

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2019] NZERA Auckland 135
3025531

BETWEEN HIMANSHU MISTRY
Applicant

AND NEW ZEALAND
COMPLIANCE AND
REPAIRS LIMITED
Respondent

Member of Authority: Robin Arthur

Representatives: Glenn Finnigan, Counsel for the Applicant
Danny Gelb, Advocate for the Respondent

Investigation Meeting: 6 December 2018

Submissions: 10 December 2018 from the Applicant and the
Respondent

Determination: 8 March 2019

DETERMINATION OF THE AUTHORITY

- A. New Zealand Compliance and Repairs Limited (NZCRL) unjustifiably dismissed Himanshu Mistry.**
- B. In settlement of his personal grievance NZCRL must pay Mr Mistry the following remedies, within 28 days of the date of this determination:**
- (i) \$10,000 for lost wages and \$300 for lost KiwiSaver contributions; and**
 - (ii) \$12,000 for humiliation, loss of dignity and injury to his feelings.**
- C. Costs are reserved, with a timetable set for lodging memoranda if**

an Authority determination of costs is necessary.

Employment Relationship Problem

[1] Himanshu Mistry worked for New Zealand Compliance and Repairs Limited, a North Shore car service and repair business, as its workshop manager. He was employed under an employment agreement signed on 4 October 2016 by Mr Mistry and by NZCRL's director and sole shareholder Ivan Axenov. On 25 December 2017, by email, Mr Axenov advised Mr Mistry of his "immediate dismissal".

[2] On 11 October 2017 Mr Mistry had begun two months of leave, returning to his homeland of India to marry in late November. On 3 December 2017 he sent Mr Axenov an email seeking a five week extension to his leave for family reasons. He had no reply to the request. He did nothing further to check but assumed Mr Axenov had no objection to the request. Mr Axenov denied having received such an email.

[3] In his 25 December email Mr Axenov accusing Mr Mistry of "fraud". He made the accusation because the company had received an invoice for more than \$8000 for repair of what Mr Axenov described as a "customer's car", a Subaru Legacy wagon, that Mr Mistry was said to have used without permission. While Mr Mistry was driving that vehicle, the engine overheated and was later found to be badly damaged. Although not mentioned in Mr Axenov's email, that event appears to have occurred in February 2017. Mr Axenov wrote: "I told you to fix the car by yourself and I will forget for (sic) the incident". He described Mr Mistry as having chosen a "stupid way" to have the vehicle repaired. Mr Mistry arranged for the engine to be rebuilt, at a cost of more than \$8,000, rather than replaced with a second hand engine. Mr Axenov estimated a second hand engine would have cost about \$3,500. Mr Axenov also questioned invoices Mr Mistry had provided, without GST or IRD numbers, for the cost of moving cars from NZCRL's car yard on the North Shore to the South Auckland yard of another business owned by Mr Axenov.

[4] Mr Axenov wrote that Mr Mistry was due back from holiday by the end of November but, by the end of December, had not returned. Mr Axenov then wrote:

I was waiting for you to talk to you personally but you haven't shown up from your holiday. Take to consideration (sic) all above it is immediate dismissal for you from our company.

[5] He concluded his email by telling Mr Mistry he would “not put the claim against you to the Police” if Mr Mistry paid the repair workshop bill “in full ASAP”.

[6] Mr Mistry responded by email a few hours later. He said that he had emailed Mr Axenov about extending his leave, that he would be back to New Zealand in mid-January and that he would talk to Mr Axenov in person then.

[7] Mr Axenov replied, also on 25 December, that he had not received “any notices” from Mr Mistry since he went on leave in October. He again told Mr Mistry to pay the workshop that had repaired the Subaru.

[8] Mr Mistry returned to New Zealand on 22 January 2017, a week later than the five week extension of leave he had sought. That day Mr Mistry tried several times to contact Mr Axenov by telephone, unsuccessfully. He then received a text from Mr Axenov asking if the repair bill was paid. Mr Mistry replied that he wanted to meet Mr Axenov first and asked when he could do so. Mr Axenov responded, asking why a meeting was necessary, said he was on holiday and told Mr Mistry the repair bill “must be resolved asap”.

[9] Mr Mistry then sent a lengthy email on 25 January canvassing three issues: firstly, his leave; secondly, why he had driven the Subaru, denying he had seen any overheating warning light, and explaining why a second hand engine was not used for the repair; and, thirdly, how he understood that Mr Axenov had given permission for an arrangement whereby Mr Mistry paid people to move cars and then provided invoices for reimbursement of those costs.

