

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 293
5590258

BETWEEN SANDEEP NATH
 Applicant

AND ADVANCE
 INTERNATIONAL
 CLEANING SYSTEMS NZ
 LIMITED
 Respondent

Member of Authority: Vicki Campbell

Representatives: Tim Oldfield for Applicant
 Stephen Langton for Respondent

Investigation Meeting: 15 June 2016

Further Information
Received: 17 June 2016

Submissions Received: 23 June and 4 July 2016 from Applicant
 30 June 2016 from Respondent

Determination: 30 August 2016

DETERMINATION OF THE AUTHORITY

- A. One or more conditions of Mr Nath's employment were not affected to his disadvantage.**
- B. Mr Nath was not justifiably dismissed.**
- C. Mr Nath has failed to establish his claims that Advance breached its obligations of good faith, breached the terms of the employment agreement and/or breached the Fair Trading Act 1986.**

- D. Mr Nath's claim for arrears of wages is declined.**
- E. The Authority has no jurisdiction to investigate and determine the counter-claim.**
- F. Costs are reserved.**

Employment relationship problem

[1] Mr Sandeep Nath has a number of claims to be determined including claims he was unjustifiably dismissed and that one or more conditions of his employment have been affected to his disadvantage by unjustifiable actions of Advance International Cleaning Systems NZ Limited (Advance). Mr Nath also claims Advance has breached section 12 of the Fair Trading Act, its statutory obligations of good faith and the terms of the employment agreement. Finally, Mr Nath claims he is owed wages including holiday pay.

[2] Advance denies all the claims and counter-claims against Mr Nath for repayment of a loan of \$6,874.60.

[3] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from Mr Nath and Advance 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.

[4] At the investigation meeting Mr Nath withdrew claims for a penalty for breach of good faith, recovery of \$100,000 invested in Optimizer HQ shares as compensation for the breach of good faith and a declaration that the restraint of trade set out in the employment agreement is unenforceable.

Background

[5] Mr Nath started work for Advance on 10 March 2003 as an Account Manager. From 1 July 2005 he worked as Advance Sales Manager, Northern Region. Mr Nath was promoted to National Development Manager with effect from 1 June 2006.

[6] Mr Nath has never signed a written employment agreement, although I have been provided with two unsigned employment agreements, one dated 2004 and the other dated 2012. The 2004 agreement has been signed on behalf of Advance by Mr Jiwa Nadan, Managing Director, but not by Mr Nath, while the 2012 agreement has not been signed by either party.

[7] On 16 September 2014 Mr Nath suffered from a myocardial infarction and was admitted to hospital and underwent surgery. Mr Nath was discharged from hospital on 19 September 2014 and given a medical certificate stating that he was unfit for work for a period of 14 days from that date.

[8] On 25 June 2015 Mr Nath suffered a subdural haematoma as a result of anti-platelet therapy. The anti-platelet therapy related to the surgery Mr Nath had in September 2014. Mr Nath had to undergo urgent surgery which resulted in him being unable to work. As a result of his medical condition Mr Nath exhausted all of his annual and sick leave entitlements.

[9] On 2 September 2015 Mr Jiwa Nadan, Managing Director, notified Mr Nath during a telephone discussion of the need for the business to change to address its current challenges and demands.

[10] The need for changes to be made to the business was then circulated to all staff including Mr Nath in an email dated 3 September 2015. In his email Mr Nadan highlighted the poor sales for July and August which were both below target and identified the need for multiple measures to address the situation. Mr Nadan advised the staff that there was an immediate need for the business to address the structure, activity and performance.

[11] Mr Nath emailed Mr Nadan that same evening confirming advice he had received from his specialist that all being well he would be able to be back at work undertaking his full duties by end September/early October 2015.

[12] Mr Nadan emailed Mr Nath on 7 September 2015 setting out his concerns about the length of Mr Nath's absence advising Mr Nath that Advance would like to give him notice that the company was unable to hold his current role open due to his medical incapacity and that a new role would be created for him on his return to work.

