

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 106/07
5048373

BETWEEN TRACY WILLIAMS
Applicant

AND NAPIER MOTORS LIMITED
TRADING AS DUNEDIN
CITY FORD
Respondent

Member of Authority: James Crichton

Representatives: Christine French, Counsel for Applicant
David Robinson, Counsel for Respondent

Investigation Meeting: 8 and 9 May and 12 June 2007 at Dunedin

Determination: 19 September 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Williams) claims a personal grievance as a consequence of workplace stress because of the failure by the respondent employer Napier Motors Limited (Dunedin City Ford) to provide her with a safe workplace.

[2] Dunedin City Ford resists these claims and contends that at all times Ms Williams was treated fairly and properly.

[3] The parties attended mediation but were unable to resolve their differences in that forum and accordingly the matter came to the Authority for resolution of the employment relationship problem.

[4] Ms Williams was employed as a sales representative selling new cars with Dunedin City Ford. She joined the firm on 22 April 2002 and, with the exception of a

resignation which was not accepted in August of 2002, the relationship between the parties seems to have been stable enough until the middle of 2005.

[5] In April 2005, Mr Keith Kippenberger joined Dunedin City Ford as new vehicle sales manager. In that capacity, he was Ms Williams' immediate superior. He replaced Mr Robert Bain who Ms Williams appeared to have a good working relationship with. Mr Bain is now the dealer principal of Dunedin City Ford but was not dealer principal at the time that Ms Williams was employed with the firm.

[6] On 1 June 2005, Ms Williams entered Mr Kippenberger's office and saw a fellow new car salesperson, Mr Jeff McKeitch, viewing a pornographic image on Mr Kippenberger's computer. A copy of the image (or more correctly, an example of the image viewed) was made available to the Authority by a process which I will describe later. Suffice it to say that the image is of a naked woman.

[7] It seems to be common ground that Ms Williams was shocked and upset by the image and the fact that Mr McKeitch was viewing it. She complained to Mr Kippenberger who she alleges said that he would deal with it. Ms Williams' evidence is that she saw no results from Mr Kippenberger's activities and accordingly she elevated her complaint to the then dealer principal, Mr Roger Taylor.

[8] Mr Taylor told Ms Williams that he had referred the matter to Mr Kippenberger and told him to deal with it. Mr McKeitch eventually gave Ms Williams a three line written apology which according to Dunedin City Ford he had been told to give to Ms Williams.

[9] Of more concern to Ms Williams it seems was Mr Kippenberger's assurance that there would be no more pornography in the office. In her written brief of evidence, Ms Williams expresses the view that she thought there would be *some follow up* when the dealer principal, Mr Taylor, returned from a trip to Australia after the apology had been presented. However, she records that *there was none* and that *the matter was forgotten*.

[10] When I questioned her about what more she expected from Dunedin City Ford, she told me that in fact she was *satisfied* and that *as far as I was concerned it was finished*.

[11] Barely three days later, on 4 June 2005, there was another incident involving pornography.

[12] What happened on this occasion was that Mr McKeitch produced a hard copy pornographic image in the workplace and, amongst other things, showed it to Mr Kippenberger who looked at it, at least to the extent of establishing what it was, and told Mr McKeitch to put the image back in his briefcase. According to Mr Kippenberger he witnessed Mr McKeitch do precisely that.

[13] Ms Williams says that she protested about this incident to Mr Kippenberger and he agrees she did. There is disagreement about the language that was used in that exchange and the timing of it but there is no doubt that Mr Kippenberger received Ms Williams' objection to the fact of the image of a naked woman being in the workplace.

[14] It is clear that Ms Williams took no further steps to notify the dealer principal, Mr Taylor, of this latest incident although her evidence is that she did not consider that Mr Kippenberger did anything about the second incident.

[15] Ms Williams then proceeded to collect pornographic images from the workplace, principally from Mr Kippenberger's computer. She also took the opportunity of obtaining a copy of the image which Mr McKeitch had brought in via hard copy into the workplace. Ms Williams says that she found this on Mr McKeitch's desk. Mr McKeitch, and several other Dunedin City Ford witnesses are equally clear that the image in fact had been returned to his personal briefcase and Ms Williams must have taken it from there to photocopy.

