

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2022] NZERA 43
3134222

BETWEEN

BRUCE SMITH
Applicant

AND

RIGHT2DRIVE (NEW ZEALAND)
LIMITED
Respondent

Member of Authority: David G Beck

Representatives: Anna Oberndorfer, advocate for the Applicant
Sarah McFetridge, counsel for the Respondent,

Investigation Meeting: 20 January 2022

Submissions Received: 20 January 2022 from the Applicant
20 January 2022 and further information provided on
25 January 2022 from the Respondent

Date of Determination: 18 February 2022

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Bruce Smith was employed by Right2Drive (New Zealand) Limited (Right2Drive) in Christchurch from 26 March 2018 until he resigned effective on 24 September 2020. Right2Drive is a specialist car hire company assisting motorists with hire vehicles when they

are involved in no fault accidents. Right2Drive has over 250 staff and operates in 22 locations across Aotearoa/New Zealand and Australia.

[2] Mr Smith is claiming his resignation was prompted by Right2Drive instructing him to carry out additional duties he believed were outside the scope of his terms of employment and he claims this amounted to a constructive dismissal. In the alternative, Mr Smith claims he was disadvantaged by Right2Drive's actions leading up to his resignation that he considers breached his employment agreement and were inconsistent with good faith obligations owed to him. As remedies, Mr Smith claims compensation for hurt and humiliation, lost wages and a penalty for the alleged breach of good faith.

[3] By contrast, Right2Drive generally assert that the additional work Mr Smith undertook was consistent with his job description, it was reasonable to expect him to take on the additional duties and no statutory or other breaches occurred prior to his 'voluntary' resignation.

The Authority investigation

[4] At the investigation meeting, I heard evidence from Mr Smith and for Right2Drive: their NZ regional manager, Mark Sayer and Donovan Newton, Group Chief Operating Officer at Movigo Group who own and operate Right2Drive in New Zealand and Australia. Mr Smith's son, Nathaniel Smith, provided an evidential statement that was admitted by consent.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act), I make findings of fact and law and outline conclusions to resolve the disputed issues and make orders, but I do not record all evidence and submissions except to observe the parties assisted in giving evidence and submissions that I have carefully considered.

Issues

[6] The issues to be decided are:

- (a) Did Right2Drive breach any terms of employment or good faith duties owed to Mr Smith and if so, was it reasonably foreseeable that Mr Smith

would resign and the ending of the employment relationship be categorised as a constructive dismissal rather than a resignation?

(b) Prior to resigning was Mr Smith the subject of any employer actions and/or omissions that caused him detriment sufficient to establish a disadvantage grievance?

(c) If an unjustified dismissal and/or unjustified disadvantage is established what remedies should be awarded considering Mr Smith's claims for:

- i. Lost wages; and
- ii. Compensation under s 123(1)(c)(i) of the Act for hurt and humiliation caused by an alleged unjustified dismissal and \$8,000 under the same provision for an unjustified disadvantage.

(d) If Mr Smith is successful in all or any elements of his personal grievances should the Authority reduce any remedies granted because of any contributory conduct?

(e) An assessment of whether either party should contribute to the incurred costs of representation.

What caused Mr Smith's employment relationship problem?

[7] Mr Smith worked in Right2Drive's Christchurch office as a Client Services Executive (CSE) alongside two other workers, one also a CSE and the other a Business Development Executive (BDE) who was Mr Smith's direct report. The BDE reported to a manager based in Hamilton (Mark Sayer).

[8] Mr Smith's role generally involved ensuring vehicles were serviced, warranted, and cleaned before going out to be hired, liaising with customers and referrers of business and delivering vehicles. A key part of the role was explaining to customers the extent of the service available and communicating with referral parties to promote the business and secure ongoing work. The service offered by Right2Drive is of a 24/7 nature and Mr Smith was

allowed personal use of various vehicles going out to hire to commute to and from work (but not during holiday periods). The use of vehicles was not a term of Mr Smith's employment and was informally arranged at a local level.

