

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2025] NZERA 65  
3286559

BETWEEN

REIHANA MACGREGOR  
Applicant

AND

SOUTHERN FENCING LIMITED  
Respondent

Member of Authority: Peter van Keulen

Representatives: Dave Cain, advocate for the Applicant  
Michael Andrews for the Respondent

Investigation Meeting: 8 October 2024 in Queenstown

Submissions Received: 6 November 2024 from the Applicant  
13 November 2024 from the Respondent

Date of Determination: 13 February 2025

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Reihana Macgregor worked for Southern Fencing Limited in its fencing business for a short time in October and November 2023.

[2] Southern Fencing did not provide Mr Macgregor with an employment agreement and Mr Macgregor commenced work under a trial to see if he was suitable for the role.

[3] Mr Macgregor's employment came to an end after a verbal altercation between him and Micheal Andrews, who runs Southern Fencing's business, on 3 November 2023.

[4] Mr Macgregor says this verbal altercation was a dismissal. Mr Andrews says it was

merely him telling Mr Macgregor to get off his phone whilst he was working, which Mr Macgregor objected to and walked off the job.

### **My investigation**

[5] The employment relationship problem is expressed as being an unjustifiable dismissal and a failure to have a written employment agreement and a failure to meet the bargaining requirements in s 63A of the Employment Relations Act 2000 (the Act). Mr Macgregor seeks remedies for his dismissal and penalties for the employment agreement and bargaining failures.

[6] I investigated this employment relationship problem by reviewing relevant documents and holding an investigation meeting on 8 October 2024 in which I heard oral evidence from Mr Macgregor and Mr Andrews. I also received and reviewed written submissions from the parties' representatives.

[7] As permitted by s 174E of the Act I have not recorded all of the evidence and submissions received, in this determination. I have set out my findings of fact and law, then based on this I have expressed conclusions on the issues as necessary to dispose of the matter, and then I have specified the orders made as a result.

### **What happened?**

[8] In mid-October 2023 Mr Macgregor saw a job vacancy advertised by Southern Fencing and he contacted Mr Andrews to discuss it. Mr Macgregor had no experience in fencing but Mr Andrews was prepared to give him a go to see if he worked out.

[9] Both Mr Andrews and Mr Macgregor agreed that he was employed by Southern Fencing initially on a trial. This was not a formal 90-day trial period as provided for in the Act but rather a trial in practical application; essentially a few days of Mr Macgregor working for Southern Fencing that would turn into full time work if the job was something he could do and wanted to do.

[10] Mr Macgregor says he never received an employment agreement from Southern Fencing.

[11] Mr Andrews says that Southern Fencing would have given Mr Macgregor an employment agreement as his wife takes care of all of those things and she was reliable. Despite this Mr Andrews was unable to provide me with a copy of a draft employment agreement with evidence that it was provided to Mr Macgregor such as an email.

[12] Mr Macgregor started working for Southern Fencing on 24 October 2023. He worked four days that week. First, he worked at Mr Andrew's house for two days and then helped building a fence nearby for the other two days. Mr Macgregor says he enjoyed the work and got on well with Mr Andrews.

[13] Mr Andrews thought Mr Macgregor worked well with the other employee at Southern Fencing. However, he was concerned and annoyed by the amount of time Mr Macgregor spent vaping and on his phone. He spoke to Mr Macgregor and told him not to vape but let the phone use go without mentioning anything.

[14] The next week Southern Fencing had a job constructing retaining walls on a property by Arrowtown. Mr Macgregor worked this week mainly with the other employee of Southern Fencing. That employee told Mr Andrews that Mr Macgregor was on his phone all the time when Mr Andrews was not around or not looking at what he was doing.

[15] The phone use annoyed Mr Andrews and this came to a head at the end of the week on Friday 3 November 2023. Both Mr Andrews and Mr Macgregor were on site, the other employee had the day off and Mr Andrews saw this an opportunity to work closely with Mr Macgregor and see how he was doing.

