

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 170
3023478

BETWEEN TONY FLAY
 Applicant

A N D THE NEW ZEALAND
 AUTOMOBILE ASSOCIATION
 LIMITED
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Emma Moss, Advocate for Applicant
 Richard Upton, Counsel for Respondent

Investigation Meeting: 2 and 3 May 2018

Submissions Received: 27 April 2018 and 8 May 2018 from Applicant
 3 May 2018 from Respondent

Date of Determination: 29 May 2018

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. The applicant, Mr Tony Flay was unjustifiably dismissed by the respondent, The New Zealand Automobile Association Limited (AA).**
- B. In order to settle Mr Flay’s personal grievance claim, AA is to make payment of the following sums to him within 21 days of the date of this determination:**
- (a) Following deduction for contribution, \$10,500 pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000 (the Act) for humiliation, loss of dignity and injury to feelings in respect of his unjustifiable dismissal.**

- (b) **Following deduction for contribution, \$4536 gross in lost remuneration under s128 of the Act together with interest from 24 January 2018 at the rate of 5% per annum until the date payment is made in full.**
- C. **The applicant was suspended from his employment and this amounted to an unjustifiable disadvantage. Following deduction for contribution, AA is to pay Mr Flay the sum of \$1,750 to settle this grievance.**
- D. **Costs are reserved.**

Employment relationship problem

The New Zealand Automobile Association Limited (AA)

[1] AA provides a range of services to its members including motoring advice, breakdown services, pre-purchase vehicle inspections and vehicle repairs. AA employs Vehicle Inspectors to carry out vehicle inspections at its own sites and at third party sites throughout New Zealand.

Automotive Advantage Compliance and Inspection Centre Limited (Automotive Advantage)

[2] AA had a contract with Automotive Advantage Compliance and Inspection Centre Limited (Automotive Advantage) in Hamilton to provide vehicle inspection services, at its site.

Mr Flay's employment by AA

[3] Mr Flay was employed by AA in the position of Vehicle Inspector from 10 April 2017. Mr Flay worked at the Automotive Advantage site.

[4] Mr Shayne O'Hagan and Mr David Toombs are co-owners of Automotive Advantage. Mr Toombs managed the site. On 7 September 2017, Mr O'Hagan requested AA to remove Mr Flay from its site.

Termination of Mr Flay's employment agreement by AA

[5] On 22 September 2017, AA terminated Mr Flay's employment. The grounds for termination were that Mr Flay's employment agreement had been frustrated following the decision by Mr O'Hagan that he and Mr Toombs no longer wanted Mr Flay to work at the Automotive Advantage site.

[6] Because Automotive Advantage would not allow Mr Flay to continue working at its site, AA decided it had no other option but to terminate his employment on the grounds of frustration.

[7] AA says the employment agreement between the parties did not contemplate the situation where Mr Flay was prohibited from entering the Automotive Advantage site where he was employed to work. This prohibition amounted to a supervening event and led to the frustration of his employment agreement.

[8] Mr Flay says the events which lead to his prohibition by Automotive Advantage from its site, were provided for in his employment agreement. The termination amounted to a dismissal which Mr Flay says was unjustified. Mr Flay also says that when he was removed from Automotive Advantage, he was unjustifiably suspended by AA. Mr Flay says this amounted to an unjustifiable disadvantage.

[9] Mr Flay seeks remedies in respect of his claims of unjustifiable dismissal and disadvantage, including compensation for humiliation and hurt suffered by him and loss of remuneration.

Investigation meeting

[10] Mr Flay and his wife, Ms Margaret Flay both filed witness statements.

[11] Mr Alain Rennie, the Vehicle Inspections Manager for AA, for the Auckland and Waikato regions, Mr Michael Griffiths, an Entry Compliance Vehicle Inspector and Team Leader employed by AA, Mr Donovan Edwards, Mobile Vehicle Inspection Manager employed by AA, all filed witness statements in the Authority. Mr Shayne O'Hagan, co-owner of Automotive Advantage, was summonsed by the Authority to appear and to give evidence.

[12] Each witness confirmed by way of affirmation or on oath that their evidence was true and correct.

[13] As allowed under s.174 of the Act, this Determination does not set out all of the evidence. Rather, relevant facts and legal issues are set out, along with the Authority's conclusions.

[14] The issues for the Authority to determine are:

- (a) Was the employment agreement between Mr Flay and AA frustrated?
- (b) If the employment agreement was not frustrated, was Mr Flay unjustifiably dismissed?
- (c) If Mr Flay was unjustifiably dismissed, what remedies are available to him?
- (d) Was Mr Flay unjustifiably disadvantaged by being asked not to attend work between 14 September and 22 September 2017?
- (e) If Mr Flay was unjustifiably disadvantaged, what remedies are available to him?
- (f) If Mr Flay is entitled to remedies, did he contribute to the unjustified dismissal and/or disadvantage and, if so, should the remedies be reduced by the Authority pursuant to s.124 of the Act?

Relevant facts

[15] Mr Flay is a senior mechanic with considerable experience in the automotive industry. Mr Flay has owned his own trucking business in which he repaired trucks, was employed at the Hamilton WOF (Warrant of Fitness) centre for nine years and was employed carrying out compliance work at VTNZ for approximately seven years. Mr Flay's qualifications include a New Zealand trade certificate and an advanced trade certificate in automotive engineering. Mr Flay's qualifications are the equivalent to the current New Zealand Qualifications Authority (NZQA) qualifications in automotive engineering. Mr Flay has been a vehicle inspector for a considerable period of time.

Application for Vehicle Inspector Position with AA – February 2017

[16] AA regularly advertises for “qualified and experienced automotive technicians”.

[17] Mr Flay applied for the position of “**Vehicle Inspector – Hamilton (Mobile)**” with AA, advertised by it in February 2017. The successful candidate was required to be a trade certified automotive technician (NZQA level 4) with 1 to 4 years experience and expertise in vehicle inspections and vehicle testing.

Job Description

[18] The job description referred to the position title as “Automotive Technician (Vehicle Inspector) (Mobile, AA Site or Third Party Site) reports to Vehicle Services Manager”.

[19] In the functional/technical competencies and experience area of the job description, the requirements were:

- Minimum of NZ trade certificate, or equivalent (verification required)
- Minimum of three years experience in the automotive industry (gained within the last five years)
- Understanding of customer service principles and practices
- Basic computer knowledge and keyboard skills
- Full New Zealand driver’s license.

Job Interview

Mr Flay says the job was discussed at the interview with Mr Rennie and he understood that he would be undertaking pre-purchase inspections, certifications and vehicle inspections. Mr Flay says that he was willing to be a mobile inspector as advertised. Mr Rennie says Mr Flay was employed to work at Automotive Advantage’s site, there was no intention that he be employed as a mobile inspector.

Offer of employment – 7 March 2017

[20] Mr Flay had the skills and experience required for the job and was employed following his interview with Mr Rennie. Mr Rennie says he offered Mr Flay the

position of Entry Compliance Inspector, a role which was to be undertaken at AA's third party Hamilton site, namely Automotive Advantage

[21] Mr Flay was sent an individual employment agreement offering him employment as a vehicle inspector based in Hamilton. There was no reference to his employment being restricted to that of a third party, namely Automotive Advantage in Hamilton. The job description also did not refer to employment at a third party site.

New Zealand Transport Agency (NZTA)

[22] NZTA is the agency responsible for the regulation of vehicle inspection in New Zealand. There are vehicle inspection requirements manuals (VIRMs) and other information for use by vehicle inspectors and certifiers, such as for warrant of fitness or certificate of fitness inspections available through NZTA.¹ The requirements of the VIRMs are complex and often what is required before a vehicle is issued with a warrant or certificate of fitness, these can be open for interpretation by mechanics and vehicle inspectors.

Training

[23] At the time of his employment by AA in March 2017, Mr Flay had not performed compliance certificate work for some years, his certification had lapsed and he needed to requalify. Mr Donovan Edwards was AA's Mobile Vehicle Inspection Manager and part of his role at that time was to provide guidance and support to vehicle inspectors. Mr Edwards assisted Mr Flay with training and his site induction at Automotive Advantage.

[24] Mr Flay completed his training and passed both the theoretical and practical exams required to be a certified vehicle inspector.

Working relationships during employment

[25] During the course of Mr Flay's employment as a vehicle inspector at Automotive Advantage, there was friction between him and the co-owner and manager of Automotive Advantage, Mr Toombs.

¹ www.nzta.govt.nz

[26] Mr O'Hagan, the other co-owner of Automotive Advantage, says that issues arose between Mr Flay and Mr Toombs over Mr Flay's decisions as to repair certifications on vehicles and whether or not a particular vehicle should be issued with a warrant of fitness (wof).

[27] Mr Michael Giffiths, is employed by AA and was the entry compliance vehicle inspector and team leader at the Automotive Advantage site at the time of Mr Flay's employment. Mr Griffiths says Mr Toombs knows the NZTA regulations and manuals better than most vehicle inspectors. Mr Griffiths says Mr Toombs would challenge vehicle inspectors if he felt they were not making decisions in accordance with the appropriate regulations.

[28] Mr Edwards also says that Mr Toombs while not being a certified vehicle inspector, was very knowledgeable with the NZTA requirements of entry compliance and if he did not agree with a decision being made by a vehicle inspector was not afraid to question the decision.

[29] During the course of his employment disputes arose between Mr Flay and Mr Toombs, in particular, over decisions made by Mr Flay in relation to vehicles inspected by him.

[30] Mr O'Hagan says Mr Flay was issuing wofs for cars that should not have been issued with them for safety reasons or he was requiring cars to have repair certificates when they were not needed. Mr Flay disputes this, saying Mr Toombs was keen to have cars issued with wof's and not to have repair certificates issued to save Automotive Advantage clients from being put to the cost of repairs.

[31] Mr Toombs is the co-owner of Automotive Advantage and the manager. While he is not a qualified mechanic or a certified vehicle inspector, he has considerable knowledge of the relevant vehicle regulations. Mr Toombs would regularly challenge decisions made by Mr Flay and other vehicle inspectors, including Mr Geoff Gibson, an AA employee previously employed as a vehicle inspector at the Automotive Advantage site.

[32] As a result of his experience in particular with Mr Toombs, Mr Gibson complained to Mr Rennie and was relocated to another AA site. He remains employed by AA as a vehicle inspector at another site.

[33] Mr Toombs was described by his business partner, Mr O'Hagan, as "blunt and to the point, and very factual". Mr O'Hagan says that he thought certain inspectors did not always like being found to be incorrect about one of their decisions by Mr Toombs. Mr Griffiths described Mr Toombs as being "short, sharp and blunt" and if the work was not flowing he would get stressed.

[34] At the Authority's investigation meeting, Mr Rennie said he had spoken with Mr O'Hagan about Mr Toombs' attitude during the time AA had contracted services to Automotive Advantage. Mr Rennie says he had cautioned Mr O'Hagan that if Mr Toombs did not change his attitude and treat AA staff with more respect, the commercial relationship between them may be in jeopardy.

[35] Mr Rennie was aware of the issues and says he put in place a process in which rather than Mr Toombs talking to Mr Flay about his decisions, any matters were referred through Mr Griffiths, the team leader. Mr Griffiths would discuss his opinion with Mr Toombs and then make the final decision as to whether a repair certificate or a wof would be issued for a vehicle. Mr Toombs says he put the process in place "to avoid arguments between AA and its client, Automotive Advantage".

[36] Mr Flay says matters got to a point where he was not being spoken to by Mr Toombs and his workmate, Cory and this was becoming intolerable. Mr Flay says he felt bullied and harassed.

Performance Review

[37] On 21 July 2017, Mr Rennie conducted Mr Flay's performance review. The review was on the whole positive. It was noted that Mr Flay had done well passing his theory and practical examinations and gaining his authority. Mr Rennie remarked on Mr Flay's achievement in this regard and noted that he expected Mr Flay to put effort in to "everyday tasks and relationship management with the team at the site. Communication is king in your environment and will help to minimise frustration and guess work. I look forward to seeing you achieve your goals in 2017/2018 and look forward to helping you achieve them."

Further issues

[38] A few days following the performance review, Mr Flay says he asked Mr Toombs to strip a vehicle further so he could see the chassis. Mr Flay says Mr

Toombs responded aggressively asking why he needed to see it. An argument ensued and Mr Flay says he was told by Mr Toombs to leave the worksite.

[39] On 5 September 2017, Mr Flay says he failed the suspension on a vehicle. Mr Toombs inspected the vehicle and decided it should not have been failed. Mr Flay says Mr Toombs became very angry and aggressive about his decision. Mr Flay decided to walk out of the workshop to avoid further confrontation.

[40] Mr Edwards and Mr Griffiths both say Mr Flay became argumentative with Mr Toombs when he challenged his decisions and that more often than not Mr Toombs was correct to challenge the decisions.

[41] Mr Griffiths says Mr Toombs began raising serious concerns with him about Mr Flay and the fact he was missing major defects and still passing vehicles. Mr Rennie says he too was having similar issues raised with him by Mr O'Hagan.

Meeting on 7 September 2017

[42] A meeting was held on 7 September 2017, including with Mr Flay, Mr Griffiths, Mr Rennie, Mr O'Hagan and Mr Toombs to discuss issues at Automotive Advantage. The meeting was not a disciplinary meeting and was called to discuss issues at the workshop in general. It became clear that the meeting was to raise issues with Mr Flay about his decisions in issuing wofs and repair certificates when Mr O'Hagan and Mr Toombs did not agree they were warranted.

[43] Mr O'Hagan raised concerns about defects in vehicles not being picked up but vehicles still being passed by Mr Flay.

[44] Mr Flay was shown a vehicle which he passed which according to Mr O'Hagan should not have been.

Email from Mr O'Hagan to Mr Rennie – 7 September 2017

[45] Following the meeting, Mr O'Hagan sent an email to Mr Rennie outlining the issues with Mr Flay and informing him that he had decided Mr Flay was no longer to work at the Automotive Advantage site.

[46] The email set out a number of issues with Mr Flay and his work. They included:

- Failure to identify and record critical safety defects during entry inspection
- Failure to follow inspection process
- Workplace intellectual property and confidentiality
- Workplace health and safety
- Hours of work

There followed a summary:

We find it incomprehensible that an inspector with this amount of knowledge and previous experience can be genuinely this inept at their duties. Tony refuses to accept responsibility for failure to correctly inspect vehicles and makes factually incorrect statements in an attempt to apportion blame to co-workers. We have been led to believe there is collusion between this inspector and our main competitor in Hamilton. We do not consider this inspector is acting ethically in their position, nor respecting the confidentiality required of their position. We feel this inspector has no respect for the AA brand is actively seeking to damage both our business and the reputation of the AA. This inspector is creating an unhealthy work environment at our site that could ultimately expose us to legal proceedings. This inspector is not taking seriously their responsibility to ensure the safety of the motoring public, and by his actions could be endangering road users.

Outcome

After considering the above information, having discussions with yourself, the site team leader Mike and Tony, and taking into consideration the safety and security of other employees at the site, we regret we are left with no option but for AA to remove this inspector from our site. We hereby request that Tony Flay be removed from our site. We look forward to moving on from this unfortunate situation and growing our business with the assistance of the AA in the future.

Regards
Shane O'Hagan

Automotive Advantage refuses to allow Mr Flay back on to its site

[47] Mr Rennie was on annual leave on 8 September 2017. He rang Mr O'Hagan in the morning and asked him to reconsider the decision not to allow Mr Flay back on

site. Mr O'Hagan refused to change his mind and told Mr Rennie that Mr Flay was putting his business into danger and he did not want him back. Mr Rennie said he pushed the issue with Mr O'Hagan and Mr O'Hagan told him that if he tried to put Mr Flay back at the work site, he would "trespass him". Mr O'Hagan sent a text to Mr Flay and told him not to go into work. Mr Rennie then telephoned Mr Flay and told him that he needed to sort out some issues relating to the meeting the previous day and that those issues would need to be addressed before Mr Flay could go back on site.

[48] Mr Rennie says he then met with Ms Andrea Long AA's human resources manager to get advice on how to move forward with the situation. Ms Long informed Mr Rennie that he needed to talk to Mr Flay about the issues that had been raised. Ms Long informed Mr Rennie that he needed to share the contents of the 7 September 2017 email from Mr O'Hagan with Mr Flay and get his response to it.

11 September 2017 meeting

[49] On 11 September 2017, Mr Rennie met with Mr Flay at a coffee shop in Hamilton in order to discuss Mr O'Hagan's email of 7 September 2017. They discussed the matters raised in the email. Mr Rennie says Mr Flay told him that he was doing his job properly and that it was Mr O'Hagan and Mr Toombs who were the problem. Mr Flay says that he was told by Mr Rennie that he was to remain away from work but would be paid until further notice. Mr Flay says he went home after the meeting and composed an email covering all the items that he could remember and put in writing the issues which he had already raised with Mr Rennie about the bullying behaviour by Mr Toombs and Cory.

14 September 2017 – letter

[50] On 14 September 2017, Mr Flay received a letter from Mr Rennie. The subject heading was "Potential frustration of employment agreement". The first paragraph stated:

As you are aware, you are required to work for a client of the NZAA on a full time basis, being Ideal Cars Hamilton Limited. We have unfortunately been told by this client that they will no longer permit you to work at their work site. They allege that you have behaved inappropriately and/or failed to perform – and this has led to their position. They have reached the point where they have simply stated they will not allow you back on their premises as a result. As you

appreciate, NZAA has contacted the client about this in the hope that we may be able to change their position. Unfortunately, we could not do so. Their position is resolute. We have considered the implications of this. As you appreciate, your duties require you to be able to complete work on this client's site on a full time basis. You cannot transfer your duties to another location as they are site specific. Given that the client will not allow you to return to their worksite, I have considered whether there is the opportunity for you to work elsewhere within the NZAA. Unfortunately, the NZAA does not have any vacancies that fit your skills and experience. As a result, I believe that you are unable to perform your obligations that are required under the employment agreement and that the contract may be frustrated as a result.

Mr Rennie went on to say that he had not finalised his view and would like to meet with Mr Flay to discuss further. Mr Flay was informed that he was able to bring a support person or representative to the meeting.

22 September 2017 meeting

[51] A meeting was held on 22 September 2017. Mr Rennie was present with Ms Long. Mr Flay and his wife were present along with their representative. There was a discussion about concerns relating to entry inspections made by Mr Flay. Mr Rennie explained that Automotive Advantage was not prepared to have Mr Flay back on site. Mr Flay says Mr Rennie repeatedly told him that his contract had been frustrated because he was to work at the Automotive Advantage site and as they did not want him back there was no other position for him.

[52] Following the meeting, Mr Rennie confirmed in writing that Mr Flay's employment was terminated on the grounds of "frustration of contract". The letter concluded:

Accordingly, and as advised at our meeting on 22 September 2017, we have concluded that Tony's employment must be terminated by reason of frustration of contract. We do not necessarily believe that we are obligated to do so, but we have decided that we will pay his notice period to him in lieu. Any other salary and annual leave that may be owing will be also paid to him in the next pay run.

First issue: was the employment agreement between Mr Flay and NZAA frustrated?

[53] The full bench of the Court of Appeal in *AO Karelrybflot v Arthur Udovenko*² determined that the doctrine of frustration of contract could be applied to employment contracts.³ The Court continued:

It is not difficult to conceive of situations in which a supervening event might produce consequences for an employer which would render the situation, and the performance of an employment contract, particularly one for a fixed term, radically different from what had been undertaken when the contract was entered into. Whether a contract is frustrated in the particular circumstances of the case will be a matter of fact and degree, but it seems to us that, in view of the nature of a contract of employment the doctrine will not easily be able to be invoked by an employer because of the drastic effect which it would have on the rights of vulnerable employees ...

...We bear in mind also the observation of Bingham LJ (as he then was) in *J. Lauritzen AS v Wijsmuller BV (The "Super Servant Two")* [1990] 1 Lloyds Rep 1, 8 that:

Since the effect of frustration is to kill the contract and discharge the parties from further liability under it, the doctrine is not to be lightly invoked, must be kept within very narrow limits and ought not to be extended⁴.

[54] The Court of Appeal also considered the doctrine of frustration of contract in the employment context in *A Worker v A Farmer*⁵. At paragraph 21, the Court stated:

... It is only if the employment contract did not make sufficient provision for what occurred that the doctrine of frustration will apply. In this context ...the statutory requirements, including dealing in good faith⁸ and providing the employee with an opportunity to comment on information relevant to a proposed termination of employment⁹, are imported into the contract ...

[55] The Court in *A Worker v Farmer* concluded that the Judge in the decision from which had been appealed "should have considered whether the dismissal was justifiable on an objective basis in terms of s.103A of the Employment Relations Act".

[56] It is my view that the doctrine of frustration does not apply in the current context. The concerns around Mr Flay's performance were matters within the

² [2000] 2NZLR 24 (CA)

³ Para 36

⁴ Para 37

⁵ [2010] NZCA 547

⁸ Section 4A(b) Employment Relations Act 2000

⁹ Section 4(1A)(c)

employment relationship, within the scope of his employment agreement and could have been dealt with by Mr Rennie accordingly.

[57] Mr Rennie did not take any disciplinary action during the course of Mr Flay's employment. Mr Flay was given a positive performance review with indications that he needed to work on his communication at the Automotive Advantage site. There were no warnings issued.

[58] Further, the situation which had arisen at the Automotive Advantage site was foreseeable and had occurred previously. A former vehicle inspector, Mr Gibson had experienced significant difficulties with Mr Toombs. The issues seemed similar to those between Mr Flay and Mr Toombs. Mr Gibson says he asked to be moved to another site when an opportunity arose to do so.

[59] When Mr Flay was employed by AA, Mr Rennie was aware that there had been issues between Mr Gibson and Mr Toombs, over decisions Mr Gibson was making and with which Mr Toombs disagreed.

[60] AA had the knowledge that this type of situation had occurred and could occur again. It was not a supervening event which triggered a frustration of contract. Further, it is apparent that there were job advertisements placed by AA at about the time of Mr Flay's dismissal for which he would have been suitably qualified. This would have obviated the need to frustrate the contract.

Second Issue

If the employment agreement was not frustrated was Mr Flay unjustifiably dismissed?

The test of justification

[61] By raising personal grievances and bringing them to the Authority for investigation and determination, the Authority is required to apply the test of justification under s.103A of the Act. Under this test, the question of whether AA's decision to terminate Mr Flay's employment was justifiable, must be determined on an objective basis, by considering whether AA's actions and how it acted were what a

fair and reasonable employer could have done in all the circumstances at the time the termination occurred.⁶

[62] In applying s.103A, the Authority must also consider four particular factors set out in s.103A(3) as well as any others it thinks appropriate. The four particular factors in s.103A(3) relate primarily to the way in which complaints about an employee are investigated, whether the employee concerned has been properly notified of the complaints, provided with a proper opportunity to respond to them and whether the employer has genuinely considered the employee's responses.

[63] The test in s.103A is to be applied with the proviso that a dismissal or an action by an employer must not be determined to be unjustifiable solely because of process defects if they were minor and did not result in the employee being treated unfairly.⁷

[64] Mr Flay had a positive performance review on 22 July 2017. While there were issues raised with Mr Rennie by Mr O'Hagan and Mr Toombs, they were not raised clearly and with a view to resolving them. Rather, Mr Rennie put a process in place in which Mr Flay was not to communicate with Mr Toombs and Cory. Any issues to be discussed in relation to Mr Flay's decisions regarding a vehicle, were to be put through an intermediary, namely the team leader, Mr Griffiths. It is not clear that Mr Flay was in fact told that this was the process that was going to occur. From his perspective, he was not being spoken to by Mr Toombs and Cory, a fact which he says was making working in the environment very difficult.

[65] It was not until the meeting on 7 September 2017 that Mr Flay was given specific examples of Mr O'Hagan's and Mr Toombs' concerns about his work. However, even then the meeting was not one which was flagged to him as being a meeting to talk about issues with his performance and issues that Mr O'Hagan and Mr Toombs had with him. Rather the meeting was said to be a general discussion about issues which were arising within the work environment. However, it became apparent during the course of that meeting that Mr O'Hagan and Mr Toombs had serious issues with Mr Flay which they wished to have resolved.

⁶ Section 103A Employment Relations Act 2000 (the Act).
⁷ Section 103(5)

[66] Mr O'Hagan was unhappy following the meeting and informed Mr Rennie later in the afternoon, by email, that he was not willing to have Mr Flay back on site.

Dismissal

[67] Mr Flay's employment was terminated on 22 September 2017 on the basis that AA was unable to employ him elsewhere and so his employment agreement had been frustrated. I do not accept that the employment agreement was frustrated.

[68] In the circumstances, it is clear to me that dismissal was not the action of a fair and reasonable employer. Mr Rennie had ample opportunity during the course of Mr Flay's employment to deal head on with issues which were being raised with him. He did not.

[69] As Judge Perkins stated in a recent Employment Court decision, *Hayashi v Sky City Management Limited*⁸

- (f) The right to employment is a substantial right requiring protection. Therefore, the starting-point for a dismissal to be valid is that it must be justifiable and fair.

[70] I do not consider that the dismissal was justifiable and fair.

[71] I find AA unjustifiably terminated Mr Flay's employment. Accordingly, Mr Flay is entitled to remedies under the Act.

Third Issue

If Mr Flay was unjustifiably dismissed what remedies are available to him?

[72] Mr Flay was paid 4 weeks salary in lieu of notice. Mr Flay seeks the following remedies in relation to his unjustified dismissal:

- (a) Compensation of \$15,000 under s.123(1)(c)(i) of the Act for hurt and humiliation he says he suffered as a result of AA's actions;
- (b) Loss of remuneration pursuant to s.128 of the Act from 20 October 2017 until he secured a further position. Mr Flay secured a part time position on 30 October 2017 at a lesser hourly rate. Mr Flay seeks

⁸ [2018] NZEmpC 14 at para [27]

losses from 20 October 2017 to the date of the Authority's investigation meeting.

[73] Mr Flay says his dismissal was one of the worst experiences of his working life. He had never lost a job before and was embarrassed and humiliated. Mr Flay says he lost interest in hobbies, preferring to stay at home rather than talking to people. Mrs Flay spoke of the impact the dismissal had on Mr Flay, saying he lost self confidence and found the experience humiliating.

[74] I consider an award of \$15,000 compensation to be an appropriate.

[75] I order payment to Mr Flay of 3 months loss of remuneration totalling \$6480 gross, being the difference in salary of \$540 gross a week received by him when he started his new part time position, than he had been receiving at AA.

Fourth Issue

Was Mr Flay unjustifiably disadvantaged by being asked not to attend work between 14 and 22 September 2017?

[76] Clause 21.2 of Mr Flay's employment agreement allows for suspension of an employee by the AA. In such a case the employee may be required by the AA to remain away from the workplace, on pay, "...while it conducts an investigation into your conduct as an employee or your performance."

[77] Mr Flay received a text from Mr Rennie on the morning of 8 September 2017 as he was going into work to tell him not to go into work. This was because Mr Rennie had received the email of 7 September 2017 from Mr O'Hagan that Mr Flay was not to return to the workplace.

[78] Clearly, this put Mr Rennie into a difficult position. However, in my view, Mr Rennie had an obligation to act fairly and reasonably, and failed to do so. Mr Rennie informed Mr Flay not to go into work and this was without any prior notice or consultation with him. There was no specific reason given to him. Mr Rennie referred generally to issues in the workplace as a result of the meeting on 7 September 2017.

[79] It was open to Mr Rennie to discuss issues openly with Mr Flay before informing him not to return to work. Mr Flay had not had the opportunity to discuss the issues raised at the meeting on 7 September 2017, with Mr Rennie.

[80] Further, the suspension was not lawful. Suspension under clause 21.2 of the employment agreement is to allow AA to investigate an employee's conduct or performance. The letter of dismissal states that the meeting held on 22 September 2017, was to "discuss an apparent instance of frustration of contract". It appears this is what was investigated by AA, not Mr Flay's conduct or performance. AA relied on allegations by Automotive Advantage to suspend Mr Flay, AA did not conduct its own investigation in to those allegations. Mr Flay was unjustifiably disadvantaged in my view.

Fifth Issue

If Mr Flay was unjustifiably disadvantaged what remedies are available to him?

[81] I consider the suspension was not lawful and amounted to an unjustifiable action by AA. I consider an award of \$2500 compensation under s123(1)(c)(i) of the Act to be appropriate in the circumstances.

Sixth Issue

If Mr Flay is entitled to remedies, did he contribute to the unjustified dismissal and/or disadvantage and, if so, should the remedies be reduced by the Authority pursuant to s.124 of the Act?

[82] I am required to consider whether or not Mr Flay's actions or conduct contributed to the situation that gave rise to his disadvantage and dismissal. I consider Mr Flay did contribute to the situation giving rise to the disadvantage and to his dismissal.

[83] Mr Flay appeared not to take any responsibility for his part in the deteriorating work relationships at Automotive Advantage. Mr Griffiths says he felt the relationship between Mr Toombs and Mr Flay was "doomed from the start". He says Mr Flay was negative and would make comments in front of others at work about the authority he intended wielding once he was certified. Such comments were not well received and did not help the working environment.

[84] Mr Flay accepted he was partly to blame for the poor working relationships at Automotive Advantage but felt the “seniors” should take responsibility for resolving these, not him.

[85] I consider remedies should be reduced by 30% to take into account Mr Flay’s contribution.

Costs

[86] Mr Flay has 14 days within which to file a memorandum as to costs. AA has 14 days from receipt within which to file its memorandum in reply.

Anna Fitzgibbon
Member of the Employment Relations Authority