

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2020] NZERA 363
3071333

BETWEEN SHAYNE ALBERT
McCORMICK
Applicant

AND PACIFIC AUTO PARTS
LIMITED
Respondent

Member of Authority: Michele Ryan

Representatives: Jenny Beck and Ryan Jones, counsel for the Applicant
Omid Rahimi, for the Respondent

Investigation Meeting: 16 January 2020 at Dunedin

Submissions [and further Information] Received: No submissions received from either party

Date of Determination: 9 September 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Shayne McCormick began working for Pacific Auto Parts Limited (Pacific Auto) on 4 April 2019 as a truck driver. His role involved picking up and placing vehicles on a hiab (crane) truck and transporting them to the car yard.

[2] Pacific Auto specialises in removing old and unwanted vehicles and selling these as parts.

[3] Mr McCormick's statement of problem and first written brief of evidence referred to a range of matters and interactions where he says he was unjustifiably disadvantaged by Pacific

Auto or by the Managing Director of Pacific Auto, Mr Omid Rahimi, known as Adam Rahimi. Mr McCormick alleges:

- (a) on several occasions he raised concerns about the safety of the truck, but he was berated and his concerns ignored;
- (b) on 19 June 2019, when he returned to work having been absent for several days, Mr Rahimi told him he had “*let the company down*” and then refused to provide him work for a month;
- (c) on 11 July 2019 he [Mr McCormick] found out Mr Rahimi was “*skimming money from my wages*” and believes this is because he had cost Mr Rahimi money due to the safety concerns with the truck;
- (d) he is owed expenses of \$150 but Pacific Auto has refused to reimburse him this sum.

[4] Mr McCormick then says that on 14 July 2019, an accident, arising out of wear and tear on a cable attached to the hiab truck he was using, resulted in damage to a vehicle on the truck.

[5] He says after he informed his direct manager, AJ of the incident, Mr Rahimi contacted him by phone, swore at him and told him “*that is the end of it*”. Mr McCormick says he asked whether that meant he no longer had a job, Mr Rahimi affirmed that was the case.

[6] Mr McCormick claims he was unjustifiably dismissed. He says he was not paid for 14 July 2019 and seeks corresponding wage arrears, 13 weeks’ lost wages, compensation for hurt and humiliation, and costs.

[7] Pacific Auto strongly denies Mr McCormick’s claims and challenges his version of events, including the terms of his employment, what occurred over the course of the relationship, when it was terminated, and by whom.

The Authority’s investigation meeting

[8] Mr McCormick is in receipt of legal aid and with his counsel attended the Authority’s investigation meeting. In addition to his statement of problem, two separate written statements (briefs of evidence) were lodged and a small number of accompanying documents.

[9] Pacific Auto was self-represented. Mr Rahimi; Car Removal Operations Manager, Ahmed Akbari (known as AJ); and Zara Russell, Accounts Administrator Manager, were each

present at the investigation meeting and provided relevant documentation on behalf of Pacific Auto.

[10] Each witness had the opportunity to provide any additional comments and information and did so.

[11] This determination has been issued outside the timeframe set out at s 174C(3)(b) Employment Relations Act 2000 (the Act), where the Chief of the Authority has decided exceptional circumstances exist.¹ As permitted under s 174E of the Act, this determination does not set out all the evidence or information received from the parties. Rather, this determination makes findings of fact and law and sets out conclusions on the issues necessary to dispose of Mr McCormick's claims.

The issues

[12] The Authority is required to examine and determine:

- (a) whether Mr McCormick's employment beginning on 4 April 2019 was permanent and ongoing or for a fixed term;
- (b) whether Mr McCormick was bullied by Pacific Auto when he raised concerns about the truck;
- (c) whether Pacific Auto refused to provide Mr McCormick work for 4 weeks as a means to bully or punish him for taking time off work and/or complaining about safety of the truck;
- (d) what occurred between the parties after 19 June;
- (e) whether Mr McCormick was dismissed;
- (f) whether Mr McCormick is owed wages.

Credibility

[13] Over the course of the Authority's investigation meeting both parties made occasional concessions regarding some interactions at issue. However there remains a stark contrast in the evidence given by the parties on matters relevant to Mr McCormick's claims. As a

¹ Pursuant to s 174C(4)

consequence many of the issues that require a determination in this matter involve a finding as to credibility.

[14] The onus of proof is the balance of probabilities. This means the Authority is required to determine which version of events is more likely than not. In doing so I have reviewed the written statements provided by each of the witnesses and their individual answers given to questions asked during the meeting, alongside material such as text messages sent at relevant times.

[15] Taking the above factors and applying a common sense approach I have assessed whether the evidence given is consistent, reasonable, plausible, and probable (or not) so as to determine what is more likely to have occurred.