Mr Nath was invited to provide feedback on this proposal before the final decision was made on Wednesday 9 September 2015.

[13] Mr Nath responded on 8 September 2015. In his email Mr Nath advised that he was due for a cerebral angiogram the following day and he would be in a position to provide further medical information after that. Mr Nath requested detailed information on the new role being proposed for him.

[14] In response, on 15 September 2015 Mr Nadan reminded Mr Nath that he had been absent from the business for an extended period and he would not commit to what the new role would be until such time as Mr Nath had recovered from his procedure and Advance had full information about what Mr Nath could and could not do. Mr Nadan was not prepared to discuss a role to suit Mr Nath until that process had been worked through. Mr Nadan did however reiterate his proposal to Mr Nath that he would accommodate his future within the business when he was 100% well.

[15] On 18 September 2015 Mr Nath raised personal grievances alleging he had been unjustifiably disadvantaged in his employment and had been unjustifiably dismissed.

[16] Mr Nadan responded on 22 September 2015 by requesting Mr Nath to return all company property in his possession and arrange a handover of all other company IP. Mr Nadan advised Mr Nath that he would respond to his letter dated 18 September 2015 once he had had the opportunity to “...*understand its content and relevance...*” as Mr Nadan had been out of town and only just returned to his office.

[17] On 23 September 2015 Mr Nath forwarded to Mr Nadan a copy of a medical certificate confirming Mr Nath was fit for work from 28 September 2015. Mr Nath advised Mr Nadan that he considered his employment had terminated and the termination was unjustified. Mr Nath asked Mr Nadan to confirm the date of termination and that he would be paid out his notice and outstanding holiday entitlements.

[18] On 25 September 2015 Mr Nadan responded to Mr Nath’s notice that he was fit to return to work. Mr Nadan denied Mr Nath had been dismissed but confirmed that Advance had advised Mr Nath of changes to the company structure and reiterated

his previous advice that Advance will have a job for Mr Nath when he was cleared as 100% fit to be able to work.

Issues

[19] The issues for determination are:

- a) Whether one or more conditions of Mr Nath's employment have been affected to his disadvantage by unjustified actions of Advance and if so, what if any remedies should be awarded;
- b) Whether Mr Nath was unjustifiably dismissed and if so, what if any remedies should be awarded;
- c) Whether Advance has breached its statutory obligations of good faith with respect to a promised share scheme, a tax free benefit and an Optimizer share purchase;
- d) Whether Advance has breached the terms of the employment agreement with respect to a promised share scheme and a tax free benefit;
- e) Whether any wages and/or holiday pay is owed to Mr Nath;
- f) Whether Advance has breached section 12 of the Fair Trading Act 1986 with respect to the failure to deliver on a promised share scheme and tax free benefit;
- g) Whether Advance should succeed in its counter-claim for the repayment of a loan of \$6,874.60.

Unjustified disadvantage

[20] Pursuant to section 103A I must be satisfied on the balance of probabilities that one or more conditions of Mr Nath's employment were affected to his disadvantage due to the employer's unjustified action. This requires a two-step process, firstly I must be satisfied of the disadvantageous actions and then I must determine whether those actions were justifiable.

[21] The justification test in section 103A of the Act is to be applied by the Authority in determining justification of an action or dismissal. This is not done by considering what the Authority may have done in the circumstances. The Authority is required under section 103A of the Act to consider on an objective basis whether Advance's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances.

[22] The Authority must consider the four procedural fairness factors set out in section 103A(3) of the Act and may take into account other factors as it thinks appropriate. The Authority must not determine an action to be unjustified solely because of defects in the process if they were minor and did not result in the employee being treated unfairly.