Job description

[9] Mr Smith was engaged pursuant to a job description (JD) and individual employment agreement he signed respectively on 8 and 20 March 2019. The JD is reasonably concise and broken into headings of: Role and Responsibilities; Qualifications, Education and Licence Requirements; Competencies; and Physical Requirements and Working Conditions.

[10] The following extracts from the JD are relevant to the dispute between the parties on whether additional duties Mr Smith was expected to undertake were reasonably contemplated by the JD – these include:

- An: "Ability to ambassador R2D Mission, Vision & Values".
- "Form and maintain partner relationships with repairers and tow truck operators, and other third party referrers, as required to help the branch achieve and maintain optimal performance".
- That the appointee possesses: "Well-developed phone and interpersonal skills to be able to build professional positive relationships".
- be able to communicate "effectively with co-workers, management, clients and other parties to exchange or convey information".

[11] Mr Sayer's expectation of Mr Smith's role was described in his brief of evidence as:

CSEs are the front-line of our business: they are required to engage with our customers and third party referrers, such as repairers, and ultimately to promote our business in their daily interactions. They meet with customers and referrers every day in picking up and dropping off our loan vehicles. In essence, CSEs are brand ambassadors for Right2Drive.

[12] In addition, Right2Drive has highlighted clause 2.2 of Mr Smith's employment agreement that stated his:

..... position, duties and location of employment may change from time to time in accordance with the operational requirements of R2D and you agree to comply with such changes if requested by R2D.

[13] Mr Smith who has a background in the logging industry, says his initial view of the job was it had a “pretty fancy” title for what was “essentially looking after a fleet of vehicles” and “organising vehicles for clients”. Mr Smith described the practical elements of the job but acknowledged it also involved forming relationships with “third party referrers” and that this meant “repairers of all types, such as window replacement, vehicle suspension, panel beating and so on”. Mr Smith says prior to the Covid lockdown he sometimes rang “potential customers (repairers)” but only about twice a year and “if R2D asked me to”.

Impact of Covid-19 restrictions

[14] Mr Sayer described the significant impact that the March 2020 Covid-19 lockdown and other restrictions on travel, had upon Right2Drive’s business model – in a nutshell significantly fewer cars were being utilised to respond to customer needs as traffic volumes plummeted and the business declined by up to 64%. Right2Drive secured a government wage subsidy to maintain its workers’ ongoing employment.

[15] As lockdown restrictions eased, Mr Sayer says he became concerned about the Christchurch branch vehicle hire numbers being low in early July 2020 and he received a report from the Christchurch BDE that during down time Mr Smith was not using this time to best develop potential business. Mr Sayer conceded he did not directly approach Mr Smith about the concern that he was underutilised. In a 14 July 2020 documented “performance discussion” as part of an informal annual appraisal Mr Sayer had introduced, no specific concerns were raised with Mr Smith and apart from needing to remind him of the need to be positive with customers, nothing untoward was discussed.

[16] Mr Sayer resolved to urge all staff to contact potential referrers and try and expand the business. In an email early on 31 July 2020 to the Christchurch branch (including Mr Smith), Mr Sayer suggested staff utilise “customer service/teamwork skills of yours” and get out and “see some panel and tow shops to drum up business”. Mr Sayer’s email sought a report by 3pm that day so the BDE could conduct follow up visits. Mr Smith responded at 3:52pm that day, outlining businesses he had contacted and their responses. Mr Sayer emailed him his thanks.

[17] In a Microsoft teams' meeting of 5 August 2020, Mr Sayer recalled setting out expectations of how all staff including CSEs were expected to pitch for new business by providing pamphlets and engaging during visits with potential referrers when "existing work" was not busy. Mr Sayer asserted he thought this was "a continuation of their existing role, perhaps with renewed emphasis on re-establishing existing relationships and building new ones in response to the challenges of Covid-19". Mr Sayer says Mr Smith raised no objections to his suggestions.

[18] An email of 7 August 2020 from Mr Smith to Mr Sayer outlined four plumbing firms he had visited (as a part of a strategy to target 'tradies') with no highlighted concerns. In an email of 8 September, that placed more focus upon staff searching for new business opportunities and some assistance freeing CSEs up from booking tasks, Mr Sayer asked the two Christchurch CSEs to "find and promote our business to place like plumbers, builders, sparkys and mechanics". Mr Sayer also asked the CSEs to create a spreadsheet identifying contact information and that he expected a "mid-week and weekly report sent to me".