[16] Ms Williams' next referred to a number of incidents in which she says she was *isolated and/or marginalised* by her work colleagues in a number of particular respects. She refers to her inability to access tickets to an All Blacks game at Carisbrook noting that her colleagues received tickets when she did not.

[17] Then she refers to problems in the payment of commissions which she claimed in respect of deals with Sunnyvale Contractors and KB Contractors.

[18] There was a problem with the sale of a vehicle to a client, Graeme Hardy, which resulted in Ms Williams being criticised by management of Dunedin City Ford.

[19] Then Ms Williams refers to an argument about salespeople attending the various A&P shows around the Otago district. Ms Williams says that she was not permitted to attend the Wanaka show.

[20] Ms Williams complains about a disciplinary meeting which she attended, the principal thrust of which was that there had been a drop off in sales in the period immediately prior to the meeting occurring and Ms Williams' sales decline was a particular subset of that drop off of sales. Dunedin City Ford sought to address that issue and that was the purpose of the meeting. Ms Williams says she was *singled out* because other sales people also did poorly.

[21] The incident which led to Ms Williams leaving the workplace on sick leave was an allegation of bullying by Mr McKeitch. Essentially, Ms Williams' evidence was that she had dealt with a client who had previously been a client of Mr McKeitch's, Mr McKeitch became angry and excited about this and there were various shouting matches. Ms Williams says in effect that by Dunedin City Ford failing to support her, it effectively condoned Mr McKeitch's bullying behaviour. Ms Williams left the workplace on long term sick leave on 21 June 2006 and never returned. She was dismissed from her employment some months later on the grounds of serious incapacity.

[22] Finally, and emerging out of correspondence between solicitors acting for Ms Williams and Dunedin City Ford there is an allegation that Ms Williams was sexually harassed by Mr Kippenberger at a golf match on 11 December 2005 when it is alleged that Mr Kippenberger grabbed Ms Williams' breast *sneakily*. Ms Williams left the function immediately but the matter was not raised by her at all until 31 July 2006 by correspondence from her lawyer to the employer.

Issues

[23] It will be helpful to analyse the factual matrix by looking at each of the incidents on which the applicant relies, in turn. To that end, I intend to look at the first pornographic incident, the second pornographic incident, the issue of the All Blacks ticket, the claim of a failure to pay commission due and owing, the vehicle sale to Graeme Hardy, the Wanaka show, the disciplinary proceedings, the alleged bullying by Mr McKeitch, the sexual harassment claim, and finally the circumstances of the dismissal.

The first pornographic incident

[24] As I have mentioned, on 1 June 2005 Ms Williams walked into Mr Kippenberger's office and saw a fellow salesperson, Mr McKeitch, viewing a pornographic image of a naked woman on Mr Kippenberger's computer. Her evidence, which is accepted by Dunedin City Ford, was that she was shocked and upset by this and she raised the matter with Mr Kippenberger who undertook to deal with it.

[25] Ms Williams saw no evidence of that and so she escalated her concern by talking to the dealer principal, Mr Roger Taylor.

[26] When she subsequently followed the matter up with Mr Taylor, she extracted from him the observation that he had referred the matter back to Mr Kippenberger to deal with.

[27] Subsequently, Mr Kippenberger spoke with Ms Williams, indicated to her that Mr McKeitch was extremely embarrassed and arranged for Mr McKeitch to provide Ms Williams with a written apology.

[28] As I mentioned earlier, despite Ms Williams' comments in her brief of evidence where she says that she expected more of the employer and in particular of Mr Taylor, the dealer principal, when he returned from a trip overseas after the incident, when pressed by me in oral evidence at the investigation meeting, she accepted that she was *satisfied* by the response of Dunedin City Ford and she said that as far as she was concerned, *it was finished*.

