available to the public including the business or affairs of Engenco or affiliated companies.⁵ At the investigation meeting Mr Graham initially said that this was the first time he had seen the code of conduct. However, on questioning and presentation of training records, he accepted that he had undertaken training on the code of conduct in 2017 and 2018. He had also completed training on misleading conduct and competition law.

[90] Mr Graham breached his obligations to keep the company's information confidential⁶, by providing the company's bank statements, as well as bills, to the agency.

Investigation

[91] I move now to look at the process adopted by Drivetrain and whether it met the elements set out in s 103A(3) of the Act.

[92] As part of its investigation Drivetrain received information from, questioned, and met with the agent. The solicitor for the property owner was also present at the meeting. Drivetrain also followed up on points which Mr Graham raised by seeking more information from the agency. The company searched Mr Graham's emails for information which could be relevant to the investigation and collected documents from that search.

⁴ Engenco Code of Conduct, p 9.

⁵ Ibid p 13.

⁶ Employment agreement, clauses 29.2.1 and 29.2.2

Raising concerns with Mr Graham

[93] Mr Graham's actions contradict his expressions at the investigation meeting that he was not aware of what was going on or it had not sunk in. He communicated on several occasions to Mr Whitehead about the issues being investigated and sent relevant documents. This included disputing the allegations and saying that he could prove that he had told the agency to change the tenancy/lease agreement. I can only conclude that Mr Graham understood what Drivetrain's concerns were and was in a position to respond to them.

[94] Mr Graham raises an issue about not knowing what the "complaint" from the agency was. However, once the agency brought the issue to Drivetrain's attention, the concerns which Drivetrain pursued were its own. These were adequately outlined to Mr Graham.

[95] Mr Graham also says that he was not told that there was discussion between Mr Edwards and the agency. Drivetrain could have been more explicit about this in the 8 June letter. However, Mr Graham assumed that that was the case. Discussions proceeded on that basis with Mr Graham talking at the 12 June meeting about the deterioration in his relationship with the agency and the dispute.

[96] Mr Graham complains that he was not told the questions to be asked in advance of the disciplinary meeting. He did not ask for the questions and I do not consider that Drivetrain was obliged to provide them in those circumstances. In any event Mr Graham appears to have been able to respond to the questions.

Providing documents at the 12 June meeting

[97] It would have been preferable for Drivetrain to have sent Mr Graham the documents it had with the letter inviting him to the meeting. However, he already had most of the documents the agency provided as well as being the author or recipient of the emails IT found, so they were not new to him. He had used his access to his work emails on 11 June to locate and send documents exchanged with the agency off to Mr Whitehead.

[98] Mr Edwards had documents at the meeting which he offered to Mr Graham, but Mr Graham declined to take them. I also take into account that Drivetrain did not make its decision immediately after the meeting. Mr Graham had time to comment on the documents after the meeting in response to the preliminary decision.

[99] To the extent the failure to provide the documents in advance of the meeting is considered a defect, in these particular circumstances it was minor and did not result in unfairness to Mr Graham.⁷

Reasonable opportunity to respond

[100] Mr Graham took the opportunity to respond to Mr Whitehead on the phone on 11 June, disputing the allegations and commenting on what he had done. This information was passed along to Mr Edwards. Mr Graham also provided emails and documents in response to the allegations.

[101] Then Mr Graham attended the 12 June meeting and again provided multiple and detailed responses.

Representation

[102] As noted above, I have found that Mr Graham chose to attend 12 June meeting on his own despite knowing that he could seek an adjournment. He also communicated to Mr Whitehead subsequently that he intended to seek representation. He says that he then chose not to do so once he got the preliminary decision as he thought there was no point.

[103] Mr Graham's expression of intention to seek representation without actually then appointing anyone were also reflected in his dealings with the Authority and seemingly with the Tenancy Tribunal. He stated that he would try to seek an employment lawyer to prepare his submissions but there is no indication that he did so. It appears from a Tenancy Tribunal Order that Mr Graham indicated to that Tribunal an intention to instruct a lawyer resulting in the hearing being adjourned. It is not evident that he then did so.

[104] Drivetrain encouraged representation. Mr Graham had the opportunity to make arrangements for representation and was aware that he could seek to adjourn meetings or timeframes. He chose not to do so.

Predetermination

[105] In the statement of problem Mr Graham alleges that the appointment of a caretaker manager indicated that the dismissal was predetermined. I do not accept that. Mr Graham was

⁷ Section 103A(5) of the Act.

the only manager of the Drivetrain's New Zealand business. In deciding to suspend him, something had to be done regarding his role in the interim. There was no suggestion that any of the other New Zealand staff could have taken over the role. Thus someone had to be brought in from Australia.

Conclusion

[106] Did Drivetrain have reasonable grounds to believe, after a proper investigation, that Mr Graham had improperly held himself out as representing the company which intended to lease the residential premises for a manager being brought over from Perth?⁸

[107] Although this was a short process, I am satisfied that Mr Graham was sufficiently informed of the allegations against him, was actively involved in the early stages and had adequate opportunity to respond to those allegations. Mr Graham had extensive management experience, including of disciplinary processes.

[108] Drivetrain followed up with the agency before making its preliminary decision. The company adequately considered Mr Graham's responses and was entitled to conclude that Mr Graham had misrepresented the position.

[109] I regard it as significant that Mr Graham chose not to comment on the substance of Drivetrain's preliminary decision to terminate. He communicated only about property return and expenses issues. Had he engaged at this point or sought further investigation by the company, the process could well have been longer.

[110] The totality of the material as presented to Mr Graham, was sufficient for a reasonable employer to conclude that Mr Graham had acted dishonestly and thus the underlying trust and confidence of the employment relationship had been destroyed. Drivetrain was justified in dismissing Mr Graham.

[111] For the sake of completeness I note that even if I had not been satisfied that the dismissal was justified, I would have found that Mr Graham's conduct was so egregious that he disentitled himself from any remedies.⁹

⁸ *Airline Stewards and Hostesses of New Zealand IUOW v Air New Zealand Ltd* [1990] 3 NZLR 549

⁹ *Xtreme Fining Ltd t/a Think Steel v Dewar* [2016] NZEmpC 136 at [216]

Good faith claim

[112] Mr Graham refers to s 4(1A)(c) of the Act, alleging that Drivetrain did not provide him with relevant documents and give him did not an opportunity to comment before a decision was made. I have already dealt with these issues above.

[113] Additionally, Mr Graham suggests that he should have been informed earlier of the allegations and initial investigation. However, in contradiction he also complains that the company had not had any discussions or confirmed that the allegations were not malicious before inviting him to a meeting. There was no breach of good faith.

Counterclaim

[114] The counterclaim which the Authority permitted Drivetrain to pursue at the same time as Mr Graham's claims, was an allegation that he represented himself as being authorised on behalf of Drivetrain to enter into the lease. This appears to be a claim regarding a disentitlement of remedies due to contribution. No penalty or other remedy was pursued in Drivetrain's closing submissions.

Costs

[115] Costs are reserved and the parties are encouraged to the issue themselves. If they are unable to do so Drivetrain shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Mr Graham shall have a further 14 days in which to file and serve a memorandum in reply. All submissions claiming costs must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Nicola Craig
Member of the Employment Relations Authority