

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 83
3023027

BETWEEN

DANIEL MORGAN

Applicant

AND

FORTIS CARS LIMITED

Respondent

Member of Authority: Jenni-Maree Trotman

Representatives: Senta Knapp, Advocate for the Applicant
No appearance for the Respondent

Investigation Meeting: 9 March 2018

Additional documents received: 12 March 2018 from Applicant

Determination: 13 March 2018

DETERMINATION OF THE AUTHORITY

A. Mr Morgan was unjustifiably dismissed by Fortis Cars Limited.

B. Fortis Cars Limited is ordered to pay to the following amounts to Mr Morgan within 14 days of the date of this determination:

- a. The sum of \$2,658.35 gross for wages lost as a result of Mr Morgan's personal grievance.**
- b. The sum of \$835.51 gross for unpaid holiday pay.**
- c. The sum of \$3,000 under s 123(1)(c) of the Employment Relations Act 2000.**

C. Costs are reserved.

Employment Relationship Problem

[1] Fortis Cars Limited (Fortis Cars) is a vehicle dealership operating in Auckland. Mr Morgan was employed by Fortis Cars as a vehicles sales person.

[2] On 5 September 2017 Fortis Cars summarily dismissed Mr Morgan. He claims this dismissal was unjustified and claims Fortis Cars breached its duty of good faith. In addition he claims that he suffered an unjustified disadvantage to his employment as a result of not having an individual employment agreement (IEA) from 30 May 2017 and not receiving payslips. He claims wage arrears, holiday pay, lost wages and for compensation under s 123(1)(c) of the Employment Relations Act 2000 (the Act).

[3] No Statement in Reply was filed by Fortis Cars. In addition, there was no appearance for or on behalf of Fortis Cars at the investigation meeting.

[4] Prior to the investigation meeting a minute setting out, inter alia, the date of the investigation meeting was personally served on Fortis Cars. Service occurred on 23 January 2018 at Fortis Cars registered office at Haven Accounting Services Limited, 511 Rosebank Road, Avondale, Auckland. Thereafter, the Notice of Investigation Meeting was served by email on Fortis Cars on 23 February 2018 and at its registered office on 1 March 2018.

[5] No good reason has been provided for Fortis Cars' failure to attend the investigation meeting or be represented. As provided for in clause 12 of Schedule 2 of the Act I have proceeded to act as fully in the matter before me as if Fortis Cars had duly attended or been represented.

[6] As permitted by 174E of 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 but has not recorded all evidence and submissions received.

The issues

[7] The issues requiring investigation and determination were:

- a) Did Mr Morgan suffer an unjustified disadvantage to one or more of his conditions of employment?

- b) Was Mr Morgan unjustifiably dismissed?
- a) Did Fortis Cars breach its duty of good faith?
- b) If Mr Morgan was unjustifiably disadvantaged, or was unjustifiably dismissed, what remedies should be awarded?
- c) If any remedies are awarded, should they be reduced, under s124 of the Act, for blameworthy conduct by Mr Morgan that contributed to the situation giving rise to his grievance?
- d) Are any wage arrears or holiday pay owing to Mr Morgan? If so, in what amount?

Background against which issues are to be determined

[8] Mr Morgan was initially employed by Fortis Cars on 20 June 2016 in the Finance Department. On 14 September 2016 he joined Fortis Cars' sales team.

[9] On 20 March 2017 Fortis Cars proposed a company restructure and sought feedback from its staff. Following discussions between Mr Morgan and Fortis Cars Manager, Clyde Hollick, Mr Morgan tendered his resignation and commenced working elsewhere.

[10] Thereafter, at a meeting held with Mr Hollick, the parties agreed that Mr Morgan would recommence employment with Fortis Cars on 30 May 2017.

[11] A new individual agreement was not signed. However, Mr Morgan said during the investigation meeting that the terms were those contained in an agreement presented to him during the restructure in March 2017. The only difference, he said, being the hourly rate to be paid to him. He said the agreement reached with Mr Hollick on behalf of Fortis Cars was:

- (a) He would be paid \$19.50 per hour;
- (b) He was required to work for a period of 40 hours each week;
- (c) His wages would be reviewed after a period of three months.

