IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2015] NZERA Christchurch 181
5521183

BETWEEN	GETHYN JONES Applicant
AND	CHRISTCHURCH EUROPEAN LIMITED Respondent

Member of Authority:	Christine Hickey
Representatives:	Peter Moore, Advocate for the Applicant Robert Thompson, Advocate for the Respondent
Submissions:	Submissions from the Applicant on 26 July 2015 and 16 August 2015 Submissions from the Respondent on 10 August 2015
Determination:	24 November 2015

DETERMINATION OF THE AUTHORITY

A. Gethyn Jones was unjustifiably disadvantaged and unjustifiably dismissed.

B. Within 28 days Christchurch European Limited is to pay a penalty of $5,000 to the Authority.

C. Within 28 days Christchurch European Limited must pay Gethyn Jones:

(i) $11,396.66 gross in lost remuneration, and

(ii) interest on that lost remuneration at 5% from 13 September 2014 until the investigation meeting date,

(iii) $8,000 gross in compensation for humiliation, loss of dignity and injury to his feelings,

(iv) $80 for unpaid fuel allowance,

(v) $500 for the bonus not paid in December 2012 plus 5% interest until the date of the investigation meeting,

(vi) $200 for the August 2014 bonus plus 5% interest until the date of the investigation meeting,

D. In relation to amounts still claimed by Mr Jones for holiday etc. pay and minimum wage claims the parties are to work together. Mr Jones must first clearly calculate what amounts of minimum wage he says are still owed as well as show his calculations on what amounts of holiday and all other kinds of leave pay are owed. Christchurch European Limited must set out it calculations for the amounts of holiday and other leave pay it has made and identify all payments made to Mr Jones, including cheque numbers when necessary. The parties should seek to agree on the amounts owed, if any. If agreement on any part of those issues is not possible leave is granted to come back to the Authority on those issues only.

Employment relationship problem

[1] Mr Jones worked as a car salesman for Christchurch European Limited (CEL). He began working there in October 2010. He says he was unjustifiably dismissed, or constructively dismissed, by Niki Mills on 12 September 2014.

[2] He also claims he was unjustifiably disadvantaged for the following reasons:

- he was not given a written employment agreement;
- he has not been paid the minimum wage for all hours worked (calculations not supplied but either $982.00 or $1,182.00 claimed);
- he was not correctly paid for working on statutory holidays (calculations not supplied);
- he was underpaid holiday pay (calculations not supplied - $17,495 claimed); and

- CEL failed to pay contributions to his KiwiSaver account despite him already being a KiwiSaver member when he began work.

[3] By way of remedy Mr Jones seeks an award of lost wages and any other money lost, plus interest.

[4] He also seeks compensation for humiliation, loss of dignity and injury to his feelings of $15,000 or more for the dismissal. He seeks additional compensation for humiliation, loss of dignity and injury to feelings of $20,000 for the unjustified disadvantageous actions.

[5] Mr Jones seeks penalties of $5,000 per breach for:

(a) Non provision of a written employment agreement;

(b) Non-payment of wages;

(c) Non-provision of wage and time records upon request.

[6] He claims the penalties should be paid to him personally.

[7] Mr Jones claims that some of the matters amounting to unjustified disadvantage action were also breaches of contract. He claims CEL:

(a) Failed to pay a $500 commission he was due for selling ten cars per month on 21 December 2012 and short-paid commission on 5 September 2014 (total of $700 claimed);

(b) Unilaterally reduced his fuel allowance from $50 per week to $30 per week from 23 August 2014 (total of $80 claimed);

(c) Underpaid his weekly retainer which initially was $300 per week gross, $350 gross from 1 April 2011 and from early August 2014 was $300 gross. He seeks a total of $5,120.08

[8] On 27 July 2015 CEL paid Mr Jones $300 gross which it owed as his retainer for his last week of work. As part of his claim of not being paid the minimum wage, and perhaps also for two days of sick leave pay, Mr Moore submits that by his last week of work Mr Jones was working 40 hours per week and at the minimum wage of

$14.25 he should have been paid a minimum of $570 gross instead of the $300 gross he was paid.

[9] Mr Jones seeks a payment from the respondent of 3% for the employer's contribution to KiwiSaver which should have been made over the period of his employment.

[10] In addition, Mr Jones claims unpaid sick leave of four days and unpaid bereavement leave of two days.

Background facts

[11] Mr Jones began working for CEL in October 2010. Niki Mills is the sole shareholder and director of CEL, although it is clear the business is also operated by his father, Phillip Mills, who was the 'boss'.[1] It is common ground that no written employment agreement was entered into.

[12] Until shortly before the investigation meeting CEL claimed that Mr Jones was not an employee but an independent contractor. However, it, quite properly, conceded that Mr Jones had been an employee.

[13] Before an extended holiday Mr Jones was employed from October 2010 until June 2014. Mr Jones was paid a retainer of $350 gross per week, plus commission on the cars that he sold (which varied depending on the value of the car sold), and a monthly bonus of $500 if he sold ten or more cars a month. He also received fuel of $50 per week which he used a CEL fuel card to access.

[14] Mr Jones was provided with a car, which varied from time to time according to what cars were in stock, to drive to and from work and for his personal use.

[15] In June and July 2014 Mr Jones was on holiday in Thailand. I do not accept that prior to that leave Mr Jones' employment ended. Some of the leave was unpaid and there was not an agreed date for him to return to work. His employment continued when he came back although some of its terms and conditions changed.

[1]Phillip Mills sent Mr Jones an email on 6 March 2014 "We have a problem. Niki is not the boss I own ChCh euro not Niki. … ignoring calls pisses me off and bleating to Niki is a waste of time as what I say goes".

[16] When Mr Jones came back he spoke to Niki Mills and they agreed that when he began work again he would only work five days a week (40 hours), as opposed to the six days (47 hours) he worked before his holiday. Both parties agree that because Mr Jones reduced his days the retainer would reduce to $300 gross per week.

Determination

Credibility and weight that I can put on evidence

[17] Over the two days of the investigation meeting I found both parties' evidence to be self-serving at times. However, at times I found the applicant's evidence to be so self-serving as to strain credulity. Mr Jones has a view of himself that he desires to project at all times. Over the period of his employment with CEL he was involved in two fights in which he appears to have been the aggressor, including one on CEL's premises. His explanation for the latter incident was that he used to be the victim of bullying when he was at school and now he does not allow that to happen to him. My impression from both incidents is not so much that Mr Jones is inappropriately aggressive but rather that his judgment is poor and that he is determined to be right and to be seen to be right despite the cost.

[18] His use of Facebook is perhaps no different from that of most people in that he projects an image that he wishes the world to have of him. He says that he is a *horrific show-off* on Facebook. One particular example illustrates why I have been cautious to accept everything he says at face value. Various Facebook posts were put to Mr Jones in cross-examination by Mr Thompson. On 7 September 2012, Mr Jones posted a photograph of his current work car and wrote:

> *Tonight I'm taking the Supercharged v8 XJR to kick boxing then go park up at the beach and hot box the shit out of this $220,000 car …. boooyaa!!!! Life is good*

[19] On 24 September 2012 he posted:

> *Bosses can never figure out why all my company carts smell funny!*

[20] Mr Thompson put it to Mr Jones that he smoked marijuana in his work vehicles. He denied it. I asked him what hot boxing was. He told me that it was a challenge when a group of people rolled the windows up tightly and put the heating up high and the first person to crack by opening a door or rolling down the window was the loser and became the sober driver for the night. He said that his Facebook posts were *just the ramblings of a show-off.*

[21] Mr Jones says that he has smoked marijuana but never in a work car.

