

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2014] NZERA Auckland 156
5428581**

BETWEEN CHRIS THOMAS
 Applicant

AND VOGELSANG PTY LTD
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Clive Bennett, Advocate for Applicant
 Garry Pollak, Counsel for Respondent

Investigation Meeting: 25 March 2014 at Auckland

Submissions received: 26 March 2014 from Applicant
 26 March 2014 from Respondent

Determination: 24 April 2014

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Chris Thomas, claims that he was unjustifiably disadvantaged in his employment by the Respondent, Vogelsang Pty Ltd (Vogelsang) and also unjustifiably dismissed.

[2] Vogelsang denies that Mr Thomas was unjustifiably disadvantaged in his employment, or that he was dismissed. Vogelsang claims that Mr Thomas's employment was ended by mutual agreement.

Issues

[3] The issues for determination are whether or not Mr Thomas was unjustifiably:

- disadvantaged as a result of Vogelsang:
 - failing to reimburse him for expenses incurred in June 2012

- not completing ACC forms in a timely manner
- making late payment of his wages
- failing to provide support and advertising for a Sales Manager in April 2014
- dismissed by Vogelsang or whether his employment ended by mutual agreement
- Whether Vogelsang should be penalised for:
 - failing to supply Mr Thomas with a written employment agreement
 - a breach of good faith towards Mr Thomas

Background Facts

[4] Vogelsang is a wholly owned Australian subsidiary of a German business, which trades internationally. It sells, designs, and maintains rotary lobe pumps which are designed primarily for use in effluent disposal.

[5] Prior to Mr Thomas's appointment, the pumps were sold in New Zealand by a distributor, however in early 2012 Vogelsang decided to recruit a Business Development Manager to expand and develop sales, particularly into the dairy sector.

[6] Accordingly the position was advertised, and Mr Thomas applied to the advertisement which described the position as having the main focus of developing new business throughout the North and South Islands of New Zealand, and which stated: *"Successful applicant will have back up support at head office level however will enjoy the autonomy this role offers."*

[7] Mr Brad Adams, Managing Director of Vogelsang Australia, said that during his discussions with Mr Thomas about the Business Development Manager position, he had explained that Mr Thomas would be in sole charge in New Zealand, with responsibility for setting up the New Zealand business by securing sales. All technical support would be based in Australia, and the technical support staff would be easy to contact.

[8] Mr Adams said he had made it clear to Mr Thomas that he would not be managed in the normal way, but that by regular contact with him and others at the Vogelsang head office

in Sydney he could effectively undertake his role. He also emphasised the importance of regular contact with him by Mr Thomas by telephone, email or email reports on a daily or weekly basis.

[9] Mr Thomas confirmed at the Investigation Meeting that he had understood that the role of Business Development Manager was to set up a business in New Zealand and that it would be autonomous in nature, with support based in Sydney.

[10] Mr Adams said that he had also outlined to Mr Thomas that Vogelsang's expectations were that after some months other employees would be employed in the New Zealand based operation. Mr Thomas confirmed at the Investigation Meeting that this issue had been discussed at the outset of his employment.

[11] On 1 May 2012 Mr Thomas was offered employment on terms of employment set out in a letter from Mr Brad Adams, Managing Director (Australia), which included:

- *Wages P.A. \$80,000 NZ, paid monthly*
- *Fully maintained company vehicle*
- *Lap top – with internet connection*
- *Blackberry mobile phone*

[12] Mr Adams concluded the letter: *“Any questions contact me on office numbers below or Mobile. +61 408 422 232.*

[13] Mr Thomas said he had not been provided with an individual employment agreement in accordance with the New Zealand statutory requirements.

[14] Mr Adams confirmed that this was correct, and explained that provision of a written employment agreement is not a requirement in Australia and he had not been aware that this was the case in New Zealand. However had Mr Thomas raised this as a concern with him, he would have either instructed lawyers based in Sydney to provide one, or have asked Mr Thomas to facilitate a New Zealand based legal firm to do so.

Expenses Claim

[15] Mr Thomas commenced employment with Vogelsang on 4 June 2012 and spent the first month of his employment undertaking training in the UK and at Vogelsang's head office in Germany. On his return to New Zealand Mr Thomas said he had sent his expenses claim to a Vogelsang Operations Manager, Mr Scott Hawkes, however he had not received any reimbursement in respect of the expenses.