[10] In a reply email on 28 January Mr Axenov confirmed his 25 December email had dismissed Mr Mistry “immediately for serious misconduct”. He gave three reasons for Mr Mistry’s dismissal, the third being additional and different from those given in his 25 December email. Firstly, Mr Axenov said Mr Mistry was away without approval for more than three working days. Secondly, he said Mr Mistry had “damaged our client’s car while driving it without any management permission and then used our company name and work account details to fix it”. Thirdly, he said Mr Mistry had received cash payments from the company’s “business partners” but the cash was not deposited into the company’s bank account.

[11] In March 2018 Mr Mistry lodged a personal grievance application in the Authority. NZCRL's statement in reply conceded its termination of Mr Mistry's employment was unjustified because it "did not follow the principles of natural justice". However it said Mr Mistry had committed "multiple items of serious misconduct" involving "fraud and misappropriation of [NZCRL's] cash" so awarding him any remedies would not be just.

The Authority's investigation

[12] As well as Mr Mistry and Mr Axenov, the following people provided written witness statements for the Authority's investigation:

- Gorjan Sidorovski, NZCRL's North Shore business manager;
- Randell Edgell, proprietor of the business that repaired the Subaru engine;
- Arno Barkhuizen, owner of a battery supply business who said he had given cash to Mr Mistry for scrap batteries and which Mr Axenov said had not been passed on to him or NZCRL's accountant; and
- Kelvin Ajudia, a former NZCRL employee who carried out the workshop manager role while Mr Mistry was on leave.

[13] All witnesses attended the investigation meeting in person except Mr Ajudia. He attended by way of a Facetime audio visual link from Christchurch. Each witness, under oath or affirmation, confirmed their written statements and answered questions from me and the parties' representatives. The representatives also provided oral closing submissions on the issues for resolution.

[14] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[15] The matters for determination fell into two categories – some points of fact, and then some points about what legal implications arose from those facts and the rest of what had happened.

[16] Findings were necessary on the following factual matters:

- (i) Was use of the Subaru wagon authorised?
- (ii) Should Mr Mistry have noticed a warning light or otherwise been aware of a risk of the Subaru engine overheating?
- (iii) Had Mr Mistry agreed to pay for repairs to the Subaru?
- (iv) Had Mr Axenov made any attempts to contact Mr Mistry about his concerns before deciding to dismiss him by email on 25 December 2017?
- (v) Did Mr Mistry take cash from sale of scrap batteries and keep the money?

[17] In light of those factual findings, conclusions are expressed on the following legal questions that required determination:

- (i) Was Mr Axenov's decision to dismiss Mr Mistry substantively justified (that is, was it what a fair and reasonable employer could have done in all the circumstances at the time)?
- (ii) If the company's actions were not substantively justified (as well as procedurally unfair), what remedies should be awarded, considering:
 - (a) Lost wages (subject to Mr Mistry's evidence of reasonable endeavours to mitigate his loss); and
 - (b) Compensation under s123(1)(c)(i) of the Employment Relations Act 2000 (the Act)?
- (iii) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Mr Mistry that contributed to the situation giving rise to his grievance, including:
 - (a) whether he made unauthorised use of the Subaru and damaged it; and/or
 - (b) whether, as was said to have been discovered after his dismissal, Mr Mistry had kept proceeds from sale of used car batteries that were the property of the company; and/or
 - (c) had Mr Mistry acted dishonestly in providing invoices to NZCRL for the costs of paying people for driving cars between yards?
- (iv) Should either party contribute to the costs of representation of the other party?

Findings of fact

Credibility and the balance of probability

[18] The Authority makes findings of fact on the civil standard of the balance of probability, that is what is more likely than not to have occurred. The written and oral evidence of the witnesses is weighed against that standard of likelihood. Likelihood is increased where the accounts given by witnesses can be corroborated by reliable documents or other records made at or close to the time of the relevant events.

[19] In this case both parties impugned the credibility of the other party and the evidence of witnesses given in support of one or other party. Generally, on those points of conflict, Mr Axenov's allegations and the evidence in favour of them fell short of the threshold of probability and Mr Mistry's evidence was more reliable and likely.

[20] Some instances of that shortfall were found in Mr Axenov's email of 25 December dismissing Mr Mistry. He described the Subaru as having been "towed from harbour bridge" on the day it broke down as Mr Mistry drove it back to work. In fact, as Mr Sidorovski's evidence confirmed, it broke down a few hundred metres from NZCRL's premises in Glenfield and was then towed a few hundred metres to a nearby repair shop. Mr Axenov described the car as belonging to a client or a customer of NZCRL. The reality was that another company owned by Mr Axenov, based at the same premises, owned the car.