[22] When Amber Cels, Mr Jones' girlfriend who had not been present when Mr Jones gave evidence, was giving her evidence I asked her if she could explain what hot boxing was to me. She said it is *smoking weed in a car with a number of people*.

[23] In Mr Thompson's submissions he refers to a definition for hot boxing in the *Urban Wiki*. I am satisfied he probably means the Urban Dictionary, which operates as Wikipedia does in that it is open to input from contributors.

[24] Mr Moore says that of 80 definitions on the Urban Dictionary to explain hot boxing one defines it as:

> *To do or act in a way that brings attention to you or a group.*

[25] He submits that language, especially slang, is an imperfect medium and it is inappropriate to assume that a slang term is necessarily being used in a technical sense.

[26] The Urban Dictionary defines 'hot boxing' as a noun meaning:

> *The practice of smoking marijuana in an enclosed space (e.g. a car or a small room) in order to maximize the narcotic effect.*

That definition is approved of, or 'liked', by 1,050 users of the site and only dis-liked by 267 users.

[27] The Urban Dictionary defines 'hot boxed' as:

> *smoking a substance in a confined area so that the area fills with smoke and the smoke is all you breath in.*
> *"I hotboxed a car last night!"*

That definition is liked by 154 users and disliked by 26 users.

[28] 'Hot box' is defined as:

> *A hotbox is an air-tight room or vehicle that contains one or more pot-smokers smoking one or more joints. The exhaled smoke and the smoke coming from the joint, unable to escape, circulates and thus is breathed in and is not wasted. Smokers in a hotbox may find themselves totally fucked beyond the point of speech after about 30 minutes. Hotboxing is an event that requires some amount of planning, but ensures optimal weed usage.*

> *Guy 1: "Dude, my parents are on holiday and we're gonna hotbox my bathroom!!"*
> *Guy 2: "SWEEET!"*

That definition is liked by 2,629 users of the Dictionary and dis-liked by 724 users. The definition Mr Moore quotes has 22 likes and 24 dis-likes. I was unable to find one that matched Mr Jones' explanation.

[29] Based on evidence from Ms Cels and Mr Jones, as well as the Urban Dictionary top definitions I find it more likely than not that Ms Cels told the truth about what hot boxing is and that Mr Jones did not.

[30] I find that when Mr Jones posted on Facebook on 7 September 2012 he intended anyone who saw that post to believe that he was going to smoke marijuana in the work car. His post on 24 September 2012 was intended to convey that he did smoke marijuana in his work cars. Whether or not he did is beside the point. What it proves to me is that Mr Jones deliberately projects the image he wishes the onlooker to have, and crafts that image for different audiences. Mr Jones probably unintentionally revealed that to me when he said in relation to an injury he got when he head-butted someone that he *would've made up some cool story about it instead* but *I don't remember making up a story about that*.

[31] For the above reasons I have been cautious in assessing the weight I give to Mr Jones' evidence.

The law

[32] The test of justification under s 103A of the Employment Relations Act 2000 (the Act) applies to the claims of unjustified disadvantage and unjustified dismissal. The test is whether what the employer did, and how it did it, were actions that a fair and reasonable employer could have taken in all the circumstances at the time.

[33] In applying the test the Authority must consider a number of factors set out in s 103A(3) of the Act that relate to the process followed by the employer and any other factors it considers appropriate.

[34] However, the Authority must not find a dismissal to be unjustified solely because of defects in the process followed by the employer if the defects were minor and did not result in the employee being treated unfairly.

[35] Parties to an employment relationship are required by s 4 of the Act to deal with each other in good faith. This includes not doing anything, either directly or indirectly, that will, or would be likely to, mislead or deceive the other party.

[36] The duty of good faith imposes a number of obligations in the parties. These include being active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative.

Unjustified disadvantage

[37] For each of his claimed personal grievances of unjustified disadvantage Mr Jones has to prove that he was disadvantaged by an action of CEL. CEL then has to prove that its action was justified. I need to assess the issue of justification objectively using the test in s 103A of the Act.

[38] I have considered these as unjustified disadvantage claims only and not also as breach of contract claims. The same allegations and facts were relied on for each and I would not award remedies for both even if I was to find some of them were unjustified disadvantages as well as breaches of contract.[2]

Did CEL unilaterally change Mr Jones' terms and conditions of employment to his disadvantage?

[39] Mr Jones says that at the end of August or in early September 2014 CEL unilaterally imposed a reduction in his fuel allowance and an unfair increase in the number of cars per month he had to sell to be eligible for a bonus. He says he did not agree to those terms.

[40] Niki Mills says it was agreed before Mr Jones started working again in August 2014 that the fuel allowance of $50 per week would be reduced to $30 per week and the target for getting a monthly bonus would be raised from ten cars per month to fifteen cars per month. Niki Mills says the rationale for the fuel allowance was that Mr Jones was now working fewer days and the rationale for the increased bonus target was to bring Mr Jones' target up to that of Paul Mills, another salesperson, and also because since when Mr Jones started monthly sales overall had increased by about 20 cars per month.

[2] See, for example, Judge Perkins' remarks in *Fredericks v VIP Frames and Trusses Limited* [2015] NZEmpC 203, paragraph [7].

[41] In paragraph 18 of Niki Mills' written statement of evidence he states that as part of the new arrangement between CEL and Mr Jones they agreed that the fuel allowance would drop to $30 per week. He does not mention any discussion about the higher target for a bonus.

[42] After considering all of the evidence, including that Mr Jones filled his car with $50 of fuel on 15 August 2014 and Ms Cels' evidence of Mr Jones' mood changing after being back at work for a couple of weeks, I consider it is more likely than not that the lower fuel allowance and the increased bonus target were not discussed at the first meeting at which a 5 day week was agreed. I find that Niki Mills verbally told Mr Jones at a later date that the fuel allowance had reduced to $30 and even later told him that his bonus target had been raised.

[43] I also find that Mr Jones had not accepted or agreed to the change in the bonus target as is evidenced by him claiming $500 for selling 11 cars on his invoice dated 5 September 2014. I consider that Niki Mills paying $300 as a bonus for Mr Jones selling 11 cars in August - *just trying to be fair* - supports Mr Jones' view that increasing the bonus target was not something that he agreed to before he started back at work.

[44] A dispute over the terms of the agreement between the parties could have been avoided if CEL had provided Mr Jones with a written individual employment agreement, as it was required to do.

[45] The two changes in Mr Jones' existing terms and conditions were disadvantageous to him because they reduced the financial benefit he got from his employment.

[46] Despite CEL having what it considered logical reasons for the changes, a fair and reasonable employer could not have unilaterally changed an employee's terms and conditions in the way that it did without agreement from Mr Jones. Therefore, the changes amounted to unjustified disadvantage personal grievances.

[47] CEL must pay Mr Jones $80 for the loss of the benefit of the fuel allowance, as claimed, and $200 to make up for the decreased bonus payment which should have remained $500 for August 2014.

Did CEL unjustifiably disadvantage Mr Jones by not paying him the employer contribution towards KiwiSaver?

[48] Mr Jones was already a KiwiSaver member and contributor when he started working for CEL. He says it was only when his employment ended that he discovered that no contributions had been made to KiwiSaver during his employment. He says that he was disappointed to discover that and that he had missed out on the employer contribution.

[49] Michael Mills says that during a conversation in the summer of 2013-2014 Mr Jones said he did not want to contribute to KiwiSaver and preferred to have the money coming to him every week. Niki Mills also says that Mr Jones told him he did not want to contribute to KiwiSaver.

[50] In the Employment Court case of *Rittson-Thomas trading as Totara Hills Farm v Davidson*[3] there was similarly disputed evidence. However, in that case the written employment agreement was found to be objective evidence of the intent of the parties at the beginning of the employment that KiwiSaver contributions would be made. In this case there is no written employment agreement lending weight to Mr Jones' position.