[16] Mr Thomas said he had followed up the non-payment with Mr Hawkes, however he had still not received any payment and he had decided not to pursue the issue at that stage. Mr Thomas confirmed that he had not informed Mr Adams about the non-payment of his expenses claim at that time.

[17] Mr Adams said that Mr Thomas had submitted an expenses claim to him in accordance with standard practice in July 2012 which included telephone expenses incurred whilst Mr Thomas was in Germany, however he had not been made aware of any other expenses claim in relation to Mr Thomas's training overseas or that these expenses had not been paid.

[18] Mr Adams explained that as the German office had usually met all training expenses he had assumed that this had happened in Mr Thomas's case in the absence of any information to the contrary.

[19] Mr Thomas had initially set up the necessary infrastructure for the New Zealand based operation, and had commenced expanding the existing customer base.

September 2012

[20] Mr Adams said that he had not initially required Mr Thomas to report to him on a weekly basis, but after a few months he had instructed Mr Thomas to submit weekly reports by means of telephone calls, or by Skype, or by email. However by October 2013 he had developed concern about the irregularity of Mr Thomas's reporting, and had raised this issue with him.

[21] Mr Thomas said he had submitted fortnightly reports and he and Mr Adams had communicated regularly by email. However he also agreed that Mr Adams had raised the quality of his emails and regularity of reporting with him.

[22] There had also been concern about the lack of sales by September 2012 and Mr Thomas had voiced his concerns about this to Mr Adams. Mr Adams said that he too had been concerned about the lack of sales achieved, but had provided encouragement that sales would eventuate.

[23] During September 2012 Mr Thomas injured his back. Mr Adams said that Mr Thomas had informed him of the injury but categorised it as minor and not likely to affect his work.

October – December 2012

[24] Mr Adams said that by October and into November 2012 he had been becoming increasingly concerned about Mr Thomas's lack of communication with him and he had again asked him to keep him updated by email. They had also agreed to have weekly telephone calls on Fridays and Mr Adams had sent Mr Thomas reporting sheets.

[25] Towards the end of December 2012 no sales had been achieved in New Zealand; however Mr Adams said that when they had spoken Mr Thomas sounded positive and they had agreed that if Mr Thomas continued to work hard, the sales would eventuate.

[26] During the remainder of 2012 and the beginning of 2013 Mr Adams said that he had experienced increasing concern about the lack of communication from Mr Thomas, and had sent him emails instructing him to send the weekly reports required as evidenced by emails from Mr Adams to Mr Thomas dated 25 January and 1 February 2013.

February 2013

[27] In February 2013 the lack of sales continued to be of concern and Mr Thomas had been upset about this and apologised to Mr Adams.

[28] On or about this time Mr Thomas agreed that he had started to become concerned about the future success of Vogelsang in New Zealand. Mr Thomas attributed the difficulty in achieving sales to pricing of the Vogelsang products as compared with competitor products, Vogelsang being a new brand for New Zealand, and customers being able to buy the same products cheaper on line.

[29] Mr Adams said that when they had discussed the sales situation during February 2013, he had again reassured Mr Thomas that the sales would eventuate, however he had also formed a view that Mr Thomas required some assistance to be able to achieve sales given the territory to be covered.

[30] As most of the dairy industry growth was based in the South Island, Mr Adams said he had appreciated that it would be difficult for Mr Thomas to adequately service that area in addition to the whole of the North Island territory.

[31] Following the back injury sustained in September 2012, Mr Thomas required surgery during February 2013. ACC had agreed to pay for the surgery required and Mr Thomas understood that a two week recovery period would be required as advised by his doctor.

[32] Mr Adams said he had not understood the significance of Mr Thomas's surgery or the effect it would have as Mr Thomas did not inform him of this, but rather minimised the issue. Mr Thomas explained that he had not been able to provide Mr Adams with much information as he had not been provided with much information himself.

[33] Although advised of the two week recovery period by Mr Thomas, Mr Adams said he had been subsequently informed at either the end of February or the beginning of March 2013 that Mr Thomas would also need the whole of March off work to recover from the surgery.