14 September 2020 email

[19] On 11 September, to follow up on a concern that Mr Smith had not provided a detailed outline of businesses visited, Mr Sayer emailed and texted Mr Smith. Mr Smith did not promptly respond, then on 14 September he copied Mr Sayer into an email he had sent to Right2Drive's Head of HR (Sonya Leyds) who was based in Australia. The email stated:

I have been informed that you have added a Marketing component to my job description. I have stated on a number of occasions that I have no interest in marketing yet you persist in trying to pressure me to do it. As I will not be applying for the new revamped CSE position I am wandering [sic] when I will see my redundancy notice.

[20] Although Ms Leyds, who I established during the investigation 'drove the process', did not make herself available to give evidence and is no longer employed by Right2Drive, I had no documentary evidence of her acknowledging or promptly responding to Mr Smith's 14 September email. I note from Ms Leyds later 12 November 2020 response to Mr Smith's personal grievance letter, reference is made to a 16 September conversation she had with Mr Smith in which he asked to meet. Ms Leyds' letter asserted that Mr Smith sought the meeting to clarify what his role was and to understand what the 'marketing' component of his job entailed as he believed visiting referrers was not part of his original role.

[21] By contrast, Mr Smith did not recall a 16 September conversation with Ms Leyds and says that on or around 17 September, a Microsoft Teams message issued by Ms Leyds invited him to a meeting on Monday 21 September. Apart from “catch up” the invite did not state the specific purpose of the meeting or who would be attending. Mr Sayers confirmed this was how the meeting was set up.

21 September 2020 video meeting

[22] Mr Smith says he participated in the ‘video link meeting’ by joining utilising his phone whilst in a vehicle. Present for Right2Drive were Sonya Leyds, Vanessa Olla (both HR officers) Mark Sayer and John Dawson, Fleet Manager.

[23] I was provided with no contemporaneous notes of this meeting. All parties say it was a very brief meeting (5-10 minutes). Mr Sayer indicated Ms Leyds had no discussion with him beforehand or to the best of his knowledge with John Dawson about the 14 September email from Mr Smith. It was evident Mr Sayer and Mr Dawson joined the meeting with no idea of how it would proceed. Mr Sayer indicated he had no experience of resolving such situations as he had a sales background and he deferred to Ms Leyds and senior management to handle the situation.

[24] The following summarises what the parties recalled of the 21 September meeting:

Bruce Smith: says during the first meeting John Dawson asked him what the problem was, and he indicated he had been asked to approach builders, plumbers and electricians and he was uncomfortable with this as “not being his kind of work” and he did not have the “gift of the gab”. He recalled John and Mark debating whether it was a good idea to target such groups and Mark saying he was just giving it a try to expand the business. He recalls, Sonya then took over and told him that finding new business was part of his employment agreement (that he did not have a copy before him) and she referred to specific wording of the job description to “form and maintain partner relationships” and that generally his employment agreement required he agreed to comply with a change of duties “from time to time”. Mr Smith says he tried to make a distinction between “cold-calling” customers and maintaining existing relationships – asserting the

former task was not his job. Mr Smith says Ms Leyds was not interested in discussing his perspective of the situation and when he asked why he was not being made redundant she pointed out his employment agreement did not provide for redundancy compensation. Mr Smith says Ms Leyds then proceeded to explain if he did not take on the extra work he would face disciplinary action and if he did not want to do it, he would have to resign.

Mark Sayer: had difficulty in distinguishing and recollecting what was said at this meeting and a subsequent meeting. The lack of notes did not assist. Notwithstanding, Mr Sayer confirmed Ms Leyds guiding the meeting and expressing Right2Drive's stance was based on the employment agreement that what was being asked of Mr Smith was a basic function of his role. His written brief said:

... we told Mr Smith that if he failed to comply with what we considered were reasonable instructions, Right2Drive would need to take action in respect of his failure to perform his role and one option was a performance management process.