[51] In the *Davidson* case Chief Judge Colgan wrote:

> *Mr Davidson was a member of a KiwiSaver scheme when he began his employment with Mr Rittson-Thomas. If the employee is to continue to contribute, the statutory scheme provides that in such circumstances an employer will pay the employer's contributions at, at least, the minimum statutory rate for the time being to the Commissioner of Inland Revenue who will remit these payments to the employee's KiwiSaver scheme by reference to information identifiable from the employee's IRD number.*[4]

[52] Chief Judge Colgan found it significant that Mr Davidson received an amount in his bank account each week without receiving pay slips and because of the employment agreement he assumed that he was being paid a net amount less PAYE and less his contribution to KiwiSaver.

[53] Section 22 of the KiwiSaver Act 2006 obliges new employees who are already members of the scheme and who wish to keep contributing to the scheme to give their new employer, along with their IRD number, a KiwiSaver deduction form. I am

[3] [2013] NZEmpC 39
[4] Ibid. paragraph 19

satisfied that Mr Jones did not do this. However, neither did he have an approved exemption from the IRD to stop his contributions.

[54] I am satisfied that although Mr Jones was asked for his IRD number he was not asked about whether or not he wished to contribute to Kiwisaver, likely because CEL says it did not consider him an employee.

[55] Like Mr Davidson, Mr Jones did not get pay slips. However, I consider that Mr Jones' case is sufficiently factually different to the *Davidson* case to be distinguishable. I am certain that Mr Jones was aware that he was not making any contribution to KiwiSaver because he knew the amount of the retainer he was paid every week was either $300 less 20% tax = $240.00 or $350 less 20% tax = $280. He was also aware through his use of invoices to claim his commission payments that he was not contributing to KiwiSaver and that only 20% tax was taken off his commissions. Mr Jones did not act in any way during his 4 years of employment at CEL as if he expected to be paying his own contributions into the KiwiSaver scheme.

[56] If Mr Jones was not making KiwiSaver contributions then his employer was not obliged to do so, despite Mr Jones not having sought permission from IRD to stop his KiwiSaver contributions. This claim is dismissed.

Was Mr Jones unjustifiably disadvantaged by not being paid a $500 bonus in December 2012 and is he owed that money?

[57] Mr Jones says that in December 2012 he was allowed to take a day's leave on a Saturday but in return CEL expected him to work the following Tuesday which was usually his day off. He says because he did not work on the Tuesday that CEL withheld his $500 monthly bonus although he had sold ten or more cars that month. By way of evidence he produced an invoice dated 12/12/12 which shows him claiming the bonus as well as taking it off as "punishment for not working on Tuesday". I am satisfied that is not evidence of Mr Jones acquiescing in acceptance of the fact that the bonus was not paid.

[58] CEL's view was that this must have been resolved to Mr Jones' satisfaction at the time.

[59] I am satisfied that Mr Jones not attending work on the Tuesday having had the Saturday off should not have resulted in the loss of his monthly bonus which he

earned through selling a target number of vehicles. The proper course of action was to deduct Saturday as a day of annual leave. Mr Jones has proved this claim.

[60] CEL must pay Mr Jones the $500 bonus withheld in December 2012.

Was Mr Jones disadvantaged by the lack of a written employment agreement?

[61] This was not raised as a personal grievance until 5 November 2014. The failure to supply a written employment agreement began in October 2010. I consider this grievance to have been raised out of time and therefore I have no jurisdiction to consider it.

Is Mr Jones due to be paid for various types of leave and is he owed any payment of wages because he was underpaid the minimum wage?

[62] Mr Jones claims he was not paid for two days of bereavement leave in January 2014 when his friend, flatmate and colleague died and was not paid for four days of sick leave. I assume that this claim is made hand in hand with the claim that Mr Jones was paid less than the minimum wage for the hours he worked. There is no evidence that his retainer was cut in the weeks he was on bereavement leave or was away sick.

[63] Section 132 of the Act allows an employee who brings a claim to the Authority to recover wages or other money to call evidence that an employer failed to keep or produce a wages and time record.

[64] It is common ground that CEL did not keep wages and time records. It was required to do so under s 130 of the Act.

[65] Under s 132 of the Act Mr Jones is able to call evidence to show that the failure to keep a wages and time record prejudiced his ability to bring an accurate claim for wage arrears or other money. I am satisfied that Mr Jones' claim for not being paid the minimum wage for all hours and days worked and for his holiday pay has been prejudiced by CEL's failure to keep a wages and time record.

[66] Section 132(2) provides that the Authority ***may***, unless the defendant proves the employee's claims are incorrect, accept as proved all claims made by the employee in respect of the wages actually paid to him and the hours, days and time worked by him.

[67] CEL had its accountant retrospectively create a spreadsheet of amounts of retainer and commission payments paid to Mr Jones and also a spreadsheet showing what public holidays the premises were open from 2010 to 2014 and, therefore, what public holidays Mr Jones would have worked on, and how many alternative holidays in lieu he should have been paid for. Despite Mr Jones' claim the premises were shut on Easter Sundays CEL's evidence appears to be that the business was open on Easter Saturday and Easter Sunday.

[68] The problem for the Authority is how to calculate what amounts may be owed in the absence of reliable records. Mr Jones submits his own records should be relied upon to make calculations and in reliance on s 132 I am able to do so, at my discretion. Mr Jones supplied the IRD summaries of his earnings over the relevant periods. The only other records he has are invoices which for the majority of time he worked do not include his retainer payments. He also has bank statements which show when his retainer payments were made but do not identify bonus or commission payments which were usually paid by cheque.

[69] There may be sufficient evidence that in some weeks Mr Jones was not paid the applicable minimum wage. That may be the case for any week in which he did not earn a commission. However, his monthly bonus would also have to be taken into account to determine any breach of the requirement that he was paid the minimum wage. I do not consider the evidence before me is sufficient at this stage to make an overall assessment of the issue of the minimum wage. Mr Jones should make his own calculations and set out the basis for them and put those to CEL in the hope that the parties can agree on what, if any amount, is owed by way of minimum wages. The parties may come back to the Authority on this issue if it is necessary.

[70] CEL should first identify <u>all</u> payments made to Mr Jones, including by cheque and on what dates those were paid.

Holiday pay

[71] Mr Jones submits the claim for statutory holidays is also difficult to calculate without the employer's records, and I agree. He says that when he did work on statutory holidays he was not paid time and a half and not given a day off in lieu, in breach of the Holidays Act. He says the "half-time" that should have been paid for working on statutory holidays is approximately $3,580 and that he should have been

paid for 24 days in lieu amounting to $6,342. However, the total being sought in relation to statutory holidays is $13,568. That is based on the fact that no commission was paid for those holidays when some would have been earned on the four Easter Sundays on which Mr Jones says he did not work because the car yard was closed.

[72] CEL paid Mr Jones $18,392.34 net on 24 June 2015 which Mr Thompson's submissions say was holiday pay of $15,350.10 gross and $8,537.83 gross of payment for *outstanding public holiday entitlements.* CEL paid PAYE to the IRD on those amounts. CEL considers that the payments are probably in excess of what it owed to Mr Jones because it failed to keep records of wages and time and leave. No calculations have been provided by CEL.

[73] Mr Moore does not accept that those amounts settle Mr Jones' claims for holiday pay, statutory holiday pay and time in lieu for working on statutory holidays. However, Mr Moore has not supplied his calculations to show that Mr Jones should have been paid more leave related pay.

[74] In addition, if more money is owed by way of wages then more holiday pay will also be owed (8%). The parties should seek to agree on this point too or otherwise come back to the Authority with clear claims showing their calculations.