ACC Issues

[34] Mr Thomas said that Vogelsang had failed to respond to ACC requests for information, and this had resulted in him being paid for the whole of February 2013 by Vogelsang, although ACC had agreed to make payments in respect of his time off work in February.

[35] Mr Adams said that Vogelsang had experienced difficulty with communications with ACC, however after these were resolved, all documentation had been sent to ACC as required.

[36] In March 2013 Mr Thomas said he had resumed working from his home base, although he had not been answering telephone calls during his period of absence and had only removed a 'sick leave' message from the answering service on the telephone during the latter part of March 2013.

Salary non-payment

[37] Despite resuming work in March 2013, Mr Thomas had not received his monthly salary from Vogelsang, and there had been no explanation made by Vogelsang as to the reason for this.

[38] This situation had caused Mr Thomas to experience some financial difficulty, however ACC had subsequently agreed in April 2013 to make a payment in respect of the month of March 2013 taking into account the fact that no ACC payment had been made or required in February 2013 as this had been paid by Vogelsang.

[39] In April 2013 Mr Thomas said that as he had again not received his monthly salary payment on the due date, he had contacted Mr Adams and payment had been made as soon as the payroll provider was able to do so, which had been on 7 May 2013.

[40] Mr Adams said he had not been aware that Mr Thomas had resumed work in March 2013 and there had been no evidence that he had done so since he had received no reports

whatsoever from him during that period. As he believed Mr Thomas to be absent for the whole of March 2013 and being paid by ACC during the period of his absence, he had instructed the payroll agency to cease paying Mr Thomas's salary.

[41] Mr Adams confirmed that he had failed to inform the payroll agency to reinstate Mr Thomas's salary payments in April 2013, but said that as soon as Mr Thomas had raised the matter with him, he had apologised and given the necessary instructions for Mr Thomas to be reinstated on the payroll, Mr Thomas having subsequently received the April salary payment on 7 May 2013.

[42] Mr Adams said Mr Thomas had not informed him that he was experiencing financial difficulties as a result of the non-payment of his salary during March and April 2013, but if he had been so informed, he would have taken appropriate action to deal with the situation.

Support

[43] Mr Thomas said that Mr Adams had failed to contact him during his period of sickness absence, and shown no concern or empathy for his well-being during that period.

[44] Mr Adams disputed that this was the case, and said that during Mr Thomas's absence from work following his back surgery, he had made a number of calls to Mr Thomas's mobile telephone and had left messages, however Mr Thomas had not returned any of his calls.

[45] Despite the fact that Mr Thomas indicated that he had continued working for the whole of April 2013, Mr Adams said he had received no reports of any kind from him during that month.

Advertisement for a Sales Manager

[46] Mr Thomas said that towards the end of April 2013 his attention had been drawn by a customer to an advertisement on the SEEK website placed by Vogelsang. The advertisement had been for a Sales Manager, however the description and wording in the advertisement was otherwise identical to that in the advertisement for the Business Development Manager to which he had responded in early 2012.

[47] In particular the position was described as being '*autonomous*' and as reporting to Mr Adams. There had been no mention in the advertisement of a Business Development Manager or that the position would report to him.

[48] Mr Thomas said that in the absence of any communication from Mr Adams about the placing of the advertisement, he had become extremely concerned that it was his job that was being advertised, although he did not immediately contact Mr Adams about this.

[49] Mr Adams said that at the outset of Mr Thomas's employment there had been a discussion and an understanding that the Vogelsang operation in New Zealand would require additional employees. Mr Thomas agreed that this discussion had taken place.

[50] Mr Adams said that in early 2013 he had decided to advertise for a Sales Manager to assist Mr Thomas due to his on-going medical issues associated with his back problem and his inability to communicate effectively. He said he would have informed Mr Thomas of the job advertisement prior to placing it; however he had been unable to contact him.

