IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2015] NZERA Auckland 223
5532487

	BETWEEN	KEVIN MCCORMICK Applicant
	AND	COMPASS COMMUNICATIONS LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Greg Bennett, Advocate for the Applicant Dean Organ, Advocate for the Respondent
Investigation meeting:	27 July 2015
Determination:	29 July 2015

DETERMINATION OF THE AUTHORITY

A. Compass Communications Limited (CCL) unjustifiably dismissed Kevin McCormick.

B. In settlement of Mr McCormick's grievance CCL must pay him $8000 as compensation under s123(1)(c)(i) of the Employment Relations Act 2000, an amount that has been reduced by one third due to conduct by him that contributed to the situation giving rise to his grievance.

C. Costs are reserved (with a timetable set for memoranda).

Employment Relationship Problem

[1] At the time he was dismissed for serious misconduct in November 2014 Kevin McCormick worked for Compass Communications Limited (CCL) as an installation

technician. He had eight years' service. His duties included installation of wireless broadband connections at customers' premises.

[2] On the afternoon of 22 October 2014 Mr McCormick was up an extendable ladder clipping cable onto the gable of a house on the Awhitu peninsula, about an hour's drive from central Auckland in an area with no mobile phone coverage.

[3] The cable was to be connected to an antenna already installed on the roof. A CCL trainee, Nilesh Narayan, had accompanied Mr McCormick that day and watched his work from the ground. According to Mr McCormick light rain began to fall and he became anxious to hurry and finish the job as it would be difficult to connect the cable to the antenna if the roof got too wet. He did not want to have to come back to the remote property and thought the clients would be unhappy too as they would have to wait a week or so until someone could return to finish the job.

[4] Mr McCormick decided he needed to extend the ladder's height by one rung and to do that by 'jumping' the extension part of the ladder upwards rather than climbing down the ladder and then making the adjustment. Mr Narayan held the base of the ladder while Mr McCormick moved the extension section of it. As Mr McCormick did so a hammer he had left on a step of the lower extension of the ladder fell off and hit Mr Narayan on the head, causing a gash and bleeding. Mr McCormick believed the hammer dropped around half a metre (that is about 18 inches). He said he came down the ladder and looked at Mr Narayan's injury. The couple who owned the property also came and looked at Mr Narayan's injury and administered first aid. They used a first aid kit Mr Narayan got out of the work van. Mr Narayan said he was "*OK*" and Mr McCormick should carry on with the work. Mr McCormick did so, finishing the job around two hours later.

[5] Mr Narayan asked Mr McCormick if the accident should be reported. When Mr McCormick said yes, Mr Narayan told him not to do so if Mr McCormick would get into trouble over it. As they drove back towards Auckland they got mobile coverage and Mr McCormick telephoned the CCL office and reported the accident. He was told to take Mr Narayan to the doctors. They drove to Mr Narayan's house so he could get some money to pay for the doctor and Mr McCormick then dropped him at Mr Narayan's brother's house which was near to his doctor's premises.

[6] The next day Mr McCormick was interviewed by CCL's human resources manager Mabel Vivera. He filled out a Work Safe NZ form and ended his written account of the incident with this comment: "*Sorry it won't happen again*". On 28 October he was interviewed by his manager Michael Lancaster and Ms Vivera.

[7] Mr Lancaster also interviewed, by telephone, one of the couple who had attended to Mr Narayan at the Awhitu house. He did not make any notes of that conversation but included some of that account in a four-page report that he prepared, dated 29 October 2014 and headed "*Accident investigation, summary and recommendations*". His report listed "*points of concern*" about Mr McCormick and Mr Narayan. He recommended Mr Narayan be given a verbal warning and further training. He recommended Mr McCormick be dismissed for breaching safety provisions of his employment agreement. He also stated there was not enough office work for Mr McCormick to be kept in a full-time desk bound role and the risk of having him working out in the field was "*too great*".