Was Mr Jones' retainer underpaid?

[75] Mr Moore submitted that CEL underpaid the IRD the 20% tax it had taken off Mr Jones' retainer over the whole period of his employment. In the period before Mr Jones holiday in 2014 he received direct credited amounts of $280 per week into his bank account.

[76] After his holiday he submitted invoices claiming his weekly retainer of $300 gross and his commission payments and, on one, the bonus he claimed during that time.

[77] While there does appear to have been an issue about how much PAYE tax was paid to the IRD on Mr Jones' behalf, especially prior to June 2014, I do not consider that Mr Jones was routinely underpaid his retainer. If anything, it may be that more tax needed to be paid to the IRD which would have resulted in a lower in-the-hand amount to Mr Jones.

[78] The Ace Payroll records dated 20 November 2014 provided by Mr Thompson on 17 April 2015 show payments to Mr Jones apparently during August 2014 but do not tally with Mr Jones' invoices and are unhelpful since it is clear that the wages records were not adequately kept **during** Mr Jones' employment.

[79] From August 2014 I am satisfied that the evidence establishes that 20% tax was taken off all invoices supplied by Mr Jones and that it was his understanding that would be the case. Again it may be that more tax is owed to the IRD but it is not the case that Mr Jones' retainer was underpaid. Mr Jones agreed to a retainer of $300 per week gross for working a 5-day week. He claimed that, and was paid that, less 20% tax.

[80] For the period before Mr Jones' 2014 holiday I do not consider he has proved his retainer was underpaid although it may be that CEL has underpaid tax to the IRD.

[81] The claim the retainer was underpaid is dismissed.

Was Mr Jones unjustifiably dismissed?

Relevant background

[82] Both parties, and many of CEL's witnesses, agree that the employment relationship was volatile. It is perhaps understating things to say that there was a culture of robust exchanges by text and in person between Phillip Mills, Niki Mills and Mr Jones, as well as between Phillip Mills, in particular, and other employees. Niki Mills had a history of acting as a peacemaker to a large extent.

[83] Witnesses estimated that on 10 - 12 occasions prior to Friday 12 September 2014 either Mr Jones would have been sent away to cool down after an altercation with Niki and/or Philip Mills or he would leave of his own accord after an angry exchange and return either later that day or the following day. Mr Jones was required to apologise to Philip Mills more than once.

[84] Philip Mills sent a number of intemperate text messages to Mr Jones during his employment, including in the earlier part of 2014. I accept Mr Jones' evidence that Phillip Mills was at least once physically threatening to him and also told him that he could ruin his future career in car sales.

[85] Niki Mills also sent intemperate text messages to Mr Jones including numerous ones on 6 March 2014 when Mr Jones was at home sick:[5]

> *It's a 24 hr bug. Answer your bloody phone.*
>
> *Need keys 530d you need to toughen up.*
>
> *Wee need the bloody scan tool! For fucks sake!*
>
> *Answer the bloody phone!*
>
> *You will lose your job over this. Grow some balls answer the phone. Get scan tool in her now, it's fucken stealing! Doug can't deliver X5 until Gavin scans car.*
>
> *We have a business to run geythn. Very busy today, you hold on to 530D key and will sort tomorrow. Have no time. I was sick too but yet took calls you need to do the same. Your 27 this is pathetic.*
>
> *You make things worse going quiet.*
>
> *You also expect us to allow 2 months leave this winter. You better sort this attitude if you want a job when your back.*

In fact, it turned out that another employee had the scan tool.

[86] The following day Niki Mills sent the following text to Mr Jones:

> *… not worth confusing him. Not trying to get one over Paul, its immature.* ***You need to LISTEN you are not always right. Its arrogance. Your attitude annoys me so much. You should never talk that way to your employers****. Apologise properly and understand what I am saying. Simple.*
>
> *Paul was dealing with the man prior. Simple then, yours to leave. He would do the same. The way you talk to Philip is not good when Autohub boss was there, that is crap Geythn****. He is your boss and can say what he needs to, you not!*** *I suggest you come and apologise to Philip today!* (emphasis added)
>
> *People here come back and move on! I am helping you.*

[87] Mr Jones replied:

> *You fired me and sent me home!!! If I come back now we will end up screaming at each other. I need time to reflect on what I am going to do as well. This is not working. We are all bloody tired of arguing. Maby its time for me to take a step back.*

[88] From Niki:

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[5] All texts are written as they were originally sent. No typos or spelling mistakes have been corrected.

> *I am trying to help you! Philip is pissed off and rightly so! Come and apologise don't let it simmer. Now rather than later, you know he moves on but you need to respect him.*

[89] On 7 May 2014 Philip Mills sent the following text to Mr Jones:

> *Get in tomorrow and get your deliveries ready and if not much on then MAYBEE you can disappear for the day.* ***We pay your wages and WE make the rules***. ***Don't ever forget that …*** (emphasis added)
>
> *I think a couple of months break will help you in many ways. See u in the morning.*

Events in September 2014

[90] The final events that led to these proceedings were in September 2014. Mr Jones was ill with the flu and was due to work on Wednesday, 10 September. At 7.44 am that day he texted Niki Mills:

> *I am ruthlessly sick today ache all over and can barely move/talk. Despite the doctor giving me sleeping pills I barely slept a wink. Apparently there is a very aggressive flu going around. There is no chance I can make it in, even the morning light is hard on my eyes. I will send you a copy of doctors note when I can get out of bed. My apoligys, I know it will leave you guys short with it being Paul's day off. But if I come in the docs said I wouldn't get better and that the rest of the team would get sick.*

[91] Niki Mills replied:

> *Not ideal. Okay. Philips delivering cars tomorrow. Come in then.*

[92] Later on the same day Mr Jones scanned and sent a copy of his medical certificate which said:

> *The above patient was seen and examined by me on 09 Sep 2014 and in my opinion has been medically unfit from 10 Sep and should be fit to resume work on 17 Sep.*

[93] Mr Jones sent that with a text which said:

> *Just coughed up so much flem it made me vomit. I will take sleeping pills today and hopefully be better in the morning.*

[94] Niki Mills replied *chin up! We have all had it.* He later texted *4 today. Mike did one all himself.*

[95] Mr Jones replied:

> *Theres no need to rub it in my face, I would be there if I wasnet so sic. Wed is my favorate day because I don't have to compeate with daddys golden boy*[6]

[96] On Thursday, 11 September Niki Mills texted:

> *Are you coming in today????*

[97] In response from Mr Jones:

> *Sorry I have been out to it with the sleeping pill the doctor gave me, still very very sick but will come in tomorrow whether I am better or not. Just be aware if you get sick it wont be pleasant. This has been the sickest I think I have ever been.*

[98] On Friday, 12 September 2014 Mr Jones went into work despite still being ill. It is not entirely clear what time he started.

[99] Mr Jones says in the previous week he had shown the Mercedes CLS, which Michael Mills sold on the Wednesday, to the group of buyers that eventually bought it on 10 September. He admits that they had not taken it for a test drive that day and they test drove an XF instead.

[100] Mr Jones secretly audio-recorded two parts of his interaction with Niki Mills from approximately 9.11 am to a little after 9.16 am, from 9.17 am for about 35 seconds, and then secretly video-recorded a later part of the interaction from about 9.22 am for about 1.5 minutes. He also secretly recorded a later telephone call he had from Michael Mills. He used his mobile phone to make all the recordings.

[101] The secret recordings were provided before the investigation meeting. I have accepted them as evidence as they are relevant.

[102] Niki Mills says that Mr Jones began badgering him about the commission almost as soon as he came in and prior to the recording had been calling him a liar and insulting him. Mr Jones denies that and says he started recording soon after he first asserted he should receive half of the commission.

