

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 103
3000157

BETWEEN ANTHONY McGRATH
 Applicant

A N D A2Z AUTO DISMANTLERS
 LIMITED
 Respondent

Member of Authority: Helen Doyle

Representatives: Wendy Christie, Advocate for Applicant
 Philippa Tucker, Counsel for Respondent

Investigation Meeting: 7 June 2017 at Christchurch

Submissions Received: On the day from both parties

Date of Determination: 28 June 2017

DETERMINATION OF THE AUTHORITY

- A Anthony McGrath was not unjustifiably dismissed from his employment with A2Z Auto Dismantlers Limited. There was a heated and emotional exchange on 5 April 2016 but neither party I find intended the relationship to end.**
- B Following 5 April 2016 there were about eight occasions when A2Z Auto Dismantlers Limited asked Mr McGrath to return to work including at a face to face meeting. Mr McGrath said that he could not return to work and the possibility of the relationship continuing therefore ended. The relationship ended not by unjustified constructive or actual dismissal but by Mr McGrath's decision not to return to work after the heat of the moment had passed in the nature of a resignation.**

- C A2Z Auto is ordered to pay a penalty of \$700 to Anthony McGrath for its failure to provide him with an employment agreement.**
- D Costs are reserved and failing agreement a timetable has been set for an exchange of submissions.**

Employment relationship problem

[1] Anthony McGrath worked for A2Z Auto Dismantlers Limited (A2Z Auto) as a mechanic and repair person from in or about late May 2015 until 5 April 2016. He was offered a job at A2Z Auto by one of its directors, Talib Hassanian. Prior to that, Mr McGrath had been a customer of A2Z Auto and had obtained parts for his own projects.

[2] A2Z Auto is a duly incorporated company having its registered office at Christchurch and is involved in the business of auto dismantling.

[3] Talib Hassanian's brother, Mustafa Stefan Hassanian (Stefan) is also a director of A2Z Auto. To reduce confusion I shall refer in this determination to Talib Hassanian as Talib and Stefan Hassanian as Mr Hassanian. At the Authority's investigation meeting I only heard evidence from Mr Hassanian on behalf of A2Z Auto.

[4] Mr McGrath says that he was unjustifiably dismissed from his employment after an incident on 5 April 2016. He seeks lost wages, compensation for hurt, humiliation and loss of dignity in the sum of \$15,000 together with costs. He says that he was not provided with an employment agreement and seeks a penalty of \$1,000. Mr McGrath withdrew before the investigation meeting a claim for holiday pay because it was paid and his claim for a penalty for a failure to pay wages was withdrawn on the day of the investigation meeting.

[5] A2Z Auto did not provide a statement in reply. I will set out what occurred in that regard because it may be relevant to costs.

Investigation process

[6] Tony Hassanian is another brother of Mr Hassanian. He attended a telephone conference on 18 January 2017 with the Authority and the advocate, at that stage, for Mr McGrath with a view to setting the matter down for investigation. At that stage although the parties had attended mediation no further steps had been taken by A2Z Auto to reply to the statement of problem lodged in late November 2016. Tony Hassanian is involved in the business although not in Christchurch. There are two other businesses in Auckland that the Hassanians are involved in. Tony Hassanian explained that Mr Hassanian was in Afghanistan at the time of the telephone conference and therefore not available to deal with the matter.

[7] During the telephone conference there was a direction made that A2Z Auto provide a statement in reply setting out its view of the matters and the remedies sought by Mr McGrath by close of business 23 January 2017. There was a date set for the investigation meeting and a timetable for an exchange of statements of evidence. All of these matters were contained in a notice of direction dated 19 January 2017 which I am satisfied was sent to A2Z Auto.