[8] Mr Lancaster gave his report to CCL's chief financial officer Paul Carter. Mr Carter was to decide what action would be taken about the incident. He read Mr Lancaster's report and reports from Ms Vivera about information she had gathered from Mr Narayan and Mr McCormick. He also talked with Mr Lancaster and Ms Vivera about their investigation and directed them to arrange a disciplinary meeting with Mr McCormick. A letter notifying Mr McCormick of that meeting listed, as allegations for him to answer, that he had:

> *1. Failed to adhere to our health and safety policy & instructions.*
> *2. Failed to observe all safety precautions.*
> *3. Act negligently causing head injury to a colleague.*
> *4. Failed to immediately report the accident to the office.*
> *5. Failed to … arrange immediate medical attention to the injured party.*
> *6. Reported to work on that day in such a condition that duties were unable to be carried out properly and safely.*

[9] At the disciplinary meeting, held on 3 November, Mr McCormick described what happened as an accident in which he had made a mistake. He said he continued working because Mr Narayan asked him to do so. During the meeting he was given the first two pages from Mr Lancaster's report but not the two other pages that listed steps that CCL could take to improve its safety standards and Mr Lancaster's

recommendations (that included dismissing Mr McCormick). Mr McCormick was asked for his comments on the parts of Mr Lancaster's report that he was given which set out a summary of events and listed points of concerns. He was not given – either at the meeting or before it – copies of the other documents gathered or prepared by Mr Lancaster and Ms Vivera. Those documents included the Work Safe NZ forms that Mr McCormick and Mr Narayan had filled in, Ms Vivera's preliminary investigation reports based on interviews with the two men, and her handwritten notes from those interviews. While Mr Lancaster's evidence suggested he had repeatedly emphasised the seriousness of the situation for Mr McCormick, there appeared to be no direct discussion about the prospect of dismissal and Mr McCormick was not asked about any matters he wanted to have taken into account if CCL concluded he had committed serious misconduct and was then considering dismissing him for it. The letter calling him to a disciplinary meeting had mentioned summary dismissal was possible if the allegations were established but minutes of the 3 November meeting taken by Ms Vivera noted no discussion of that topic. Neither was Mr McCormick told that Mr Lancaster's report had recommended his dismissal. He was told a decision would be made within two or three days although it was not clear that he was told Mr Carter would make the decision.

[10] Mr Carter then reviewed the information gathered by Mr Lancaster and Ms Vivera, including notes of the disciplinary meeting. After discussing the matter further with them, he decided to dismiss Mr McCormick. Mr McCormick was called to a further meeting with Mr Lancaster and Ms Vivera on 6 November where he was told that he was to be dismissed. He was given a letter that stated the termination of his employment was for "*gross misconduct with immediate effect*". It then referred to the termination as not being effective until 28 November. His last day of work was on 6 November but he was paid through to 28 November. He was also later given a letter of service setting out his role and job responsibilities while employed by CCL.

Issues and investigation

[11] As Mr McCormick claimed he was unjustifiably dismissed the Authority had to determine whether CCL's decision to dismiss him for serious misconduct was within the range of responses that a fair and reasonable employer could have made in all the circumstances at the time. The statutory test considers whether CCL's

managers – in first investigating Mr McCormick's conduct in the 22 October incident and then deciding to dismiss him for it – sufficiently investigated the allegations, raised their concerns with him and gave him a reasonable opportunity to respond, and genuinely considered his responses. The Authority could not determine Mr McCormick's dismissal was unjustified solely because the process followed by CCL had minor defects that did not result in Mr McCormick being treated unfairly.[1]

[12] For the purposes of the Authority investigation I considered relevant documents (including Mr McCormick's employment agreement, the records of CCL's investigation and its correspondence with Mr McCormick over its disciplinary inquiry) along with the written and oral evidence – given under oath or affirmation – by Mr McCormick, Mr Carter, Ms Vivera, Mr Lancaster and Mr Narayan. During the investigation meeting the parties' representatives had the opportunity to question those witnesses and provide closing submissions on the issues for determination. At the conclusion of the meeting I gave the parties an oral indication of preliminary findings.[2] The parties then sought to settle the matter between themselves but the next day Mr McCormick's representative advised they had been unable to do so. Mr McCormick requested a determination of the Authority.

[13] The issues for determination, as they emerged from the evidence and submissions, were

(i) Was the investigation of what had happened sufficiently fair and thorough?

(ii) Was the disciplinary process fair – with CCL's concerns fully put to Mr McCormick with a reasonable opportunity to respond and his explanations genuinely considered?