[21] Mr Axenov described Mr Mistry as missing a warning light and not seeing the temperature gauge showing the engine was overheating, both assumptions he made without any reliable evidence that the light or gauge gave those indications when Mr Mistry was driving it.

[22] Mr Axenov also referred in his evidence to having made attempts to call and text Mr Mistry in India after 11 December and before 25 December. Ultimately he was unable to provide any evidence of having done so. Mr Axenov said this was because of changes to his phone associated with his regular business travel to Japan and because he had either deleted the WhatsApp and Viber applications on his phone or lost the data in those applications. Mr Axenov had used those applications for communication with Mr Mistry before his departure to India and after his return to New Zealand. He said he had attempted to contact Mr Mistry using one or other

application while Mr Mistry was away in India. What was available on Mr Mistry's phone showed no missed calls or other messages from Mr Axenov in that period. The leave application letter Mr Mistry had submitted in September 2017 included both his personal address and his mobile telephone number. Mr Axenov had, in December, checked with Mr Ajudia whether he had the correct email address for Mr Mistry. He did and he used it soon after to send the 25 December email dismissing Mr Mistry.

Was use of the Subaru authorised?

[23] There was no dispute Mr Mistry was authorised to use a company van for transporting other staff and for his own use to and from work. He said Mr Axenov told him in February 2017 he could use any company car on the lot. Mr Axenov denied giving that permission. He said only mechanics and sales people were allowed to drive those cars, not administrators or managers such as Mr Mistry or Mr Sidorovski.

[24] Mr Mistry said that the company van was on a hoist awaiting new tyres on the night he used the Subaru. He had worked late, up to around 11pm, and did not have a vehicle to return to his home in Mount Roskill from the company's car yard on the North Shore. Among the cars on the lot the Subaru was accessible. Before taking it he checked the ownership of the car with an office administrator who worked at that time for New Zealand Car Limited, the other company owned by Mr Axenov that shared the same premises. On finding out that company owned the car, Mr Mistry took it as being one he considered Mr Axenov had approved him using when needed.

[25] Although Mr Axenov's evidence was that he chastised Mr Mistry for using the vehicle, there was nothing to corroborate he had done so at the time of the vehicle breaking down. No disciplinary action was taken. Rather, at the time, it was the issue of the cost of its repair that was important to Mr Axenov. As recorded in his 25 December email, written some ten months later, Mr Axenov had said to Mr Mistry: "I told you to fix the car by yourself and I will forget for (sic) the incident".

[26] On that evidence, on the balance of probabilities, it was not established that Mr Mistry knew he was not authorised to use that vehicle on the evening he did or that using the vehicle was a matter amounting to serious misconduct.

Should Mr Mistry have known the risk of the car overheating?

[27] Mr Sidorovski said the Subaru wagon was used as a loan vehicle for clients awaiting repair of their own cars. He said the wagon was twice returned by clients concerned that a warning light or error message showed up on the dashboard saying there was a lack of water in the engine. He said he had then arranged for the car to be parked in the NZCRL repair workshop at the rear of the car yard.

[28] The point of Mr Sidorovski's evidence, for NZCRL's case, was that Mr Mistry should have known the Subaru wagon had a fault and should not be driven until that fault was repaired. He said he had told either Mr Mistry "or one of the other workshop staff" about the problem with the wagon and, as workshop manager, Mr Mistry was responsible for knowing the status of all vehicles in the workshop for service. Mr Sidorovski said all vehicles parked in the rear workshop were "in need of something to be done to them to get them ready for sale". He said that even if he had not spoken directly to Mr Mistry about the car and the fault, Mr Mistry would have seen the wagon there and, if he did not know why it was there, should have spoken to his staff about it before driving it.

[29] Mr Sidorovski's evidence about the assumptions he had made carefully went no further than expressing his expectations. It fell short of establishing that Mr Mistry was told of, or could be reasonably be expected to aware of, the exact fault of the Subaru wagon and should have been alert to the risk. There was also some doubt, arising from oral evidence at the Authority investigation meeting, that the location of the wagon on the lot necessarily gave as clear as message about its status as Mr Sidorovski's evidence suggested. Changes underway around that time in the businesses Mr Axenov ran from those premises meant cars were being moved around different areas on the lot and away to other premises in Penrose.

