

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 319
3177087

BETWEEN

SHELLY PENNIALL
Applicant

AND

WORLD MOVING AND
STORAGE LIMITED
Respondent

Member of Authority: Alastair Dumbleton

Representatives: Theresa Tudor, advocate for the Applicant
Bruce Reid, advocate for the Respondent

Investigation Meeting: 16 March 2023

Determination: 19 June 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant Shelly Penniall had been an employee of the respondent World Moving and Storage Ltd (WM&S) for about 5 ½ years, when she sent a message giving notice of her immediate resignation.

[2] A personal grievance was raised. When this remained unresolved, Ms Penniall lodged a statement of problem in the Authority.

[3] She claimed she had been unjustifiably disadvantaged and constructively dismissed by WM&S, and that the employer had breached its obligations of good faith owed to her.

[4] Mediation was undertaken, but as a settlement was not reached by the parties the Authority proceeded to investigate the grievance and breach claims.

[5] At an investigation meeting Ms Penniall and her partner Mark gave evidence and were questioned by Therese Tudor their advocate, Bruce Reid a director and manager of WM&S, and the Authority. Mr Reid also gave evidence and was questioned. Submissions were made in writing for Ms Penniall and orally for WM&S, at the end of the meeting.

[6] This determination is given in accordance with s 174E of the Employment Relations Act 2000 (the ER Act) and does not therefore fully record all the evidence or information considered by the Authority, or the submissions received.

Terms and conditions of employment

[7] The grievance and breach claims were made against a background of disagreement between Ms Penniall and Mr Reid, as to the terms and conditions of employment under which Ms Penniall had the use of a company vehicle. Also not far in the background was an arrangement made where, to avoid the risk of catching and spreading Covid among at-risk family members, Ms Penniall was able to work from home and did not have to go out and meet customers in their homes as she normally would have done in better times.

[8] Ms Penniall's job was to assist people with the logistics of moving and storing belongings and household items, when relocating their residence to a retirement village. She had been given a company car to enable her to travel to see customers.

[9] Ms Penniall gave her resignation after a request was made of her to allow the car to be used by others for the business purposes of WM&S. At the time she was not using it for those purposes because of Covid constraints, but she did use it for her personal transport while working from home. She had no other car to use because she had given her own to her son upon his return from overseas.

[10] During her several years of employment there had been changes to Ms Penniall's position. She had commenced in 2016 as a Sales Consultant. She told the Authority this work had been done by telephone and she had also done some office administration. In 2020 although her position title she said remained Sales Consultant,

she received a promotion and her work required visits to customers in their houses, instead of her staying in the company's offices to work. She thinks she received a pay increase for this change, which she regarded as a different job from the previous one she had started on in 2016.

[11] There is no dispute that in 2020 when she was given a car, Ms Penniall was permitted to use it to travel to and from her home at the start and finish of each working day. The car was fuelled and fully maintained by WM&S. It was zero-rated by the company for fringe benefit tax (FBT) purposes.

[12] The car use was not negotiated as an agreed part of Ms Penniall's total remuneration. As Mr Reid put it, it was not a 'monetarised' component of her pay or conditions.

[13] Undoubtedly, free personal use of the car was of financial benefit, saving her the usual significant cost of car ownership, maintenance and running expenses.

[14] The Authority accepts that Ms Penniall had an understanding with a co-director of Mr Reid, David Williams, that she could use the vehicle more widely than from home to work and back. She gave the example of travel to the local shopping centre, and she thought even a trip to Taupo would have been within the approval she had. The Authority accepts the personal use was an arrangement informally entered into with Ms Penniall by invitation.

[15] In her evidence Ms Penniall said she had understood that the arrangement was not a permanent or immutable one.

The 2016 IEA

[16] When she commenced in 2016 with WM&S, an individual employment agreement (IEA) was signed by Ms Penniall and the company. It provided that she would do her job as Sales Consultant at the company's base in Avondale. There was no apparent need for her to have a company car then, although the IEA did have a general provision covering company motor vehicles, when provided to employees.

[17] Under clause 4 of the IEA the vehicles were not to be used for personal or private purposes without express permission or direct instruction. It is reasonable to imply from this provision that permission, once given, could also be withdrawn later.