(iii) Were any defects in the investigation and process more than minor with Mr McCormick unfairly treatment as a result?

(iv) On the basis of its investigation and disciplinary process could CCL have reasonably come to the view that Mr McCormick's conduct was serious misconduct?

(v) If CCL was found to have failed to meet the standard of justification for its actions, what remedies should be awarded to Mr McCormick, considering

[1] Section 103A of the Employment Relations Act 2000 (the Act).
[2] Section 174B of the Act.

lost wages and compensation under s123(1)(c)(i) of the Employment Relations Act 2000 (the Act)?

(vi) Should remedies awarded to Mr McCormick, if any, be reduced due to conduct by him that contributed to the situation giving rise to his grievance?

(vii) Should either party contribute to the costs of representation of the other party?

A sufficient investigation?

[14] There was relatively little disagreement about what CCL's investigation had disclosed of the facts of what happened on 22 October 2014. The points of difference concerned matters such as whether Mr McCormick should have acted differently after the accident – by not carrying on with his work, ignoring Mr Narayan's encouragement to continue, reporting the incident to CCL's office earlier, and taking Mr Narayan for medical attention immediately rather than finishing the job.

[15] Information from the customers at the house was an important 'third party' source to assist with making fair and reasonable assessments about those points of difference. The couple reportedly had different views on how serious matters were at the time. The man, who was a builder, was said to have told Mr Narayan to 'harden up' as the half-inch cut on his head was only a flesh wound while the woman was said to have been more concerned. Mr Narayan told Ms Vivera he had "*politely declined*" the woman's offer to call an ambulance.

[16] Mr Lancaster had not taken any notes of his telephone conversation with the male customer at the Awhitu so it was not possible to assess whether he had fully included relevant information from him in the investigation report. However it was clear that, as Mr Lancaster stated in his report, the couple gave "*mixed messages*" about the seriousness of the injury and the need for any medical attention at the time. While sketchy it was a factor relevant to assessing the propriety of Mr McCormick's actions and was sufficiently disclosed in the parts of Mr Lancaster's report that were given to Mr McCormick at the 3 November disciplinary meeting.

[17] Mr McCormick's closing submissions suggested CCL managers should have sought more information from Mr Narayan's GP about the nature and seriousness of the head injury. However, in the circumstances of this case, the relevant issue for investigation was not the degree of harm caused by the injury. The conduct under scrutiny was the unsafe work practices – in the way he tried to extend the ladder and left a tool loose on it while doing so – and his response to the accident. Those practices and his response were the relevant issues for inquiry (and in my view sufficiently investigated in this case) regardless of whether the injury caused to Mr Narayan was minor or much more harmful than it proved to be.

A fair disciplinary process?

[18] There were, however, four significant shortcomings in the fairness of the disciplinary process and decision subsequently undertaken by CCL managers.

[19] Firstly, there was an element of pre-determination, or at least the risk of the appearance of it, in the report that Mr Lancaster provided to Mr Carter about the accident investigation. It recommended Mr McCormick's dismissal on the grounds of failing to abide by terms of his employment about following safety policy and procedures. It did so without having yet held a disciplinary process in which he was properly advised of the potential consequences and given, in advance, all the relevant information on which to comment. In that sense the employer had not met the requirement of s103A(3)(c) and (d) of the Act to give the worker a reasonable opportunity to respond and to consider those responses before deciding on any action about the concerns raised. While Mr Lancaster said his suggested course of action (on 29 October) was only a recommendation, his position as a manager and trusted advisor (as Mr Carter's evidence confirmed he was) made that recommendation inevitably influential and prematurely prejudicial for Mr McCormick. The prejudicial potential was compounded by Mr Carter than having Mr Lancaster, the manager who had made that recommendation, carry out the 3 November disciplinary meeting.

[20] Secondly, Mr McCormick was entitled to have an adequate opportunity to prepare for the disciplinary meeting. The statutory duty of good faith requires an employer who is proposing to make a decision that is likely to have an adverse effect on the continuation of a worker's employment, to provide that worker with access to

relevant information.[3] In circumstances where Mr Lancaster and Ms Vivera had prepared reports on their investigation of the accident which they had already provided to Mr Carter, Mr McCormick should have been given full copies of those reports before the meeting as he had already been notified – in the letter calling him to the disciplinary meeting – that dismissal was a possible outcome if the allegations made were established.