[12] The relationship between the parties continued without issue. However, on 5 September 2017 Mr Hollick called Mr Morgan into a meeting. During that meeting

Mr Morgan says Mr Hollick told him that it had come to his attention that Mr Morgan had been looking for other jobs. When Mr Morgan confirmed this, Mr Hollick responded telling him that he considered this to be un-teamlike. He asked him to take his jacket off and told him he would receive his holiday pay in his final week's pay.

Issue One: Unjustified Disadvantage

[13] On 31 January 2018 Mr Morgan filed an Amended Statement of Problem. He claimed he had suffered an unjustified disadvantage by Fortis Cars failing to provide him with an IEA and payslips from 30 May 2017 onwards. This was the first time a personal grievance for these matters was raised.

[1] Section 114 of the Act provides that an employee who wishes to raise a personal grievance must raise the grievance with his employer within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later. This is unless the employer consents to the personal grievance being raised after the expiration of that period or leave is granted by the Authority. A personal grievance is "raised" with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.

[2] In *Creedy v Commissioner of Police* the Employment Court addressed what constitutes the raising of a personal grievance under s 114(2).¹

[36] It is the notion of the employee wanting the employer to address the grievance that means that it should be specified sufficiently to enable the employer to address it. So it is insufficient, and therefore not a raising of the grievance, for an employee to advise an employer that the employee simply considers that he or she has a personal grievance or even by specifying the statutory type of the personal grievance as, for example, unjustified disadvantage in employment ... As the Court determined in cases under the previous legislation, for an employer to be able to address a grievance as the legislation contemplates, the employer must know what to address. I do not consider that this obligation was lessened in 2000. That is not to find, however, that the raising cannot be oral or that any particular formula of words needs to be used. What is important is that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates.

¹ [2006] ERNZ 517 (EmpC)

[16] In the present case, Mr Morgan raised a personal grievance with Fortis Cars for unjustified dismissal and breach of good faith. This was done on 25 September 2017 i.e. within 90 days of his grievance arising. The statement of problem which he filed with the Authority on 7 December 2017 mirrored the facts and grievances he had raised. However, the only mention of a personal grievance for unjustified disadvantage was a brief comment in Mr Morgan's personal grievance letter that:

Daniel was seriously and unjustifiably disadvantaged in his employment by the acts and omissions of his employer. Those acts and omissions may affect future employment prospects and also constitute breaches of principles of good faith and reasonable dealing. Under these circumstances, it is simply not reasonable to terminate his employment. This is a breach of good faith obligations under the Employment Relations Act.

[3] This statement was made under a heading "Breach of Good Faith". No indication as to what the unjustified acts and omissions might entail was provided so as to enable Fortis Cars to address the grievance. Read in context, it appears on balance that Mr Morgan was not raising a grievance for unjustified disadvantage at the time this letter was written. The words were intended to support his claim for unjustified dismissal and breach of good faith. Even if I am wrong in that finding, I am satisfied that Mr Morgan has not met the statutory requirements for raising a grievance in relation to an unjustified disadvantage claim. No leave has been sought to raise this claim out of time.

Issue Two: Unjustified Dismissal

[4] There is no dispute that Mr Morgan was dismissed from his employment with Fortis Cars on 5 September 2017. The onus falls upon Fortis Cars to justify whether its actions were justified.

[5] Whether a dismissal was justifiable must be determined under s 103A of the Act which provides the test of justification. The Authority must, in determining whether a dismissal is justifiable, objectively determine whether the actions of Fortis Cars, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[6] In applying this test, the Authority must consider the matters set out in s 103A (3)(a)-(d). These matters include whether, having regard to the resources available, an employer sufficiently investigated the allegations, raised the concerns with the

employee, gave the employee a reasonable opportunity to respond and genuinely considered the employee's explanation prior to dismissal.