Sonya Leyds: whilst Ms Leyds did not give evidence, Right2Drive's counsel drew my attention to her letter of 12 November 2020 as a purported record of what Ms Leyds recalled of the 21 September meeting. I accept this 'evidence' with some caution as it was in response to a personal grievance letter that questioned Ms Leyds conduct of the meeting, it was written nearly three weeks later, and I had no opportunity to ask questions of clarification. With those reservations, I do observe that Ms Leyds curiously suggested of the meeting that: "This was not a formal process as Mr Smith requested this meeting" that she considered it had a purpose of reviewing his job description. Ms Leyds did not address the allegation put by Mr Smith's advocate that she had advised he would face disciplinary action and would have to quit if he did not comply with his job description, she suggested all she advised was he should adhere to what was considered a reasonable request. Unlike Mr Sayer's recollection, Ms Leyds made no reference in her letter of Mr Smith potentially being performance managed as an option at either meeting. Ms Leyds portrayed the purpose of the

second meeting (discussed below) as a “catch up” if he “had any further questions”.

[25] Mr Sayer was of the belief that Mr Smith had been given time to go away and think about his situation and he says Ms Leyds indicated they would reconvene in two days in case Mr Smith had any further questions or concerns.

[26] I observe that Ms Leyds as might have been reasonably expected, did not then set out in writing to Mr Smith what Right2Drive’s position was.

23 September meeting

[27] Again, no contemporaneous notes were provided. The meeting involved the same parties, and it was again conducted by video link. By consensus, it lasted about the same time as the first meeting. I once again set out the respective parties’ recollections:

Mr Smith: in recalling the second meeting says Ms Leyds did all the talking and she opened by asking him had he thought about his position and when he reiterated it had not changed, Ms Leyds raised the two choices of being performance managed or disciplined. Mr Smith’s written evidence was: “They went on to say if I did not follow this instruction, everything I did would be critiqued and disciplinary action would be taken, with the potential to result in my dismissal”. When questioned Mr Smith claimed the meeting ended with Ms Leyds informing him, he would have to resign, and he responded he would think about it overnight.

Mr Sayer: claimed he was stunned that Mr Smith announced he had decided to resign at the second meeting and recalls two options being put prior to him coming to this conclusion after Mr Smith asked what would happen if he refused what Mr Sayer had requested. In response, Mr Sayer’s written evidence recalls Ms Leyds indicating this would “likely result in a performance management process or an investigation into his behaviour (i.e., it would be a misconduct issue)” – “he was only told to consider his options, he was not told that he needed to do these duties or resign”. When questioned about the incongruity of the choices and whether the

performance management option was explained, Mr Sayer after suggesting it was “retraining help”, accepted that Ms Leyds did not explain what this would involve, and this option was not “fleshed out” beforehand or their approach to the meeting discussed.

Ms Leyds: by contrast, does not mention in her 12 November letter, Mr Smith resigning during the second meeting implying that he first communicated his resignation after the meeting.

Mr Smith’s Resignation

[28] By email of 8 am the next morning (24 September) to Ms Leyds, Mr Smith indicated:

After the final meeting concerning the extra duties assigned to me by my manager Mark Sayer the conclusion of the meeting is that either I accept the extra duties or resign as Right2drive claim that the extra duties are covered by my job description.

I am here by giving my resignation and will terminate my employment with Right2Drive on the 22/10/2020.

The Aftermath

[29] Ms Leyds by an email of 24 September, acknowledged and accepted Mr Smith’s resignation but before doing so, she set out Right2Drive’s view of the situation that during the two meetings Mr Smith had “not been asked to do anything outside his current job description”. Ms Leyds attached Mr Smith’s job description to her email and referenced and attached, Mr Sayer’s 31 July 2020 email urging staff to canvass new business. Ms Leyds then indicated:

On the 23rd of September we advised you that this is a reasonable request as your employer and that you have been instructed by us to ensure you perform every aspect of your role.

- a. You were also advised you do not wish to do this part of your role [sic] even though you have contractually agreed to it (IEA attached)
- b. You were advised that failure to comply to our request and to fulfil your role as per the signed job description would result in further action being taken against you for failure to perform your role.