[21] Thirdly, Mr McCormick was not given a proper opportunity to comment on CCL's proposal to dismiss him – either in the 3 November meeting or at the 6 November meeting where he was told he was dismissed. He did not know in the 3 November meeting that Mr Lancaster had already recommended that he be dismissed. He was not asked – in any direct or clear way – to comment about the prospect of dismissal or for his ideas on any alternatives to that notion or any pleas he might make about it being imposed. Similarly the 6 November meeting was simply for the purpose of advising him of the decision, with no consideration of anything else he might have to say before it was delivered to him.

[22] Fourthly, Mr McCormick was not at any stage interviewed by or given the opportunity to speak directly to the person who made the decision to dismiss him, Mr Carter. In *Irvine Freightlines Limited v Cross* Judge Palmer stated:[4]

> *It is, I consider, of the essence of that fundamental principle of natural justice, namely the right to be heard, that this right in a disciplinary setting affecting a particular employee should be exercisable by that employee in a real and purposeful hearing before the person or persons who are to decide how the disciplinary infraction, if proved or admitted, shall be dealt with.*

[23] In *Quinn v BNZ* the Court emphasised that written reports of the employee's position or explanations were not sufficient:[5]

> *The decision to dismiss was not made by any of the senior officers who had interviewed Mrs Quinn but by the Chief Personnel Manager who had never seen her but was relying entirely on reports. We do not think that this is a satisfactory way to proceed. The right to be heard is a right to be heard by the decision-maker."*

[24] Mr McCormick got no 'real and purposeful hearing' from Mr Carter. He had no opportunity to make a 'plea in mitigation' on factors such as his service, any

[3] Section 4(1A) of the Act.
[4] [1993] 1 ERNZ 424 at 442.
[5] [1991] 1 ERNZ 1060 at 1070.

personal circumstances, the likelihood of avoiding any repetition of the mistake made or any other factors that might have swayed a decision-maker still considering the matter – however serious the circumstances of the accident were – with an open mind.

[25] Mr Carter suggested, when this issue was put to him in the investigation meeting, that Mr McCormick worked in the same office and could easily have come and spoken to Mr Carter if he wanted to. The responsibility for arranging that opportunity rested with CCL not Mr McCormick. It was also not entirely clear that he even knew that it was Mr Carter who would make the decision (even if Mr McCormick might guess that was likely to be so).

[26] I concluded each of those four defects were more than minor and resulted in Mr McCormick being treated unfairly. With proper prior disclosure to him of the full investigation reports Mr McCormick might have sought fuller advice about his situation before the disciplinary meeting, where he relied instead on the support of a colleague. He may also have sought a resolution of the issue on a basis other than his dismissal, such as by resignation or by proposing some other acceptable alternative change to his working arrangements. Accordingly I concluded CCL had not acted as a fair and reasonable employer could have in all the circumstances at the time, with the result that Mr McCormick's dismissal was unjustified.

Was a finding of serious misconduct within the range of reasonable responses?

[27] With a fair disciplinary process it could have been within the range of reasonable responses for CCL to conclude what Mr McCormick did on 22 October – on the ladder and in attending to Mr Narayan afterwards – was serious misconduct.

[28] Mr McCormick's conduct on the ladder was carelessness. When first interviewed by Ms Vivera he readily admitted his actions were "*a dumb thing to do*" and described them as human error. Generally mere inadvertence, negligence or oversight – although seemingly a dereliction of duty and having serious consequences – is deemed to be a matter of misconduct rather than serious misconduct.[6] However where an employer's confidence and trust in a worker is deeply impaired by a worker's *actions* or even a single *action* (rather than the *consequences* of the action or

[6] *Makatoa v Restaurant Brands (NZ) Limited* [1999] 2 ERNZ 311 (EC) at 319.

actions), an employer may justifiably decide the worker's conduct was serious misconduct.[7] The justifiability of that decision is a matter of fact and degree in the particular circumstances of each case.[8]

[29] There were some elements of subjective and unreliable information that may have unduly influenced CCL's response – such as Mr Narayan reporting that his doctor had said the falling hammer could have been fatal if it had hit him an inch or so either way on his head and that Mr Narayan's mother was angry that her son's life was at risk. However it was also clear Mr McCormick's actions after the accident were influenced by Mr Narayan (who encouraged him to continue work) and the customers, one of whom saw the wound as superficial. Mr McCormick also rejected Mr Narayan's suggestion that the incident not be reported and did report to the office as soon as, according to him, he was able to get mobile coverage to do so.