[8] There was no compliance by A2Z Auto with any of the directions. There may have been some miscommunication. Mr Hassanian did know there was an investigation meeting on 19 May 2017 and attended at the meeting. Mr McGrath also attended but unfortunately his representative did not. Mr McGrath did not want to proceed without his representative and the matter was adjourned to 7 June 2017. A2Z Auto between 19 May and 7 June 2017 obtained legal representation and a statement of evidence was provided that reflected for the first time the view of A2Z Auto.

[9] A2Z Auto does not accept that Mr McGrath was dismissed from his employment but says that he resigned after the incident on 5 April 2016. It further says that it then made multiple offers to Mr McGrath to return to work but he did not do so.

The issues

[10] The issues for the Authority to determine in this matter are:

- (a) What happened on 5 April 2016;

- (b) How did the relationship end?
- (c) What was the effect of Mr McGrath being contacted after 5 April 2016 and being asked to return to work but not agreeing to the same;
- (d) If Mr McGrath was dismissed then was the dismissal unjustified and are there other issues of contribution and mitigation;
- (e) Was there a failure to provide Mr McGrath with an employment agreement and if so should there be a penalty awarded?

What happened on 5 April 2016?

[11] Mr Hassanian had been involved with the businesses in Auckland but he relocated to the Christchurch business of A2Z Auto in or about early 2016. By that stage Mr McGrath was already employed.

[12] There are different accounts about what happened on 5 April 2016 but when the evidence is carefully considered some areas of agreement.

[13] It is not unlikely that Mr McGrath came to work late on the morning of 5 April 2016. Mr McGrath said that Talib understood that this may happen from time to time because of the distance Mr McGrath lived from Christchurch. Mr Hassanian agreed that nothing in particular arose from the lateness because of the understanding with Talib. It was agreed that after arriving at work Mr McGrath went to get changed into his overalls in the usual place.

[14] Mr Hassanian said that he was advised that morning by another employee Daniel that Mr McGrath had been drinking and that Daniel had seen him drinking. Mr Hassanian said that he was asked by Daniel to have a look at Mr McGrath's car and when he did he could see a half box of Smirnoff Ice and some empty cans that had been crushed. There is agreement that Mr Hassanian did not raise his concern with Mr McGrath that he had been drinking. Mr McGrath did not accept in his oral evidence that he had been drinking.

[15] There is agreement that Mr McGrath was instructed to move an engine to his area so that he could undertake some work on it. Mr McGrath did not necessarily disagree with Mr Hassanian's description of his driving the forklift to move the

engine to his work area as “rough”. There is no dispute that the rocker cover of the engine came off but there is a dispute as to how this occurred. Mr McGrath in his oral evidence said that the rocker cover came off the engine when he was in the process of picking up the engine. Mr Hassanian said that Mr McGrath hit the engine with the forklift forks and the rocker cover fell under the tyre of the forklift as a result of that. There is no dispute that Mr McGrath then proceeded to get off the forklift and kick the rocker cover towards his work area.

[16] Mr McGrath said that Mr Hassanian spoke to him about his actions and in his oral evidence recalled him saying “what the hell did you do” and “why did you do that”. Mr Hassanian agreed that he had asked Mr McGrath why he had hit the engine and said that he also advised him the original cost of the engine being moved was \$1000. His voice was probably raised. Mr McGrath said that he responded to Mr Hassanian saying “don’t you start your shit with me.”

[17] There is no dispute that Mr Hassanian asked Mr McGrath to go upstairs to his office and they both went upstairs. During the exchange Mr McGrath made a statement along the lines that he would give Mr Hassanian three weeks. There is a dispute about whether that was said on the floor or upstairs. I accept for present purposes Mr McGrath’s evidence that he stated he would give three weeks’, meaning a notice period, upstairs.

[18] The sharp point I find of the dispute is about what was said upstairs because after that each party reached a view that following that the relationship had ended but for different reasons. Mr McGrath said that after he made the statement about three weeks Mr Hassanian said “fuck off now”.

