IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2012] NZERA Auckland 465
5360934

	BETWEEN	PHILLIP MURPHY Applicant
	A N D	MITECH LIMITED Respondent

Member of Authority:	James Crichton
Representatives:	Mark Nutsford, Advocate for Applicant James Turner, Counsel for Respondent
Investigation Meeting:	15 October 2012 at Auckland
Date of Determination:	19 December 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Murphy) alleges that he suffered an unjustified disadvantage and was unjustifiably dismissed by the respondent (Mitech). Mitech resist those claims.

[2] Mr Murphy commenced employment with Mitech as a customer service engineer on 27 August 2007. That employment was covered by the terms of an individual employment agreement dated 13 August 2007.

[3] As part of his duties, Mr Murphy travelled to provide services to clients of Mitech and for that purpose he was allocated a company vehicle.

[4] On 15 April 2011, Mr Murphy was involved in a "nose to tail" car accident on the Auckland motorway from which he suffered mild concussion.

[5] A neurologist stood him down from driving for a three month period and during that time, there were various engagements between Mr Murphy his ACC case manager on the one hand, and Mitech.

[6] Mr Murphy alleges that Mitech prevented his early return to work because of concerns that Mitech had about his "aggressive driving".

[7] Mitech says that it responded appropriately to ongoing concerns of a disciplinary nature about the standard of Mr Murphy's driving. There were a number of previous incidents involving similar facts.

[8] Mitech says that Mr Murphy insisted that he be provided with a company vehicle on his return to work and that he had failed to provide any evidence of his ability to return to work as at 7 October 2011, some six months after the accident.

[9] As a result, Mitech elected to dismiss Mr Murphy following on from a meeting between the parties on 10 October 2011 and that decision was confirmed by letter dated 17 October 2011. A personal grievance was promptly raised thereafter.

Issues

[10] It will be convenient if the Authority considers the following questions:

(a) What were Mr Murphy's obligations to Mitech?

(b) Was Mr Murphy subject to any disadvantage caused by Mitech?

(c) Was Mr Murphy unjustifiably dismissed?

(d) Is Mr Murphy liable for the counterclaim?

What were Mr Murphy's obligations to Mitech?

[11] As the Authority has already noted, there was an individual employment agreement dated 13 August 2007 between these parties and in addition, a "company vehicle policy" applied.

[12] In terms of clause 6.2 of the operative employment agreement, what is referred to as "a service vehicle" may be provided to the employee and in terms of clause 20 of the same employment agreement, the parties agree that Mitech has the right to

determine policies and procedures from time to time, agree that they form part of the bargain between the parties, and give Mitech the opportunity to make changes "at any time".

[13] In terms of the position description attached to the employment agreement and forming part of it, one of the specific objectives is simply "no accidents".

[14] A document entitled Standard Operating Procedure Company Vehicle Policy provides under the subheading Misuse of Company Cars that misuse or careless handling "*may lead to termination of the Company Car facility. In addition, any misuse may result in termination of your employment with the company"*.

[15] In respect to insurance matters for company vehicles, the following provision applies:

> *Where any excess is unable to be recovered from a third party, the company may at its discretion forward a charge to the employee if in its opinion the employee was negligent.*

[16] In terms of the contractual relationship between the parties then, Mr Murphy had accepted a company vehicle as part of the terms of his engagement, it being necessary for him to attend to his obligations to Mitech, and he had accepted as part and parcel of that commitment, an obligation to abide by the relevant Mitech policies. Those policies include an aspirational goal in the job description of "no accidents", together with a general provision in the company vehicle policy confirming that misuse or careless handling of the subject vehicle could lead to the termination of the right to use the vehicle and potentially to the termination of the employment as well.

[17] Further and finally, in relation to the counterclaim brought by Mitech against Mr Murphy, there is a contractual underpinning for that claim in the company vehicle policy in that it specifically provides for a discretion on the part of Mitech to seek recovery of the insurance excess on a vehicle in circumstances where that excess is unable to be recovered from a third party.

[18] Moreover, although there is common ground about previous incidents in which Mitech was concerned about Mr Murphy's driver behaviour, there is argument around the dates on which some of these events are supposed to have happened. The first of these events (in time) happened in Silverdale. Mr Murphy said this event happened in mid-2008 but that is inconsistent with Mitech's file note on the subject

which is dated 11 February 2010 and which relates to an incident that occurred on the day before, 10 February 2010. Although nothing turns on which date is the correct one, for the avoidance of doubt, the Authority prefers Mitech's recollection of events. It seems inconceivable that it would take the trouble to produce a file note on the subject unless the file note was accurate. The Authority might have reached a different conclusion if there had been no file note and the parties were simply each of them talking from recollection.