[30] There was no further communication between the parties during Mr Smith’s notice period that ended on 22 October. By way of a letter of 27 October 2020, utilising an

advocate, Mr Smith raised a personal grievance alleging he had been unjustifiably dismissed and unjustifiably disadvantaged over what he viewed as a unilateral variation of his job description. When the matter was filed in the Authority on 10 March 2021, Mr Smith asked that the Authority resolve claims that he had been:

- Unjustifiably (constructively) dismissed.
- Unjustifiably disadvantaged by Right2Drive’s conduct in seeking to vary his employment terms.
- Treated in a manner inconsistent with good faith obligations owed.

Was Mr Smith constructively dismissed?

[31] A ‘constructive dismissal’ can be found if an employer’s conduct compels a worker to resign in circumstances where although on the surface the worker appears to have voluntarily resigned, it can be held to constitute an unjustified dismissal. One instance of this doctrine is where the resignation is caused by a breach of a duty owed to the worker and the employer could reasonably foresee that rather than put up with the breach, the worker resigns – effectively the worker is signalling a belief that their employment agreement has been repudiated. The Court of Appeal has stated the legal test as:

In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach. ¹

[32] The overarching and well recognised duty that is now statutorily recognised as a component of ‘good faith’ ² is that an employer should not without proper cause, act in a

¹ *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 2 NZLR 415 (CA), [1994] 1 ERNZ 168, 172.

² Section 4 (1A)(a) and s 4(1A)(b).

manner calculated to or likely to destroy or seriously damage the relationship of trust and confidence between the parties to the employment relationship.³

Mr Smith's claim regarding a potential breach of duty

[33] In submissions, Mr Smith's advocate suggested that the breach at issue involved Right2Drive unilaterally altering his terms of employment and then giving Mr Smith an ultimatum that if he did not adhere to the instruction to continue with canvassing for new business, he had no option but to resign.

Assessment

[34] The terms of Mr Smith's job description are unambiguous and envisage at several points [paras 7-10 above] that his role was both to "Form and maintain" relationships with customers and parties that would further his employer's interest in expanding the business and that these goals would be met by him demonstrating effective communication skills including the ability to convey information. I find that basic communication skill and ability to convey information was a core part of Mr Smith's role regardless of the additional requirements placed upon him and others and he deployed those skills without negative feedback.

[35] To suggest that Mr Smith's role was unilaterally altered needs to be first assessed against the written terms of such and then, whether what was practically being asked of Mr Smith, was reasonable in contemplation of the scope of his role as described. Set against this, was Right2Drive's evidence that changes to how they wished Mr Smith to approach his tasks and deploy his skills, did change over time and in response to pressing circumstances.

[36] In general, as Mr Smith asserts, this analysis must also involve consideration of the extent of what changes an employer is allowed to make to a role within the doctrine of 'managerial prerogative' short of a situation where the enacted changes alter the position so substantively that it creates a redundancy situation. Applying a test from *Carter Holt Harvey Ltd v Wallis* of what would be a sufficient indication of changes in terms and conditions breaking "the essential continuity of the employment",⁴ Judge Travis in *Sanson v Auckland Regional Council* expressed the issue in these terms:

³ *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372.

⁴ *Carter Holt Harvey Ltd v Wallis* [1998] 3 ERNZ 984 (EmpC).

Although the former position's job description was 'subject to change at the discretion' of the plaintiff's general manager, the differences between the former position and the proposed position were so great that they could not be considered mere changes. It could not be said that there was any continuance of employment. The differences between the positions showed that the former position had ceased to exist rather than [having] merely changed. The proposed position was an entirely new position.⁵

[37] I observe that Mr Smith's JD and work he was engaged in, involved dealing with customers and referrers and this did not change in any degree apart from the flow of the direct customer contact decreasing and expectation around canvassing for new business temporarily increased during a Covid-19 downturn. On the facts, this involved little more than Mr Smith disseminating information and compiling data and regularly reporting on such. It was objectively not onerous work and whilst generally capable of being deemed 'marketing' it was limited in scope and unlike a specialist marketing role. The work involved Mr Smith deploying skills he possessed but has expressed it was not an aspect of his job he was comfortable in. On the latter issue, Mr Sayer indicated whilst being aware that communication was not a strength of Mr Smith's, he had no discussion about Mr Smith's specific reservations.