[23] Mr Nath claims one or more conditions of his employment were affected to his disadvantage by unjustifiably actions of Advance in relation to :

- a) Advance's failure to deliver the promised share scheme;
- b) Advance's failure to provide the promised tax free benefit; and
- c) Actions of Advance in changing its mind about whether he had a job after notification that his job had been disestablished.

Allocation of shares in Advance

[24] In March 2012 Mr Nath and Mr Nadan discussed the possibility of Mr Nath being allocated shares in Advance. On 7 March 2012 Mr Nadan confirmed their discussions and set out in writing his suggestions. These were:

- a) A phantom share option to the value of \$100,000 to be exercised by 30 June 2015. This was based on a nominal value as at that date. It was envisaged this would be equivalent to around 6,500 shares.
- b) Nadan trust will issue the shares under a covenant for Mr Nath's trust as class B shares.
- c) Any gains will remain with Mr Nath after the three year period (from 2015 onwards).

- d) Mr Nath's contribution would be a \$10,000 per year salary sacrifice for the following three years.
- e) Nadan Trust will double the contribution as part of the offer for loyalty and commitment. The value being \$30,000 par value.
- f) At the end of three years Mr Nath would have the option to exercise the balance at issue par value.

[25] A phantom share scheme is an agreement to vest shares in an employee but without actually receiving any stock. The scheme acts the same as a bonus payment or deferred cash compensation. Par value is the value of the stock at which it will be redeemed.

[26] Mr Nadan's uncontested evidence at the investigation meeting was that he and Mr Nath discussed the share scheme but that Mr Nath did not want to sacrifice his salary. No further action was taken on this proposal until 9 April 2014 when Mr Nadan confirmed that he had an allocation of \$100,000 of shares in value in the business and that he was working on a phantom share scheme that would provide the details of this allocation and how it would be governed from a business perspective. Mr Nadan expressed his hope to have this completed in the next few weeks. At that time Mr Nath received an increase in his salary which rose from \$110,000 per annum to \$120,000 per annum.

[27] No further action was taken and the details of the allocation and the governance of the scheme were never reduced to writing.

[28] As noted above the intention in March 2012 was for Mr Nath to enter into a salary sacrifice with Advance to the value of \$10,000 for each year the scheme operated. Mr Nath told me he believed he did sacrifice his salary and that this is evidenced by the lack of any regular salary increase from 2012 onwards.

[29] It is not clear to me why Mr Nath was expecting regular salary increases. The records produced by Advance show Mr Nath had not received a regular salary increase since 2008 when Mr Nath's salary increased from \$90,000 to \$110,000. When Mr Nath received the salary increase in 2014 he made no enquiries about whether this increase would affect the share scheme or his contended salary sacrifice. I have concluded this is because the parties had not agreed on the detail of the scheme and there was no certainty about it.

[30] Mr Nath's contribution to the share scheme was to be a \$10,000 salary sacrifice for the three year period 2012 to 2015. No reduction to Mr Nath's salary was ever made and the increase in his salary in 2014 is inconsistent with Mr Nath's belief that not receiving a salary increase was his salary sacrifice.

[31] The failure to act on the phantom share scheme did not cause Mr Nath to be disadvantaged in his employment. Mr Nath never followed up with Mr Nadan about the scheme and his salary was not sacrificed to the tune of \$10,000 per annum.

Tax free benefit

[32] On 9 April 2014 Mr Nadan confirmed to Mr Nath that as part of his remuneration review Mr Nath would be entitled to a tax free benefit of \$3,000 to be utilised for a trip to the Islands for Mr Nath and his family or similar.

[33] Due to his illnesses Mr Nath was not in a position to be able to utilise the tax free benefit during his employment.

[34] The failure to act on the tax free benefit for travel was not a disadvantageous action nor can it be said to be an action taken by Advance. The tax free benefit was contingent on Mr Nath actually taking a holiday during his employment. He did not do this due to his medical condition.