Notice of Personal Grievance May 2013

[51] Mr Thomas said he had become increasingly concerned about several matters and he had taken legal advice as a result of which a letter dated 3 May 2013 had been sent to Mr Adams. The letter raised a Personal Grievance for disadvantage based on several areas of concern, these being:

- Non-payment of expenses incurred during Mr Thomas's first month of employment with Vogelsang;
- Failure to complete ACC paperwork and a lack of empathy or concern during his sickness absence;
- Lack of support in his employment;
- Non-payment of his April salary payment resulting him having been placed in: "*an extremely precarious position*"; and
- The Sales Manager advertisement.

[52] Mr Adams said he had been shocked to receive the Personal Grievance letter and started to draft a response to the various issues raised using the original letter as a template:

1. Non-payment of expenses: Mr Adams stated that he had only been advised of the expenses during the preceding two weeks which was some 10 months after they had been incurred. The issue having been raised with him by Mr Thomas at that time, he had requested supporting invoices which had not been received to date;
2. ACC paperwork: Vogelsang had completed the ACC records when they had been received;

3. Lack of support and the Sales Manager advertisement: Mr Adams had written: *“As per conversation with Chris, he envisaged 3 people would be required to successfully service NZ, to which we placed an advertisement for a Sales Manager to help Chris.*

We noticed Chris struggling with many issues, ie, Sales reports and expenses reports not completed properly or on time, having trouble managing areas, also complaints that he was not returning emails at all and or in a timely manner. We were also willing to help with his dyslexia issues which made it difficult to perform his roll and daily duties of sending out emails until his wife had checked them beforehand (which we were not told upon employing Chris).

[53] However before Mr Adams had sent the draft email, he had received a letter headed ‘*Without prejudice*’ from Mr Thomas’s representative, Mr Bennett, and instead of sending the draft email in response he returned the ‘*Without prejudice*’ letter after adding a response in the form of a footnote which stated:

Clive, We except (sic) Chris’s resignation as his final day being 10th May 2013. We are willing to offer Chris holiday pay owed plus one month’s salary, providing vehicle and sales tools are returned.

[54] Mr Bennett received the response email from Mr Adams on 13 May 2013 and responded the following day. In the email dated 14 May 2013, again headed “*Without prejudice*” Mr Bennett had stated: “*I wish to clarify that Chris has not resigned*” and:

He rejects your offer to pay him one month and holiday pay He has instructed me to revise the proposal made in my email to you dated 8th May as follows:

1. *That Chris’ employment will terminate with effect from the 15th May 2013 by way of his resignation. He will be paid as normal, including annual leave, up to and including that date and will not be required to work other than in providing whatever hand-over duties may be required.*
2. *That he be paid an amount of \$13,000 in terms of s123(1)(c)(i) of the Employment Relations Act 2000.*

[55] Mr Adams explained that he had taken legal advice from a firm of Australian lawyers who advised that it was not possible for an Australian company to make a payment in accordance with s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act), which would in effect be an ex gratia payment.

[56] Accordingly he had offered in an email dated 15 May 2013 a gross payment of 2 months' salary, which would result in a net payment equivalent to \$13,000.00 stating: "*We accept Chris's resignation as of 15th May 2103. With holiday pay owing up to 15th May 2013 plus 2 months Salary.*"

[57] On 17 May 2013 Mr Thomas said he had been advised by solicitors acting for Vogelsang that his employment had been terminated as at that date. In response Mr Bennett raised a Personal Grievance in respect of unjustifiable dismissal.

Determination

[58] Mr Thomas is claiming unjustifiable disadvantage. Section 103(1)(b) of the Act is applicable to disadvantage grievances and states:

That the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer;

[59] The elements of s 103(1)(b) are:

- a. An action
- b. The action was unjustifiable
- c. The action affected the employee's terms and conditions of employment, and this was to the employee's disadvantage.

Was Mr Thomas unjustifiably disadvantaged by Vogelsang failing to reimburse him for expenses incurred in June 2012?

[60] Mr Thomas stated that he had claimed reimbursement of expenses associated with the training visit to Germany upon his return to New Zealand on or about the beginning of July 2012.

[61] The expenses claim was submitted to Mr Hawkes although the usual procedure was for Mr Thomas to submit his expenses claims to Mr Adams.

[62] It is not disputed that the non-payment of the expenses had not been raised with Mr Adams until almost 10 months later, and that upon being notified he had requested supporting invoices in accordance with the standard practice regarding expenses reimbursement requests.