[18] When Ms Penniall questioned Mr Reid's request for her to make her car available for the company to use, Mr Reid, who it seems from his evidence was unaware of any informal arrangement with Mr Williams, under which Ms Penniall was using the car privately, in effect terminated or overrode that arrangement. He drew attention to the IEA provision and advised

The vehicle is not a monetarised component of your employment but is provided as a tool for you to do the job as we typically require you to meet clients in their homes.

As there are no requirements for you to do face to face surveys under the current COVID restrictions the car is not required so we will bring it back to use for other jobs.

When we recommence face to face surveys the company vehicle will be returned.

[19] Other WM&S employees doing similar jobs to Ms Penniall had also been asked to hand back their cars, which were needed for ferrying workers to sites where they could assist with moving items in and out of a removal truck.

[20] On 13 March 2022, Ms Penniall in replying to Mr Reid's advice about the purpose for which she had been given the vehicle, disputed that the 2016 IEA was her current employment agreement. She asserted the company vehicle was part of her remuneration package and advised that she was resigning with immediate effect, or without giving any notice.

[21] On 11 March after an earlier request to return the car had been made by Mr Reid, she had asked him if her employment agreement was going to be negotiated. She suggested a new agreement should be concluded before the car was returned.

Disputes are excluded from disadvantage grievance claims

[22] The communications between employee and employer, show the emergence of a dispute about the interpretation, application or operation of the IEA, regarding the company provided motor vehicle policy at clause 4 of the IEA.

[23] Section 103(3) of the ER Act provides that an unjustifiable action grievance does not include action deriving solely from a dispute (as defined at s 5 of the ER Act).

A disadvantage grievance is not intended to be a means by which a party to an employment relationship can have new terms and conditions of employment fixed by the Authority, which has a very limited ability under the ER Act to fix terms and conditions.

[24] The Authority finds that WM&S was correct in regarding the 2016 IEA as the current agreement binding on employer and employee. It had not been revised or varied in writing when the role of Ms Penniall changed in 2020. Permission to use a company vehicle privately could be given under clause 4 but also the Authority finds, by clear and necessary implication, such permission could be revoked, temporarily or permanently.

[25] Mr Reid had stated that the car would be returned once the Covid restrictions were lifted. The Authority also finds that he was not aware Ms Penniall had no other car to use. Had he known that it is likely, as he said, he would have tried to help her overcome that problem, although legally it was not the company's concern.

[26] The Authority does not accept that a disadvantage grievance arose as claimed from bullying behaviour by Mr Reid or WM&S, or unfair treatment, or through any meting of punishment to Ms Penniall, or failure to act in good faith. The written communications in emails and letters do not show any sign of this conduct. Mr Reid confirmed that Ms Penniall had performed well in her role and was a greatly valued member of the staff.

[27] The Authority finds that WM&S was motivated simply by a desire to use a company vehicle to conduct company business, the purpose for which it was intended the vehicle would be used. It was not seeking to reduce any of Ms Penniall's terms and conditions of employment except to the extent it was entitled to withdraw, temporarily only, the invitation Ms Penniall had been given to use the company vehicle privately. As an invitee, she had no contractual entitlement to private or personal use of the car.

[28] Evidence was given about the actions of WM&S during the Omicron wave of Covid, when Ms Penniall held a genuine and justified concern about exposure if she carried out face to face interviews with clients or visited them at their homes or retirement villages.

[29] That issue was resolved readily enough by Mr Reid in Ms Penniall's favour. She was not required to put herself or her family at risk. The matter was discussed and resolved reasonably and without bad faith being shown, the Authority finds. As with many employers, WM&S was forced to adjust to doing business differently during Covid and there was the potential for staff to become upset at proposals put to them, but in the end Ms Penniall was not asked to do something which, for good reason, she did not want to.

Requirement for good faith behaviour

[30] The Authority has found no instance of conduct by WM&S which could support a claim that a requirement of s 4 of the ER Act had been breached. There was no misleading or deceptive behaviour. Mr Reid was up-front and business-like in his approach and his communications. He was responsive and communicative.