Changed advice as to new job

[35] Mr Nadan confirmed several times that the details of a job for Mr Nath would be resolved once he had been cleared 100% fit to return to work. Mr Nath says the lack of any certainty over what that job would look like was vague and disadvantaged him in his employment.

[36] By 18 September 2015 Mr Nath considered his employment had been terminated and he raised a personal grievance for unjustified dismissal. Mr Nath relies on the email dated 7 September 2015 from Mr Nadan as the catalyst for his understanding that he had been dismissed. In that email Mr Nadan confirmed with Mr Nath that he was consulting with him about Advance no longer being able hold his role open due to his medical incapacity.

[37] In his communication Mr Nadan stated that he wished to conclude the final decision before Wednesday 9 September 2015. No final decision was ever made.

From the papers and evidence before the Authority I have concluded that discussions between Mr Nath and Mr Nadan continued until and even after Mr Nath raised his personal grievance claiming he had been dismissed.

[38] As at 18 September 2015 Mr Nadan was clear that a position would be available for Mr Nath but the role and responsibilities would be contingent on understanding what Mr Nath could and could not do. No information about what that would look like had been provided by Mr Nath. At the time these discussions were being held with Mr Nath, Mr Nath was unable to drive or fly, both of which were requirements for him to undertake his previous role.

[39] Taking all the circumstances of this case into account, Advance's proposal to wait until Mr Nath had been cleared as fully fit to return to work before confirming the new role for him was an action an employer acting fairly and reasonably could take.

Conclusion

[40] Mr Nath has not established to my satisfaction that one or more conditions of his employment were affected to his disadvantage by an unjustifiable action of Advance and I am unable to be of further assistance to him in this regard.

Unjustified dismissal

[41] Mr Nath claims that he was dismissed either by reason of redundancy or for medical reasons and that dismissal was unjustified. On 18 September 2015 Mr Nath, through his legal advisor, raised a personal grievance for unjustified dismissal.

[42] The test of justification for dismissal is set out in section 103A of the Act. The test requires the Authority to assess whether Advance's actions and the way it acted was what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.

[43] In order to succeed with his claim for unjustified dismissal Mr Nath must first establish that Advance dismissed him. That is, there had been a permanent sending away.¹

¹ *Wellington Clerical IUOW v Greenwich* (1983) ERNZ Sel Cas 95 at [102].

[44] If he establishes this then the onus shifts to Advance to prove that its actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal. In many unjustified dismissal cases, the fact of dismissal is not in issue. That is not the case here.

Redundancy

[45] Mr Nath claims he was dismissed by reason of redundancy on 7 September 2015 when he received an email from Mr Nadan advising him that his role could no longer be kept open due to his medical incapacity.

[46] Mr Nath has not established to my satisfaction that his employment terminated by reason of redundancy. Certainly on 2 September 2015 Mr Nadan telephoned Mr Nath and explained the need to restructure the business. During this call Mr Nath and Mr Nadan also discussed that Mr Nadan could not keep Mr Nath's role open for him. Mr Nadan's uncontested evidence is that he told Mr Nath that if he could not keep his role open for him a new role would be created for him when he was well enough to return.

[47] This telephone call was followed by an email on 3 September 2015 to all Auckland employees (including Mr Nath) explaining the need to change the business to address its demands and challenges. Mr Nadan advised employees that the business structure in Auckland was not working in addressing the sales maintenance and development needs after losing the majority of its key account sales in the prior year.

[48] No further action was taken by Advance in respect of a restructuring as other events intervened.

Medical termination

[49] Mr Nath claims that if he was not dismissed by reason of redundancy then he was dismissed due to his medical incapacity. The letter in which Mr Nath's personal grievance is raised was confusing as to what Mr Nath says was the action of dismissal. At one point the letter states that Mr Nath's employment had not been terminated for medical incapacity, but then concludes that termination for medical incapacity was premature.