[30] On that evidence, on the balance of probabilities, it was not established Mr Mistry knew of the vehicle's fault at the time and should have been particularly alert for a warning light or a dashboard message about water levels in the engine. He denied any such warning appeared. In his oral evidence Mr Axenov could only say he was "assuming" the warning light was showing when Mr Mistry was driving the wagon. Reports of a warning light or dashboard message having shown on some previous occasions suggested it might have done. However nothing established that it had done so and Mr Mistry must have seen it, on the occasion he drove it. Nothing sufficiently conclusive was established.

Had Mr Mistry agreed to pay for repairs to the Subaru?

[31] Both men agreed Mr Axenov had told Mr Mistry to get the vehicle fixed at his own cost when Mr Axenov learned of the engine problem but Mr Mistry had not accepted he should do so. Mr Axenov's evidence was that Mr Mistry did not say anything and was "just quiet".

[32] Mr Mistry's account was that he had not accepted any financial liability for the repairs because he did not consider he was responsible for the damage to the vehicle. He understood he was responsible for arranging its repair, as cheaply as possible, but the company would bear the cost.

[33] In May 2017 he arranged for Mr Edgell, who frequently did work for NZCRL, to carry out the repair. After testing and then removing the engine from the vehicle, Mr Edgell had initially sought a replacement engine but was unable to source one in New Zealand or Australia, including from a supplier importing Japanese car parts. He then priced parts to rebuild the engine and, on Mr Mistry's approval, went ahead. The work was completed in July and an invoice emailed to NZCRL's office for a little over \$8,000. Just under half the cost was for parts, with the remainder being for labour. By October the invoice was not paid and, on checking with Mr Mistry, Mr Edgell sent a further invoice to a different accounts email address for the business. By November the invoice was still not paid and Mr Edgell visited NZCRL to enquire about the delay. It was not until then that Mr Axenov that he had become aware of how the repair was carried out, its cost and the invoice to NZCRL for the work.

[34] Mr Sidorovski gave evidence of having got information in May from a Japan-based supplier that a replacement engine could be purchased in Japan for the equivalent of around \$5,500. He said the engine could have been shipped to New Zealand in the back of one of the vans that NZCRL imported from Japan so there was no shipping cost and minimal tax. He also believed the work of installing such a replacement engine could have been done in-house by an NZCRL mechanic, substantially reducing costs compared to the work Mr Mistry commissioned from Mr Edgell. Mr Mistry accepted he had known about the quote Mr Sidorovski got for a replacement engine from Japan but believed that shipping and labour costs would not have necessarily made that a cheaper alternative. Mr Edgell, in his oral evidence, shared Mr Mistry's view. He estimated costs of as much as \$2,500 would

nevertheless have been incurred for removing the old engine, dressing the new engine and installing it along with paying for any incidental parts that might also need to have been replaced. On that assessment there was little difference between his eventual invoice and what costs might have been incurred if the engine from Japan had been imported.

[35] On that evidence, on the balance of probabilities, it was not established Mr Mistry had accepted he was liable for the cost of repairs to the vehicle, whatever they might have proven to be.

Had Mr Axenov tried to contact Mr Mistry before dismissing him on 25 December?

[36] Mr Axenov's 25 January email to Mr Mistry gave the following as one of three reasons for his immediate dismissal for serious misconduct: "You were away more than three working days without any serious reason and any management approval".

[37] He was attempting to rely on the abandonment of employment clause in Mr Mistry's employment agreement:

In the event the Employee has been absent from work for three consecutive working days without any notification to the Employer, and the Employer has made reasonable efforts to contact the Employee, this agreement shall automatically terminate on the expiry of the third day without the need for notice of termination of employment.

[38] It failed for two reasons. Firstly, it was more likely than not Mr Mistry had sent an email on 3 December about extending his leave, so there was not failure of notification. Secondly, the evidence did not establish Mr Axenov had made reasonable efforts to contact Mr Mistry.

[39] Mr Mistry had sent Mr Axenov an email on 3 December seeking an extension to his leave. Mr Axenov did not reply. He accepted in his oral evidence at the Authority investigation that Mr Mistry had probably sent the email but he had not seen it. However, if he had not seen Mr Mistry's 3 December email, it was unlikely Mr Axenov would not have made some inquiry of Mr Mistry on or soon after 12 December when Mr Mistry would, if his leave was not extended, have been due back at work.