[63] Mr Adams had not received the supporting invoices from Mr Thomas prior to the raising of this issue in the Personal Grievance letter dated 3 May 2013. It was also confirmed at the Investigation Meeting that submission of the requested supporting invoices by Mr Thomas had not happened at that date.

[64] Whilst non-payment of reasonably incurred authorised expenses may constitute a disadvantage in employment, an employee acting in good faith would have been expected to raise the issue with his/her manager once it had arisen thereby giving the employer the opportunity to address it.

[65] Mr Thomas had failed to raise the issue until some 10 months after the event, however once he had done so, Mr Adams had taken immediate steps to address it by requesting the supporting invoices in line with the standard practice for reimbursement of expenses claims. Mr Thomas however failed to send the requested invoices and despite the Authority also requesting copies of the relevant invoices on 21 March 2014, none have been received.

[66] I find that once advised of the issue, Mr Adams had acted justifiably and in good faith by responding in a timely manner to the issue and requesting supporting documentation.

[67] I determine that Mr Thomas was not unjustifiably disadvantaged by the non-payment of expenses incurred in June 2012.

Was Mr Thomas unjustifiably disadvantaged by Vogelsang not completing ACC forms in a timely manner?

[68] Mr Adams's evidence was that there had been some communication issues with ACC, however once these had been resolved Vogelsang had responded to the ACC requests and all documentation had been sent.

[69] At the Investigation Meeting Mr Thomas stated that he had been absent from work from approximately mid-February to mid-March 2013, this being the period which should have been covered by ACC payment.

[70] It is clear that the delays in communications between Australia and New Zealand resulted in some confusion regarding the applicable payment periods, however as Mr Thomas had been paid his full salary by Vogelsang in February 2013 and his March salary payment had been covered by an adjusted ACC payment; I find that he suffered no loss.

[71] I determine that Mr Thomas was not unjustifiably disadvantaged by Vogelsang not completing ACC forms in a timely manner.

Was Mr Thomas unjustifiably disadvantaged by Vogelsang making late payment of his wages?

[72] Mr Thomas ought to have been paid his April salary payment at the end of April 2013 however that payment was not made until 7 May 2013 as Mr Adams had forgotten to give the instruction to the Vogelsang payroll provider to reactivate Mr Thomas on the payroll.

[73] As soon as Mr Adams had been alerted by Mr Thomas to the issue, he had immediately apologised and taken steps to reinstate Mr Thomas on the payroll and arranged for his salary arrears to be paid on 7 May 2013, a short time after the due date.

[74] Mr Thomas agreed that he had not advised Mr Adams that he had suffered any financial hardship as a result of the late payment of his April 2013 salary, and I accept Mr Adams's evidence that if he had been so advised, he would have ensured a more speedy payment than that of 7 May 2013 to Mr Thomas.

[75] On this basis I find that Mr Adams had acted in good faith on the information provided by Mr Thomas. Whilst Mr Thomas may have experienced some short-term financial difficulty as a result of the late payment in April 2013, approximately 7 days, I

accept that had he been communicative with Mr Adams over this issue, there would have been a speedy resolution to this situation.

[76] Moreover the delay in making the payment of the April 2013 salary had been relatively short.

[77] Given these circumstances I determine that Mr Thomas was not unjustifiably disadvantaged by Vogelsang making late payment of his salary.

Was Mr Thomas unjustifiably disadvantaged by a lack of support from Vogelsang and by it advertising for a Sales Manager in April 2013?

[78] Mr Thomas had been employed for what was in essence, a business ‘start-up’ operation in New Zealand. The advertisement to which he had applied stated that the successful applicant: *“will have back up support at head office however will enjoy the autonomy this role offers”*.

[79] At the Investigation Meeting Mr Thomas had confirmed that it had been made quite clear to him at the outset that the position was to be autonomous.

[80] From the evidence provided to the Authority, I accept that most of the communication was at a distance, by email, Skype or telephone, and that Mr Adams did not visit New Zealand on a regular or frequent basis.

[81] It had been detailed in the advertisement to which Mr Thomas replied that the support he received would be from the head office, based in Sydney, Australia. The fact that support would be at a distance does not automatically imply that such support would be inadequate, especially in these days of speedy technological communication.