[29] That being the position, it seems to me inconceivable that there can be any complaint by Ms Williams about this first incident. She herself told me that she was satisfied with the result and it is plain that the employer dealt with it reasonably promptly. It seems axiomatic that if the matter had rested there, Ms Williams might still be in her position of employment and the Authority might not have been considering her employment relationship problem.

The incident on 4 June 2005

[30] Ms Williams' evidence is that on 4 June 2005 she saw her work colleague, Mr Jeff McKeitch, with a hard copy image of a naked woman. Ms Williams contends that the woman in the picture looked like her.

[31] She says that Mr McKeitch walked with the image from his office to Mr Steve Simpson's office where Mr Simpson and Mr Kippenberger were both present and that the three men *looked at it and laughed*.

[32] Ms Williams felt *dumbfounded and angry* and describes feeling *marginalised* in that her complaints about pornography were not being taken seriously.

[33] Ms Williams says that the hard copy image that she refers to was put down by Mr McKeitch on his desk amongst other papers and that later that day Ms Williams went to Mr McKeitch's desk, found the image and made a photocopy of it which she retained.

[34] Ms Williams says that she raised the matter with her immediate manager, Mr Kippenberger, but after prevaricating he undertook to do something about it but that *nothing happened*. She said she *thought she was doing the right thing* by raising it with her immediate manager. However, Ms Williams took no further steps in relation to this particular matter and in particular did not refer her complaint to the dealer principal.

[35] Mr Kippenberger's version of these events is quite different. He denies that Mr Simpson was in any way involved except to the extent that Mr McKeitch showed the offending image to Mr Kippenberger in Mr Simpson's office but both Mr Simpson's evidence and Mr Kippenberger's evidence is that Mr Simpson did not see the image.

[36] Further, Mr Kippenberger says that he only saw a part of the image and that, once he realised what the image contained, he immediately closed the folded paper, gave it back to Mr McKeitch, told Mr McKeitch to put it back in his briefcase and not bring *such material to the workplace*.

[37] Mr Kippenberger says that Ms Williams confronted him immediately and asked him what he was going to do about it and there was an intemperate exchange which ended with her saying to him *you all stick together don't you*.

[38] Mr Kippenberger said that that was the only occasion that Ms Williams raised the matter with him and that he had never said to Ms Williams that he would deal with it as she alleges.

[39] Further, there is dispute about whether Mr McKeitch placed the offending image back on his desk amongst his papers from whence Ms Williams removed it to make a photocopy of it. Mr McKeitch's evidence is that he put the image back in his briefcase and Mr Kippenberger says in his evidence that he *saw him* (Mr McKeitch) *place the image back in his briefcase*. Further, Ms Paulette Wilson gave evidence for Dunedin City Ford that she had seen Ms Williams remove an item from Mr McKeitch's briefcase and that in doing so Ms Williams had said to her *you haven't seen anything*.

[40] There is no question that Ms Williams obtained a copy of the image. She produced it at the investigation meeting. The question is where did she obtain it from? If she obtained it by rummaging through the papers on Mr McKeitch's desk and removing the original from that source to photocopy it, that may be seen by Dunedin City Ford as being an inappropriate action, but rummaging through a work mate's briefcase for the same purpose must be seen, and indeed is seen by Dunedin City Ford, as an even more culpable action.

[41] It is necessary for the Authority to make some findings of fact in relation to this episode. The first question to be addressed is whether Ms Williams took proper steps to alert the employer to this second pornography incident. I am satisfied on the balance of probabilities that she did. Dunedin City Ford relies on the fact that Ms Williams did not escalate her complaint to the dealer principal, Mr Roger Taylor. I do not accept that submission. In my view, Ms Williams has fulfilled her obligations by referring the matter to her manager.

[42] By Mr Kippenberger's own direct evidence, there was a discussion between himself and Ms Williams about this hard copy pornography image, although he denies that Ms Williams asked him to deal with the matter. Whatever words Ms Williams used, Mr Kippenberger cannot reasonably claim that he was unaware of the issue;

even by his own admission Mr Kippenberger knew that Ms Williams was unimpressed by this second outbreak of pornography in almost as many days.