[40] Mr Axenov said he had made some unsuccessful attempts to contact Mr Mistry between 11 December and his 25 December email, including “multiple times” trying to call him. As already noted earlier in this determination, at paragraph [22], Mr Axenov was not able to provide any evidence of attempts to do so on the WhatsApp and Viber applications he had sometimes used to communicate with Mr Mistry on earlier occasions.

[41] Mr Mistry said he often used his New Zealand sim card in his mobile phone while in India during that period and he had received text messages from other senders in New Zealand. He had no text messages or missed calls from Mr Axenov.

[42] Mr Axenov did not send an email to Mr Mistry before 25 December, although he had Mr Mistry’s email address on his leave application. Other documents provided for the investigation also showed Mr Axenov had used that address in March and April 2017 to send emails to Mr Mistry. Mr Axenov’s only explanation for not having attempted to contact Mr Mistry by email after 12 December and before the dismissal email of 25 December was that he was “very busy” until then.

[43] On that evidence, on the balance of probabilities, Mr Axenov had not established that he had made “reasonable efforts” to contact Mr Mistry. NZCRL could not rely on the abandonment clause for terminating Mr Mistry’s employment.

Did Mr Mistry keep cash from sale of scrap batteries?

[44] Following his dismissal NZCRL alleged Mr Mistry had engaged in a scam where he sold scrap batteries for cash to the company’s car battery supplier but had not given the cash to Mr Axenov or the company’s accountant or deposited the money into the company’s bank account. This was third and additional reason Mr Axenov gave in his 28 January email for dismissing Mr Mistry. Mr Axenov’s evidence was that situation was not known to him when he dismissed Mr Mistry on 25 December.

[45] An allegation of such a serious nature, and about supposed after-discovered conduct, is assessed on the same standard of proof as if it were known and had formed part of the reasons for dismissal – that is to the balance of probabilities. There must be more than mere suspicion but the allegation need not be proved to the higher standard of being beyond reasonable doubt. In undertaking that task the Authority

considers the nature and quality of the evidence for the allegation, and whether the employer had a sufficient and reliable evidential basis for making it.¹

[46] Mr Mistry denied the allegation of keeping cash for the sale of scrap metal and batteries at the car yard. He accepted he had sold scrap metal on one occasion and had sold scrap batteries to Mr Barkhuizen and another representative of the company's battery suppliers. He insisted he had given the cash to Mr Axenov or the company's accountant on each occasion.

[47] Mr Ajudia took over the workshop manager role while Mr Mistry was on leave. Before leaving Mr Mistry had explained to him the arrangement for selling batteries and for handing in the cash. Mr Ajudia recalled one occasion, around October 2017, of Mr Mistry giving him \$50 or \$60 received from battery sales and telling him to give it to the accountant, which Mr Ajudia said he did. Mr Axenov said he had not known about any such arrangement until the company accountant asked him what to do with cash that Mr Ajudia had given her sometime in October or November 2017.

[48] Mr Barkhuizen's evidence did not resolve the conflict in the evidence of Mr Axenov and Mr Mistry. Pages from his order book showed invoices for delivery of new batteries and included a note of amounts paid for scrap batteries he picked up when making those deliveries. He recalled dealing with Mr Mistry and another person, who he said looked to be of Fijian descent. The amounts he noted as paid for 'junk' batteries were \$268 (with \$52 owed) for 31 on 9 October 2017, \$160 for 13 on 20 October 2017, \$25 for 2 on 27 October 2017, and \$156 for 12 on 16 November 2017. On that tally \$701 cash was paid in four transactions.

[49] However this did not resolve the essential question of whether the cash was then handed over to the company, either directly or as a bank deposit. Mr Axenov pointed to bank records as showing no deposits of those amounts. The difficulty with that proposition was that there was also no record of a deposit of the amount Mr Axenov said was handed over to the accountant by Mr Ajudia and that had alerted Mr Axenov, he said, for the first time to the cash sales. He could not explain that discrepancy and suggested the accountant may have kept the cash and used it as petty

¹ See *Ritchies Transport Holdings Limited v Merennage* [2015] NZEmpC 198 at [108] and *Airline Stewards and Hostesses of New Zealand IUOW v Air New Zealand Ltd* (1990) ERNZ Sel Cas 985 (CA) at 992-993

cash. In that light, NZCRL could not discount the possibility that cash previously handed over by Mr Mistry had also been used as petty cash in the same way.

[50] A further piece of evidence weighed against the likelihood of Mr Axenov's account of events. If Mr Mistry was running a cash scam, it was unlikely he would have told Mr Ajudia how to make arrangements for the cash sale of scrap batteries and then tell him to hand over the cash to the office.