[82] Mr Adams’s evidence was that in fact the problem with communication had lain with Mr Thomas. Having stated his expectations in regard to communications in September 2012, he had raised issues regarding the lack of communication from Mr Thomas in October and November 2012. Following Mr Thomas’s recovery from surgery and resumption of work in March 2013, he had received no sales reports at all from Mr Thomas in March or April 2013.

[83] Whilst Mr Thomas stated that he had submitted fortnightly reports to Mr Adams, and he and Mr Adams had communicated regularly by email, he did not dispute that Mr Adams had raised a communication issue with him, nor did he provide any supporting evidence that he had sent regular reports to Mr Adams, or in fact that such communication existed.

Furthermore, copies of the reports allegedly sent to Mr Adams were requested by the Authority on 21 March 2014, none of which have been received.

[84] I do not find that Mr Thomas had a lack of support from Vogelsang, but rather that he failed to communicate as expected of him.

[85] Mr Thomas accepted during the Investigation Meeting that the future intention from the outset of his employment had been to employ additional employees for the New Zealand based operation.

[86] During the period between his commencing employment and his surgery in February 2013 Mr Thomas had achieved no sales, a matter of some concern to him and which he had raised on more than one occasion with Mr Adams. It was against this background that Mr Adams had advertised for a Sales Manager.

[87] I accept that anxiety on the part of Mr Thomas may have been avoided had he been advised by Mr Adams prior to the advertisement being placed on the SEEK website of the intention regarding the new appointment, however Mr Adams's evidence was that he had made attempts to contact Mr Thomas during March 2013 but had been unable to do so, which I find to be consistent with Mr Thomas's evidence that he had placed a message on the telephone during the period of his surgery recovery period.

[88] Although I accept that the advertisement may have caused Mr Thomas to be concerned about the security of his own position, I note that he did not contact Mr Adams about this matter, or provide him with an opportunity to explain the reasoning behind the placing of the advertisement, prior to the raising of the Personal Grievance on 3 May 2013.

[89] I further note that Mr Thomas's terms and conditions of employment were not affected to his disadvantage.

[90] I determine that Mr Thomas was not unjustifiably disadvantaged by a lack of support from Vogelsang and by it advertising for a Sales Manager in April 2013.

Was Mr Thomas unjustifiably dismissed by Vogelsang or did his employment end by mutual agreement?

[91] During May 2013 I find that there had been a series of communications between the parties, some of which were termed to be '*without prejudice*' although any privilege which may have existed had been waived by the parties during the course of the Authority's investigation process.

[92] It had been at Mr Thomas's instigation, by email dated 8 May 2013, that the suggestion that he resign with a termination date of 10 May 2013, together with certain financial payments was proposed. I find that at this point in time it is evident that Mr Thomas considered that his employment relationship with Vogelsang was coming to an end. What followed from thereon I find had been negotiations regarding the terms on which the employment would cease, however no satisfactory agreement was concluded.

[93] As a result I find that the letter from Vogelsang's lawyers dated 17 May 2013 which confirmed the termination of Mr Thomas's employment with the words: "*To clarify the matter beyond any doubt our client (Vogelsang) considers any employment at an end as from this day*" with payment of salary until the end of May 2013 constituted a dismissal.

[94] I determine that Vogelsang unjustifiably terminated Mr Thomas's employment with effect from 17 May 2013.

Should Vogelsang be penalised for failing to supply Mr Thomas with a written employment agreement?

[95] Employers are under an obligation to provide employees with an employment agreement pursuant to s 63A of the Employment Relations Act 2000 ("the Act"), which states:

63A Bargaining for individual employment agreement or individual terms and conditions in employment agreement

(2) The employer must do at least the following things:

(a) provide to the employee a copy of the intended agreement, or part of the intended agreement, under discussion; and

(d) consider any issues that the employee raises and respond to them

[96] Section 65 is also relevant:

65 Terms and conditions of employment where no collective agreement applies

1. The individual employment agreement of an employee whose work is not covered by a collective agreement that binds his or her employer-

d) must be in writing; and or her employer –

e) May contain such terms and conditions as the employee and employer think fit

2. *However, the individual employment agreement-*

d) *must include-*

- i. *The names of the employee and employer concerned; and*
- iv. *A plain language explanation of the services available for the resolution of employment relationship problems, including a reference to the period of 90 days in section 114 within which a personal grievance must be raised*

[97] I accept that Australian employment law differs from New Zealand employment law in that there is no requirement to provide an employee working in Australia with a written employment agreement.