[103] It is clear that when the first recording begins Niki Mills is already frustrated with Mr Jones and Mr Jones is also frustrated and being very persistent.[7] Quite early

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[6] I am satisfied this was a reference to Paul Mills, also Phillip Mills' son, who had started working as a salesman after Mr Jones and who Mr Jones considered to be his competitor.

[7] I have listened to and viewed the recordings before the investigation meeting and during the investigation meeting. I am basing these quotes on transcripts prepared by Mr Jones and Mr Moore which were presented at the investigation meeting. I am satisfied that the transcripts, as corrected at the investigation meeting, are accurate.

on Mr Jones says *I deserve half that sale* and Niki Mills responds *Fuck off you do*. He then responds twice to Mr Jones saying he was changing the rules by saying *Bullshit*. Later Niki Mills says *will you shut up and just let me finish*.

[104] Niki Mills then told Mr Jones his justification for why Michael deserved the full commission. Mr Jones continued to disagree. Later Niki Mills said:

> *Fuck off, you're fucking me off. Because, no, you're not right. A sale happens when you get them signed up, mate.*

[105] Soon after that the following exchange happened:

> *GJ: … I fully demonstrated that car to them.*
> *NM: What was the guy's name then?*
> *GJ: It's written in my book.*
> *NM: OK, did you write it in your book? No you didn't.*
> *GJ: Niki I showed them the car. I got them, I got them out in a car that was a different XF to the one I was showing them as well.*
> *NM: You don't even know the guy's name.*
> *GJ: Oh, for fucks sake, Niki, you always change the rules. I've come in, I'm sick as fuck, to try to help, because I know you need some help.*
> *NM: No, I'm not changing the rules*
> *GJ: You are! You constantly do it. You changed the rule with my wages; you've reduced how much I earn …*
> *NM: Oh, fuck off! Fuck off! You're fucking' me off! Go away now, you're fuckin me off!*
> *GJ: Fine.*
> *NM: Go away, talk to Michael.*
> *GJ: Fine. I don't need this shit when I'm sick anyway… You're the one that's changing the rules. For 4 years I've worked within certain parameters.*
> *NM: You didn't show them the fuckin' car*
> *GJ: I've shown it to them!*
> *NM: Oh, bullshit! You're just saying that now.*
> *GJ: Fine. Let's call them right now and find out whether I showed it to them!*
> *NM: You talk to Michael right now.*
> *…*
> *GJ: How did you know I did not show them that car?*
> *NM: For fucks sake, you're starting to fuck me off. You can fuck off.*
> *…*
> *NM: Go and talk to Michael, mate, 'cause you're pissing me off.*
> *GJ: Michael doesn't know.*
> *…*
> *NM: You don't even know the guy's name.*
> *…*
> *NM: It makes no fucking difference.*
> *GJ: I spend an hour showing them both the CLS and XF. I got them out in the XF that was out there, because it was easier.*
> *NM: Fuck off! Fuck off! I'm doing work here! I don't need a whinging little bitch!*
> *GJ: Don't touch me!*

NM: Go away!
GJ: Don't fucking touch me!
NM: You're fucking me off …
NM: Talk to Michael.
…
GJ; let's call them and ask them … you're saying I'm wrong. Let's call them. I'll call them right now then, I'll call them right now.
NM: Yeah. Call Michael.
GJ: No, not Michael. The Asian guy. I'll find out.

[106] That is where the first recording ends. Mr Jones says that he stopped recording because he was about to call the customer.

[107] Niki Mills says that he told Mr Jones not to call the client after the first recording ended but that Mr Jones ignored him and went into Phillip Mills' office where the 'deals' are kept which is where the client details would be. Mr Jones denies that he was told not to call the client.

[108] I am satisfied that the next recording starts when Mr Jones is in Phillip Mills' office:

GJ: Stop physic…
NM: you're starting to fuck me off right now. You go. You go.
GJ: Ow. Why are you touching me?
NM: Cause I don't need a total bitch …
GJ; What, so you're going to boss me around, you're gonna hurt me? You think you have any right to touch me?
Paul Mills: Get out of here!
NM: I'm the boss!
Paul: Look, Gethyn..
NM: Just fuck off and think about …
GJ: OW! Stop touching me!
NM: GET OUT OF HERE!!
GJ: OW!
NM: You're starting to fuck me off!
GJ: Ow! Why are you hitting me?
NM: Because you don't believe me. There's so many…
GJ: so you think that gives you the right to touch me?
Paul: Gethyn.
GJ: You have no right to touch me!
Paul: Get out of here.
NM: Get out of here.
Paul: Get out.
GJ: Fuck this.

[109] Mr Jones turned off the recording a little before 9.18 am and went into his office to clear out his desk and put his belongings into a plastic bag.

[110] At about 9.20 am Niki Mills sent Mr Jones the following text:

> *Leave the X3. Get the bus home. You're the fucken fool mike going to make you feel like an idiot*

[111] At 9.22 am Mr Jones turned on the video-recording function of his phone. By then Niki Mills was in Mr Jones' office and the following audio exchange took place.[8]

> *GJ: Stop going through, stop going through my stuff. You have no right, you have no right to assault me. You have no right to assault me.*
> *NM; Yes, I have plenty of right to ass…*
> *GJ: Why?*
> *NM: Would you fuckin listen to me? Because I am the one who pays you and I …*
> *GJ: You think you can attack me for no reason? You think that's fair? You can't touch me. You have no right to touch me, I didn't touch you. I didn't touch you. I'm leaving.*

[112] After that Gavin Sampson, from the workshop, came in and tried to assist Mr Jones and get him to *settle down.* He asked him for the car keys. By then Niki Mill was outside the office door but the following exchange took place:

> *GJ: No, it's not fair he just fuckin hit me. He's not … he can't hit people.*
> *NM: I did not hit you mate.*
> *GJ; you did, mate. You just, you just hit me, mate. No, no you just hit me, mate. You just assaulted me, Niki. That's not fair. I want, I want to get the stuff out of my car. I want to get the stuff … Don't try to reason with me. You just hit me and now all of a sudden, now there's other people, you think it's different.*
> *NM: I have been calm with that guy so many times!*
> *GJ: You've not been calm! You just hit me Niki!*
> *NM: He just called me a fucken liar, so I'm not …*
> *GJ: You've pushed me around. You are a liar. You've reduced my wages. I've worked for you for 4 years and you think you can assault me. You're full of it.*
> *NM: Assault you?*
> *GJ; You throw me around, you throw your weight around. You're an idiot, Niki.*

[113] Mr Jones went out to the car with Mr Sampson and collected his things from it. He went out to the roadside.

[114] At approximately 9.26 am Michael Mills called Mr Jones, having been told to do so by Niki Mills. Mr Jones answered the phone and having established who he was speaking to turned on the phone's speaker and recording function. He tells his story to Michael Mills and in part said:

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[8] The video recording is not particularly helpful as it not focused on what the people were doing. It is more useful for the audio recorded.