[50] The requirements of section 103A apply when an employer contemplates dismissal by reason of medical incapacity. This has been confirmed by various cases including *Motor Machinists Ltd v Craig*² where the Court observed:

...where illness or injury occurs which prevents an employee from returning to work the employer is not necessarily bound to hold that employee's job open indefinitely. However, if the employer chooses to dismiss the employee, its action must be justified at the time in accordance with the established jurisprudence. The employer must have substantive reasons for the dismissal and must show that the procedure it followed in carrying out the dismissal was fair. This ensures that the employee is not dismissed without the opportunity to provide information, such as medical reports, to prevent the employer taking such action, while at the same time allowing the employer to end the contract without needing to establish that the contract was frustrated.³

[51] When Mr Nadan spoke to Mr Nath on 2 September 2015 and then wrote to him on 7 September 2015 expressing his concern that he was unable to hold his job open for him due to his incapacity Mr Nath had already alerted Mr Nadan to the possibility that he would be back at work by the end of September or early October.

[52] Mr Nadan wanted to make the decision about disestablishing Mr Nath's role by 9 September 2015 and asked for Mr Nath's feedback which he provided on 8 September 2015. The decision about whether Mr Nath's role could be kept open was never formally made as other actions intervened.

[53] Despite still being in discussions with Mr Nadan, Mr Nath raised a personal grievance on 18 September 2015 alleging he had been unjustifiably dismissed. The conclusion that Mr Nath's employment had terminated was misconceived.

[54] Mr Nadan responded initially on 22 September 2015 to Mr Nath's assertions that he had been dismissed by asking Mr Nath to return all property in his possession and asking for a proper handover of all other company IP so that the business essentials could be managed. At the same time Mr Nadan advised that he was out of town and would respond in full to Mr Nath's letter on his return after he had had the opportunity to understand the letter's relevance and content.

[55] A medical certificate was provided by Mr Nath on 23 September 2015 which cleared Mr Nath to return to full time and normal work duties from 28 September 2015.

² [1996] 2 ERNZ 585.

³ Above at page 592 line 3.

[56] Mr Nadan responded to the 18 September 2015 letter on 25 September 2015. In his response Mr Nadan made it clear that a role would be available for Mr Nath when he was cleared 100% fit to be able to work. Mr Nadan referred to Mr Nath's inability over the previous 12 months to perform his role at 100% due to his various medical issues.

[57] Mr Nadan had undergone major surgery in September 2014. Mr Nadan's uncontested evidence is that when he returned to work Mr Nath was not performing his duties at 100%. Mr Nath then suffered the subdural haematoma in June 2015 which removed him from the workplace entirely.

[58] The situation around the ending of the employment relationship is not clear cut. On the one hand Mr Nadan received a letter from a lawyer advising him that Mr Nath believed his employment had been terminated. Mr Nadan took steps to act on that notification by requiring the return of company property and disabling Mr Nath's email and mobile phone access. Mr Nath then submitted a medical certificate clearing him to return to his normal work on 28 September 2015. This notification was at odds with Mr Nath's assertion that he had been dismissed.

[59] Mr Nadan confirmed to Mr Nath's lawyer his previous advice to Mr Nath that a job would be found for Mr Nath once Mr Nadan was satisfied Mr Nath was able to perform at 100% capacity. Mr Nadan wanted to be sure that when Mr Nath returned to work he was able to function at 100% capacity.

Conclusion

[60] The letter of 7 September 2015 put Mr Nath on notice that due to the amount of time he had been away from work (at that stage just over two months) Advance was seeking to engage with him about the possibility of giving him notice that the company could no longer hold his job open for him. At this point in time Mr Nath was not able to work and had not done so for more than two months.

[61] On 3 September 2015 Mr Nath had indicated that he may have to undergo further surgery and may not be back at work until the end of September or at the beginning of October. There was nothing certain about Mr Nath's return to work.