[38] Mr Smith accepted he had a 'PR' component of his role with customers and referrers to provide both written and oral information on what services his employer provided but felt being asked to write reports and seek additional information from prospective referrers, was outside his role. Mr Smith confirmed he had never discussed his reservations about the work with Mr Sayer prior to his 14 September 2020 email to Ms Leyds. Mr Smith said he became convinced after reading a website article, that his job description had been unilaterally altered to the point his position was redundant.

[39] I find it was open to Mr Smith once his employer's expectations became clear, to dispute his employer's response by utilising the dispute mechanism in his employment agreement whilst continuing in employment but because he sought no advice, it is unlikely he was aware of this option. Mr Smith's resignation was because he was wrongly of the belief that his job had been significantly altered. As a result of this genuinely held belief, Mr Smith

⁵ *Sanson v Auckland Regional Council* [1999] 1 ERNZ 708.

became unwilling to undertake additional tasks that I find had been reasonably imposed upon him. Mr Smith chose to resign when he had the clear option of continuing in employment.

[40] In my view, Right2Drive exercised a managerial prerogative in a reasonable manner and that no significant changes to Mr Smith's role were effected by Right2Drive to an extent that they altered the core purpose of the role. The role at all times included communication and relationship building requirements. Unfortunately for him, Mr Smith's constructive dismissal claim falls at the first hurdle as no unilateral breach of his terms and conditions occurred.

Finding

[41] I find that no threshold breach is made out, in that Right2Drive acted reasonably and in accordance with Mr Smith's job description in expecting him to approach prospective referrers at times when the predominant part of his role was not busy. The expectations placed on Mr Smith were not onerous and not outside what Mr Smith had already been doing. Having found no breach there is no unjustified dismissal so it is not necessary to make any finding on any justification issues, but I deal with Mr Smith's remaining disadvantage and breach of good faith claims below.

Unjustified disadvantage claim and/or breach of good faith?

[42] Having not found a breach sufficient to allow Mr Smith to legitimately claim his employment agreement was repudiated I examine whether the actions Right2Drive took after Mr Smith advised of concerns were justified.

Assessment

[43] As discussed, my investigation was hampered by a lack of contemporaneous notes pertaining to both the 21 and 23 September 2020 meetings. In conducting an assessment, I have regard to obligations owed as set out in s 103A(2) of the Act (Test of Justification) and whether Right2Drive also adhered to good faith obligations pursuant to s 4(1A) of the Act.

[44] The test I must apply objectively, is to examine how Right2Drive approached the situation when Mr Smith signalled his concerns and assess if their actions or omissions “were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred”.⁶

[45] I find there were significant communication omissions that potentially caused Mr Smith to be disadvantaged by how his concerns were handled. These were:

- The lack of formality in the process – including a failure to specify the specific purpose of the first and second meetings in writing, who would attend and a consequent failure to set out what Right2Drive’s view of the situation was after the first meeting, including the basis of their concerns.
- The haste of both the meetings and lack of preparation that evidently led to a lack of exploration of Mr Smith’s perspective of why he did not wish to take on the extra duties allocated and led to no consideration of his personal circumstances.
- A failure to recognise the inherent imbalance in bargaining power between the parties as evidenced by Right2Drive senior managers attending both meetings and the consequent failure to recognise that alternative dispute resolution mechanisms existed in the employment agreement. On the latter, given Mr Smith’s entrenched and genuinely held view, an offer of an early mediation was appropriate and Right2Drive had the resources and knowledge available (senior HR advisers) to explore this.
- After the first meeting, Right2Drive’s HR professional inexplicably failed to set out a record of the discussion and explicit parameters of their position. I

⁶ Section 103A(2) Employment relations Act 2000.

could not form a view on whether Mr Smith was offered ‘options’ at either meeting or precisely what those were.

- Confusion on what premise Right2Drive was adopting during the meetings i.e., were they relying upon Mr Smith’s failure to follow a lawful and reasonable instruction? or a belief that his job description covered the tasks asked of him? or the enabling clause in his employment agreement that he be flexible?
- The inexplicable lack of communication during the notice period.