> *And Niki just goes, "Nah", he starts grabbing me and pushing me, I'm just like, "stop fucking attacking me, Niki". He's literally physically like shoving me; he even raised his fist like ....he didn't hit me, but he ...raised his fist like he was going to hit me. Starts, like, just about pushes me over. Paul and Gavin had to intervene. Like he's yelling and screaming, like, physically pushing me. I am not even touching him back. He's twice my fucking size. He's fucking throwing me around. And he's just like ... Nick gets me to. ..grab all my shit. He's taken my keys off me for me company car so I now I am stranded with all of my stuff ... I've got no way to get home ...*
> *... he has not right to assault me. And he was like, "aw, I didn't assault" like he was pushing and shoving me, he physically grabbed me, dragged me, and then shoved me over.*

[115] There is more of an exchange during which Mr Jones got Michael Mills to agree that Niki Mills cannot treat his staff that way. Mr Jones told Michael Mills that it was not the first time that Niki Mills had assaulted him. He then said:

> *I don't even want to go back to work now. I shouldn't have to put up with this ... I draw the line at ... I just want to go the fuck home because I've had, I've had enough.*

[116] At 9.27 am Niki Mills sent another text to Mr Jones:

> *I have been always very fair with you. You did not have any part of michaels sale. End of story. You then call me a liar when I pay your wages you can get the fuck off our premises. It is my right.*

[117] Mr Sampson gave Mr Jones a ride home. Niki Mills sent two more texts to Mr Jones that morning justifying his actions.

[118] Some hours after he left the premises Mr Jones drove his own car to CEL and gave his keys to the yard to Niki Mills. Both parties agree the conversation between them was civil.

[119] Mr Jones says that when he handed back his work keys he told Niki Mills that he was *done.* Niki Mills told him he had been a good salesman and they should not let it end like this. Mr Jones asked for his pay which Niki Mills said he would pay later. However, the conversation was brief as the telephone rang, Niki Mills went to answer it and Mr Jones left and went to Mr Moore's office where he gave Mr Moore access to the recordings.

[120] Later that day Niki Mills sent a text:

> *Now that we have both calmed down. You have your customers coming tomorrow on XFR and I do not have a problem if you want to put today behind us and you can come in and make some money. If I was an arsehole I would not be texting this.*

[121] On Sunday 14 September he also texted Mr Jones to encourage him to come back to work.

The law on dismissals

[122] At law a dismissal is a sending away at the instigation of the employer. Mr Jones claims he was dismissed by Niki Mills, or alternatively, constructively dismissed.

[123] The very nature of a claim for constructive dismissal is dependant on the events that preceded it; the focus of such claims is on the employee's motivation for their decision to leave, and whether the motivation arises from a breach or breaches of the employer's duty.

[124] One type of constructive dismissal occurs where the actions of an employer constitute a breach of the implied term that employers ought not, without reasonable and proper cause, conduct themselves in a manner calculated to or likely to destroy or seriously damage the relationship of trust and confidence.[9] If an employer acts that way it is not necessary to show that the employer intended to repudiate the contract. [10]

[125] To found a claim for constructive dismissal the breach or breaches of duty by the employer relied on by the employee must be of such character as to make the employee's resignation reasonably foreseeable.[11]

[126] I find that Niki Mills assaulted Mr Jones by pushing him to escort him out of Phillip Mills' office[12], and in the showroom by shoving him in the chest aggressively and by poking him. Niki Mills accepted that he did push Mr Jones aside, or pushed to get past him, and said that he did not hit him but *was just moving him out of my face and towards the door*.

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[9] *Auckland Shop Employees Union v Woolworths (NZ) Limited* [1985] 2 NZLR 372
[10] *Review Publishing Co Ltd v Walker* [1996] 2 ERNZ 407
[11] *Weston v Advkit Para Legal Services Ltd* [2010] NZEmpC 140
[12] As confirmed by Paul Mills' evidence.

[127] I accept that Niki Mills did not hit or punch Mr Jones, as Mr Jones admits to Michael Mills, despite what he alleges during the earlier recordings between him and Niki Mills.

[128] If Niki Mills had not done more than escorted Mr Jones out of Phillip Mills' office or pushed him to get him 'out of his face' I would have expected him to instantly deny that he had touched or assaulted Mr Jones at all. Instead, the recording shows that in response to *Ow why are you touching me* Niki Mills said *cause I don't need a total bitch* and in response to *why are you hitting me* he said *because you don't believe me* and later in response to *you have not right to assault me* he said *I have plenty of right to ass....*

[129] However, I accept that when Mr Sampson was present in Mr Jones' office there was no physical assault and I will consider the significance of this under my assessment of Mr Jones' contribution to the situation leading to his grievance.

[130] Any physical assault on an employee by an employer is an action that breaches the fundamental requirement of trust and confidence an employee should be able to have in his employer.[13] Despite Mr Jones' evidence that Niki Mills had assaulted him previously I consider that there was nothing quite of this nature or extent in Niki Mills' prior conduct.[14]

[131] In this case the physical aggression and the heated nature of the verbal exchanges, the majority of the heated language coming principally from Niki Mills, combined with the length of the altercation together made it reasonably foreseeable to Niki Mills that Mr Jones might treat the employment as at an end. In fact, when Mr Jones handed back his work keys it was clear that he did not intend to return to work and at that point Niki Mills did not expect him to or he would not have accepted the keys back.

[132] Niki Mills' texts to Mr Jones over the following days are evidence that he was aware that Mr Jones was not likely to come back to work.

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[13] Except by way of self-defence or in defence of another.

[14] I accept that Niki Mills had once intervened between Mr Jones and Paul Mills when they were likely to come to blows and once intervened when Phillip Mills was being physically aggressive towards Mr Jones.

[133] Mr Jones says that the keys to his work car had not previously been taken off him. In evidence prepared for the investigation meeting Niki Mills says that he only decided to take the car keys that day as he thought Mr Jones was too angry and it would have been dangerous for him to drive. However, I am not satisfied that reason was conveyed to Mr Jones on the day.

[134] CEL also says that the altercation was not so different from other times Mr Jones had been sent away to cool down and that he had always come back to work.

[135] Niki Mills' behaviour on 12 September 2014 repudiated the contract of employment, even if CEL did not intend to terminate the employment relationship. Mr Jones was entitled to treat the employment relationship as at an end, despite Niki Mills' texts inviting him to come back. Those texts did not convey any remorse or awareness on Niki Mills' part that he had not acted correctly.

[136] The unilaterally imposed changes to the fuel allowance and the bonus target contributed to the loss of confidence and trust Mr Jones had in CEL. Mr Jones made it clear he considered the relationship at an end when he handed back his work keys in person and did not respond to the texts or go back to work.

[137] CEL submits that Mr Jones disobeyed lawful and reasonable instructions to not call the customer, to 'go away' and to phone Michael Mills. Therefore, CEL submits if it had decided to dismiss Mr Jones it would have been justified in doing so. I accept that Niki Mills did not agree with Mr Jones' suggestion that he call the client. I do not accept that the dismissal of Mr Jones due to his actions that day would necessarily have been justified. I consider that Niki Mills, as the employer, had a greater duty than Mr Jones to keep his cool and act in a professional manner, but he failed to do so.

[138] In all the circumstances, even taking into account Mr Jones' dogged and no doubt irritating insistence on being right, a fair and reasonable employer could not have acted as Niki Mills did on 14 September 2014. Mr Jones has a personal grievance that he was unjustifiably dismissed.

Remedies for unjustified dismissal

Lost wages

[139] Section 123(1)(b) of the Act allows me to provide for the reimbursement by CEL of the whole or any part of wages Mr Jones lost as a result of his grievance. Section 128(2) of the Act provides that I must order CEL to pay Mr Jones the lesser of a sum equal to his lost remuneration or to 3 months' ordinary time remuneration.[15] Since Mr Jones did not obtain work within the first three months after his dismissal I need to consider his lost income over that period.

[140] In addition, s 128(3) gives the Authority discretion to order an employer to pay an employee a sum of lost remuneration greater than is compulsory under s 128(2); that is, for more than thirteen weeks.