[30] It was also arguable that the conclusions reached on some of the allegations lacked a proper evidential basis. The CCL health and safety policy did expressly require reporting of accidents but not the immediate medical attention Mr McCormick was said to have failed to arrange. The conclusion he had reported to work in a condition unable to safely carry out his duties was based only on a comment he made that he was very tired that day. However I have accepted that the conclusions on the other allegations – about breaching his contractual obligation to work safely and having acted negligently – could have been open to a reasonable employer (who had acted fairly in reaching those conclusions).

[31] Consequently – as a point relevant in the assessment of contribution – Mr McCormick's actions could have been found to be serious misconduct. What was not justified was the fairness of the process, including the decision to dismiss him.

Remedies

[32] Having found CCL acted unjustifiably in how it went about deciding to dismiss Mr McCormick, I considered his claims for lost wages and distress compensation and whether any deduction for contribution was required.

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[7] *Angel v Fonterra Co- operative Group* [2006] ERNZ 1080 (EC) at [78].
[8] *Click Clack International Limited v James* [1994] 1 ERNZ 15 (EC) at 32; and *Northern Distribution Union v BP Oil New Zealand Limited* [1992] 3 ERNZ 483 (CA) at 487.

Lost wages

[33] Mr McCormick sought an order for lost wages of $838.46 for each week from 1 December 2014 until the date of determination. However his evidence did not support an assessment of loss of just on seven months, because he had not established that he made reasonable endeavours to mitigate the loss claimed.

[34] As the Employment Court explained in *Allen v Transpacific Industries Group Ltd* in relation to a claim for lost wages:[9]

> *… dismissed employees are not only under an obligation to mitigate loss but to establish this in evidence if called upon. This will require, in practice, a detailed account of efforts made to obtain employment including dates, places, names, copies of correspondence and the like. If alternative employment is obtained, details of this will also need to be retained for the hearing including dates of employment, amounts paid and reasons for ceasing employment.*

[35] The Authority's directions for the investigation – made on 28 April 2015 – required Mr McCormick to provide evidence of his endeavours to find alternative work and mitigate his loss of wages. He did not lodge any documentary evidence of having applied for jobs. His witness statement said "*personal issues had intervened due to my dismissal that have not helped*". In his oral evidence he said he had earned nothing since his dismissal and had not attended any job interviews but had sent a list of jobs applied for to his representative. No such list was provided to the Authority. Mr McCormick said his representative had forgotten to bring the list. His evidence about personal issues concerned his separation from his wife, leaving his marital home, and difficulties with the behaviour of a teenage son. I considered those personal matters in regard to his distress compensation claim (below) but was not satisfied that they were sufficient to displace his obligation to make reasonable endeavours to mitigate losses claimed and to provide evidence of having done so.

[36] Mr McCormick's representative took part in the Authority case management conference in April 2015 at which directions for lodging evidence were given. He was sent a message from on 2 July 2015 noting that the common bundle of document received in the Authority's offices on 15 June did not contain any documents supporting the remedies Mr McCormick claimed. He submitted at the close of the

[9] AC20/09, 4 May 2009 at [78].