[51] On that evidence, on the balance of probabilities, NZCRL had not established Mr Mistry was keeping cash from battery sales.

Justification of the dismissal

[52] NZCRL conceded from the outset that how it went about dismissing Mr Mistry was unfair but considered its evidence would establish he committed several instances of serious misconduct that could have justified his dismissal. It submitted findings of blameworthy conduct by him should be made so no remedies could justly be awarded.

[53] On the findings of facts made in this determination, NZCRL's dismissal of Mr Mistry certainly fell well short of meeting the statutory test of justification. At the time and in the circumstances he was dismissed, it was not what a fair and reasonable employer could have done.

Remedies

Lost wages

[54] Mr Mistry sought an award for ten weeks of lost wages until he got another job (\$9,600) and then, for a further three week period, an award for the \$4 an hour shortfall between his earnings in his new job and what he had earned previously at NZCRL (\$400). He got a better paid job after those three weeks. He also sought reimbursement of the loss of KiwiSaver contributions on that amount, that is \$300.

[55] He gave evidence of his diligent search, after he returned to New Zealand on 22 January, for the type of work he had the experience to do. Securing a new job within 10 weeks mitigated his loss and reduced the amount that NZCRL had to pay in reimbursement of lost remuneration.

[56] Accordingly, under s 123(1)(b) of the Act NZCRL must pay Mr Mistry reimbursement of \$10,000 for lost wages and \$300 for lost KiwiSaver contributions. Those amounts are to be paid to him, less any applicable tax, by no later than 28 days after the date of this determination.

Compensation for humiliation, loss of dignity and injury to feelings

[57] Mr Mistry claimed \$12,000 as compensation for humiliation, loss of dignity and injury to his feelings caused by his unjustified dismissal and the manner in which it was carried out. He was on leave, newly married and visiting family when he was told in a quite brutal and unexpected manner that he was dismissed. It was inherently shocking, embarrassing and injurious to his feelings. The sting of the allegation of 'fraud' in relation to the costs of engine repair, and the threat to report him to Police if he did not pay that money, inevitably compounded that injury. He understandably reported sleeplessness and worry about what had happened and the effect his dismissal in that way would have on him in future.

[58] The sum of \$12,000 was well within the range of compensation awarded in similar cases and appropriate on the particular facts.

[59] Under s 123(1)(c)(i) of the Act NZCRL must pay Mr Mistry \$12,000 as compensation for humiliation, loss of dignity and injury to his feelings. This amount must be paid to him, in full, by no later than 28 days after the date of this determination

Reduction for contribution

[60] For reasons given earlier in this determination NZCRL failed to establish the evidential foundation that would warrant a finding of blameworthy conduct regarding the sale of batteries, use of the Subaru wagon or arrangements for its repair. As a result no reduction of remedies could be awarded on those grounds under s 124 of the Act.

[61] The outstanding issue related to Mr Axenov's allegation that Mr Mistry had acted dishonestly in providing invoices to NZCRL for the costs of paying people for moving cars between yards.

[62] In July 2017, before he went abroad for a month's holiday, Mr Axenov arranged for Mr Mistry to transfer cars between NZCRL's North Shore yard to a yard in Penrose used by another of Mr Axenov's companies. Mr Axenov said Mr Mistry told him he could arrange for friends to drive the cars across. Mr Axenov said he agreed a price of \$40-\$45 per car, which was cheaper than another service that charged \$46 a car, GST inclusive. However on his return he found Mr Mistry had provided invoices for the transfers at the cost of \$60 a car.

[63] Mr Mistry said he was told to provide invoices for the work at the meeting it was arranged with Mr Axenov. Staff working at the car yard were asked to suggest people who would do the driving. Mr Mistry paid those people in cash for their work and prepared his invoices for reimbursement of the amounts he had paid.

[64] This was not an instance of blameworthy conduct warranting a reduction of any remedy. Rather, as a matter of likelihood, Mr Axenov had made arrangement for cash payments for tasks to be done. The issue was a disagreement about price, not conduct.

Costs

[65] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[66] If they are not able to do so and an Authority determination on costs is needed Mr Mistry may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum NZCRL would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[67] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.² As a preliminary indication which may assist the parties resolve this matter themselves, and subject to the parties'

² *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].

submissions if an Authority determination of costs is sought, a 50 per cent uplift of the tariff is likely on what is presently known of the conduct of the case.

Robin Arthur
Member of the Employment Relations Authority