[62] Mr Nadan proposed giving Mr Nath notice that his job could not be kept open but did not give notice of the termination of Mr Nath's employment. Consistent with other discussions and communications prior to 7 September 2015 Mr Nadan was seeking to

retain Mr Nath in employment. He was just not sure what that would look like until more information about Mr Nath's capabilities was known.

[63] Mr Nath was not dismissed on 7 September 2015. I am supported in my conclusions by Mr Nath's own actions after 7 September 2015 when he responded to the proposal that his job could not be kept open on 8 September 2015.

[64] The employment relationship continued on foot until at least 15 September 2015 when Mr Nadan responded to Mr Nath's feedback. This letter also did not purport to terminate Mr Nath's employment, on the contrary, Mr Nadan reiterated to Mr Nath that he was proposing to accommodate his future within the business when he was 100% well.

[65] Mr Nath claims Advance confirmed his dismissal by its actions after 7 September. In particular Mr Nath says he:

- a) Had his work phone and email cut off;
- b) Had been required to return company property and adhere to post-termination obligations, and provided a final pay checklist;
- c) Had his pay stopped in spite of an earlier commitment to continue; and
- d) Was not offered work after he provided a medical certificate certifying him as fit for work.

[66] Further, Mr Nath says that when he asserted he had been dismissed Advance did not disabuse him of that notion but took the steps outlined above which were not reasonable responses to the raising of a personal grievance.

[67] The actions described by Mr Nath as confirming his dismissal were actions taken by Advance only after Mr Nath himself had asserted that his employment had ended.

[68] Once Advance was on notice that Mr Nath claimed he had been dismissed, the principle described by the Employment Court in *New Zealand Cards Limited v Ramsay* applied:⁴

⁴ [2012] NZEmpC 51 at [51] and [52].

If the mistake is about dismissal rather than resignation, the ... scenario is this. Where the communication is equivocal, the employer learns that the employee has misunderstood it as a dismissal contrary to the employer's intention but does nothing within a reasonable time to correct the employee's false impression. In such a case the employer must suffer the adverse consequences of passively standing by and letting the employee think that a dismissal has taken place.

A fair and reasonable employer in [the employer's] position would have communicated directly with [the worker] without delay and, in any case, within a day or so. As I have already found, [the employer] could easily have done that. He chose not to and the Company must now accept responsibility for the consequences of his inaction.

[69] Contrary to the facts in *Ramsay* Mr Nadan took steps within seven days of receiving Mr Nath's letter alleging that he had been dismissed to correct Mr Nath's misapprehension that he had been dismissed. While this did not occur within a day or so, Mr Nadan was out of town when he received the letter and he had already made it clear to Mr Nath that he would continue to be employed by Advance.

[70] Mr Nadan had advised Mr Nath on 15 September 2015 (three days prior to the 18 September 2015 letter alleging he had been dismissed) that he would be accommodated when he was 100% fit to return to work.

[71] Throughout the process leading up to the investigation of this matter, Mr Nath has maintained he was dismissed when he received the letter dated 7 September 2015 while Advance has maintained that a job would be created for Mr Nath depending on his capabilities after being confirmed 100% fit.

[72] Mr Nath has not established he was dismissed either by reason of redundancy or on medical grounds. Advance's responses to Mr Nath's assertion that he had been dismissed did not fall below the standard of what a fair and reasonable employer could have done in all the circumstances at the time. I am unable to be of further assistance to Mr Nath in this regard.

Breaches of good faith

[73] Mr Nath claims Advance breached its duty of good faith when it failed to live up to its promises with respect to the share scheme, the promised tax-free holiday each year to the value of \$3,000 and when it encouraged Mr Nath to purchase shares in Optimizer HQ.

[74] A duty of good faith includes that a duty of good faith 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 and not to mislead or deceive each other.⁵

Phantom share scheme

[75] Mr Nath claims Advance acted in a manner which was either misleading or deceitful or in a manner likely to mislead or deceive. Mr Nath relies on the email dated 9 April 2014 in which Mr Nadan states that the details of the share scheme would be provided in the next couple of weeks but 15 months later no share documentation had materialised to support his claim for breach of good faith.