[31] It seemed to the Authority that Ms Penniall by nature may be a more sensitive person than others. This could have led her to unduly dwell on the changes that were requested of her by WM&S when Covid took hold, leading her to conclude that she was being punished because she had expressed some unhappiness about proposed change. Her reason may have been overcome by these strong feelings and caused her to misunderstand the true intention and motivation of her employer. Her sudden resignation seems inexplicable and out of all proportion to the degree of adjustment in her life she would have had to make in giving back her car for a while.

[32] The Authority is quite satisfied that there was no punishment motive behind the request to use Ms Penniall's company car. WM&S had a real use for that car and others, which were needed to transport workers to and from the job sites. The truck being used had limited seating for carrying additional crew. There was also a need to maintain isolation for workers who were working under an exemption which allowed WM&S to operate during Covid in early 2022.

[33] Ms Penniall said she had expected or hoped Mr Reid would be jolted by her resignation into asking her to stay and begin discussing new terms and condition of employment. She may have seen her action as a form of solo strike action, but Mr Reid was entitled to take the resignation at face value for what it was, put it behind him and move on. It might be a risky strategy for an employee to resign in the hope that the gesture will prompt the employer into negotiation for new terms and conditions.

[34] Mr Reid was disappointed to receive the resignation, but the law is clear that an employer in the face of an unambiguous resignation has no obligation to try and persuade an employee not to resign, just as it is meaningless for an employer to reject a resignation. Mr Reid spoke no doubt from long experience when he said that people who are talked out of resigning will usually end up leaving sooner or later anyway, so it is best to simply accept the employee's wish and will to leave.

Constructive dismissal

[35] The Employment Court has recently reviewed the principles of constructive dismissal in *Ngawaka v Global Security Solutions Ltd*¹. The situations where a constructive dismissal might occur include²:

- (a) Where the employee is given a choice of resigning or being dismissed.
- (b) Where the employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to leave.
- (c) Where a breach of duty by the employer leads the employee to resign.

[36] The situations (b) and (c) are those contended to match the circumstances of this case.

[37] It will be clear from the Authority's views of what happened that it is unable to find that Ms Penniall's resignation was somehow coerced from her by some unreasonable or unfair conduct of WM&S, as in situation (b). Although the times were difficult for everyone, WM&S acted fairly and reasonably in the circumstances. It did not plot to force Ms Penniall out. No reason has been suggested why it would have done that. To the contrary, good reason has been shown why it would not; Ms Penniall was a good worker and valued employee, although it is settled law that a constructive dismissal may still occur even where the employer had not sought resignation and wanted to retain the employee³.

¹ [2022] NZEmpC 40

² At [7] to [10]

³ [2022] NZEmpC 40, at [10]

[38] If there was a breach of duty at all, it was certainly not of such seriousness that it could have been foreseen by WM&S that Ms Penniall would respond by resigning, as in situation (c). Mr Reid was quite surprised by that response. Some forms of conduct may be unreasonable but that is not enough to base a constructive dismissal claim on⁴.

Conclusion

[39] The Authority therefore concludes that Ms Penniall does not have a personal grievance of any kind, whether of unjustified dismissal or disadvantage, and there was no breach of the duty of good faith owed under s 4 of the ER Act.

[40] For completeness, the Authority emphasises that not all breaches of good faith are punishable with a penalty. If there was a breach in this case, it fell well below the requirements under s 4 of the ER Act for it to be deliberate or intentional, or serious and sustained, before any penalty can be imposed for the conduct.

[41] To resolve this employment relationship problem, no orders are required to be made against WM&S.

Costs

[42] WM&S was represented at the investigation meeting by its director Mr Reid. Unless legal costs were incurred by his company there can be no claim for costs, although reasonable expenses, if any, could be claimed.

[43] In the circumstances costs ought perhaps to lie where they fall. If an application is to be made by WM&S for costs or expenses, it must be received by the Authority within 14 days of the date of this determination. Any reply for Ms Penniall must be received within 14 days of any application made.

Alastair Dumbleton
Member of the Employment Relations Authority

⁴ [2022] NZEmpC 40, at [8]