[141] Apart from a social welfare benefit Mr Jones did not earn any income over the three months after his dismissal. I am satisfied that Mr Jones' doctor certified that he was too unwell to work for two months and was willing to certify that he was unable to work for a further month. However, in November 2014 Mr Jones asked her to certify that he was fit to look for work. He believed that unless he got a new job he would not get better. He got assistance to look for work from APM, a contractor to WINZ, and used Trade Me and Seek to look for work. Eventually he went to some car yards and approached them. He started his new employment in early February 2015.

[142] CEL submits that Mr Jones did not adequately mitigate his loss because he only looked for sales jobs and did not, for example, sign on with any labour hire agencies. Mr Thompson also submits that Mr Jones was not so unwell that he could not assist with the organisation of a rave that he had been helping to organise all year. Mr Jones says he allowed his trailer to be used and that he did attend and help out with security.

[143] I do not accept that Mr Jones' depression and inability to actively seek work mean that he should not have had any social life over that period. I consider the rave to have been part of his social life.

[15] Three months is equivalent to 13 weeks.

[144] I accept Mr Jones' evidence that for at least the first two months he was so badly affected by the events of 12 September 2014 that he was too ill to look for work. In all the circumstances, I consider Mr Jones adequately mitigated his loss and it is reasonable to award him three months of lost remuneration.

[145] Mr Moore submits Mr Jones earned an average of $1,577 per week before he was dismissed, so his wage loss over the following three months, or 13 weeks, was $20,501. Mr Jones actually seeks his full wage loss through to the date of the investigation because although he was employed again from 3 February 2015 his earnings are lower than what he earned from CEL.

[146] My calculations are based on Mr Jones' invoices over the period starting when he returned from his holiday up until 12 September 2014 and include the $300 he was paid for his last week, the $300 bonus paid for August 2014 as well as the further $200 of the bonus I have ordered to be paid. I note that Mr Jones in his invoice dated 8 August 2014 claimed, and presumably was paid $350 *outstanding holiday pay*. That relates to the earlier period when the weekly retainer was greater and so I have not taken that into account. Overall over that period Mr Jones earned $6,575.00, being an average of $1,095.83 per week.

[147] Therefore, subject to any deduction for contribution, the amount of lost wages over the three months after the termination of Mr Jones' employment was $14,245.83.

[148] I do not consider this a suitable case to exercise my discretion to award lost remuneration beyond three months. Evidence from Mr Jones, including that he had already consulted Mr Moore before 14 September 2014, makes it clear that, even in the absence of the events of 12 September 2014, it was unlikely that he would have remained employed at CEL beyond three months.

Compensation

[149] Since I have found that Mr Jones was unjustifiably disadvantaged as well as unjustifiably dismissed I need to consider the effects of those disadvantages as well as his dismissal.

[150] Mr Jones's evidence was that he was very unhappy in the last couple of weeks of his employment because of the unilateral changes to the bonus target and the fuel allowance. He says that the 12 September 2014 incidents were the last straw for him.

He says he was crying when he left the premises and was still doing so out on the roadside.

[151] Ms Cels' evidence was that Mr Jones had been happy when he first came back from Thailand but that after a couple of weeks back at work he *went downhill* and that she could see he *was unhappy and frustrated in a situation he could not change, working with people he could not change*. She said from the time he stopped work *it was similar but much worse*.

[152] Mr Jones saw his doctor later that day in an emergency appointment. He was put on anti-anxiety mediation and sleeping pills and was signed up for a WINZ benefit and his doctor certified that he would not be fit for work for a month. Mr Jones had counselling that was arranged through his doctor.

[153] Mr Jones says he felt lost and had fear of the unknown, particularly of what work he could get. He says that his identity was very linked to his job and that in losing his job he felt he had a lost a *pretty big chunk of me.*

[154] He said he did not sleep well and was very stressed not knowing if he could get a reference for his four years of work. Mr Jones and Ms Cels, his partner, both gave evidence that his drinking became problematic. Ms Cels says that Mr Jones was sleeping a lot during the day but had trouble sleeping at night.

[155] Mr Jones says that he had worked very hard over his four years with CEL to overcome a difficult upbringing and his criminal history that he was afraid would limit his opportunities. He felt like his loss of a job had jeopardised his future and he wondered how he would explain to future employers his loss of the job at CEL.

[156] During the three months Mr Jones was not paid his retainer for his last week of work. He worried about money.

[157] Mr Jones' evidence about his despair and depression establish that he has suffered humiliation, injury to his feelings and a loss of dignity warranting an award of compensation under s 123(1)(c)(i) of the Act. I propose to consider a global award for the combined effects of the dismissal and unjustified disadvantage grievances I have found proved. The unilaterally imposed changes to the fuel allowance and the bonus target contributed to the loss of confidence and trust Mr Jones had in CEL.

[158] However, I am satisfied that not all of Mr Jones' poor mental health in the last months of 2014 was directly attributable to the unjustified disadvantage and unjustified dismissal grievances I have found proved. Mr Jones was badly affected by the death by suicide of his good friend, flatmate and workmate in January 2014 and was still suffering some of those negative effects in September 2014. I have taken that into account in making my assessment of how much compensation was due to the personal grievances.

[159] Subject to consideration of contribution but mindful of the need not to keep compensatory payments artificially low and balanced against the need for moderation – applying a formulation for exercising the discretion to award compensation recently expressed by the Employment Court in *Hall v Dionex Pty Limited*[16] – I conclude $10,000 is the appropriate award for the particular circumstances of Mr Jones' case.

Contribution

[160] Mr Thompson submits that Mr Jones' actions on 14 September 2012 were deliberately antagonistic and unreasonable and directly contributed to the situation leading to his dismissal so that his remedies should be significantly reduced, if not negated.

[161] Mr Moore submits that the fact that Niki Mills made repeated subsequent attempts to get Mr Jones to go back to work shows that CEL considered that Mr Jones *had no substantive case to answer for his behaviour on the day in question*.

[162] I accept that at CEL swearing was not unusual and that aggressive exchanges, including yelling, were not unusual either. Mr Jones considered he had previously been fired and he had previously walked out. However, Mr Jones and Niki Mills agree that Niki usually walks away from conflict. On the day in question when Niki Mills tried to do that Mr Jones continued to follow him around. He did so because he was recording their interaction.

[163] Mr Jones said that the Mills family was likely to stick up for each other against him and so he needed some proof of how badly he was treated. He was already contemplating bringing proceedings against CEL and I consider he deliberately decided to keep being antagonistic, and to begin recording, when he realised Niki Mills was not going to back down.

[16] NZEmpC 29, at paragraph [87]

[164] I do not by any means condone any physical assault on Mr Jones when I say that I consider that there was an amount of blameworthy contribution from Mr Jones. He believed or hoped that if he pursued the issue and pursued Niki Mills strongly enough and for long enough that he would get a 'smoking gun' to use against CEL. Mr Jones agrees that he followed Niki Mills to pursue the issue of his commission and did not 'get out' or 'call Michael' as Niki suggested he should. I accept that Mr Jones got very close to Mr Mills and was 'in his face' at times.

[165] Mr Jones was aware that the interaction was being recorded and so made sure he sounded calmer than Mr Mills and I consider that at times he exaggerated what was happening for good audio effect, such as when he said *ow* and *ouch* in Phillip Mills' office, to ensure those reactions were caught on the recording.

[166] There was an element of entrapment in Mr Jones' behaviour that day which sits uncomfortably alongside his obligation to act in good faith and be communicative. The obligation to be communicative and the obligation to maintain trust and confidence are mutual. Mr Jones did not disclose that he was recording the altercation and in that way I consider he was not communicative or responsive. He was also deceiving Niki Mills by undertaking covert recording he intended to use in legal proceedings against CEL. Mr Jones breached his duty of good faith that day.