[21] The Authority must not determine a dismissal unjustifiable solely because of defects in the process if they were minor and did not result in the employee being treated unfairly.² A failure to meet any of the s 103A(3) tests is likely to result in a dismissal being found to be unjustified.

[8] The process leading to Mr Morgan's dismissal was defective. Fortis Cars failed to meet any of the mandatory considerations set out in s 103A(3). There was no investigation before dismissal. There was no raising of concerns before dismissal. There was no opportunity to respond to the concerns before dismissal. There was no genuine consideration of the explanation before dismissal. In effect the dismissal was immediate and abrupt. These defects were not minor and did result in Mr Morgan being treated unfairly.

[9] A decision to dismiss in all the circumstances known at the time was not one that a fair and reasonable employer could have made. Mr Morgan was unjustifiably dismissed from his employment with Fortis Cars and is entitled to remedies.

Issue Three: Breach of good faith

[10] Mr Morgan says Fortis Cars breached its statutory obligations of good faith contained at s 4 of the Act. He said it did this by failing to review his salary within three months as per the parties' oral agreement.

[11] Section 4(1A)(b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative.

[12] At the time of Mr Morgan's dismissal the agreed three month period had only just elapsed. In these circumstances I am not satisfied that Fortis Cars' failure to review Mr Morgan's salary was a breach of its duty of good faith. Even if it was, no penalty is claimed by Mr Morgan.

² S 103A(5)

Issue Four: Remedies

Lost wages

[27] Section 123(1)(b) of the Act provides for the reimbursement by Fortis Cars of the whole or any part of wages lost by Mr Morgan as a result of his grievance. Section 128(2) provides that I must order Fortis Cars to pay Mr Morgan the lesser of a sum equal to his lost remuneration or to three months' ordinary time remuneration. However, I have discretion to award greater compensation for remuneration lost than three months' equivalent.³

[13] The amended statement of problem claims the difference between 13 weeks' lost wages and the earnings Mr Morgan received from new employment during this period. Weekly wages are calculated based on a 40 hour week at the hourly rate of \$19.50.

[14] By Minute dated 22 January 2018 the Authority directed the Respondent to provide Mr Morgan's wage and time records, leave and holiday records, payslips and final pay details. Fortis Cars has failed to provide this information.

[15] At my request Mr Morgan produced his bank statements showing payments made by Fortis Cars during the period at issue, namely 30 May 2017 to September 2017. These statements show Mr Morgan received varying wage payments from Fortis Cars each week. During questioning Mr Morgan said that this was because he often worked more than 40 hours, and on occasion he had worked less. Overall he said his normal hours of work during this period were 40 hours each week. I accept his unchallenged evidence.

[16] Multiplying 40 hours by Mr Morgan's hourly rate of \$19.50 I reach a weekly wage of \$780 gross. Multiplied by 13 weeks equals \$10,140 gross. From this sum the amended statement of problem pleaded that a sum of \$7,978.44 net needed to be deducted for monies Mr Morgan had received from Work and Income New Zealand and from new employment during this period. He explained that due to financial pressures, and without a reference, he was required to take the first job that was offered to him. This position paid him less than he previously earned. He said that he has been unable to secure another sales position earning the same money as he received working for Fortis Cars.

³ S 128(3).

[32] Following a request for documentary evidence of Mr Morgan's earnings during the 13 weeks following his termination, he provided copies of his payslips. Comparing the payslips with Mr Morgan's bank statements I am satisfied he received income totalling \$7,481.65 gross.

[7] Mr Morgan has lost the sum of \$2,658.35 gross as a result of his personal grievance. Payment of this sum must be made within 14 days of the date of this determination.

Section 123(1)(c)(i) Compensation

[8] Mr Morgan claims compensation for humiliation, loss of dignity and injury to feelings pursuant to s 123(1)(c)(i) in the sum of \$11,000.

[9] Mr Morgan gave very brief evidence of the effects that the dismissal had on him. He said he felt traumatised by the way in which he was dismissed. He explained how he "battled" to honour his financial commitments following his termination. This led to him feeling stressed.