[19] Mr Hassanian said that he asked Mr McGrath to follow him upstairs to his office and he said that once they went into the office Mr McGrath started shouting whilst he was leaning over the table at him and was “in his face.” He said that Mr McGrath smelt of alcohol and he could not talk sensibly to him about the engine matter because Mr McGrath was angry so he asked him to go home.

[20] Mr Hassanian denied using any profanities such as “fuck” and said that that was not something he would do. Having heard from Mr Hassanian I find it less likely that he used profanities when asking Mr Hassanian to leave. I find that Mr Hassanian felt overwhelmed by a situation where it was clear that no meaningful discussion

could take place about the engine matter, he was embarrassed about how Mr McGrath had addressed him in front of other employees downstairs and he was struggling to assert his authority. He asked Mr McGrath to leave. Mr Hassanian said that he expected Mr McGrath to return to work.

[21] Mr McGrath left the premises after collecting his belongings. Mr Hassanian followed him down the stairs. Mr Hassanian said that he was concerned there may be further damage to the property and wanted to make sure Mr McGrath left the premises.

[22] Mr McGrath said that he was dismissed and Mr Hassanian said that he concluded that Mr McGrath had resigned. Matters however were not left there.

After Mr McGrath left the work place

[23] Mr Hassanian spoke to Talib about the situation. Talib wanted to contact Mr McGrath in order to talk to him about coming back to work. Both Talib and Mr Hassanian had no difficulty with Mr McGrath's actual work but Mr Hassanian had some other concerns. Mr Hassanian said that he told Talib that he would want Mr McGrath to change his attitude and not to smoke or drink at work.

[24] I accept having heard the evidence Mr McGrath's smoking in the workshop was an issue of concern for Mr Hassanian. Talib had not raised any issue with Mr McGrath about this and it would have appeared to Mr McGrath that he was able to smoke close to the door but in the workshop.

[25] I find it likely however that Mr Hassanian had raised a concern verbally with Mr McGrath about his smoking although I place less weight on the written warning that was sent to Mr McGrath about smoking. The address on the written warning, although in all likelihood provided by Mr McGrath, was incorrect. Further Mr McGrath cannot read or write although I could not be satisfied that anyone from A2Z Auto knew about this. From the evidence I formed the view that Mr McGrath was less likely to take instructions from Mr Hassanian and regarded Talib with whom he had a good relationship as being the only one that he would listen to.

[26] The drinking allegation is a serious matter and is denied. I am unable on the evidence to conclude on the balance of probabilities Mr McGrath had been drinking.

How did the relationship end?*Resignation or dismissal?*

[27] I accept both Mr McGrath and Mr Hassanian were angry and upset on 5 April 2016. Mr McGrath says that Mr Hassanian was the aggressor and Mr Hassanian says that Mr McGrath was very angry. I find objectively assessed Mr McGrath set the scene for an escalation of the situation after he kicked the rocker cover. When the matter was raised by Mr Hassanian, and I accept this may have been in a loud voice that confirmed displeasure, instead of explaining his actions or even apologising Mr McGrath told Mr Hassanian “not to start his shit with him”.

[28] I do not find that Mr McGrath’s reference to three weeks could be relied on by A2Z Auto as his resignation. After the statement about notice he was then told to leave or go home by Mr Hassanian and he did. In the context of the heated exchange as outlined above I do not find that Mr McGrath or Mr Hassanian intended the relationship to end on 5 April 2016. I find that the evidence supports they were both essentially unclear about what would happen after that date. The focus then turns to what happened after that date in determining how the relationship ended.

What did happen after 5 April

[29] Mr McGrath said that he avoided answering the telephone for about a week after 5 April 2016 although I find it more likely than not that Talib tried to contact him by telephone over that period. When Mr McGrath did pick the phone up he was asked by Talib to go back to work. He said that he went to see Talib who listened to him about the events of 5 April and offered him a return to his job without any conditions. Indeed Mr McGrath said in his evidence that he was told Mr Hassanian would no longer be in the workplace.