[43] In the context of a very recent complaint from Ms Williams about the pornography on Mr Kippenberger's personal computer, it seems frankly extraordinary for Dunedin City Ford to claim that there was any misunderstanding about Ms Williams' views on this second pornography incident. Accordingly, I am satisfied on the balance of probabilities that Ms Williams made her views known to her immediate manager, Mr Kippenberger, and that he knew or ought to have known that it was appropriate for him to respond positively to the objection and deal with it. This is particularly the case given that a matter of days before there had been another pornography incident which Ms Williams had also complained about and which she herself acknowledges had been properly dealt with.

[44] The next finding of fact that I need to address is the question of where the image was when Ms Williams removed it for the purpose of copying it. I am satisfied that on the basis of the evidence I heard, Ms Williams is mistaken when she said the image was on Mr McKeitch's desk and that in fact the image was in Mr McKeitch's briefcase as he claims, as Mr Kippenberger claims and as Ms Wilson's evidence also points to.

[45] I agree with Dunedin City Ford that it was inappropriate of Ms Williams to open a work colleague's private briefcase and rummage through it looking for an offending pornographic image. I do not accept Ms Williams' claim that she had Mr McKeitch's tacit permission to open his briefcase and remove the daily newspaper from it and that in consequence she could extend that tacit permission and open his briefcase for other purposes.

[46] Nor do I think it reflects well on Ms Williams that, instead of placing the matter firmly in the hands of the dealer principal (which she should have done if she had any concern about the unwillingness or inability of Mr Kippenberger to deal with the matter), she rummages through a work mate's briefcase in order that she can make a copy of an offending image to use at some later date, presumably when she decided to engage formally with the employer on the issue.

[47] In my judgment, it is not the job of an aggrieved party in matters of this kind to set about collecting evidence of the matters complained of. Rather, Ms Williams

should have put the matter in the hands of the dealer principal, if she had concerns about Mr Kippenberger's performance, and required an appropriate resolution from that source. The fact that Ms Williams has managed to collect a copy of the offending image using an improper process really does nothing to advance her position. At no stage did she put that image (and the numerous other images that she collected from Mr Kippenberger's computer) before the dealer principal to give him an opportunity to appropriately deal with the problem. Dunedin City Ford is entitled to say, as indeed it does, that the collection of this material breached the privacy of some employees, the internal office protocols of the employer in other instances, and that as the documents were never provided to Dunedin City Ford for its appropriate action, it is difficult for it to respond in a proper way.

[48] Having said all that, I must emphasise that my objection to Ms Williams' conduct is about her willingness to engage in the improper collection of material. I agree with Dunedin City Ford that that collection of information and material was not a proper one in all the circumstances.

[49] However, the fact remains that I am satisfied Ms Williams did raise this second issue with her immediate superior, Mr Kippenberger, that he knew or ought to have known, whatever words she used, that it was his obligation to deal appropriately with the matter, particularly in the light of the earlier incident and that he failed absolutely to deal with the issue in a proper fashion.

[50] I am absolutely persuaded that Ms Williams was not provided with a safe and secure workplace free of avoidable harm as a consequence of this failure by the employer to deal with the second pornographic issue coming so quickly on the heels of the first incident. It follows that I accept Ms Williams' contention that she has suffered disadvantage in her workplace as a consequence of an unjustifiable action (or perhaps more accurately inaction or series of inactions), on the part of her employer, Dunedin City Ford.

[51] I also accept that the fact of the second image coming so soon after the first image which by Ms Williams' own evidence she thought had been dealt with and put behind her, caused significant distress and that she is entitled to compensation.

All Blacks tickets

[52] Ms Williams says that she was *isolated and/or marginalised* by her work colleagues after the two pornographic incidents.