[167] Mr Jones could have acted differently, and an employee acting in good faith would have done so. Quite early on, when he said that Niki Mills was changing the rules again, he could have walked away and said he was going home to consider what to do about it. Instead, he chose to pursue the issue to the ends he desired which either would be Niki Mills capitulating and paying him some commission or what he suspected would become a negative climax that he could record and later use against CEL.

[168] I am not suggesting that he was not legitimately upset by the actual turn of events. However, I am satisfied that Mr Jones pushed beyond what he would normally have pushed for the sake of about $175 in order to collect evidence for a potential constructive dismissal claim that he had been advised he could make. I am also satisfied that despite being apparently so ill both mentally and physically, according to his own evidence, that he had to have an emergency appointment with his doctor he was well enough to take the covert recordings to his advocate that same day.

[169] The covert recording in itself did not contribute to the situation leading to his personal grievance of dismissal except insofar as Mr Jones pursued the issue further than was advisable with the knowledge he had about the volatile nature of the workplace because he was aware that he was recording events.

[170] I consider that Mr Jones behaviour on the day was the kind of blameworthy conduct that should result in a reduction in remedies of both his wages and his compensation. Overall I consider that the remedies otherwise due to Mr Jones should be reduced by 20%.

After-discovered conduct

[171] Mr Thompson submits that Mr Jones' conduct discovered after his dismissal via Facebook should also reduce Mr Jones' remedies. In particular he refers to the 'hot boxing' which he submits if proved and discovered during Mr Jones' employment would been sufficient for a justifiable dismissal.

[172] The Court of Appeal case of *Salt v Fell*[17] decided that behaviour discovered subsequent to an unjustified dismissal can be relevant to remedies on the basis that a wrongdoer cannot be allowed to profit from their wrongdoing. However, the subsequently acquired evidence relied on for a deduction in remedies must be reasonably connected to the reason for dismissal.

[173] In this case any possible marijuana use in CEL cars is not connected at all to Mr Jones' personal grievances and therefore his remedies will not be reduced for subsequently discovered conduct.

[174] There was another allegation that Mr Jones stole fuel from fuel cans at the CEL premises. Mr Jones says that early on in his employment he did use that fuel, which other employees also used, but was told not to do so and therefore he discontinued the practice. It is not proved that this was a practice unique to Mr Jones or that it was a dishonest practice. Therefore, his remedies will not be reduced for that either.

Penalties

[175] **Non-provision of a written employment agreement** – Despite CEL's submissions that it was acting in line with its accountant's advice I find that not

[17] [2008] ERNZ 155

providing a written employment agreement was unjustified. It is clear that Phillip and Niki Mills considered themselves Mr Jones' bosses and did not consider that he was a contractor in business for himself.

[176] An employer's failures to provide a written agreement (s 65) and to retain a copy of an individual employment agreement (s 64) are breaches of the Act and there are penalties for such breaches. It is arguable that the claim has not been brought within time under the Act, being within 12 months of the earlier of the date when the cause of action first became known to the person bringing the action or the date when the cause of action should reasonably have become known to the person bringing the action.[18]

[177] Mr Jones is the person bringing the action and he knew from at least October 2010 that he did not have a written employment agreement. However, even if the claim was made in time only a Labour Inspector can bring a penalty claim under either s 64(4) or s 65(4):

> *64 … (4) An employer who fails to comply with subsection (1), (2) , or (3) is liable, in an action brought by a Labour Inspector, to a penalty imposed by the Authority.*
>
> *65 … (4) An employer who fails to comply with this section is liable, in an action brought by a Labour Inspector, to a penalty imposed by the Authority.*

[178] Mr Jones' claim has not been brought by a Labour Inspector as required under s 64 (4) and s 65 (4) for a penalty. Therefore, I am not able to impose a penalty.

[179] **Non-payment of wages** – Mr Moore submits that s 13 of the Wages Protection Act 1983 (the WPA) applies to allow Mr Jones to claim that a penalty should be imposed on CEL for its failure to pay Mr Jones the correct amount he asserts he was owed.

[180] Section 13 of the WPA empowers the Authority to impose a penalty if any payment is made in contravention of the WPA or if an employer fails to comply with any of the provisions of the WPA. I do not agree that the WPA is the correct legislative provision for seeking wage arrears in this case. The WPA allows an employee to claim back deductions unlawfully made from wages and ensures that

[18] Section 135(5) of the Act.

wages are paid in cash. Instead s 131 of the Act applies to allow Mr Jones to be able to apply for any default in wages or any other money due to him under his employment agreement. I dismiss the claim for a penalty.

[181] **Non-provision of wages and time record** – such records were not kept, in contravention of s 130(1), and therefore they could not be provided, in contravention of s 130(2). Again the 12 month limit on making a claim for a penalty applies. This claim is within the time limit as it was made within 12 months of the employer failing to supply copies of wages and time records.

[182] I now need to consider whether a penalty should be imposed on CEL, and if so whether it should be paid to the Crown, which is the presumption, or to Mr Jones as he claims.

[183] A penalty should only be imposed for the purpose of punishment and should not be used as an alternative way of increasing compensation to parties who have been disadvantaged by the actions of the wrongdoing party.[19]

[184] Section 135 of the Act provides that the maximum penalty for an individual is $10,000 and the maximum penalty for a company or corporation is $20,000.

[185] The following non-exhaustive list of factors is useful to consider in exercising the Authority's discretion about whether or not to impose a penalty and if it is to be imposed, what amount should be ordered to be paid. I will look at:

- the seriousness of the breach,
- whether the breach is one-off or repeated,
- the impact if any on the employees, including considering the vulnerability of the employees,
- the need for deterrence,
- remorse shown by the party in breach, and
- the range of penalties imposed in other comparable cases.[20]

[19] *Xu v McIntosh* [2004] 2 ERNZ 448 (Employment Court).
[20] *Tan v Zhang* [2014] NZEmpC 65, at paragraph [32].

[186] The failure to keep wages and time records over a period of four years is a serious breach of an employer's obligations. The breach was not a one-off one and was a long-standing and ongoing breach.

[187] I have already dealt with the negative effect on Mr Jones' ability to accurately quantify his claim for arrears of wages of the lack of a contemporaneous wages and time record. The retrospective creation of wages records does not assist him adequately.

[188] CEL submits that the breach was inadvertent as its accountant advised it to treat Mr Jones, and presumably its other sales staff, as independent contractors and not employees. As Mr Moore's submissions point out I did not hear any direct evidence of such advice being given. I do not accept that such experienced business men as Phillip Mills and Niki Mills were unaware of their obligations towards their employees. I consider the breach was not inadvertent. In addition, there has been no remorse expressed by CEL. To the contrary, until almost the eve of the investigation meeting CEL continued to insist that Mr Jones was not an employee.

[189] One purpose of the imposition of a penalty is to deter CEL in particular and other employers more generally from their failure to meet statutory requirements. I consider there is both a specific and a general need for deterrence in this case and that a penalty should be imposed.

[190] In all circumstances, bearing in mind that the top of the penalty range is $20,000, I consider a penalty of $5,000 is reasonable. The penalty must be paid to the Authority for the benefit of the Crown. I do not consider that it should be paid to Mr Jones as its purpose is not to compensate him but to punish CEL.

Costs

[191] Costs are reserved. The unsuccessful party can usually expect to pay a reasonable contribution towards the successful party's costs.

[192] The parties are invited to agree on the matter. In order to assist the parties I can indicate that the Authority is likely to adopt its notional daily tariff based approach to costs. The daily tariff is $3,500.

[193] If no agreement is reached any party seeking costs shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have 14 days from the date of receipt of the memorandum in which to file and serve a memorandum in reply. The parties should identify any factors which they say should result in an adjustment to the notional daily tariff.

Christine Hickey
Member of the Employment Relations Authority