

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 423
3060673

BETWEEN TIANARA SCHUSTER
Applicant

AND PACIFIC AUTO PARTS
LIMITED
Respondent

Member of Authority: Trish MacKinnon

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

Investigation Meeting: 14 July 2020 at Dunedin

Submissions [and further 17 July 2020 and 4 August 2020 from the Applicant
Information] Received: 24 July 2020 from the Respondent

Date of Determination: 30 September 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Tianara Schuster was employed by the Respondent as a parts dispatcher/auto-dismantler from May to December 2018. Mr Schuster claims he was unjustifiably dismissed on 13 December 2018 and he seeks remedies for the personal grievance he raised with his employer on 17 January 2019.

[2] Pacific Auto Parts Limited ("Pacific" or "the company") denies dismissing Mr Schuster. The Managing Director, and sole director, of the company, Omid Rahimi (also known as Adam Rahimi), says Mr Schuster freely and voluntarily resigned and there was no dismissal.

[3] The parties attended mediation but were unable to resolve the matter.

The Authority's Investigation

[4] In accordance with s 174E of the Employment Relations Act 2000 (the Act) I have set out the material facts and made findings on issues relevant to the determination of Mr Schuster's claims. I have not however set out a record of all the evidence received and nor have I recorded all submissions made by the parties.

[5] This determination has been issued outside the timeframe set out at s 174C(3) of the Employment Relations Act 2000 (the Act) in circumstances the Chief of the Authority has decided, as he is permitted by s 174C(4) to do, are exceptional.

Relevant background and the parties' perspectives

[1] Mr Schuster's employment with Pacific appeared to have been unremarkable in the first few months but there was some growing dissatisfaction on both sides in the latter stages. Mr Schuster itemised some concerns to the Authority that he had not raised as personal grievances, but as background information regarding the employment relationship. From his perspective they set the context within which his claim to have been unjustifiably dismissed occurred.

[2] Mr Schuster's concerns included his claim to have been verbally abused by his employer on a regular basis. Mr Rahimi denied this but acknowledged that in a blue collar workplace there is a lot of banter and swearing. He said none of that was specific to Mr Schuster.

[3] For his part, Mr Rahimi had some minor concerns over Mr Schuster's time management but no serious concerns until, by his account, Mr Schuster started displaying aggression and negativity towards him and other employees.

[4] On 23 October 2018, an incident occurred while Mr Schuster was helping Mr Rahimi unload a container. The facts of the incident are disputed but the result was that Mr Schuster sustained an injury which he attributed to Mr Rahimi's carelessness, and which required him to take three days off work.

[5] The same day, shortly after the incident, Mr Schuster swore at Mr Rahimi, in front of others in the workplace office, telling Mr Rahimi he wanted to "smash" him. Mr Rahimi asked Mr Schuster to leave the premises and Mr Schuster left for the day. Mr Schuster acknowledged he had used that language to Mr Rahimi and said he thought it better that he used words rather than actions to express his anger.

[6] Four weeks later, on 20 November 2018, Mr Schuster, who had continued to work since the incident, resigned from his employment giving three weeks' notice.

[7] Mr Rahimi's evidence was that he accepted the resignation, which he said was in writing on a torn out piece of notebook paper that was left on his computer keyboard. He began advertising immediately for a replacement for Mr Schuster.

[8] The parties' evidence of what happened after Mr Schuster resigned is disputed and will be canvassed below.

[9] On 13 December, Mr Schuster's evidence is that Mr Rahimi introduced him to a new employee and asked him to train him that day. Mr Rahimi advised Mr Schuster that was his last day of employment.

Issues

[10] The main issues for determination are:

- (a) Whether Mr Schuster withdrew his resignation; and, if so
- (b) Whether Pacific agreed to the withdrawal of the resignation.
- (c) Alternatively, whether Pacific asked Mr Schuster to stay on in his employment following his resignation of 20 November 2018.
- (d) Whether Pacific unjustifiably dismissed Mr Schuster on 13 December 2018.

[11] Issues of remedies and contribution will also arise if Mr Schuster is successful in his personal grievance.

Was Mr Schuster's resignation withdrawn?

[12] There is no dispute that Mr Schuster resigned in writing, giving three weeks' notice. Under the terms of his IEA he was required to give four weeks' notice, but Mr Rahimi did

not raise an issue over this: he said he was happy to accept the three weeks. Mr Rahimi said the resignation, which he was unable to find when asked for a copy, did not provide a date for Mr Schuster's last day of work.