[98] However Mr Thomas was to be working solely in New Zealand and in that situation I consider that Vogelsang, a company registered in New Zealand, should have ascertained the requirements of New Zealand employment law and complied by issuing Mr Thomas with a written employment agreement pursuant to ss 63A and 65 of the Act.

[99] I determine that Vogelsang failed to supply Mr Thomas with a written employment agreement in accordance with the statutory requirements.

Should Vogelsang be penalised for a breach of the duty of good faith it owed to Mr Thomas?

[100] The Employer has a duty of good faith pursuant to the Act, which states at s4 (1A)(b):

4 Parties to employment relationship to deal with each other in good faith

(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

[101] I have found that Mr Adams was responsive and communicative to Mr Thomas, and that he responded appropriately to issues which Mr Thomas had raised with him. I observe that the duty of good faith carries with it a dual responsibility and requires an employee to also be responsive and communicative.

[102] Mr Thomas agreed that issues had been raised with him regarding his poor communication during the period of his employment with Vogelsang. He also confirmed that he had not answered telephone calls during February and March 2013 when he had been recovering from surgery.

[103] In these circumstances I find that Vogelsang acted in good faith towards Mr Thomas, however Mr Thomas had failed to reciprocate.

[104] I determine that Vogelsang did not fail to act in good faith towards Mr Thomas.

Remedies

[105] Mr Thomas has been unjustifiably dismissed and in that situation remedies including lost wages pursuant to s 123 (1)(b) and compensation pursuant to s 123(1)(c)(i) of the Act may fall to be awarded.

[106] However in determining the issue of remedies the Authority must have regard to s. 124 of the Act and:

- a) *Consider the extent to which actions of the employee contributed towards the situation that gave rise to the personal grievance; and*
- b) *If those actions so require, reduce the remedies that would otherwise have been awarded accordingly.*

[107] I find that although Mr Thomas had not been achieving sales, and raised this issue with Mr Adams as early as September 2012, Mr Adams had been supportive and encouraging whenever the issue was raised with him. Certainly I have found no evidence that Mr Adams had indicated that there were performance concerns with Mr Thomas, or that his continued employment was at risk.

[108] Mr Thomas's evidence was that by February 2013 he had been concerned about the future of Vogelsang in New Zealand, and this concern may have contributed towards the proposal regarding his resignation made in the letter from Mr Bennett on 3 May 2013.

[109] I note that the initial resignation proposal to terminate Mr Thomas's employment on 10 May 2013, only 2 days following the date of the letter, also contained the proviso that he would not be required to work other than providing hand-over duties, making it clear that Mr Thomas did not intend working his notice period, this was also confirmed in the subsequent letter dated 14 May 2013.

[110] It is also relevant that during this period of ‘negotiation’ Mr Thomas did not attempt to do work of any sort for Vogelsang, or offer an explanation as to what he was doing.

[111] In this situation I find that Mr Thomas, in initiating a proposal that he resign his employment with Vogelsang in consideration of a financial payment, and with no offer to work a notice period, and not working during negotiations, contributed to Vogelsang’s understanding that Mr Thomas regarded the employment relationship at an end.

[112] In this situation I assess Mr Thomas’s contribution to the situation in which he subsequently found himself to be 100% and I award no remedies in respect of the unjustifiable dismissal.

Penalty

[113] Vogelsang failed to provide Mr Thomas with a written employment agreement in accordance with the New Zealand statutory requirements; however I note that Mr Thomas had been supplied with a written offer of employment which set out the principle terms of his employment. I take this fact into consideration into setting the level of penalty.

[114] Vogelsang is ordered to pay a penalty of \$1,000.00 to the Crown for the non-provision of an employment agreement to Mr Thomas.

Costs

[115] Costs are reserved until the subsequent determination on a wages claim is determined.

Eleanor Robinson
Member of the Employment Relations Authority