[76] I have addressed the allocation of shares earlier in this determination. I have found the share scheme was discussed but no action was taken by either party in pursuing this. The good faith obligations are mutual obligations. I am satisfied Mr Nadan did not mislead or deceive Mr Nath in respect of his intention to pursue the share scheme. Mr Nath has not established to my satisfaction that Advance acted in breach of its obligations of good faith in relation to the promised share scheme.

Tax Free benefit

[77] The tax-free benefit related to a promise of a travel benefit for Mr Nath and his family to the Islands or similar which would be paid for by Advance to a maximum of \$3,000.

[78] I am satisfied the promise of the holiday benefit for Mr Nath and his family was contingent on Mr Nath taking the holiday. Due to his illnesses and then the demise of his employment, Mr Nath never had the benefit of the holiday. I am satisfied Mr Nadan did not mislead or deceive Mr Nath in respect of his intention to provide Mr Nath the benefit of a paid holiday for him and his family. The evidence shows that previously Mr Nath had been the benefactor of such a holiday when he had returned to India.

[79] Mr Nath has not established to my satisfaction that Advance acted in breach of its obligations of good faith in relation to the offer of a paid holiday for Mr Nath and his family.

⁵ Employment Relations Act 2000 section 4.

Optimizer HQ

[80] On 30 May 2016 Advance raised a question as to the jurisdiction of the Authority to investigate this aspect of Mr Nath's claims. At the time the question was raised Mr Nath was seeking the imposition of a penalty.

[81] At the investigation meeting Mr Nath advised me that he was no longer seeking penalties for the alleged breach of good faith with respect to the Optimizer HQ shares. Mr Nath still seeks a declaration by the Authority as to whether the actions of Advance in encouraging Mr Nath to invest in the Optimizer shares were a breach of good faith.

[82] In 2013 Mr Nadan was involved with a company called Optimizer HQ. Mr Nadan's uncontested evidence was that in 2013 he met with a group of Advance employees and advised them about the public launch of shares in the company and offered the employees an opportunity to invest.

[83] Mr Nadan followed up this meeting with an email dated 16 May 2013 enclosing an Optimizer HQ subscription agreement. Mr Nath received the email and he and his wife together purchased 833,333 shares which provided them with a 0.42% shareholding.

[84] Mr Nath says he only purchased the shares because of the employment relationship with Mr Nadan and based on Mr Nadan's assertions at the time that he would double his money.

[85] The Authority only has jurisdiction to investigate problems that directly and essentially concern the employment relationship.⁶ The offer for Mr and Mrs Nath to purchase shares in Optimizer HQ did not directly or essentially concern the employment relationship. Mrs Nath was not an employee of Advance. Further, Mr and Mrs Nath signed the investment subscription document confirming they had made the investment based on their own judgement.

[86] Mr Nath was not averse to taking up investment opportunities. In June 2014 while he was employed by Advance Mr Nath invested in a company which in turn invested in real estate properties. One of the properties sold in October 2015 and Mr Nath benefited financially from his interest in the company.

⁶ *JP Morgan Chase Bank NA v Lewis* [2015] NZCA 255 at [95].

[87] Mr Nath has not established to my satisfaction that Advance acted in breach of its obligations of good faith in relation to the decision by Mr and Mrs Nath to purchase Optimizer HQ shares.

Breach of employment agreement

[88] Mr Nath claims Advance breached the terms of his employment agreement when it failed to deliver on the promised phantom share scheme and the tax free benefit.

[89] In order for me to find Advance has breached a term of Mr Nath's employment agreement I must be satisfied the terms are capable of enforcement.

[90] In respect to the promised allocation of shares I am not satisfied it is.