[13] Zara Russell, Pacific's Accounts Administrator/Manager, told the Authority she recalled Mr Rahimi telling her of the resignation. Ms Russell said she was not surprised by that news as Mr Schuster had also told her that he had given notice and had said he had several interviews lined up for higher paying jobs.

[14] Mr Rahimi and Mr Schuster gave different versions of what happened after that. Mr Schuster's evidence was that Mr Rahimi was upset that he had resigned. He said his employer had talked with a family member of Mr Schuster's partner after which, according to Mr Schuster, Mr Rahimi asked him to stay on in employment. Mr Schuster said he decided to give Mr Rahimi a second chance and withdrew his resignation.

[15] Mr Rahimi's evidence was that he was not upset at Mr Schuster's resignation which he accepted. He said Pacific began advertising for a replacement for him the same day. It was getting close to Christmas and he wanted a replacement for the position to be employed before Mr Schuster left, so that he could train that person.

[16] Mr Rahimi said he then received a telephone call from a Mr Tozer, whom he believed to be Mr Schuster's uncle.¹ Mr Tozer told Mr Rahimi that Mr Schuster had been an idiot and needed his employment with Pacific to support his family. He asked Mr Rahimi to reconsider Mr Schuster's employment.

[17] Pacific's statement in reply states that Mr Rahimi agreed to think about the request and indicated to Mr Tozer he would contact Mr Schuster directly if he reconsidered.

[18] Mr Rahimi said he thought about the request, and discussed it with Ms Russell. She advised him to think about the effect on the team of employees if Mr Schuster were to remain, given his recent threats and poor attitude towards his employer. Mr Rahimi said he accepted Ms Russell's advice but wanted to sit down with Mr Schuster and have a chat with him as he did not want him to leave on bad terms and with hard feelings.

¹ Mr Tozer was a relative of Mr Schuster's partner but was regarded as an uncle by Mr Schuster.

[19] The statement in reply refers to Mr Schuster asking Mr Rahimi about his telephone conversation with Mr Tozer the day after it had occurred. It states that Mr Rahimi advised Mr Schuster he would let him know if he would allow him to withdraw his resignation.

[20] It was Mr Rahimi's evidence that he did not agree to Mr Schuster withdrawing his resignation. He had a meeting with Mr Schuster in which he told the employee he could take time off work if he needed to attend job interviews. He said Mr Schuster did not withdraw his resignation and he did not ask him to stay on.

[21] It is clear Mr Schuster would have liked to withdraw his resignation but recognised he needed his employer's approval to do so. I am not persuaded that Mr Rahimi agreed to his doing so. Text messages between them three days after Mr Schuster's resignation refer to Mr Rahimi's understanding that Mr Schuster had a job interview scheduled for that day.

[22] This supports Mr Rahimi's claim to have told Mr Schuster he could have time off work to attend job interviews. There was no evidence from Mr Schuster to suggest he had a conversation about external job interviews with Mr Rahimi immediately after tendering his resignation.

Was Mr Schuster asked to stay on in his employment after he had resigned?

[23] Mr Schuster gave two versions of the meeting between himself and his employer after Mr Rahimi had been contacted by Mr Schuster's uncle. In the first version, which I have referred to above at [15], Mr Schuster said he decided to give Mr Rahimi a second chance and withdrew his resignation.

[24] In his second version of events, which may have been a more detailed version of the first condensed account, and not necessarily incompatible with it, Mr Schuster said he had tried to withdraw his resignation but Mr Rahimi had replied that he would think about it. Two or three days later, according to the second version, Mr Rahimi pulled Mr Schuster aside and said "We will keep you on." Mr Schuster said they shook hands on it and he "took this to mean that the withdrawal of (his) resignation had been accepted and it was business as usual at work".

[25] Mr Rahimi denied he had agreed that Mr Schuster could withdraw his resignation or that he had agreed to keep him on in his employment. I have inferred from Mr Rahimi's

written and oral evidence that he did not ever actively inform Mr Schuster that he did not agree to the withdrawal of his resignation. That was consistent with what Mr Rahimi had told both Mr Tozer and Mr Schuster: that he would advise Mr Schuster directly if he reconsidered his employment and allowed Mr Schuster to withdraw his resignation.

[26] I do not accept Mr Schuster's version of these events. In preferring Mr Rahimi's evidence, I have taken into account Ms Russell's evidence regarding the advertisement for a replacement for Mr Schuster.