[19] In any event, the outcome was a verbal warning for Mr Murphy with the annotation that any repeat would result in an escalation of the warning process.

[20] Because Mitech relies, to some extent, on similar fact evidence, it is important for the Authority to note that this was an incident reported by a member of the public who rang Mitech to complain about what the complainant described as *"reckless and potentially dangerous*" driving. Mr Murphy acknowledged that it was him driving but denied the allegation of reckless and/or dangerous driving. Mitech indicated in response that "*any complaint made by a member of the public was a serious breach of the company policy and would not be tolerated should it be repeated"*.

[21] On 6 October 2010, a final written warning was issued to Mr Murphy in respect to an incident that happened the previous afternoon, 5 October 2010. A member of the public had rung Mitech to complain about the standard of driving of a person in a *"branded company vehicle"* driving in *"an aggressive and dangerous manner on the northern motorway between Albany and Silverdale"*.

[22] The complainant was sufficiently concerned about the behaviour to follow the subject vehicle and confront the driver. The driver refused to accept responsibility and allegedly abused the complainant.

[23] Mr Murphy had acknowledged that it was he that was driving the vehicle at the relevant time but he denied to Mitech that his driving was in any way inappropriate.

[24] Mitech, in its disciplinary warning letter, makes the point in clear terms that it has obligations to the public and to Mr Murphy himself to say nothing of the reputation of Mitech as a business, and that Mr Murphy's driving behaviour was

potentially compromising those obligations. Other incidents (not all of them accepted by Mr Murphy) were also referred to in the letter.

[25] The letter continued with the following observations:

> Mr Murphy *... reluctantly conceded that while not necessarily agreeing that you have any driving behavioural issues, the weight of evidence suggests you may have to address these perceptions as driving is an integral part of your job.*
>
> *We expressed that your safety and that of the public was our main priority and continuation of your reckless driving behaviour is likely to lead to a serious accident.*

[26] And the conclusion of the letter could not have been more pointed:

> *We further advise you that unsafe driving is a serious breach of your employment agreement in relation to both the OH&S provisions and the implication on the company's reputation. You are advised that in consideration of the prior incidents and verbal warnings, any further driving incidents will result in immediate and permanent removal of your access to a company vehicle and disciplinary action that may include the termination of your employment by the company.*

[27] That last referred to provision is paramount in understanding Mitech's position in this matter because it is in essence the justification for its dismissal of Mr Murphy some twelve months later. Mitech's position is that it was dealing with a continuing of behaviour which went to the heart of the employment relationship and which, notwithstanding its previous attempts to control, had continued without obvious modification.

[28] To put that last assessment into a factual context then, the accident which Mr Murphy was involved with in a company vehicle on 15 April 2011 resulted in a memorandum from Mitech to Mr Murphy dated 18 April 2011 wherein the operative provision is as follows:

> *... we believe it is not reasonable to allow you to drive a Mitech vehicle while we investigate fully the nature and reason for the crash. We will provide you with workshop activities so that you may continue with your role while the investigation is undertaken. We require you to arrange alternative transportation for yourself to and from Mitech's premises. Any work activity to be undertaken off site will be under the conditions that you are driven to and from the customer's premises by another driver.*

[29] For the sake of completeness, the Authority notes that the vehicle being driven by Mr Murphy and belonging to Mitech was declared to be a total loss by Mitech's insurers. Further, Mitech was advised that as Mr Murphy appeared to be completely responsible for the accident, there was a $500 excess to be paid by Mitech to the insurer in respect to the total loss of the vehicle.

Was Mr Murphy subjected to disadvantage by Mitech?

[30] At the investigation meeting, Mr Murphy maintained that the disadvantage that he suffered was by reason of Mitech's refusal to allow him to return to work under any circumstances. The companion claim, that by refusing to restore to him the company vehicle, Mitech also created a disadvantage, was given less emphasis at the investigation meeting although both of them are referred to extensively in Mr Murphy's closing submissions. For the avoidance of doubt, both allegations are dealt with in this section of the determination.

[31] It is trite law that in order for an unjustified dismissal to be found, there must be both proved disadvantage to the claimant as well as robust evidence of the unjustified action causative of the disadvantage. If there is no evidence of disadvantage, no causal link, or the absence of an unjustified action then the claim must fail.

[32] Here, Mr Murphy alleges unjustified disadvantage both in the alleged refusal of Mitech to allow him to return to work and in the alleged refusal of Mitech to return the company vehicle to him.

[33] Dealing with the second of those claims first, it is the case that Mitech withheld the company vehicle. As the Authority has already noted, that decision was notified to Mr Murphy by memorandum dated 18 April 2011 wherein Mitech indicated its belief that it was not reasonable for Mr Murphy to be allowed to drive a Mitech vehicle while the nature and reason for the crash he was involved with on 15 April 2011 was fully investigated.

[34] On the face of it, the removal of the company vehicle would constitute a disadvantage in relation to Mr Murphy's employment. Furthermore, it is apparent on its face that the removal of a Mitech car was a decision taken by Mitech itself and is thus causative of the disadvantage.

[35] However, the Authority is satisfied that Mitech's decision to remove the car was a justified decision in terms of s.103A of the Employment Relations Act 2000 (the Act). That test requires the Authority to make a judgment as to whether a fair and reasonable employer could have concluded that the action complained of was the appropriate action to take. It is not mandated that that action be the only action that the employer could take; only that it is one of the possible outcomes that a fair and reasonable employer could contemplate.

[36] In the particular circumstances of this case, where there has, by common consent, been a history of driving issues perpetrated by Mr Murphy in company vehicles, where in particular there has been a final written warning dated 6 October 2010 including the injunction that further driving incidents would result in immediate and permanent removal of the company vehicle and the final incident itself on 15 April 2011 when the company vehicle was written off as a consequence of Mr Murphy's driving behaviour, it is difficult to see how Mitech's decision can be unjustified.

[37] In the first place, Mitech has the contractual right to withdraw the vehicle as a previous section of this determination makes clear.

[38] Second, the reason for Mitech taking the decision it did was because of the context that Mr Murphy had been subject to previous complaints about his driving behaviour, two of which had resulted in warnings, the last of which was a final written warning making it absolutely explicit that if there was a repeat of the behaviour complained of, the consequence would be the loss of the company vehicle. When there was a further "driving incident" (to use the language from the written warning of 6 October 2010), when Mr Murphy wrote off the company vehicle on 15 April 2011, Mitech immediately withdrew access to a company vehicle pending further inquiries.

[39] Third, Mitech relies on its obligation as employer to provide a safe workplace and to insist on safe work practices.

[40] It follows from the foregoing analysis, that the Authority is not persuaded that Mitech can be criticised for removing access to a company vehicle immediately after the 15 April 2011 crash.

[41] The wider issue of the return of the company vehicle going forward is bound up with the parties' disagreement about when and if Mr Murphy could return to duty

and it is that wider aspect that is considered next. In essence, Mr Murphy contends that he has an unjustified disadvantage because of the alleged refusal of Mitech to allow him to return to duty "under any circumstances". Again, it is helpful to analyse the claim under its three components, whether there was a disadvantage, whether the disadvantage was caused by Mitech and whether the action effecting the disadvantage was an unjustified one or not.

[42] While much of the factual matrix around the return to work and the unjustified dismissal claim traverse the same elements, it is convenient to briefly sketch the relevant factors relating to the unjustified disadvantage claim here.

[43] As a starting point, it is appropriate to note that Mitech denies that it refused to allow Mr Murphy to return to duty and indeed its contention is that throughout the period from the 15 April 2011 accident down to the termination of the employment in October 2011, it actively sought a basis for Mr Murphy to return to duty, undertook a number of meetings with Mr Murphy's advisers including ACC, but was never provided with any evidence (until 10 days before the dismissal) that Mr Murphy was medically able to return to duty. Mr Murphy protests that that information was available sooner than it was first seen by Mitech and would have been provided earlier to Mitech if it had specifically asked for it.

[44] The first salient fact in the consideration of this issue is that in its memorandum to Mr Murphy on 18 April 2011, Mitech made it plain that while the car was withdrawn, Mitech:

> *… will provide you with workshop activities so that you may continue with your role while the investigation (into the accident) is undertaken. … Any work activity to be undertaken off site will be under the conditions that you are driven to and from customers' premises by another driver.*

[45] Clearly on the basis of the foregoing statement from the 18 April 2011 memorandum, Mitech was contemplating that Mr Murphy would return to duty as soon as he was fit to do so but would work from its workshop premises rather than on the road. It is difficult to construe this passage from the 18 April 2011 memorandum as anything other than the clearest statement that Mitech expected Mr Murphy to return to duty when he was able. Because Mr Murphy had been concussed in the car accident, a neurologist assessed him as being unfit to drive again for a three month period. But if he had been cleared to return to work, and the employer had been told

of that clearance, there was nothing to prevent him from returning to work in the workshop. That was what the passage from the memorandum of 18 April 2011 contemplated.

[46] But it became clear to the Authority during the investigation meeting that the real issue which prevented Mr Murphy's return to duty was his apparent inability to get into the office without the use of a company vehicle. Even on Mr Murphy's own evidence to the Authority, the issue was not the refusal of Mitech to have him back to work in the workshop but rather his reluctance or inability to find alternative means of getting to work. At para.44 of Mr Murphy's brief of evidence he describes calling work to explain that he would not be at work for at least three months as he was unable to drive and he then goes on to say:

> *James* [Mr Cato, a director of Mitech] *was not happy that I would not be coming into the office to work in the workshop but as I live in a rural area with no public transport I was unable to get into the office even when I recovered from the concussion.*

[47] So on the face of it, even Mr Murphy accepts that Mitech wanted him to return to duty and the issue was his inability to get in to the office.

[48] Of course, the position during the period that Mr Murphy is unable to drive at all can be contrasted with the period after he is cleared to drive again. During that first period, unless Mr Murphy was able to get a lift with somebody to come into the office, transport to and from work would be difficult. Conversely, once he is able to drive again, whether or not the employer has satisfied itself that he is safe to drive its vehicle again, Mr Murphy could have attended at work but in order to do that he would have had to have his own transport, which he said he did not have.

[49] The short point is that, either way, Mitech cannot be held responsible for events it did not cause. It was outside of Mitech's control that Mr Murphy lived in a rural location without public transport; there is no contractual duty on Mitech to provide transport to and from work for employees, nor should the Authority impose one. Once Mr Murphy was cleared to be able to drive again, arguably he had an obligation to find his own way to the workplace but there is no evidence before the Authority that he did that.

[50] In the ACC progress report dated 7 July 2011, it is made clear that Mr Murphy will be able to drive from 15 July 2011, provided he is cleared to do so by his doctors.

It is apparent that further tests were still being conducted at the point that report was written. Furthermore, the report indicates that if Mr Murphy was cleared by the neurologist, *"... it would be up to the Land Transport Authority to make a decision regarding Phillip's return to driving ..."* thereafter.

[51] However, whatever that document said, it was not provided to Mitech until fully three months after it was written, on 7 October 2011. It follows that as a source of information for the employer, it cannot be treated as being a realistic part of the factual matrix because it was effectively provided so long after it was written as to be of little use. As the Authority has already noted, Mr Murphy alleges that Mitech ought to have asked for this material; but that presupposes it knew of its existence and the evidence before the Authority suggests that Mitech was, not surprisingly, unfamiliar with an employee in this kind of situation and simply not experienced in dealing with just this sort of situation.

[52] It should have been apparent to Mr Murphy that he had an obligation in good faith to provide the material to the employer as soon as it became available. The 7 July 2011 report is not unique; none of the material written about Mr Murphy during the period of his recuperation from injury was provided to Mitech in a timely manner.

[53] During Mr Murphy's recuperation from the ill effects of the accident, there was a succession of meetings between Mitech and Mr Murphy and/or his advisers. The first of these meetings took place on 24 May 2011 and the documentation before the Authority includes a letter from Mr Cato to Mr Murphy in which the author, amongst other things, indicates that the purpose of the 24 May 2011 meeting was to *"... determine under what capacity you may be able to resume work with Mitech"*.

[54] Mr Murphy makes the claim that he was ready and able to return to work at this stage, but was prevented from doing so because of each occasion that a return to work was discussed, Mitech *"brought in the subject of the vehicle and the meeting would deteriorate"*. But that claim cannot be right. On the evidence which Mitech finally saw on 7 October 2011, at this point, Mr Murphy was still quite unwell and certainly not able to work.

[55] In any event, Mitech was entitled to raise the question of the vehicle. It signalled its clear intention to try to understand the causes of the 15 April 2011 accident when it sent its memorandum to Mr Murphy on 18 April 2011. That

determination never wavered and Mitech, throughout the whole period under discussion, always sought to see if Mr Murphy had remembered any particulars from the accident. It seems that Mitech finally accepted that Mr Murphy was not going to remember anything fresh at the meeting between the parties on 10 October 2011 when Ms Stone (Mr Murphy's then counsel) made it absolutely plain that Mr Murphy was not going to remember anything fresh.

[56] In the closing submissions for Mr Murphy, there is criticism of Mitech's insistence on investigating the accident and persevering with its wish to do that. But that is unremarkable, in the Authority's view. Mr Murphy had successfully written off a company vehicle and had been unable to explain to Mitech how that happened. That Mitech should continue to want to understand the reasons for the accident seems to the Authority quite unremarkable, particularly because of Mr Murphy's insistence that he should be given a further company vehicle to drive.

[57] The first meeting on 24 May 2011 was a meeting between the occupational therapist and Mitech. Mr Murphy did not attend. The evidence before the Authority suggests that Mitech made genuine efforts to assist the occupational therapist to facilitate Mr Murphy's return to duty. The evidence does not disclose that Mitech derived any material intelligence about Mr Murphy's condition from this meeting.

[58] A second meeting between the parties at which Mr Murphy was present took place on 5 July 2011. Although Mr Murphy does not comment on this meeting at all in his evidence before the Authority, Mr Cato provides his recollections of it in his brief of evidence. The impression the Authority gets from assessing that evidence is that Mr Murphy presented as being still quite unwell and according to Mr Cato, Mr Murphy said that he was not able to return to duties, was suffering from fatigue and could not concentrate for more than 20 minutes at a time. Mr Cato also indicated that Mr Murphy demanded that he be provided with another company vehicle prior to any return to work and that the meeting came to an abrupt halt when Mr Murphy stormed out.

[59] On 22 July 2011, Mr Cato was advised by an internal email that Mr Murphy was now cleared to drive and that there was a further request for a meeting with Mitech from the occupational therapist. This email is relied upon in closing submissions from Mr Murphy because it refers to the occupational therapist being advised about the inherent dangers of Mitech's workplace and the continuing

company investigation into the causes of the accident. It is suggested that these aspects go to prove that Mitech was putting obstacles in the way of Mr Murphy's return.

[60] But as the Authority has already observed, Mitech was entitled to conduct an investigation into a serious accident which left a staff member unwell for a significant period of time and wrote off one of its vehicles. Mitech would have been negligent if it had not taken an avid interest in trying to find out what went wrong. Furthermore, if the workplace is dangerous, or has particular demands, it is appropriate that the occupational therapist working with Mr Murphy is aware of the potential hazards he would face.

[61] A third meeting took place on 2 August 2011 and Mitech's evidence is that it made it clear that it wanted Mr Murphy working in the workshop. As was foreshadowed in the earlier email just referred to, there was discussion about the particular hazards of the workplace and confirmation that Mitech wanted to understand the reasons for the accident. Mitech described Mr Murphy's behaviour at this 2 August meeting as *"antagonistic and abusive"*. Mr Murphy counters by saying that Mr Cato was *"very aggressive"* and Mr Murphy's evidence is that he was unable to elicit from Mr Cato any intimation about when Mitech's investigation into the accident would ever be completed. Whichever version of this meeting is to be preferred, it is clear to the Authority that the meeting was intemperate and unpleasant, as the ACC report on the meeting and the occupational therapists email on it, confirm.

[62] The email from the occupational therapist of 3 August 2011 also made clear her understanding of Mitech's position on the return of a company vehicle in the following terms:

> *Phillip's employers made it clear that a car would not be available to him on his return, until he had met requirements that he was safe to drive, this was not from an injury perspective as although Phillip has been cleared to drive medically, pre injury there were concerns regarding Phillip's aggressive driving behaviour. Phillip was aware that if there were any further instances of aggressive driving reported that he would lose his vehicle. As it cannot be ruled out that Phillip's accident was not the result of aggressive driving and given the fact that Phillip reported that he was feeling frustrated with delays in traffic prior to his accident his employers have decided to reinforce this.*

[63] Following on from that rather unsatisfactory meeting, there were further exchanges between Mr Ayson for Mitech and the occupational therapist. Importantly for the Authority's purposes is an email dated 2 September 2011 from Mr Ayson to the occupational therapist in which he confirms that workshop work will be available on a week by week basis (depending on need) after the occupational therapist had indicated that Mr Murphy had arranged transport to and from work on Tuesdays and Thursdays. That the employer would clearly contemplate the sort of arrangement being explored by the occupational therapist rather gives the lie to the contention made on Mr Murphy's behalf that the employer had closed its mind to the prospect of him returning to the workplace. This email is evidence for the view that the employer was doing its best to accommodate Mr Murphy's circumstances, as best it could.

[64] But while ACC and the occupational therapist are working apparently collaboratively with Mitech to achieve a return to work for Mr Murphy, Mr Murphy's own efforts still seem to focus on the issue of the company vehicle. He had rung Mr Ayson on 7 September asking *"for an update on his vehicle status"* and according to Mr Ayson there was a follow up telephone discussion on 13 September which culminated in a suggestion from Mr Ayson that the parties meet on 15 September. That meeting did not take place but Mr Murphy did email Mr Ayson on 14 September and according to Mr Ayson also telephoned Mr Ayson and *"verbally abused"* him. Again, the focus of Mr Murphy's attention was Mitech's alleged refusal to complete its investigation in relation to the accident and the consequences of that refusal on Mr Murphy's access to company transport.

[65] The Authority is not persuaded that the evidence before it discloses a refusal by Mitech to allow Mr Murphy to return to the workplace. To the contrary, the evidence suggests growing frustration from Mitech about the paucity of information it was being provided with, the continuing difficulty about engaging appropriately with Mr Murphy in the various meetings that were held and his apparent refusal to see beyond the issue of the provision of another Mitech vehicle. Moreover, when Mr Murphy personally is taken out of the negotiations, there is evidence that Mitech made some progress in agreeing a basis for a return to work, as detailed above.

[66] The summary position for the Authority in relation to this second disadvantage grievance claim is that the evidence discloses that the failure of Mr Murphy to return to duty might well have been a disadvantage for him, but it was neither caused by

Mitech nor was it guilty of unjustified actions. In fact, the Authority's considered view is that the proximate cause of the failure of Mr Murphy to return to duty promptly after his health was restored was the failure to keep Mitech properly and adequately informed of the medical progress that he was making and his dogmatic insistence that Mitech had to provide him with another vehicle.

[67] It seems to the Authority plain that Mr Murphy had obligations of good faith to provide to the employer as soon as they were available each and every medical report or ACC or occupational therapy document which assisted the employer to get a full picture of his progress. In fact none of that material was provided in a timely fashion so that the employer was left in the dark about the progress that he was actually making. Mr Murphy does himself little credit by arguing that the material would have been provided if it had been asked for. Mitech says, and the Authority accepts, that it was inexperienced in these matters and had never dealt with such an issue before. As a consequence, it did not know what it ought to be asking for, and that is a perfectly reasonable position to take.

[68] Mr Murphy also claims that Mitech was obsessed about its investigation into the causes of the accident, but given the circumstances, it is difficult to see why it would not be. He was insisting on the provision of another work vehicle despite the conclusion which Mitech had reached, apparently with some in principle support from ACC and the occupational therapist, that there were potential problems about Mr Murphy's driving which had yet to be addressed, to say nothing of the destruction of a company asset worth $40,000.

[69] If Mr Murphy had adopted a more conciliatory approach with Mitech, accepted that there might be issues in respect to his driving, sought a collaborative approach to that with the employer and confirmed that he was unable to offer anything further to it in relation to its inquiries into the accident, Mitech might well have adopted a different stance.

[70] But given the approach that Mr Murphy took to the matter, it seems to the Authority inevitable that Mitech would insist on trying to get an understanding of whether the 15 April 2011 accident was caused by Mr Murphy's driving behaviour (as evidenced by the context and previous incidents) or whether it was genuinely an accident.

[71] In summary then, the Authority is not satisfied that Mr Murphy has successfully demonstrated that he has suffered a disadvantage of any kind through any unjustified action of Mitech.

Was Mr Murphy unjustifiably dismissed?

[72] The Authority is not satisfied that Mr Murphy has been unjustifiably dismissed from his employment. The Authority's conclusion is that the dismissal was a dismissal that a fair and reasonable employer could have made in the particular circumstances of the case. Mr Murphy had crashed Mitech's vehicle and completely written it off. He had done that in the context of continuing concerns by his employer about his previous driving behaviour which had itself resulted in two previous warnings. Those previous warnings were properly documented and were themselves issued in the context of very clear contractual obligations about appropriate driving behaviour and the consequences of failure in that regard.

[73] Immediately after the accident in which the Mitech vehicle was written off, Mitech indicated in writing to Mr Murphy that it was unreasonable for him to continue driving a Mitech vehicle until the employer had completed its investigation into *"the nature and reason for the crash"*.

[74] Mr Murphy has been critical of Mitech's insistence on conducting that inquiry to the best of its ability but of course he overlooks the fact that the law requires Mitech to conduct an investigation into such matters, particularly where they have a potential disciplinary consequence, as this one did. Mitech would have been failing in its duty if it had not conducted inquiries into the accident, given that the accident itself formed a significant building block in Mitech's response to Mr Murphy in an employment context.

[75] Those inquiries by Mitech included taking account of the Police inquiry into the accident and the result of it, speaking with the other driver who Mr Murphy ran into, and giving Mr Murphy the opportunity of engaging with Mitech about the cause and surrounding circumstances of the accident.

[76] In fact, Mitech gave Mr Murphy an inordinately long time to engage with his employer on that subject; in the result, it became apparent that Mr Murphy could remember nothing useful about the circumstances of the accident, presumably because

of his head injury, and so his input into Mitech's investigation was limited by that fact.

[77] Notwithstanding Mr Murphy's failure to assist the employer with its inquiries, Mitech would have been failing in its duty if it had not given Mr Murphy a proper opportunity to be heard. A failure to do that would have resulted in criticism of Mitech's process. What it did, in fact, was allow time to pass after the accident, in the hope that Mr Murphy's recollection of the events might improve. In the result, it did not and by September 2011, some five months after the accident, Mitech felt able to try to bring matters to an appropriate conclusion.

[78] Indeed, it seems that it was Mr Murphy himself who precipitated the determination of the matter by Mitech when he pursued Mr Ayson for information on *"an update on his vehicle status"*. Mr Ayson's evidence for Mitech (which the Authority has no reason to disbelieve) was that Mr Murphy had abused him for the alleged refusal of Mitech to complete its investigation into the circumstances surrounding the crash. But all Mitech was doing was waiting in the hope that Mr Murphy would remember something of use so that he could himself have input into the employer's investigation.

[79] Mr Ayson invited Mr Murphy to attend a meeting on 15 September 2011 to progress the employer's investigation into the 15 April 2011 accident. Notification of that meeting was confirmed to Mr Murphy in writing and it is Mr Ayson's evidence (again accepted by the Authority) that Mr Murphy refused to attend the meeting and indicated that he would only have future dealings with Mitech in writing.

[80] In those circumstances, it is difficult to see what else Mitech could do to obtain information from Mr Murphy to inform its investigation into the accident. Mitech resolved to persevere with the meeting, notwithstanding that Mr Murphy had chosen not to involve himself, and gave Mr Murphy one final opportunity to attend by asking him via email to reconsider his refusal to participate. Mr Murphy did not attend and the meeting proceeded on 28 September 2011. That meeting was to consider the question of whether the cause of the 15 April 2011 accident could be discerned. In the result, the conclusion reached by Mitech was that the crash was due to Mr Murphy's driving.

[81] Mr Murphy then indicated to Mitech that he wished to meet assisted by his solicitor and that meeting took place on 10 October 2011. The Authority has been provided with a transcript of that meeting which was not available at its investigation meeting. The transcript has been provided after the hearing and both parties have been given an opportunity to provide any submissions they see fit as part of their concluding submissions.

[82] It is clear from a reading of the transcript of that 10 October 2011 meeting that Ms Stone, Mr Murphy's then counsel, used her best endeavours to persuade Mitech that it should allow Mr Murphy to return to duty, initially on a part time trial basis for two weeks but then potentially full time thereafter, perhaps driving his own vehicle but appropriately branded with Mitech's insignia. Ms Stone made it clear to Mitech in her observations at the meeting, and in the evidence she subsequently gave to the Authority, that her focus was on getting Mr Murphy back to work and that focus is amply demonstrated by a reading of the transcript of the meeting.

[83] Conversely, Mitech had a number of reservations about the prospect of Mr Murphy returning to duty even on the basis proposed. First and most important was its concern around his driving record, even if he was not driving a company vehicle. Second, given the significant ill health he had suffered following the accident, Mitech was concerned about the potential need to check Mr Murphy's work and the logistics of doing that given that he was employed, as it were, on the road in customers' businesses. Third, Mr Murphy had in a variety of telephone communications indicated he did not wish to work for Mitech and/or that staff who remained working for Mitech deserved a better employer than they had.

[84] Following on from that meeting, Mitech decided to terminate Mr Murphy's employment. That decision was conveyed in Mitech's letter of 17 October 2011 which, in a detailed and measured way, sets out the nature of Mitech's process and the reasons for the conclusion it reached. The essence of the decision to dismiss is contained in the following paragraph:

> *As a result of your lack of any explanation for the serious accident causing the loss of the car to the company and damage to the victim's car, and your prior warnings regarding company car use, the company considers the matter to be a case of continual misconduct by you. The company has lost the necessary trust and confidence in you as an employee, and your ability to represent the company and carry*

> *out the tasks required of you in the role in which you were employed to do.*

[85] The letter continues with the analysis of the timing for Mr Murphy's potential return to duty and notes that he had made the claim during the 10 October 2011 meeting that he had been able to return to work for the last 2½ months and that the company had been *"at fault"* in preventing that. But as the letter recites, Mitech was never advised that Mr Murphy was able to return to work over that period of time and indeed it was not until the 10 October 2011 meeting that it was agreed between the parties that Mitech would receive all of the medical evidence on Mr Murphy's health.

[86] The Authority is persuaded then that Mitech has conducted a proper inquiry into the disciplinary circumstances that are at the centre of the allegations against Mr Murphy and that it did this in the context of what, to use Mitech's own phrase, amounted to *"continual misconduct"*. At the time that Mr Murphy crashed the company vehicle on 15 April 2011 causing it to be written off, he was on a final written warning for the same kind of default and that final written warning was expressed on the explicit basis that any further defaults:

> *"... will result in immediate and permanent removal of your access to a company vehicle and disciplinary action that may include the termination of your employment by the company.*

[87] What is more, the operative employment agreement included terms and conditions relating to the company's disciplinary policy which operated on the standard three warning basis, a verbal warning followed by a final written warning followed by a dismissal. That warning tree was followed by Mitech during its engagement with Mr Murphy.

[88] Looked at exclusively in its own context, given the employer's developing concern about Mr Murphy's driving behaviour, the escalating warnings about that behaviour (all properly documented and explicit), it is difficult to see how Mr Murphy can sustain an argument that the dismissal is unjustified.

[89] Mr Murphy's criticism appears, on its face, to be based on the contention that Mitech ought to have concluded its inquiries into the 15 April 2011 accident more quickly. But Mitech was waiting in the hope that Mr Murphy might remember something of the accident which would go some way to perhaps exonerating him from

blame. Furthermore, it seems difficult to be critical of Mitech when, whenever the parties met, the engagement seemed to degenerate. Furthermore, Mitech maintains in its evidence that all Mr Murphy was interested in was the return of a company vehicle; this was his real interest, so it is alleged, and not the conclusion of the company's investigation at all.

[90] Whether that point is accepted or not, it is certainly the case that everything before the Authority, including the transcript provided at the eleventh hour, suggests that Mr Murphy's enthusiasm for intemperate language, allegations of lack of integrity and the like, have done him little service. As Mitech observes in its closing submissions, if Mr Murphy had adopted a conciliatory approach to Mitech and sought to assist it in its inquiries rather than hinder it, he might well have got a far better result.

Is Mr Murphy liable for the counterclaim?

[91] The Authority has no hesitation in concluding that Mr Murphy is liable for the counterclaim. Indeed, Mr Murphy's own evidence on the point was that if he had been asked to pay the excess on the insurance policy prior to the investigation meeting, he would have paid up, as he acknowledged that it was part of the terms and conditions of his employment.

[92] The matter is straightforward and Mr Murphy will be directed to pay to Mitech the sum of $500 in satisfaction of his obligations pursuant to the terms of his employment.

Determination

[93] For reasons traversed in the foregoing sections of this determination, Mr Murphy's claim fails in its entirety and Mitech's counterclaim for $500 is successful.

[94] Mr Murphy is to pay to Mitech the sum of $500 in satisfaction of his obligations under the terms of his employment agreement.

Costs

[95] Costs are reserved.

James Crichton
Member of the Employment Relations Authority