[16] At one point Mr Andrews was driving a tractor and he saw Mr Macgregor answering his phone.

[17] What happened next is key and heavily disputed between Mr Andrews and Mr Macgregor.

[18] Mr Macgregor says Mr Andrews was in the tractor and he did not have a job to do. He got a phone call which was an important call so he decided to take it. He says that Mr Andrews saw him on the phone and yelled at him to "get the fuck off the phone". He says he then told Mr Andrews it was an important call and he was going to take it and Mr Andrews

responded telling him to fuck off, that people like him never learned and he should have stayed in Invercargill, so he left and walked home. He says he called both his girlfriend and his grandmother telling them he had lost his job and did not know what to do.

[19] Mr Andrews says he saw Mr Macgregor on his phone and shouted at him to get off his phone. Mr Macgregor laughed at him and walked away. Mr Andrews says he then asked Mr Macgregor who he was talking to and he told him it was his girlfriend and that they were discussing the weekend. He left it at that and continued working. Then after about 30 minutes Mr Macgregor was on his phone again so he shouted at him to get off his phone. This time Mr Macgregor laughed at him, got in his car and left work.

[20] On either version of what happened the end result is the same, Mr Macgregor left work and did not return.

[21] Mr Andrews sent Mr Macgregor a message shortly after he had left the work site. It said:

You don't sit on the phone while I'm paying you. I don't take shit.. people like you never learn

[22] Mr Macgregor responded with two messages:

I was in an important phone call

And you yelling at me

[23] The next day Mr Andrews sent another message to Mr Macgregor, saying:

I'm sorry for the way I spoke to you, there's no excuse but last week was really hard at home. I'm willing to give you another go but you can't be talking on your phone at work

[24] Mr Macgregor responded with:

Nah I'm good to be honest don't really want to work for someone like you

And you fired me and now you wanna give me a job back because you realise you've just put more pressure on yourself

[25] In a further exchange of messages that day Mr Macgregor admitted he was on the phone for an hour that day.

[26] Then in another exchange of messages that day Mr Macgregor called Mr Andrews a “piece of shit” and said he was not on his phone at all but rather that he “left as soon as it was a problem” this being a reference to the phone calls being a problem.

[27] There were also some further exchanges of messages in which Mr Macgregor was abusive to Mr Andrews. This was the last exchange of messaging in evidence.

[28] The final piece of the facts is that Southern Fencing paid Mr Macgregor for the time he worked for it and for accrued holiday pay, on 9 November 2023.

## **Analysis**

### *Employment relationship problem*

[29] Put simply Mr Macgregor’s employment relationship problem is that:

- (a) he was dismissed by Southern Fencing through Mr Andrews on 3 November 2023; and
- (b) this was not justifiable?<sup>1</sup>

### *Was Mr Macgregor dismissed?*

[30] The onus of proving there was a dismissal rests with Mr Macgregor.

[31] Dismissal is the termination of employment at the initiative of the employer, being an unequivocal act that amounts to a sending away.<sup>2</sup>

[32] So, my starting point is to establish what was said in the verbal altercation on 3 November 2023 and decide if Mr Macgregor has established that this was an unequivocal sending away.

[33] The oral evidence from Mr Macgregor and Mr Andrews as to what happened on 3 November 2023 is conflicting.

[34] When faced with conflicting evidence I must decide which evidence I prefer based on

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<sup>1</sup> Section 103A of the Employment Relations Act 2000.

<sup>2</sup> *Wellington Clerical Union v Greenwich* [1983] ACJ 965 (AC).

an assessment of credibility. As I have done in the past when assessing credibility, I have relied on the guidance provided by Judge Harding in the District Court in *R v Biddle* that was cited with approval on appeal to the High Court.<sup>3</sup> And I have relied on the guidance from the Employment Court in *Lawson v New Zealand Transport Agency* and *Cornish Truck & Van Limited v Gildenhuys*.<sup>4</sup>

[35] The key aspects of this guidance for this case are consistency of the witnesses' evidence, how plausible the evidence of each witness is and whether there are elements of confirmation bias evident.

[36] Turning first to consistency of Mr Macgregor's evidence:

- (a) Mr Macgregor's messages post altercation present two different scenarios of what occurred: (i) he had been on the phone that morning for an hour, Mr Andrews had yelled at him and fired him; and (ii) he had not been on his phone at all and had left as soon as it became a problem.
- (b) The attitude shown in the messaging responses are not consistent with Mr Macgregor's evidence about leaving. He stands up to Mr Andrews, swears at him and insults him in his messages – this attitude is not consistent with someone who takes off when someone shouts “fuck off” at him.

[37] Then turning to the consistency of Mr Andrews' evidence:

- (a) Mr Andrews evidence was consistent throughout his oral evidence that when he told Mr Macgregor to get off his phone Mr Macgregor laughed at him and left driving away – this evidence seems credible because Mr Andrews was particularly fixated on Mr Macgregor having driven to work when he did not have a licence.
- (b) Mr Andrews denied swearing at Mr Macgregor, saying he did not swear generally as he had young children. Mr Andrews' version of the altercation and Mr Andrews' messages post altercation are inconsistent with his evidence,

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<sup>3</sup> *R v Biddle* [2015] NZDC 8992; and *Biddle v R* [2015] NZHC 2673 at [21].

<sup>4</sup> *Lawson v New Zealand Transport Agency* [2016] NZEmpC 165; and *Cornish Truck & Van Limited v Gildenhuys* [2019] NZEmpC 6.

in particular, “I’m sorry for the way I spoke to you” and “I’m willing to give you another chance”. He explained this by saying Mr Macgregor walked off and I was prepared to give him a chance to return to work.

[38] Assessing the consistency of all of the evidence I conclude that Mr Andrews version of events seems more credible.

[39] Dealing next with the plausibility of the evidence:

- (a) Mr Macgregor’s oral evidence of what occurred did not present a particularly fraught or harsh confrontation. He claims he was told to fuck off but that is the extent of the offensive language.
- (b) That said Mr Andrews was clearly annoyed by Mr Macgregor using his phone during work time – this is clear from his oral evidence and his message immediately after the altercation. So, there is support for the proposition that Mr Andrews yelled at Mr Macgregor, at the very least, inappropriately.
- (c) Mr Macgregor’s evidence was that he could vape and work at the same time so he saw no reason why he could not do that while he was working. With his phone he said that he only used it if he had no work to do. He justified taking the call as it was important but would not tell me in evidence who the call was from or why it was important. Overall, Mr Macgregor had an attitude that he could do as he pleased if he could justify it and he would stand up for that – even in evidence he was somewhat belligerent on this point.

[40] Putting this together it seems that Mr Macgregor’s version of what occurred is less plausible. What I can ascertain from Mr Macgregor’s messaging and oral evidence is that he is more likely to continue doing something he can rationalise as being okay rather than comply with an instruction that does not seem right to him. This does not fit with someone who would take “fuck off” literally as meaning go away you are dismissed.

[41] In contrast what I assess about Mr Andrews is that he wanted to give Mr Macgregor a chance, he was concerned about his attitude and behaviour – particularly in relation to vaping when asked not to and driving when he did not have a licence. However, he could get angry

and did get angry over the phone use, partly because of unrelated circumstances in his family life. So, it is more plausible that he reacted to Mr Macgregor being on the phone by swearing at him but it does not seem plausible that this was enough for him to end the employment relationship.

[42] Overall, I conclude that neither witness is completely reliable, both having confirmation bias presenting as elaboration on some of what occurred and minimisation of other parts of what occurred.