Was Mr McCormick’s employment permanent and ongoing or for a fixed term?

[16] The first area of dispute is whether Mr McCormick’s employment, beginning on 4 April 2019, was permanent and ongoing, or for a fixed term.

[17] Initial documentation sent to the Authority states Mr McCormick “*did not have a written Employment Agreement while working at Pacific Auto*”.² Mr McCormick further says after his trial period finished on 3 July 2019 he was a “*permanent employee and ... could not be dismissed without cause*”.³

[18] In contrast, Pacific Auto says Mr McCormick was employed pursuant to a fixed term employment agreement whilst another of its employees, who I have referred to as “HR” in this determination, recovered from surgery.

[19] Pacific Auto provided a copy of the parties’ Employment Agreement. Page 9 records the following:

Type of employment agreement

The employee will work for the employer for a fixed period of time. Employment will start on 04/04/2019 and will end when permanent employee returns to full time driving. It will automatically end without notice or pay instead of notice, unless the employer or employee ends it in line with this agreement. The employer and employee agree there is a genuine reason for the fixed term, and finishing at the end of the term. The reason is our current driver is medically unfit to work up to three months. The employer has explained why

² Statement of Problem, paragraph 2k, dated 20 August 2019

³ Statement of Shayne Albert McCormick dated 11 December 2019, paragraph 17.

my employment will finish and the term ends when the employee has had a chance to get advice on this.

[20] Mr McCormick does not deny he received a copy of the written employment agreement before his employment began or that he took it home and returned it signed on 3 April 2019, but rather, says he was not given a copy of the document.

[21] He says it was never explained to him that he would only be filling the role while the permanent employee was away.⁴ I have not accepted his evidence on this point for the reasons set out below:

- (a) Pacific Auto provided copies of the two advertisements it used when recruiting for the position. The advertisement on Trade Me described the role as a “*casual position*” and FaceBook advised the position was temporary. Both recorded the role was for “*2-3 months possibly longer*”, and immediately available (or words to that effect).
- (b) I consider it likely that the fixed term nature of his employment was explained to Mr McCormick during his recruitment interview, as AJ attests.
- (c) Mr McCormick sent two text messages; the first sent to Mr Rahimi on 19 June 2019, and the second to AJ on 21 June 2019, which both acknowledge the availability of work for him is dependent on HR’s return to work.

[22] The totality of the above evidence leads me to have no doubt that Mr McCormick was aware both prior to, and over the course of, his employment that the role was of limited duration and would come to a halt when HR returned to work full time.

Was Mr McCormick bullied by Pacific Auto when he raised concerns about the truck?

[23] There was little evidence given as to when Mr McCormick complained about the truck and to whom. He says he was told by a third party that the truck was unsafe. Against that Pacific Auto produced COF documents which recorded the vehicle passed inspections in January and July 2019 respectively.

[24] However, I note there is undated text message sent by Mr McCormick to AJ where he expresses concerns about the truck’s excessive shaking. Mr McCormick’s message advises he

⁴ Statement in Reply Shayne Albert McCormick, dated 15 January 2020, paragraph 15.

is unwilling to drive it to Queenstown. His refusal to drive the truck at that time appears to have accepted by AJ in the reply text message without challenge.

[25] An invoice establishes that tyres and rims on the truck were replaced in or about 10 June 2019. There is no evidence that any action was taken against Mr McCormick for raising the matter and I do not accept this claim.

Did Pacific Auto refuse to provide Mr McCormick work for 4 weeks or did Mr McCormick resign?

[26] On Thursday evening, 13 June 2019, Mr McCormick sent AJ a text message advising his child had been in an accident and he would not be in the following day.

[27] Mr McCormick did not attend work the following Monday and Tuesday but he returned to work on Wednesday, 19 June 2019. His first written statement characterised the events of 19 June 2019 (and subsequently) in the following way.⁵

“When I took a day off work to look after my son who had badly cut his leg ... I was told by Mr Rahimi that I was “*letting the company down*” ... After this incident Mr Rahimi did not allow me to work for 4 weeks. Every time I enquired I was told that someone else had been brought in to cover my normal shifts on Monday, Tuesday and Wednesday.

[28] In contrast, Mr Rahimi says he and Mr McCormick met in the morning of 19 June 2019.

[29] Mr Rahimi says Mr McCormick apologized for not being at work over the last couple of days and then “*pulled out*” a written resignation letter. He says Mr McCormick told him he couldn’t work [at Pacific Auto] anymore as he had to take care of his child.

[30] Mr Rahimi says he told Mr McCormick it was “*not a problem*” and in any event “*HR was due back at work soon*”. He says he advised Mr McCormick that if his circumstances changed he should get back in touch as the business might be purchasing another hiab truck in the near future and if so there may be a possibility of work for Mr McCormick.

[31] Ms Russell’s evidence is that the conversation between Mr McCormick and Mr Rahimi occurred in the room directly opposite her office. She says after Mr McCormick left, Mr Rahimi came into her office and told her he had resigned due to family issues. She says Mr

⁵ Statement of Shayne Albert McCormick dated 11 December 2019, paragraph 10.

Rahimi photocopied Mr McCormick's resignation letter, asked her to file it, and to sort out Mr McCormick's pay.

[32] The resignation letter records the following:

ADAM

This is a letter confirming my resignation as a truck driver for Pacific Autos due to family concerns.

I would like to thank you for the opportunity to work for you.

*Thank you
Shayne McCormick
(signed)*

[33] When questioned by the Authority Mr McCormick accepted he and Mr Rahimi had met on 19 June 2019. He said they had a "*basic conversation*".

[34] By way of background, during his interview Mr McCormick had informed Pacific Auto he was involved in Family Court proceedings. He says he told Mr Rahimi about; the difficulties occurring in his family; his concerns about the truck, and told him "*I'd had enough of it*".

[35] Mr McCormick says the conversation was left on the basis that he would consider whether he wanted to work at Pacific Auto and that he would get back to Mr Rahimi.

[36] He was unable to explain why he had not referred to the discussion he had with Mr Rahimi on 19 June 2010 in any of the material furnished to the Authority by him, or the arrangement he now says was agreed.

[37] Mr McCormick also denies he gave Mr Rahimi the resignation letter. He points out the letter is not dated. He says his personal circumstances and the work atmosphere had led him to draft the letter but that he had kept it in his personal locker as he had not made a decision to leave. Mr McCormick alleges Pacific Auto breached its obligation of good faith by going through his personal belongings and seeking to pass off the document as a genuine resignation.

[38] Mr McCormick sent the following text message to Mr Rahimi at 9.26 pm in the evening following the discussion with him on 19 June 2019.

I thought(t) about what you said I've decided I don't want to give up this job and depending in what happens with [HR]Jamie I want back full time I'll leave it with you and let you think about it thank you.

[39] Mr Rahimi did not respond to the above message.

[40] I have not found Mr McCormick's written account or his answers to questions regarding the events of 19 June 2019 to be credible, and have preferred the evidence given on behalf of Pacific Auto in this regard.

[41] I am satisfied Mr McCormick resigned during the discussion with Mr Rahimi on 19 June 2019 due to personal family circumstances as was recorded in the resignation letter. Nor is there any reason to doubt Ms Russell's evidence in relation to how Pacific Auto came into possession of Mr McCormick's handwritten resignation letter.

[42] I accept the text message sent in the evening of 19 June 2019 is capable of fitting with Mr McCormick's narrative, but I find it more likely that Mr McCormick's had changed his mind about leaving Pacific Auto and, by his text message, indicated he was available for future work, noting it was dependent on HR's circumstances, and hoped Mr Rahimi would accept his his proposal.

What occurred after 19 June 2019

20 June to 9 June 2019

[43] In the weeks following his resignation Mr McCormick was in contact with AJ, largely by text, and occasionally also with Mr Rahimi, as set out below.

[44] Mr McCormick sent a text message to Mr Rahimi on 24 June 2019 asking him to call as "*AJ told me back to normal on Friday but I turned up here to find HR is here working*". As it transpires the pair did not have any further contact until 10 July 2019.

[45] Mr McCormick's request to have Mr Rahimi call him appears to be a result of text messages initiated by him to AJ, concerning his time card on 19 June 2019.

[46] On Friday 20 June 2019 Mr McCormick was advised by AJ that HR was at work that day to which he responded "*so no work again*". AJ advised: "*Not today but tomorrow is back to work*" and sent a further text saying "*Back to normal*". In evidence AJ says his messages

were to indicate HR had returned to work and “*Back to normal*” meant as it was before Mr McCormick was employed to cover HR’s role.

[47] I accept these text messages were not entirely clear but I am unwilling to conclude they can be construed as setting aside Mr McCormick’s resignation or that his role remained despite HR’s return as Mr McCormick suggests. If it was truly the case that Mr McCormick’s employment had been restored Mr McCormick has not explained why he did not attend work on 21 June 2019 which is the date to which AJ referred to as “tomorrow”.

[48] There is however some evidence to suggest Mr McCormick had advised AJ that he was available to undertake casual work on Sundays and I note AJ asked Mr McCormick if he could work on Sunday 22 June 2019. Mr McCormick advised he was unavailable.

[49] Mr McCormick had further contact with AJ in early July 2019. He offered to drive the truck on a job and also referred AJ to a couple of vehicles that Pacific Auto might want to purchase.