[10] Against this Mr Morgan said he was already looking for another job at the time he was dismissed. He explained that this was because he believed Fortis Cars would not meet its promise to increase his wages and he didn't trust them. He said he secured another job within 3 weeks. During the interim Mr Morgan's bank statements show he received support from Work and Income New Zealand. There was no evidence of any on-going hurt or humiliation after Mr Morgan obtained new employment.

[11] I am satisfied in these circumstances that Mr Morgan suffered humiliation, loss of dignity and injury to his feelings. However, I consider the evidence warrants a low award of compensation under s 123(1)(c)(i) of the Act in the sum of \$3,000.

[12] Fortis Cars is ordered to make payment to Mr Morgan the sum of \$3,000 pursuant to s 123(1)(c)(i). Payment must be made within 28 days of the date of this determination.

Issue five: Contribution

[13] Where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be

provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance. If those actions so require, the Authority must then reduce the remedies that would otherwise have been awarded. ⁴

[40] I am satisfied that Mr Morgan did not contribute to his personal grievance and for this reason I make no deduction to the remedies I have awarded.

Issue Six: Wage arrears and holiday pay

Wage Arrears

[14] The amended statement of problem claims payment of outstanding wages.

[15] Where there has been default in payment to an employee of any wages or other money payable under an IEA, those monies may be recovered by the employee.⁵

[16] Having questioned Mr Morgan on his claim I am satisfied there are no wages owing to him. Mr Morgan conceded he was paid all wages owing up to the date of his termination. Accordingly, no order is made for wage arrears.

Payment for annual leave due on termination

[17] Calculation of Mr Morgan's annual leave entitlements must be made in accordance with s 23 of the Holidays Act 2003. This section applies where the employment of an employee comes to an end and the employee is not entitled to annual holidays because he or she has worked for less than 12 months. In such a case an employer must pay the employee 8% of the employee's gross earnings since the commencement of employment, less any amount paid to the employee for annual holidays taken in advance.

[18] Mr Morgan said that his claim for holiday pay relates to the period from 30 May 2017 until 5 September 2017. During this period Mr Morgan's bank statements show that he was paid a sum of \$8,568.05 net. He has been unable to advise the Authority of his gross earnings during this period and has not provided a gross earnings figure for the Authority to verify despite request.

⁴ s 124.

⁵ Section 131 Employment Relations Act 2000

[46] In the absence of wage and time records I have used Mr Morgan's payslips for the period prior to 30 May 2017 to ascertain a gross earnings figure. These show that Mr Morgan's tax code at material times was ME SL and he was contributing 3% of his gross earnings to Kiwisaver. Applying this information against the IRD Weekly Pay Period Deduction Tables I reach a gross earnings figure of \$12,000 for the period 30 May 2017 until 5 September 2017. 8% of this sum is \$960.

[17] Mr Morgan said that following his termination he received a sum of \$124.49 into his bank account. He said this was not for hours worked. On balance, taking into account Mr Hollick's statement to Mr Morgan that Fortis Cars would pay Mr Morgan any holiday pay owed, I find it more likely than not that the sum of \$124.49 was for holiday pay owed.

[18] Deducting the sum of \$124.49 from the holiday pay I find the sum of \$835.51 is payable by Fortis Cars to Mr Morgan for unpaid holiday pay.

[19] Fortis Cars is ordered to pay Mr Morgan the sum of \$835.51 gross for unpaid holiday pay. Payment of this sum must be made within 14 days of the date of this determination.

Costs

[20] Costs are reserved.

[21] The Applicant is encouraged to resolve any issue of costs with the Respondent. If he is unable to do so, and an Authority determination on costs is needed, an application for costs can be made within 14 days. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[22] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence such as invoices. In addition, a copy of the Applicant's retainer letter must be provided.

[53] 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.⁶



Jenni-Maree Trotman
Member of the Employment Relations Authority

⁶ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].