[43] In terms of confirmation bias this manifests in both witnesses:

- (a) In the course of telling either his girlfriend or his grandmother that he had left his job Mr Macgregor and in the context of remembering that Mr Andrews swore at him Mr Macgregor formed a memory of being told to fuck off to support his actions. I do not attribute this being a deliberate falsification but confirmation bias to support his correct view that Mr Andrews was angry and swore at him as well as his incorrect view that Mr Andrews was unreasonable in telling him to get off his phone. This was then reinforced in the re-telling of events and some of the language used by Mr Andrews in the subsequent message exchanges.
- (b) After the events on 3 November 2023 Mr Andrews was contrite and he tried to explain his actions, then apologise for them and resolve everything by getting Mr Macgregor to come back to work, assuming Mr Macgregor had walked off in the heat of the moment – Mr Andrews’ oral evidence supported this view. Mr Andrews subsequently minimised his memory of his own actions in relation to be angry and swearing.

[44] Based on my assessment of consistency, plausibility and probable confirmation basis in terms of both the oral evidence and the various message exchanges this is what I conclude:

- (a) At some point in the morning of 3 November 2023 Mr Andrews saw Mr Macgregor on his phone and yelled at him to get off the phone. When Mr Andrews asked Mr Macgregor what he was doing he was told by

Mr Andrews that he was speaking to his girlfriend.

- (b) Later that morning Mr Andrews saw Mr Macgregor on his phone again and got angry at him. He yelled at him to get off the phone, swearing at him, although I cannot conclude that he used the words “fuck off”.
- (c) Mr Macgregor thought he should be allowed to take the call either because it was important, although I doubt this given the limited evidence on this point, or because he thought he had no work to do and taking a call was acceptable, which I think is the most likely scenario. Either way he decided to continue taking the call.
- (d) Mr Macgregor then walked away from Mr Andrews to continue the call and given the swearing by Mr Andrews, that Mr Andrews was angry at him, and that he thought he had a right to take the call he decided he did not need to put up with that and he left work, driving away in a car.

[45] Based on the evidence and the facts I am able to ascertain, my conclusion is that there was no unequivocal act by Mr Andrews that amounted to a sending away.

#### *Conclusion on dismissal*

[46] Mr Macgregor has failed to establish that he was dismissed by Southern Fencing and as a result his employment relationship problem based on an unjustified dismissal is resolved in favour of Southern Fencing and there is no basis to award Mr Macgregor the remedies that he seeks.

#### **Penalties**

[47] What is clear from the evidence and I conclude is that Southern Fencing did not provide Mr Macgregor with an employment agreement before he commenced work. This is consistent with the agreed nature of employment, being a trial.

[48] It is also clear that Southern Fencing did not discuss with Mr Macgregor his rights in respect of his employment, specifically it did not provide the information required under

s 63A of the Act.

[49] Despite wanting to help Mr Macgregor out and “give him a chance’ Southern Fencing was obligated to deal with the employment relationship formally and meet the requirements of the Act. This is inescapable despite the parties’ intention regarding the “trial” nature of the relationship.

[50] Given that these requirements are fundamental to productive employment relationships the failure to comply means a penalty should be imposed on Southern Fencing.

[51] Having considered the relevant factors in s 133 A of the Act I impose a penalty of \$1,500.00 against Southern Fencing. And given the circumstances of the breaches I consider it appropriate for the penalty to be paid to Mr Macgregor.

### **Conclusion and orders**

[52] Mr Macgregor has not established that he was dismissed by Southern Fencing and as a result the employment relationship problem based on unjustified dismissal is resolved in favour of Southern Fencing. There is no basis to award remedies to Mr Macgregor.

[53] Southern Fencing failed to provide Mr Macgregor with an employment agreement and consequently failed to meet the requirements of s 63A of the Act. I award a penalty against Southern Fencing for these breaches; Southern Fencing Limited is to pay a penalty of \$1,500.00 to Mr Macgregor within 28 days of the date of this determination.

### **Costs**

[54] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[55] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Mr Macgregor may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum Southern Fencing will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be

granted.

[56] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.<sup>5</sup>

Peter van Keulen  
Member of the Employment Relations Authority

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<sup>5</sup> For further information about the factors considered in assessing costs see:  
[www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1)