[30] Mr Hassanian felt that was unlikely and said that it was more the case that Mr McGrath did not want to return to work under the conditions put. Mr McGrath said that he was asked by Talib to return to work about 8 times. In response to a question from the Authority as to why he did not return when offered the opportunity several times by Talib Mr McGrath it was the impact of Mr Hassanian’s behaviour that he found intimidating and prevented his return.

[31] I find that A2Z Auto in light of what occurred on 5 April 2016 took prompt and appropriate steps to get the employment relationship back on track. There was a meeting and an offer for Mr McGrath who was skilled at what he does to return to work. This was an action consistent with good faith obligations to be active and constructive in maintaining a productive employment relationship where parties are responsive and communicative. If there were conditions to a return, and significantly Mr McGrath says in his evidence there were not, the conditions requiring a change in attitude, no smoking in the workshop or drinking at or before work could hardly be said to be unreasonable. It appears Mr McGrath concluded from discussion with Talib that he may not have to work with Mr Hassanian. For completeness I do not find there was a repudiatory breach of the employment agreement on 5 April 2016 by A2Z Auto.

[32] It was not I find a dismissal actual or constructive by A2Z Auto that resulted in the end of the relationship but rather advice from Mr McGrath that he would or could not return to work after the heat and emotion of 5 April 2016 had passed. Mr McGrath's response at that point that he would not return to work meant the possibility of a continuation of the employment relationship was removed. Mr McGrath resigned at that point.

[33] In conclusion Mr McGrath was not unjustifiably dismissed from his employment by A2Z Auto.

Penalty for failure to provide an employment agreement

[34] A penalty is sought for breaches of s 63A (2) (a) – (d) of the Employment Relations Act 2000 (the Act). The primary breach alleged is that A2Z Auto did not provide Mr McGrath with a copy of the intended employment agreement. Mr McGrath said that he never received an employment agreement.

[35] Mr Hassanian says that he was told by Talib that an employment agreement was provided to Mr McGrath but never returned. Mr Hassanian attached a template of an employment agreement which does not have the name of the employee filled in but he places emphasis on the description of the role as “mechanical/repair” in the template document because that was Mr McGrath's role and other employees do not have that description of their role.

[36] Ms Tucker suggests that the employment agreement could have been posted to the incorrect address but there is no cover letter or indeed any other evidence to support that.

[37] Whilst no penalty is sought under s 64 of the Employment Relations Act 2000 Act there is an obligation for an employer to retain a copy of the individual employment agreement. That obligation exists even if the agreement is not signed and there has not been agreement to the terms and conditions. No copy of the employment agreement was retained in this matter and supports that in fact no employment agreement was provided.

[38] I could not be satisfied in all the circumstances that an employment agreement was provided to Mr McGrath. I asked Mr McGrath what impact he thought that failure had had and he said that it “may have helped”.

[39] I find on the balance of probabilities that there was a breach of s 63A (2) of the Act because Mr McGrath was not provided with an employment agreement.

[40] I do not find Mr McGrath was significantly affected by this breach until matters went wrong in the workplace. He should however have been provided with an employment agreement and advised of his right to seek independent advice about it. I am satisfied that Mr Hassanian has made sure that matters such as provision of employment agreements are attended to.

[41] I find that there should be a penalty payable to Mr McGrath under ss 135 and 136 of the Act in the sum of \$700.

[42] I order A2Z Auto Dismantlers Limited to pay to Anthony McGrath the sum of \$700 being the penalty awarded.

Costs

[43] I reserve the issue of costs. Both parties have had a measure of success and may be able to reach agreement about costs.

[44] If agreement cannot be reached then Ms Christie has until 10 July 2017 to lodge and serve submission as to costs and Ms Tucker has until 24 July to lodge and serve submissions in response.

Helen Doyle
Member of the Employment Relations Authority