[91] In 2012 when the idea of company shares was first mooted by Mr Nadan it was done on the basis of being a suggestion and was not a formal offer capable of acceptance. There were a number of details that required completion not least of which was a confirmation from Mr Nath that he wished to proceed. Mr Nath took no steps to confirm his intention to proceed with the share scheme at that time.

[92] In April 2014 when Mr Nadan reminded Mr Nath of the share scheme Mr Nadan confirmed that the details of the allocation of shares and how it would be governed was still to be determined. There was nothing in the email of April 2014 which Mr Nath could accept because the detail of the allocation of shares was unknown.

[93] The offer of the share scheme was not a term of Mr Nath's employment. It follows that Mr Nath has failed to establish a term of his employment has been breached.

[94] In contrast, the offer of a tax free benefit for Mr Nath became a term of his employment at the time he accepted the offer. Unfortunately, as already set out, Mr Nath was not able to take up the benefit, firstly due to his medical condition and then as a result of his employment ending. The failure of Mr Nath to take up the benefit was not a breach by Advance.

[95] Mr Nath has failed to establish that the failure on his part to take up the tax free travel benefit was a breach of his employment agreement.

Arrears of wages

[96] Mr Nath seeks payment of his four week notice period in the amount of \$9,230.76 and partial payment of an alternative holiday amounting to \$115.38.

[97] Mr Nath claims he was dismissed on or about 7 September 2015. Mr Nath was not able to work in September due to his medical incapacity. He had no paid sick leave or other leave available to him and would have been unpaid for September but for money advanced to him by Mr Nadan personally.

[98] Taking those circumstances into account and the fact that I have found Mr Nath was not dismissed from his employment his claim for four weeks' notice is declined.

[99] The claim for partial payment of an alternative holiday is also declined. Mr Nath was unable to tell me which public holiday he worked to give rise to the partial payment of an alternative holiday. I have therefore accepted the evidence of Advance that the entry on Mr Nath's wage and time record is an error.

Fair Trading Act 1986

[100] This claim was in respect to the promised allocation of shares in Advance and is based on the claim that Advance acted in a misleading or deceptive manner or in a manner likely to mislead or deceive.

[101] I have already found that Advance did not breach its obligations of good faith in respect to the claim of misleading and deceitful conduct. It follows that Mr Nath's claim under this heading must also fail.

Counter-claim

[102] Mr Nadan says he advanced Mr Nath \$6,874.60 to cover his absence as he had exhausted his leave entitlements and he would not be in receipt of any income as ACC had not accepted his claim for cover at that time. Advance seeks reimbursement of the \$6,874.60

[103] By email dated 20 August 2015 Mr Nath sought assistance from Advance to assist him given that he had exhausted his leave entitlements. Mr Nath suggested that any payments could be done in advance and would be adjusted in leave when he was back working or when the ACC claim came through. Mr Nath suggested that in the worst case the money could be deducted from his salary on an ongoing basis to clear once he was back on deck.

[104] On 26 August 2015 Mr Nadan confirmed to Mr Nath that he would personally cover payment in the interim until the end of September 2015. Mr Nadan commented that if the ACC or insurance is approved then it would be academic.

[105] ACC notified Mr Nath on 11 December 2015 that his claim for personal injury would be covered and payments covering the period from 2 July to 25 September 2015 were deposited into Mr Nath's account in April 2016.

[106] As already stated the Authority only has jurisdiction to investigate employment relationship problems arising out of an employment relationship. The evidence shows that the agreement regarding the advance of money was an agreement between Mr Nath and Mr Nadan personally. There was no employment relationship between Mr Nath and Mr Nadan. The employment relationship was between Mr Nath and Advance.⁷

[107] The Authority has no jurisdiction to investigate Mr Nadan's counter-claim against Mr Nath.

Costs

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

⁷ Above n 6.

[109] 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

Vicki Campbell
Member of the Employment Relations Authority