[46] By contrast, it was clear that Mr Smith displayed a somewhat fixed belief in the soundness of his stance and his lack of communication skills were evident in his failure to explain why he had adopted such a firm view. This could understandably come across to Right2Drive as belligerent (but not aggressive) and may have driven their somewhat heavy-handed approach. Mr Smith would have been greatly assisted if he had sought legal advice beyond ‘Dr Google’. Likewise, it is apparent that Right2Drive did not seek to de-escalate the situation and use the dispute resolution provisions in the employment agreement. This brings me to an assessment of whether Right2Drive acted in a good faith manner and if not, whether as claimed, a penalty is an appropriate sanction?

Finding: breach of good faith

[47] On the facts, I do not find Mr Smith has established that he was disadvantaged by his employer’s actions or omissions, but I do find that factors I have highlighted above, assessing the appropriateness of Right2Drive’s approach once Mr Smith identified his concerns, were not consistent with good faith obligations owed to Mr Smith.

[48] In coming to this conclusion of a good faith breach, I am guided by s 4 (1A)(b) of the Act as Mr Smith’s counsel highlighted, requiring a focus upon “maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative”. I have also had regard to s 4(1A)(a) that describes good faith as being “wider in scope than the implied mutual obligation of trust and confidence” and generally the “Object” of the Act being to acknowledge the inherent inequality of power in employment

relationships.⁷ Right2Drive's approach to what I have found as essentially enforcing their expectations as set out in the employment agreement was, I find, less than an ideal process.

[49] In terms of s 4A(b) of the Act that I acknowledge sets a high hurdle, I have determined that Right2Drive's actions and omissions undermined the employment relationship and prevented it from being potentially ongoing. This includes undermining Mr Smith's employment agreement provision that disputes of this nature should ideally have resort to a specified dispute process where the consequences of not 'stepping back' and utilising such, can lead to an early confrontation. In making this assessment, I do acknowledge Mr Smith's somewhat naïve approach to this situation and that he failed to obtain appropriate legal advice, but that circumstance was impliedly exploited by Right2Drive.

Penalty

[51] Having found Right2Drive breached good faith obligations owed to Mr Smith I have to be guided by how the court has generally approached the question of penalties where statutory breaches occur. The approach I adopt is consistent with the full Employment Court decision of *Borsboom v Preet PVT Limited*⁸ and I am also guided by Judge Corkill's decision *A Labour Inspector v Matangi Berry Farm Limited*⁹. *Preet* identified a four-step framework to fixing penalties (albeit involving a case where multiple breaches of minimum standards are evident):

Step 1: Identify the nature and number of statutory breaches. Identify each one separately. Identify the maximum penalty available for each penalisable breach. Consider whether global penalties should apply, whether at all or at some stages of this stepped approach.

Step 2: Assess the severity of the breach in each case to establish a provisional penalty starting point. Consider both aggravating and mitigating features.

Step 3: Consider the means and ability of the person in breach to pay the provisional penalty arrived at in Step 2.

Step 4: Apply the proportionality or totality test to ensure that the amount of each final penalty is just in all the circumstances.¹⁰

⁷ Section 3(a)(ii) Employment Relations Act 2000.

⁸ *Borsboom v Preet PVT Limited* [2016] NZEmpC 43.

⁹ *A Labour Inspector v Matangi Berry Farm Limited* [2020] NZEmpC 40.

¹⁰ At [151].

[52] To ensure consistency I use an approach used in a recent Authority determination (*Labour Inspector of the Ministry of Business, Innovation and Employment v Nekita Enterprises Ltd*) that first considered the statutory framework and then assessed the quantum of remedies based on the four steps identified above.¹¹ I take the following factors into account.

The object of the Act

[53] Section 3(a) of the Act sets out relevant ‘aspirational’ matters I must consider these include the need to “build productive employment relationships through the promotion of good faith in all aspects of the employment environment” and the need to acknowledge and address “the inherent inequality of power in employment relationships”.