[27] Ms Russell's evidence was both considered and objective and I found her to be a credible witness. She said she drafted Pacific's advertisement for a replacement for Mr Schuster, and the advertisement remained in place in the weeks after he had resigned. During this time Ms Russell said that Mr Rahimi proceeded to interview applicants to replace Mr Schuster.

[28] If Mr Rahimi had informed Mr Schuster he could retain his employment, it is likely the job advertisement would have been taken down. It was not, and Ms Russell's evidence that Mr Rahimi was interviewing applicants for the position was consistent with Mr Schuster's evidence of what happened on 13 December 2018 when he was asked to train a new employee.

[29] I do not accept that Mr Rahimi told Mr Schuster he could withdraw his resignation or that he was being kept on in his employment.

Was Mr Schuster dismissed?

[30] On 13 December 2018, as noted above, a new employee started work at Pacific. According to Mr Schuster, Mr Rahimi asked him to train the new person, and added that this was his (Mr Schuster's) last day of employment. Mr Schuster said he was taken completely by surprise and caught off guard as he believed he had a mutual agreement with his employer that he was to remain in the job. Mr Schuster said he had turned down other offers of employment because of this and he produced some evidence that could support that assertion.

[31] Mr Schuster said that, apart from the disputed conversation about keeping him on in employment, Mr Rahimi had made no mention of his upcoming last day until 13 December

2018. As he had given three weeks' notice, Mr Schuster said that 11 December 2018 would have been his final day, if it had not been for the agreement to retain him in his job. He said he received no request or instruction from Mr Rahimi to stay on for an additional two days.

[32] Mr Rahimi, who denied there was any mutual agreement for Mr Schuster to remain employed by Pacific, said he had employed someone else to replace Mr Schuster and thought it reasonable that he ask the outgoing employee to train his replacement. While Mr Schuster had given three weeks' notice when he resigned, he had not specified what his last day of employment would be. Mr Rahimi's evidence was that, unless employees had other work arranged that they were starting immediately, they usually stayed until the end of the pay week to maximise their earnings.

[33] It seems Mr Rahimi made an assumption that Mr Schuster would be amenable to working beyond the last day of his notice, which was 11 December 2018. He did not discuss this with Mr Schuster. For his part, Mr Schuster said he believed his employer had agreed to retaining him in his employment so the news on 13 December that this was his final day was an unwelcome shock.

[34] I do not find Pacific's retention of Mr Schuster in employment for two days beyond the three week notice period he had given changed the situation significantly. It did not negate Mr Schuster's resignation and his employer's acceptance of that resignation. I therefore reject Mr Schuster's claim to have been unjustifiably dismissed on 13 December 2018.

[35] I do find, however, that Mr Schuster may have been given false hope, by the two day extension of his notice, that his employer had tacitly agreed to the withdrawal of his resignation. To that extent, I find his employment was affected to his disadvantage by Pacific failing to seek Mr Schuster's agreement to work beyond the expiry of his notice period. I therefore find, pursuant to s 122 of the Act, that Mr Schuster has a personal grievance of a different nature from that which he alleged.

Remedies

[36] As Mr Schuster was disadvantaged by the assumption his employer made regarding an extension to his notice period, he is entitled to remedies for his personal grievance, less deduction for his contribution to the situation, if any.

[37] There is no evidence that Mr Schuster raised any concerns about his employment continuing on after the expiry of his notice. That, however, is consistent with his contention, which I have rejected, that Mr Rahimi allowed him to withdraw his resignation. In the circumstances, I do not think it appropriate to make any deduction for contribution.

[38] Mr Schuster did not lose any remuneration as a result of his personal grievance: in one sense he gained an additional two days' remuneration for the days of 12 and 13 December 2018. He is therefore not entitled to reimbursement under s 128 of the Act as those provisions apply when an employee is found to have a personal grievance and to have lost remuneration as a result of that personal grievance.

[39] He is entitled, however, to be compensated for his personal grievance under s 124 of the Act. Weighing the short amount of time involved, and the frustration and disappointment experienced by Mr Schuster, I find an award of \$4,000 to be appropriate.

Orders

[40] Pacific Auto Parts Limited is ordered to pay Tianara Schuster \$4,000, without deduction, as compensation for the hurt, humiliation and injury to feelings he suffered, pursuant to s 123(1)(c)(i) of the Act.

Costs

[41] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority