IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2017] NZERA Auckland 204
5588708

	BETWEEN	MURRAY MAYSTON Applicant
	AND	AUTOMOTIVE WHOLESALE LIMITED First Respondent
	AND	JOHN INGHAM Second Respondent
	AND	TRENT INGHAM Third Respondent

Member of Authority:	Nicola Craig
Representatives:	Matthew Young for Applicant John Ingham for himself and First and Third Respondents
Investigation Meeting:	16 September 2016
Submissions and information received:	11 October, 1 November and 23 December 2016 for Applicant and 25 October 2016, 20 January 2017 and 24 and 28 April 2017 from Respondents
Determination:	13 July 2017

DETERMINATION OF THE AUTHORITY

A. Murray Mayston (Mr Mayston) was unjustifiably dismissed by Automotive Wholesale Limited (AWL) on 29 July 2015.

B. AWL is ordered to pay Mr Mayston the following amounts for his dismissal grievance:

(a) Lost wages of $21,249.99 gross;

(b) Compensation of $8,000.00 under s 123(1)(c)(i) of the

Employment Relations Act (the Act); and

(c) Reimbursement for the loss of two months' use of the company car under s 123(1)(c)(ii) of the Act. The issue of the value of the company car to Mr Mayston is left to the parties to attempt to resolve. In the event that they cannot, leave is granted for them to return to the Authority on this issue.

C. **Within 14 days of the date of this determination, AWL is ordered to pay to Mr Mayston $8010.82 gross as holiday pay and interest on that sum at the rate of 5% calculated from 1 September 2015 to the date of payment.**

D. **Within 14 days of the date of this determination AWL is to pay a penalty of $3,000.00 for breaching s 24 of the Holidays Act 2003, of which $1,000.00 is to go to the Crown and $2,000.00 to Mr Mayston.**

E. **Within 14 days of the date of this determination Mr Trent Ingham is to pay a penalty of $3,000 under s 134A of the Act, of which half is to go to the Crown and half to Mr Mayston**

F. **Costs are reserved.**

Employment relationship problem

[1] Automotive Wholesale Limited (AWL or the company) was established by Mr Trent Ingham (the Third Respondent) to wholesale cars. Wholesaling is the buying and selling of cars except to retail customers. Mr Trent Ingham is the sole shareholder of the company (personally and through his own family trust).

[2] Both he and his father Mr John Ingham (the Second Respondent) had known Mr Murray Mayston for over 10 years through the motor industry. Mr Mayston had, some years before, worked as a wholesaler for a company owned or controlled by Mr

John Ingham. Mr Trent Ingham offered Mr Mayston a job with AWL as a vehicle buyer and seller. Mr Mayston signed his employment agreement on 24 April 2014.

[3] Mr John Ingham had, some decades previously, set about establishing what became the Ingham Motor Group (the Group). The Group involves a number of car dealerships based predominately in the Waikato, with each dealership being owned by a different company. Mr Trent Ingham was employed within the Group. AWL had an association with the Group in terms of having a right of last refusal on cars which had been traded in to the Group's dealerships and which the Group was going to wholesale.

[4] In January 2015 following a dispute with a dealer principal at the Group's Hyundai dealership, that dealership refused to allow Mr Mayston access to purchase cars from it.

[5] On 15 July 2015 Mr Trent Ingham called Mr Mayston into his office and told him that AWL was to cease operating as Mr Trent Ingham was moving to Auckland to concentrate on other work for the Group. Mr Mayston's job was to finish.

[6] The Group discovered damage on Hyundai vehicles in one of its storage yards. Mr Mayston heard that there was a suggestion that he was responsible. He raised this with Mr Trent Ingham, who acknowledged that he knew about it but told Mr Mayston not to worry about it. Mr John Ingham subsequently discussed the damage issue with Mr Mayston.

[7] On 29 July 2015 Mr Trent Ingham phoned Mr Mayston and told him that his employment was finishing and to bring his company property in that day. Mr Mayston did so but was allowed to keep a company car until the end of August 2015 and his work cell phone permanently. He was paid by AWL until 12 August 2015.

The Authority process

[8] Mr Mayston initially filed his claim solely against AWL as his employer. An application was subsequently made to join Mr Trent Ingham and Mr John Ingham as parties on the basis that they had allegedly interfered with Mr Mayston's employment agreement. The application relied on section 134(2) of the Employment Relations Act 2000 (the Act) under which penalties can be imposed on people who incite, instigate, aid or abet any breach of an employment agreement.

[9] The Authority was satisfied that there was prima facie evidence of both Mr Trent Ingham and Mr John Ingham being involved in the process surrounding the Applicant's dismissal. Also, the proposed parties could have been directly affected by an order made in these proceedings [1] once an amended statement of problem was filed. Under s 221 of the Act the Authority joined both Mr Trent Ingham and Mr John Ingham as respondent parties to this proceeding.

[10] An amended statement of problem and amended statement in reply were subsequently filed.

[11] An investigation meeting was held in Hamilton on 16 September 2016. Evidence was heard from Mr Mayston, Mr Trent Ingham, Mr John Ingham, a banker Paul Stuthridge and an employee from the Group.

[12] A timetable was set for submissions following the investigation meeting. Subsequent to those submissions being received a Full Bench of the Employment Court issued its decision in *Borsboom (Labour Inspector) v Preet PVT Ltd & Warrington Discount Tobacco Ltd* [2] *(Preet)* regarding penalties. Further submissions were then sought on that issue. In addition the Authority directed that a further document be filed by the respondents and this was done.

[13] As permitted by s 174E of the Act this determination has not recorded all the evidence and submissions received but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

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[1] *Auckland Regional Services Trust v Lark* [1994] 2 ERNZ 135
[2] [2016] NZEmpC 143 Full Bench

Issues

[14] The issues for investigation and determination are:

(i) Does Mr Mayston have an unjustified dismissal claim against AWL?
(ii) If so, what remedies (if any) should he receive?
(iii) Is Mr Mayston owed any commission payments by AWL and if so, how much?
(iv) Is Mr Mayston owed holiday pay by AWL and if so, how much?
(v) Should AWL and/or Mr Trent Ingham have to pay a penalty for failure to pay holiday pay to Mr Mayston?
(vi) Did Mr John Ingham incite, instigate, aid or abet any breaches of Mr Mayston's employment agreement?
(vii) Did Mr Trent Ingham incite, instigate, aid or abet any breaches of Mr Mayston's employment agreement?
(viii) If either man did so, should a penalty be imposed for that?
(ix) Should Mr Trent Ingham be liable for a penalty under s 134A of the Act regarding obstructing and/or delaying of the Authority's investigation?

Reliability of evidence

[15] There were a number of significant differences in the evidence of Mr Mayston and Mr Trent Ingham regarding discussions between them around the time of Mr Mayston's appointment, during his employment and in mid 2015 when that employment was terminated.

[16] Unfortunately no written record was kept by AWL of various significant meetings which Mr Trent Ingham had with Mr Mayston. Mr Trent Ingham says that this is because the two men had known each other previously and had a friendly relationship during Mr Mayston's time at AWL, until close to the end of Mr Mayston's employment.

[17] Mr Mayston's evidence at the investigation meeting was consistent, both with various correspondence from his earlier advocate to AWL, and with what written material has been filed in the Authority.

[18] Mr Trent Ingham's evidence was less consistent, and in several instances he acknowledged that the written evidence which he had filed in the Authority was wrong, and that he had made a mistake. For example, in his witness statement he

stated that nowhere in the agreement does the employment agreement make mention of the Ingham Motor Group. The agreement actually refers to and attaches Ingham policies, includes reference in the scheduled House Rules to "Ingham and its companies" reserving a right to instantly dismiss for serious misconduct and in one attached policy mentions "the "Ingham" group".

[19] Given the higher degree of consistency of Mr Mayston's evidence, I therefore prefer his evidence to Mr Trent Ingham's evidence.

Connection between the Ingham Motor Group and Mr Mayston's employment

[20] On Mr Mayston's behalf, the close connection between his employment, and the Ingham Group and Mr John Ingham, was emphasised. However, it was not suggested that Mr Mayston was employed by the Group or Mr John Ingham personally.

[21] By contrast Mr Trent Ingham says that AWL was his opportunity for independence. The whole purpose was for him to do something on his own, in the sense of establish his own business. In addition, he continued to have employment with the Group.

Mr Mayston's appointment

[22] On 19 April 2014 Mr Trent Ingham, using an email address incorporating the word Ingham, emailed Mr Mayston. The email is signed "Trent Ingham Ingham Group".

[23] In the email Mr Trent Ingham sets out how he saw the wholesale company operating, and his and Mr Mayston's respective positions and responsibilities. Mr Trent Ingham was to form a new company with himself as the sole shareholder and director. The new company was to enter into a 12 month employment contract with Mr Mayston. Key terms were identified. Mr Mayston was told that he needed to treat this as his own business, being responsible for buying the cars, reconditioning and selling them. The email states that "As this is a separate company you are not accountable to anyone in the Ingham Group". Mr Trent Ingham was to take care of the administration. They were the only two people working for AWL.

[24] The email states that "We will introduce a new company policy that no vehicle over $2000 is to be wholesaled without giving you the last opportunity to buy it." Mr Trent Ingham says that he introduced the policy into the dealerships, and that "We" in that sentence refers to the Ingham Group.

[25] The letter formally offering employment with AWL, and enclosing the employment agreement, is dated 23 April 2014. It has a large letter head reading "Ingham" with a registered trademark symbol. Underneath that is "Offer of Employment" and then in smaller font "Automotive Wholesale Limited".

Employment agreement

[26] Mr Trent Ingham prepared the employment agreement. He says that it did this without his father's knowledge.

[27] The employment agreement contains a number of references to the Ingham Motor Group or similar. For example, clause 32 is headed "Ingham Business Systems" and relates to internet and email issues. Mr Trent Ingham says that AWL did not use Ingham business systems but accepted that various references to Inghams suggest that the employee covered by the agreement is an employee of Inghams. Further, that it was a huge oversight from him not to have taken those references out. He acknowledges that he should not have used the Ingham Group email address and letterhead.

Connection between the businesses

[28] Mr Mayston says that he was told that AWL was to be the wholesaling division of the Ingham Motor Group. Further, that Mr Trent Ingham told him that the money to set up AWL had come from Mr John Ingham. The latter assertion was disputed by Mr Trent Ingham.

[29] The respondents emphasise that the employment agreement and letter of offer do not describe AWL as the wholesale division of the Ingham Group. Mr John Ingham says that the wholesale company was his son's idea, to both dispose of some of Ingham's own trades and buy cars from some others.

[30] Mr Mayston says that Mr John Ingham was the real boss and that he regarded both Inghams as his bosses. Mr Mayston gave the example that Mr John Ingham would ask where AWL was at for the month in terms of sales figures. Mr Trent Ingham says that it was common in the car business for people to ask others about their sales figures, even if they were not working for the same company.

[31] Mr John Ingham says that when his company had employed Mr Mayston previously, Mr Mayston referred to Mr John Ingham as his employer rather than the Ingham Group. I took this to suggest that Mr Mayston tended to focus on the owner or manager of a business as the employer rather than a company.

[32] There were other connections. Sometime after Mr Mayston started AWL moved to an Inghams Group site as there was free office space there. Mr Mayston's pay was paid out of an Inghams Te Awamutu bank account and that was reimbursed (along with FBT, ACC etc) by AWL. AWL did not pay directly for that service.

[33] The respondents called Mr Stuthridge, a banker responsible for looking after the Ingham Group of companies and Mr Trent Ingham. He says that Mr Trent Ingham has two companies, including AWL, which Mr John Ingham has no signing authority over the accounts of. Mr Trent Ingham is the only signatory, and person authorised to run, AWL's bank account and is the only person listed as a beneficial owner on the bank's beneficial owner declaration [3].

[34] I accept that there was a close connection between AWL and the Ingham Group. However, that of itself does not establish Mr Mayston's claims and the merits of each claim still need to be examined.

Fixed term agreement claim

[35] Although the 24 April 2014 employment agreement was for a 12 month period, Mr Mayston's employment continued after April 2015, without the parties entering into a replacement written agreement.

[36] The respondents argued that Mr Mayston had been employed on a fixed term agreement which on expiry the parties agreed to continue on a month by month basis thereafter, as the business was possibly going to close. There is no written

[3] Undertaken for anti-money laundering legislation.

employment agreement or correspondence setting out such an arrangement. Also, s66(4) of the Act requires that if the parties agree that employment will be of a fixed term nature, then the employment agreement must state in writing the way in which it will end and the reasons for it ending in that way. Further, if that subsection is not complied with the employer may not rely on the term regarding the employment ceasing on a particular date or on occurrence of a particular event [4]

[37] I therefore consider that even if there was an agreement by the parties that was not effective to mean that Mr Mayston's employment could cease without the usual requirements where employment agreements are terminated.

Announcement of closure

[38] Mr Trent Ingham says that he had had discussions with Mr Mayston from early in 2015 about the business finishing. He says that at one point he talked about finishing at the end of April and later mentioned July 2015. Mr Mayston denies this. I prefer Mr Mayston's evidence in this regard.

[39] On 15 July 2015 Mr Trent Ingham called Mr Mayston into his office and told him that his job would disappear. Mr Mayston says that the reason he was given was that Mr Trent Ingham was moving to Auckland to concentrate on the Group's web design. Mr Mayston says that the announcement was a shock to him and he was extremely upset.

[40] Mr Trent Ingham's evidence was that AWL's revenue was pretty poor and he had only made a modest amount of profit from his investment.

Damage to vehicles

[41] On 23 July 2015 Mr Mayston was told by a Group sales person that Mr Mayston had been accused by the manager whom he had previously had the January dispute with, of damaging vehicles in a Group storage yard (known as the pit). The suggestion was that it was deliberate damage as Hyundai vehicles in particular had been targeted.

[4] S 66 (6) of the Act

[42] When Mr Mayston reported the accusation to Mr Trent Ingham the latter said that he knew of it, but not to worry about it, that he would sort it.

[43] On 28 July Mr John Ingham called Mr Mayston to ask if he knew anything about the vehicle damage. Mr Mayston thought that Mr John Ingham was accusing him of damaging the cars, which Mr Mayston denied. He says that Mr John Ingham told him not to set foot on any of his yards. From Mr John Ingham's perspective he was checking what Mr Mayston's position was and making it clear that Mr Mayston did not have any business being in the pit.

[44] Mr Trent Ingham's position was that the allegation had no bearing on AWL trying to make money and that that was what he was interested in.

29 July 2015

[45] On 29 July 2015 Mr Trent Ingham phoned Mr Mayston and told him that he was finishing work now, to bring in his stuff, it was over. No explanation was given. Mr Mayston says that he asked for a letter in writing three times but Mr Trent Mayston replied forcefully "I'm giving you nothing".

[46] When Mr Mayston dropped in his things he asked for his two weeks' pay in lieu of notice. Mr Trent Ingham agreed and paid until 12 August. Mr Mayston to use a company car through to the end of August 2015 and work cell phone and number permanently. Those things do show a willingness on Mr Trent Ingham's part to consider Mr Mayston's personal circumstances and the effect of the dismissal.

Dismissal claim

[47] There was no formal advice from AWL to Mr Mayston regarding why he was dismissed. This is despite Mr Mayston requesting that. I took AWL's position to the Authority to be that Mr Mayston was redundant as the business was being closed down.

[48] Under s 103A of the Act I must determine whether on an objective basis, the employer's actions, and how the employer acted, were what a reasonable employer could have done in all the circumstances. In doing so I must consider the matters listed in under s 103A(3).

Genuineness of redundancy

[49] Mr Mayston questioned whether AWL had really ceased trading and produced advertisements on Trade Me showing an account named "autowsale" selling cars. The seller's details stated that the seller had been a member since September 2015. Some ads make reference to the Ingham Motor Group. Mr Trent Ingham understood that the Trade Me account was set up by Kane Owen.

[50] In response to a query an account set up by Mr Mayston, a Mr Owen replied using an email address with the Automotive Wholesale name. He stated that "My company Automotive wholesale lists on trade me and clears the good (sic) Ingham Group". Mr Owen had previously been employed within the Ingham Group but Mr Mayston understood that Mr Owen returned shortly after Mr Mayston left.

[51] The respondents say that Mr Owen was employed by the Group on a totally different basis than Mr Mayston was employed by AWL. Mr Owen is responsible for managing the wholesaling of cars at all the Group yards, making sure that there is no old stock and relieving sales managers when they are away.

[52] Mr John Ingham accepts that the Ingham Group used the Automotive Wholesale name as a trading name, but not AWL the company. The Group had been wholesaling cars for as long as it had been in business.

[53] The respondents supplied an IR 315 form filed with the Inland Revenue Department indicating that AWL had ceased trading on 28 September 2015. The form is dated 13 October 2015.

[54] Although it is not surprising that the use of the Automotive Wholesale name raised suspicions and may have implications under the companies legislation, I am not satisfied that AWL continued operating after late 2015. On that basis Mr Mayston's redundancy was genuine.

Process used by AWL

[55] There can be little doubt that Mr Trent Ingham did not follow a process that a fair and reasonable employer could have done in terms of Mr Mayston's redundancy. Mr Trent Ingham admits that, when he told Mr Mayston that they were finishing up,

he was not going sit there and consult with Mr Mayston. He accepts that he did not follow any process, other than giving Mr Mayston pay in lieu of notice.

[56] There was no advance notice of the 15 July meeting itself or what it was about. There was thus no offer of support or representation at the meeting. There was no consultation with Mr Mayston about the prospect of the business closing and the resulting loss of his job.

[57] Nothing was put in writing regarding either the termination itself or the payment in lieu of a notice period. The employment agreement specifies that two weeks' written notice be provided by either party terminating the agreement [5] and likewise by the employer if it is terminating for redundancy [6]. No written notice was provided in this instance by AWL, breaching the employment agreement.

[58] On 29 July Mr Mayston was called on the phone, again without warning and told that his employment was over and that he should drop off company property. There was no process.

[59] Mr Mayston asked for the reasons for his dismissal to be put in writing but Mr Trent Ingham refused to do so.

[60] In conclusion Mr Mayston was unjustifiably dismissed.

Remedies for unjustified dismissal

[61] Mr Mayston claims lost wages, compensation for hurt and humiliation, and loss of a benefit.

Lost wages

[62] Mr Mayston claims lost wages up until February 2016 when he obtained some other short term employment. Mr Mayston obtained work in a different field starting from April 2016, in a physically tough job at a significantly lesser rate of pay than he earned at AWL.

[63] Mr Mayston says that it was difficult to find another job in the same industry when events at Ingham/AWL became public knowledge. He attributes his difficulties

[5] Cl 22.1
[6] Cl 23.1

with finding other employment largely to being made a pariah in the automotive industry by the respondents. However, he was unable to establish any particular action by the respondents which could have had this effect. The respondents attribute Mr Mayston's difficulties to his own prior actions and did not accept that they had contributed to the difficulty.

[64] Given that I have accepted that AWL ceased trading within a few months of Mr Mayston's dismissal, I do not exercise my discretion to grant Mr Mayston more than three months' lost remuneration under s 128(3) of the Act.

[65] I order AWL to pay Mr Mayston $21,249.99 gross being three months' salary as reimbursement for lost remuneration.

Hurt and humiliation

[66] Mr Mayston claims compensation for humiliation, loss of dignity and injury to feelings of $11,750. The reason offered for that specific sum was that that was what Mr Mayston wanted.

[67] Mr Mayston was shocked when he learned that his job was to finish. He had difficulties sleeping. Mr Trent Ingham acknowledged that the loss of the job was disappointing for Mr Mayston.

[68] Mr Mayston's relationship failed in the months following his dismissal. He describes the financial stress as nearly all consuming. He was worried about how he would live. His credit rating was negatively affected as he struggled to pay his debts.

[69] I am satisfied that Mr Mayston was much affected by his dismissal and award him $8,000 as compensation under s 123(1)(c)(i) of the Act.

Other Benefits

[70] In submissions filed on Mr Mayston's behalf after the investigation meeting, a claim was made that the calculation of wages should make allowance for the value of the company car. A figure of $1500 per month was proposed. There was evidence at the investigation meeting that Mr Mayston had been allowed to continuing using a company car until the end of August 2015. However, there was no evidence regarding the value of use of a company car.

[71] Mr Mayson's employment agreement contained provision for his use of a company car[7]. However, without evidence regarding the value of a car I am unable to make an award to him. Mr Mayston is entitled to reimbursement of two month's use of a car, being a three month period less the one month received. The parties are to attempt to resolve that issue. If they cannot, leave is given for them to return to the Authority.

Contribution

[72] Mr Trent Ingham says that at no time he was unhappy with Mr Mayston's work, and that what happened was not a performance issue. There was no serious attempt by AWL to prove at the investigation meeting that Mr Mayston had damaged the cars in the Inghams' yard. Mr Trent Ingham says that he did not believe that Mr Mayston had caused the damage. Therefore I find that there was no contributory conduct by Mr Mayston necessitating a reduction under s 124 of the Act of the remedies awarded.

Commission

[73] Mr Mayston claims that he is owed commission payments by AWL, although no amount was specified by him.

[74] The employment agreement provides that commission will be paid as set out in Schedule B[8]. Schedule B states that if there was any net profit of $85,001 and over, at the end of the twelve month period, it will be split 50/50 between the employee and the employer.

[75] Mr Trent Ingham says that the company never had an annual net profit of $85,001 or greater and so no commission was payable. There was no evidence that such a profit level was reached and Mr Mayston is thus not able to establish his claim to commission.

[7] Clause 31.1 of the employment agreement
[8] Clause 13.3 of the employment agreement

Holiday entitlements

[76] Mr Mayston claims payment for his annual holiday entitlements. The respondents dispute that any holiday pay is owing on the basis that it was included in Mr Mayston's pay and that he had agreed to that arrangement.

[77] The email from Mr Trent Ingham to Mr Mayston of 19 April 2014 includes a reference to there being no entitlement to holiday pay but this is part of the two paragraphs which Mr Mayston successfully sought to have crossed out. Mr Trent Ingham says that he and Mr Mayston discussed and agreed an all up rate that had holiday pay incorporated in it. Mr Mayston denies this.

[78] Clause 15.1 of the employment agreement states that the "Employee is not entitled to be paid annual leave".

[79] Mr Trent Ingham acknowledges that he worded that clause in the wrong way, in the sense of suggesting that there were no holiday entitlements, as distinct from the entitlement being incorporated in the pay rate.

[80] Mr Mayston says that he did not agree to his salary including holiday pay, but still signed the employment agreement as he did not have his glasses with him, when he was asked by Mr Trent Ingham in person to sign the document.

Holidays Act restrictions

[81] Under s 6(3)(a) of the Holidays Act 2003 employment agreements which exclude, restrict or reduce entitlements under that Act are of no effect to the extent that they do so. Therefore clause 15.1 of Mr Mayston's employment agreement which purports to exclude any annual leave entitlement is of no effect.

[82] Next I deal with the respondents' argument that Mr Mayston's salary included holiday pay. Under s 28 of the Holidays Act annual holiday pay may be paid with the employee's pay as long as certain requirements in subs (1) are met. Under s 28(1)(a) of that Act the situation must involve either a fixed term agreement of less than 12 months, or intermittent or irregular employment. Neither of those situations apply in this case as, although there was a purported fixed term agreement, the employment

continued after the expiry of that term. Mr Mayston's work was not intermittent or irregular.

[83] An additional requirement under s 28(1)(c) of the Holidays Act is that the annual holiday pay had to have been an identifiable component of Mr Mayston's pay. There were no identifiable components set out in the employment agreement and there was no evidence of pay slips setting out the components of payments. In conclusion AWL cannot rely on s 28 of the Holidays Act.

Holiday pay owing

[84] Mr Mayston did not take any paid holidays from AWL and did not receive payment for holidays on his dismissal. He claims $8,010.82, being 8% of his total gross earnings with AWL. I order AWL to pay to Mr Mayston $8010.82 gross as holiday pay within 14 days of the date of this determination.

[85] Mr Mayston has been deprived of his holiday pay entitlement for a long period. I exercise my discretion and order that Mr Mayston be paid interest by AWL on the holiday pay owing, calculated at the prescribed rate of 5% per annum from 1 September 2015 when his representative raised the holiday pay issue with AWL, until the date of payment.

Penalties regarding non-payment of holiday pay

[86] Penalties are sought against AWL for failure to pay Mr Mayston his holiday pay and against Mr Trent Ingham for being involved in the company's breach regarding holiday pay.

[87] Under s 24 of the Holidays Act employees who end employment with holiday entitlements must have their entitlement paid out for them. Mr Mayston's employment with AWL finished in mid 2015 but he has still not been paid his holiday pay entitlements. Section 24 has clearly been breached.

AWL

[88] Section 76(1) of the Holidays Act allows employees to bring an action against an employer to recover a penalty under s 75 of that Act.

[89] AWL breached s 24 of the Holidays Act by failing to pay Mr Mayston his holiday pay. This has continued for a long period. The issue of outstanding holiday pay was raised by Mr Mayston's then representative with AWL in September 2015. No payment has resulted. I am satisfied that a penalty should be awarded against AWL.

[90] I turn now to the *Borsboom v Preet PVT Ltd* [9] four-step analysis to determine the appropriate amount of penalty. There is one breach to be considered. The maximum penalty for the breach of the Holidays Act by a company is $20,000[10].

[91] Under step two of the *Preet* analysis I assess a provisional starting point. Although the breach related to all of Mr Mayston's holiday pay he was only an employee for a little over a year. There was no indication that he had sought paid holidays during his employment. I have assessed the severity as justifying a provisional penalty of 40% being $8,000.

[92] I now look aggravating and mitigating factors. In terms of aggravating factors this is a serious breach. Mr Mayston has not been paid his holiday entitlement for a considerable period of time after his employment finished. Mr Mayston would not usually be described as a vulnerable employee. However, there was evidence of the financial effect on Mr Mayston of his employment finishing and him being without income, although this did not solely relate to the non-payment of holiday pay. There were no attempts to rectify the breach by AWL.

[93] In terms of mitigating factors, AWL has no known history of non-payment of minimum entitlements. Only one employee was affected. In a sense there was no remorse shown, although this was on the basis of a belief by Mr Trent Ingham that the agreement could legally provide for no holiday payment to be made.

[94] I find that a small reduction is needed after consideration of these factors. I reduce the provisional figure by 25%, leaving $6000.

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[9] [2016] NZEmpC 143
[10] S 75(1)(b) Holidays Act

[95] The next step involves a consideration of AWL's ability to pay. The evidence was that the company was not trading and had very limited cash assets. I make a reduction of 50% for this factor, leaving $3000.

[96] Now under step four I look at whether a penalty of $3000 is proportionate in the circumstances. That amount is considerably less than the amount of holiday pay owing which, under other circumstances, may not be appropriate. However, as I am required to consider the company's financial position, I find that $3000 is appropriate.

[97] Within 14 days of the date of this determination AWL is to pay the sum of $3000 to the Employment Relations Authority for payment as follows. Considering whether some or all of the penalty be paid to Mr Mayston, I find that $2000 of it should be paid to him and the remaining $1000 to the Crown.

Mr Trent Ingham

[98] New provisions which came into effect on 1 April 2016 allowed penalty claims to be brought against people involved in a failure to comply who were not the employer [11]. However, under s 76(1A) of the Holidays Act only a Labour Inspector is permitted to penalty proceedings against such a person. Mr Mayston is therefore not entitled to bring such proceeding against Mr Trent Ingham and his claim in this regard must fail.

Penalties under s 134(2) of the Act

[99] Mr Mayston is seeking penalties against Mr John Ingham and Mr Trent Ingham as secondary parties for what are described as interferences in the employment agreement. He relies on s 134(2) of the Act which provides that any person who incites, instigates, aids or abets any breach of an employment agreement is liable to a penalty. There was some variation over the course of the proceeding regarding which actions penalties were sought for.

[100] For a person to be liable as an inciter, aider or abetter under s 134(2) there must be a breach of an employment agreement by a primary breacher, namely a party to the employment agreement[12].

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[11] S 75(3) of the Holidays Act
[12] *Musa v Whanganui District Health Board* [2010] NZEmpC 120 at [66]

[101] There was some suggestion in submissions that AWL had instigated, aided and abetted a breach of the employment agreement. However, AWL was a party to the employment agreement and either it, or Mr Mayston as the other party, must be a primary breacher in order to establish, incitement, aiding or abetting by another person. I do not regard the company as being able to be a secondary breacher to a breach where the company is also the primary breacher.

[102] A high standard of proof is required to impose a penalty on someone other than the employer, for aiding and abetting an employer's breaches [13].

Penalties sought against Mr John Ingham as secondary party

[103] There appeared to be a somewhat different emphasis in the amended statement of problem than in closing submissions, regarding which breaches it was alleged that Mr John Ingham had instigated, aided and abetted, for the purposes of the penalty claim. I have considered Mr John Ingham's situation in regards to the following allegations outlined in closing submissions on behalf of Mr Mayston:

(i) involving himself in an unfair disciplinary process concerning allegations of damages to vehicles;
(ii) insisting that Mr Mayston resign; and
(iii) inciting Mr Trent Ingham to dismiss Mr Mayston.

[104] Mr Mayston has not established that there was separate unfair disciplinary action against him regarding the car damage allegations, other than the sending away. I have already dealt with that under the dismissal head.

[105] Regarding any insistence on resignation, Mr Mayston's claim faces at least a couple of serious difficulties. Firstly, as set out above, there must be a primary breach. There was no evidence of AWL insisting that Mr Mayston resign and so Mr John Ingham cannot be a secondary party to the company's breach. Second, Mr Mayston did not in fact resign, even on his own evidence. Had he resigned there may have been the opportunity for a constructive dismissal claim. However, given that there was no resignation, Mr Mayston has not established any breach in that regard by the company.

[13] *Strachan v Moodie (aka "Miss Alice") t/a Moodie & Co* [2012] NZEmpC 95 at [150].

[106] In terms of the third matter outlined in the submissions for Mr Mayston, I find that there was no evidence to support Mr John Ingham having incited Mr Trent Ingham to dismiss Mr Mayston.

[107] I am not satisfied that there is any liability by Mr John Ingham as a secondary party and thus do not go on to consider the issue of penalties.

Penalties sought against Mr Trent Ingham as secondary party

[108] Mr Mayston claims penalties against Mr Trent Ingham, firstly regarding purporting to make Mr Mayston redundant on 15 July 2015 and dismissing him on 29 July 2015. Second is the refusal to give a notice detailing the reasons for Mr Mayston's dismissal pursuant to s 120 of the Act.

[109] The actions under the first item relate to the unjustified dismissal claim. Mr Trent Ingham was the sole director and manager of AWL and therefore the only way which the company could act was through him.

[110] As I have found that Mr Mayston has a claim for unjustified dismissal and remedies have been awarded for that, I am not satisfied that it is appropriate to impose a penalty for the same conduct[14].

[111] Regarding the issue of providing a written statement of the reasons for dismissal, s 120 of the Act specifies that where an employee is dismissed they may ask for a statement in writing of the reasons for dismissal and the employer must then provide one. Mr Trent Ingham accepted that Mr Mayston had asked him for a letter saying why he was dismissed. However, Mr Trent Ingham did not feel that he was required to give him a letter because the company was being closed down. No letter pursuant to s 120 of the Act was provided to Mr Mayston.

[112] AWL did not provide a statement of reasons in writing for the dismissal, as it was required to do under the Act. However, the penalty sought against Mr Trent

[14] *Salt v Fell, Governor of Pitcairn, Henderson, Ducie and Oeno Island* [2006] ERNZ 449 EC. The Court of Appeal in a leave to appeal application considered that the level of compensatory remedies awarded for the same conduct could be taken into account in deciding whether to impose a penalty : [2006] ERNZ 949.

Ingham personally relies on s 134(2) of the Act inciting, instigating, aiding or abetting a breach of an employment agreement, not the Act.

[113] No provision of the employment agreement was specified on Mr Mayston's behalf as bringing that obligation into his employment agreement. I have been unable to identify one. I therefore cannot uphold this claim against Mr Trent Ingham.

Penalty for obstructing or delaying an Authority investigation

[114] Mr Mayston seeks a penalty against Mr Trent Ingham under s 134A of the Act regarding alleged obstruction and delay of the Authority's investigation. This claim is based on a statement made to the Authority on 2 November 2015.

[115] On 21 October 2015 Mr Mayston's statement of problem was lodged with the Authority. The Authority Officer wrote to AWL on 22 October to inform the company that it had 14 days from receipt within which to file its statement in reply.

[116] The Authority received a letter from Mr Trent Ingham dated 2 November 2015, without a statement in reply attached. This letter is not on letter head and is signed by Mr Trent Ingham, without any reference in the signature provision to the company. The body of the letter reads:

> This letter is to advise you that Automotive Wholesale Limited has been placed in liquidation. The company has been wound up and there are no funds available at all. This can be verified by the Companies Accountants, Bailey Ingham…[address provided].
> At this stage I have not filled out anything in the Statement of Reply.

[117] The Authority Officer proceeded to write to Mr Mayston's then representative noting the liquidation point, stating that the Companies Register did not presently provide details of a liquidator and that the permission of the liquidator or the High Court was needed to proceed. The representative subsequently asked the Authority to request evidence of liquidation.

[118] The Authority Officer wrote back to Mr Trent Ingham on 8 December 2015 stating that the letter contained no supporting information regarding the claim that the company was entering into insolvency or liquidation. On 17 December ATW's accountant responded by letter which included the following:

> Automotive Wholesale limited is not in liquidation as previously advised. I have had discussions with the director of the company and the possibility of liquidation was

> discussed, however, as the company has no funds, the company is unable to meet the costs of liquidation.

[119] On 21 December 2015 My Mayston advised the Authority that his previous representative was no longer involved, and to correspond with Mr Mayston directly.

[120] The Authority asked for a statement in reply to be filed by the company. This was done on 16 February 2016.

[121] Mr Trent Ingham's evidence was that he had talked to his accountant in mid 2015 about what was best to do about AWL. The accountant advised Mr Trent Ingham that he would liquidate the company on the latter's behalf. Mr Trent Ingham says that he did not talk to his accountant immediately before sending the letter to the Authority on 2 November and accepted that the accountant did not tell him that the liquidation had occurred.

[122] Mr Trent Ingham also says that he did sign some documents about liquidating the company. He was not sure when that was but thought it was probably before he wrote to the Authority (on 2 November 2015). The Authority indicated to Mr Trent Ingham that it was interested in seeing those documents and time was allowed after investigation meeting for that to occur.

[123] During the investigation meeting the Authority gave Mr Trent Ingham notice that the issue of obstructing and delaying was seen as a serious one, and that he may wish to provide written evidence to support his verbal evidence that he had given instructions to his accountant to put the company into liquidation and had signed some documents regarding liquidation. The Respondents indicated that that would be done.

[124] Subsequently the Respondents filed with their closing submissions a letter dated 30 October 2015 from Inland Revenue noting that it had received a letter from AWL stating that the company had ceased trading. After direction from the Authority, the Respondents supplied an IR 315 form regarding business cessation. Nothing further was filed from the accountants directly or regarding Mr Trent Ingham's interactions with the accountants.

Obstruction or delay

[125] Section 134A of the Act provides that every person is liable to a penalty where, without sufficient cause, they obstruct or delay the Authority's investigation.

[126] The statement which Mr Trent Ingham made to the Authority in his letter of 2 November to the Authority was not accurate. The company had not been placed into liquidation nor wound up. The limited evidence which there was from the accountants, from their 17 December 2015 letter to the Authority, is that liquidation had been discussed. There was no supporting evidence that Mr Trent Ingham had given instructions for liquidation to proceed or had any reason to believe that it had proceeded.

[127] Under s 248(1)(c) of the Companies Act 1993 no legal proceedings can be continued against a liquidated company unless the liquidator or the High Court otherwise agrees.

[128] Submissions for Mr Mayston referred to the effect of Mr Trent Ingham's provision of inaccurate information to the Authority. It was suggested that the attendant costs of a High Court application and the statement by Mr Trent Ingham that the company was in liquidation, lead to Mr Mayston's then advocate advising him that the matter was not worth carrying on and then resigning. Mr Mayston was then left unpresented. The stress and upset of this to Mr Mayston was said not to be able to be underestimated. There was however no evidence from Mr Mayston of these matters.

[129] The resulting delay to the case progressing was a matter of three months from the time of Mr Trent Ingham's letter to when a statement in reply was filed.

Sufficient cause

[130] Having established that there was some delay the question becomes whether there sufficient cause for the obstruction or delay?

[131] Mr Trent Ingham says that he thought that the company had been put into liquidation as he had discussed liquidation with the company's accountants.

[132] When asked at the investigation meeting about the statement in the letter "has been placed in liquidation" Mr Trent Ingham said that the Companies Office would

not liquidate because of Mr Mayston's claim. However, the Authority file shows that the Companies Office accepted Mr Mayston's objection to the removal of AWL from the register on 19 February 2016, well after the 17 December 2015 letter from AWL's accountants advising that the company had in fact not been liquidated. I do not accept that that can be a reason for Mr Trent Ingham's November statement to the Authority.

[133] Although Mr Trent Ingham is a relatively young man, he is the director of at least three companies. He emphasises that AWL was the first company which he had owned himself. However, he had been a director of one of the large Ingham companies since about 2013. I accept that he had some awareness of his obligations under commercial legislation and should know better than to make a significant unconditional statement about the status of his company to a statutory body such as the Authority without being sure of the basis for it.

[134] Nothing from the accountant was filed. I am not satisfied that for someone with Mr Trent Ingham's level of business experience, advising the Authority that the company was in liquidation can be seen as being purely accidental.

Penalty

[135] I am satisfied that this is a case in which a penalty is required.

[136] It was submitted for Mr Mayston that this conduct must fall at the absolute upper end of offending in relation to this section. The statement was categorised as deliberate or, at best, wilfully negligent. This offending was said to require a strong and substantial sanction, as a denunciation, and a deterrent to Mr Trent Ingham and others who may wish to mislead/obstruct the Authority.

[137] I now consider other cases where a penalty has been imposed under s 134A of the Act. In *Manoharan v Chief Executive of Waiariki Institute of Technology* [15] the Authority considered an instruction by the chief executive, made after an investigation meeting had commenced, to staff not to provide support to the applicant. There was no evidence that any staff member had been dissuaded from giving evidence or assisting the applicant. The Authority considered that the point was not actual dissuasion but that there was potential for that to happen, relying on *Ho v The Chief of*

[15] [2011] NZERA Auckland 427

Defence Force [16]. In its subsequent determination on the quantum of remedies, the Authority ordered the respondent to pay a penalty of $6,000 payable full to the Crown[17]. Damages were also awarded. In the present case damages were not sought.

[138] In *Davidson v Great Barrier Airlines Ltd* [18] a representative was ordered to pay $4,000 for obstructing and delaying an Authority investigation.

[139] Recently in *Labour Inspector of Ministry of Business, Innovation and Employment v Ahuja* [19] penalties of $10,000 were imposed on each of those who had obstructed an Authority investigation meeting by arranging to have witnesses pressured.

[140] In the present case there was not a substantial delay caused by Mr Trent Ingham's letter, but there was some delay. Relying on *Ho* [20], there was also the potential for the case to have been further delayed or simply not to be pursued by Mr Mayston on the basis of the information in the letter.

[141] I have considered the factors set out in *Tan v Yang* [21] which include the seriousness of the breach, the need for deterrence and the range of penalties imposed in other cases. These factors are now largely encapsulated in s 133A of the Act.

[142] There is a need for deterrence of the provision of inaccurate information, especially on such a vital point as this. I regard the nature of the breach as reckless, in that Mr Trent Ingham failed to check on the accuracy of the information, which could easily have been done before the letter was sent.

[143] I order that Mr Trent Ingham pay a penalty of $3,000.00 pursuant to s 134A of the Act and that this penalty is paid to the Employment Relations Authority within 28 days of the date of this determination.

[144] Mr Mayston has sought that any penalty should be ordered to be paid to him under s 136(2) of the Act. Given that the conduct in question had an effect on Mr

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[16] [2005] ERNZ 93
[17] *Manoharan v Chief Executive of Waiariki Institute of Technology (No 2)* [2011] NZERA Auckland 497 at [45]
[18] [2016] NZERA Auckland 403
[19] [2016] NZERA Auckland 420
[20] Above n 17
[21] [2014] NZEmpC 122

Mayston's timely pursuit of his case as well, as on the wider system of the administration of justice, I order that 50% of the penalty be paid to Mr Mayston and 50 % to the Crown.

Costs

[145] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Mr Mayston shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The Respondents shall have a further 14 days in which to file and serve a memorandum in reply. Claims for costs must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[146] The parties could expect the Authority to determine costs, if asked to do so, on its usual 'daily tariff' basis unless particular circumstances or factors require an adjustment upwards or downwards.

Nicola Craig
Member of the Employment Relations Authority