The nature and extent of the breaches

[54] I have identified one breach involving Right2Drive for which a penalty is sought which is that there was a failure of adequate good faith communication with a concurrent failure to recognise a power imbalance during a dispute that led to Mr Smith deciding to resign in the belief no alternative existed. I have found this was a situation where the dispute could have been resolved in an alternative manner and the employment relationship potentially preserved.

The nature and extent of any loss or damages suffered

[55] Mr Smith lost his employment and ongoing income as he had no alternative job.

Was the breach intentional, inadvertent, or negligent?

[56] I conclude from the evidence that although motivated by a genuine belief that sufficient information was provided orally to Mr Smith, there was an element of intentional neglect of Mr Smith’s situation and a lack of a professional approach by Right2Drive.

¹¹ *Labour Inspector of the Ministry of Business, Innovation and Employment v Nekita Enterprises Ltd* [2020] NZERA 509.

What steps have been taken in mitigation?

[57] I was not satisfied that Right2Drive took any steps in mitigation to resile from their stated position which could have included asking him to defer his resignation in favour of an offer to utilise the employment agreement's dispute procedure or at least an offer to attend mediation when it was obvious Mr Smith was unrepresented and vulnerable.

The circumstances of the breach and any vulnerability factors

[58] I find that, as discussed, little attention was paid to Mr Smith's vulnerable position, the context of a stressful Covid environment and his (albeit at a late stage) expressed uncomfortableness with duties he was being allocated, his past work experience and his domestic situation. The matter was handled in an unnecessarily hasty and peremptory fashion without further investigation. I also observe that meeting via video-link is less than ideal when Right2Drive had New Zealand based management and an ability to procure local employment advice and support.

Previous conduct

[59] There is no suggestion of Right2Drive having previously appeared before the Authority facing breach actions.

***Preet* step one – nature and number of breaches**

[60] Here, I have determined that one overall breach is involved and as per s 135 of the Act the Authority can impose a penalty up to \$20,000.

***Preet* Step 2 – severity of breaches**

[61] On top of statutory considerations (the aims of the Act) I am obliged, following *Preet*, to examine the extent of Right2Drive's culpability and take the public interest factor of using the penalty regime as a legitimate deterrent to others into account.

[62] Considering the above and the aggravating feature that the breach was easily resolvable had Right2Drive sought appropriate legal advice on available dispute resolution mechanisms and their good faith communication obligations, I believe deterrence where vulnerable individuals are involved is a key consideration. Taking the latter considerations

into account I conclude that the breach is reasonably significant, and I deem 75% of the maximum accumulated penalty to be a 'starting point' (\$15,000).

[63] Right2Drive's remorse or understanding of their good faith obligations was not evident at the investigation meeting although I observe they treated Mr Smith with due respect. In the circumstances, I consider a further 10% reduction of the maximum penalty is warranted which reduces it to \$13,500.

Preet step 3 – means and ability of the respondent to pay

[64] I did not have a submission suggesting Right2Drive would be unable to meet any liability arising from an imposed penalty.

Preet step 4 - Proportionality

[65] This step requires me to stand back and consider consistency with other comparable situations where the Authority has imposed penalties and to assess whether the final figure I determine is in proportion to the extent and severity of the breaches and the context of such albeit that this is a case of unique circumstances.

[66] Considering the totality of factors including that Right2Drive had a legitimate expectation that Mr Smith adhere to his job description and applying proportionality to my analysis should lead to a further reduction. I find it just in the circumstances that Right2Drive (New Zealand) Limited should pay a penalty of \$4,000 and that this amount be paid to Bruce Smith.

Conclusion

[67] Within 28 days of the date of this determination Right2Drive (New Zealand) Limited must pay to Bruce Smith a penalty in the sum of \$4,000 without deductions.

Costs

[68] Costs are at the discretion of the Authority and are reserved. I encourage the parties to try and resolve costs and any disbursements incurred by agreement. Should this not be possible and either party considers they should be awarded a contribution to costs incurred,

then that party shall have 14 days to lodge a memorandum from the date of this determination and the other party has a further 14 days to lodge a memorandum in response.

David G Beck
Member of the Employment Relations Authority