[50] There is no suggestion in any of text messages exchanges between the parties over this period that Mr McCormick raised concerns with AJ or Pacific Auto that he was being unfairly deprived of work. The absence of any complaints of that nature reinforces my views that Mr McCormick always understood the role was temporary and, in any event, he had freely resigned and his resignation had been accepted by Pacific Auto. Pacific Auto had no further employment obligations towards Mr McCormick going forward and I find Mr McCormick’s conduct towards Pacific Auto reflected that understanding.

10 to 15 July 2019

[51] The next contact between Mr McCormick and Mr Rahimi occurred on 10 July 2019. On this date Mr McCormick received holiday pay accrued between 4 April and 19 June 2019. The effect of this final payment removed his access to a Viber messaging app for Pacific Auto’s drivers. Mr McCormick sent a text message to Mr Rahimi as below.

McCormick: *By removing me from the group does that mean I know longer have a job with Pacific Auto*

Rahimi: *Hey man are you still willing to work here? Are you still working with Chris?*

McCormick: *Nope I am not working with him and yes I am still willing to work for you. You gave me the open chance and I am waiting to hear back.*

Rahimi: *Awesome bro. can you sundays at the moment*

[52] The above exchange does not alter my view that the employment relationship entered into in April 2019 ended on 19 June 2019 with Mr McCormick's resignation.

[53] Nor am I willing to find Mr Rahimi's forecast in June of possible work in the future was an offer of ongoing employment or that Mr McCormick's text message can be regarded as acceptance of an offer.

[54] I am satisfied the text message initiated by Mr McCormick was a means to remain visible to Pacific Auto with the hope he would be offered casual work (and this in fact did occur) and that a permanent role for him may emerge.

[55] Following Mr Rahimi's text message, AJ made arrangements with Mr McCormick to have him travel to Roxburgh on Sunday 14 July 2019 to pick up several vehicles. This is the day Mr McCormick says Mr Rahimi dismissed him over the phone.

[56] The evidence from both parties concerning their exchange is scant.

[57] Mr Rahimi concedes he was terse with Mr McCormick, but I am not persuaded Mr McCormick was dismissed. In forming this view I have considered the text messages exchanged between AJ Mr Rahimi on 15 June 2019, the day after the accident, in relation to Mr McCormick.

AJ: *... he asked me if I had any extra work that he can work sunday. What u reckon bro?*

Rahimi: *Na not really bro .he left the job and now HR is back so we should be swet bro*

AJ *Yeah fair enough bro, was just tryig to help him out cause he's having some family issues*

[58] I have no reason to consider the content of AJ's text message on 15 June 2019 was not genuine. I find it unlikely that Mr McCormick would have asked AJ if work was available (as referred to in AJ's first text message) if he had been dismissed by Mr Rahimi the previous day.

[59] Conversely, I consider it likely that had Mr Rahimi dismissed Mr McCormick in the way he alleges he would have communicated that matter to AJ.

[60] I have not been persuaded Mr McCormick has dismissed. It follows that he had not established an unjustified dismissal personal grievance.

Is Mr McCormick owed wages?

[61] As already noted, Mr McCormick alleges Mr Rahimi “*skimmed money from my wages*”. This matter appears to relate to the payment of holiday pay on 10 July 2019.

[62] There is a suggestion that Pacific Auto unfairly withheld payment of this sum (for three weeks) from Mr McCormick.

[63] Ms Russell accepts she was responsible for processing wages at that time, and that Mr McCormick should have been paid his holiday entitlement earlier than he was. I am unwilling to award any remedies in relation to the matter.

[64] Mr McCormick was paid his holiday entitlement and no arrears are owed. He cannot have been unjustifiably disadvantaged by the delay in payment where the omission did not occur while he was “in his employment”.

[65] A claim for a penalty was not made, but even if it had, no evidence was produced to establish the omission was anything other than inadvertent, or that Mr McCormick was impacted by the delay.

[66] Mr McCormack further says he is owed the sum \$150.00 which he gave to a customer when purchasing several vehicles.

[67] Mr McCormick conceded the payment was “*technically my stuff up*”. Under questioning he accepted he had not sought reimbursement of the sum during his employment. Unchallenged evidence given by AJ on behalf of Pacific Auto is that Mr McCormick told him it was “*all sorted*”. I find the matter has already been disposed of between the parties and I am unwilling to make orders on this issue.

[68] There is, however, no evidence that Mr McCormick was paid for his work on 14 July 2019. That omission appears to have been an oversight but must be paid if it has not already.

Summary

[69] Pacific Auto Parts Limited must pay Mr McCormick wages for work undertaken on 14 July 2019 at the rate of \$18.25 per hour (plus holiday pay on that amount) if that sum has not yet been paid.

[70] The remainder of Mr McCormick's claims have not been determined in his favour and are dismissed.

Costs

[71] Costs are reserved.

Michele Ryan
Member of the Employment Relations Authority