Authority investigation meeting that the Court now took a "*more liberal view than it did previously*" – referring to the *Allen* case – on the need for evidence of reasonable endeavours made in mitigation of a lost wages claim. He cited *Maharaj v Recon Professional Services Limited* in support of that proposition.[10] While the Court in that interlocutory decision on a security for costs application noted it could ultimately take a different view than that reached by the Authority in the determination under challenge (that there was insufficient material to show the former employee had mitigated his claimed loss of wages), the judge was expressing possibilities that might result from evidence to be put to the Court rather than denying the principle that evidence of mitigation was required.[11] It was on a different aspect of remedies claimed in that case – for distress compensation – that the judge disagreed with the Authority's conclusion that the former employee's evidence was not corroborated. The judge said evidence on hurt and humiliation (not lost wages) could be accepted *in toto* without corroborating evidence.[12]

[37] Accordingly, as Mr McCormick's evidence did not establish he had made reasonable endeavours to mitigate his loss (or reasons that he was not able to do so), I was not able to make the assessment of loss necessary under s123 and s128 of the Act to make an order for reimbursement of lost remuneration.

Compensation for humiliation, loss of dignity and injury to feelings

[38] Mr McCormick's witness statement provided this limited evidence in support of his claim for compensation for distress resulting from his unjustified dismissal:

> *I have found the dismissal has caused me enormous stress and caused my marriage to come apart which I am only now starting to be able to bring back together again.*

[39] Mr Lancaster's evidence established a longer history to Mr McCormick's marital problems. During his employment at CCL Mr McCormick had talked to Mr Lancaster about those issues and Mr Lancaster had often overhead heated phone conversations between Mr McCormick and his wife over what Mr Lancaster described as "*significant home challenges*".

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[10] [2015] NZEmpC 61 (EC, Judge Ford, 13 May 2015).
[11] Above, at [12] and [14].
[12] Above, at [11].

[40] Mr McCormick gave oral evidence of personal distress and difficult circumstances for him in the months since his dismissal. He described his life as being "*in freefall mode*". He said he was ostracised from his family home, had lost his car, was attending counselling about family matters, had lived in five addresses since March, and IRD was pursuing him for child support he could not afford.

[41] I was not convinced Mr McCormick's dismissal was causative of his current personal difficulties to the degree attributed by him. Some relatively objective assessment, most likely from a registered health professional, would have been necessary to confirm the alleged causal links (or discount other personal or historical factors). However his oral evidence of feeling despair and depression as the result of "*getting dumped the way I have*" established that he had suffered injury to his feelings and a loss of dignity warranting an award of compensation under s123(1)(c)(i) of the Act. Mindful of the need not to keep compensatory payments artificially low and balanced against the need for moderation – applying a formulation for exercising the discretion to award compensation recently expressed by the Employment Court in *Hall v Dionex Pty Limited* – I concluded $12,000 was the appropriate award for the particular circumstances of Mr McCormick's case.[13]

Reduction for contributory conduct?

[42] I concluded a reduction of one third was required from the compensation awarded because Mr McCormick's errors in carrying out his work on 22 October 2014 were blameworthy and contributed to the situation giving rise to his grievance.

[43] He admitted from the outset that the accident was caused by his mistake or human error. The error was not the result of any lack of safety training by CCL. Mr Lancaster's evidence established that Mr McCormick had attended relevant training courses. However – as a matter of common sense and as Mr McCormick candidly accepted in answer to questions at the Authority investigation – no safety course was needed for him to know that it was dangerous to extend the ladder while he was up on it or to leave a tool loose on a rung while doing so or to have Mr Narayan, who was

[13] [2015] NZEmpC 29 at [87] and [90].

not wearing a hard hat, hold the ladder at the base. Mr McCormick had a tool belt available in his work van but did not use it.

[44] However culpability in other aspects of his conduct that day – concerning his attention to Mr Narayan and when he reported to the office – were less straightforward, considered in light of the information Mr Lancaster and Ms Vivera gathered from Mr McCormick, Mr Narayan and one of the couple at Awhitu. Mr McCormick had, for example, reported the accident to the office despite Mr Narayan's encouragement not to do so if he would get into trouble. Neither was Mr McCormick responsible for the defects of the disciplinary process that were part of the situation that gave rise to his grievance – that was the responsibility of the CCL managers involved.

Costs

[45] Costs are reserved. The parties are encouraged to resolve any issue as to costs between themselves. If they are not able to do so, Mr McCormick may lodge and serve a costs memorandum within 28 days of the date of this determination. Once served CCL would then have 14 days to lodge a reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[46] 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 required an adjustment upwards or downwards.[14]

Robin Arthur
Member of the Employment Relations Authority

[14] *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820.