[53] A particular example of the conduct that Ms Williams complained about was her belief that she had not received an allocation of tickets to an All Black game at Carisbrook. Her brief of evidence claimed that other sales staff did receive allocations and therefore she was effectively discriminated against. However in her oral evidence she agreed that three of the five sales staff did not receive tickets. Mr Taylor, the dealer principal, said that two of the five sales staff did not attend.

[54] Dunedin City Ford was very clear in the evidence from its witnesses that there was no hard and fast rule that any particular employee would receive tickets, that the firm had received its usual allocation, had allocated them in the usual fashion and that the end result of that process was that a significant number of staff across the whole business who would like to have gone to the match were not able to go on Dunedin City Ford tickets.

[55] The contention Ms Williams made in her evidence that she was somehow being singled out was absolutely rejected. Dunedin City Ford indicated that it had a particular process for allocation which relied on giving priority to important clients of the business and to try and get a reasonable and fair spread amongst the staff.

[56] I am not satisfied that Ms Williams has made out her claim for any discriminatory treatment in relation to the issue of the allocation of All Black tickets. Some staff received tickets and some did not and there is no apparent pattern, in my view, which would support Ms Williams' contention that she was being unfairly or unjustly treated.

Failure to pay commission

[57] Again, Ms Williams cites this issue as evidence for the view that she has been isolated and marginalised by her senior colleagues at Dunedin City Ford.

[58] Robert Bain for Dunedin City Ford, on the other hand, says that arguments about commissions are endemic in the motor industry and stem particularly from disputes between salespeople about who was actually entitled to the commission that is to be payable.

[59] The first of these two *commission* incidents involves Sunnyvale Contractors. Ms Williams says she *arranged* a purchase but that is not the case at all; she started to arrange a purchase, gave the customer a new demonstrator vehicle to try, the customer returned, said he could not afford it and was referred to used vehicle sales.

[60] At this point, the liability for the payment of commission moves with the sale from new vehicles to used vehicles. When the customer purchased a second hand vehicle, the second hand salesperson received the commission.

[61] The fact that the sales documentation appears to support Ms Williams' claim for commission just confirms that the documentation is in error; there is no entitlement to commission for sales a salesperson has not made and longstanding custom and practice validates the transfer of the commission from one salesperson to another in these circumstances.

[62] The second *commission* matter involves a sale to KB Contractors. Here it is common ground that Ms Williams made the relevant sale but, according to Dunedin City Ford, was denied the commission because the client was a relative of a staff member and thus qualified for being treated as part of the staff purchase scheme which does not attract commission.

[63] Ms Williams points out that the scheme specifically requires purchases under this scheme to be for private use and she says this was not. Mr Kippenberger says the deal qualified for inclusion in the staff purchase scheme.

[64] I accept Dunedin City Ford's submissions that it is available to the employer to make final decisions about commission disputes. I do not find the allegation of unpaid commissions supports Ms Williams' claim of isolation or marginalisation.

The sale to Graeme Hardy

[65] Mr Hardy was a longstanding client of Dunedin City Ford. He emailed Ms Williams and sought proposals which would enable him to *downsize* his vehicle.

[66] Ms Williams sought to respond appropriately to Mr Hardy but was unable to conclude the arrangements because she fell ill at a critical time. She left the transaction in the hands of a colleague, Mr Buchanan.

[67] When Ms Williams returned to the workplace after a short period of sick leave, the deal had been taken over by Mr Simpson, the used vehicle sales manager, who sold Mr Hardy a second hand vehicle rather than the new vehicle Ms Williams had proposed to sell him.

[68] In the course of the actual transaction, Ms Williams alleges that Mr Simpson *humiliated* her in front of the client. Mr Simpson acknowledged that he did make negative observations but not just about Ms Williams but also about Mr Buchanan. Mr Simpson's evidence was that neither Ms Williams nor Mr Buchanan were *listening* to Mr Hardy and his needs and he meant no *offence* by his observations but that they needed to know *that the customer felt let down by them*.

[69] Later there was a meeting to discuss the issue and the evidence suggests that Mr Buchanan and Ms Williams were both rebuked for failing to acknowledge the client's needs. Mr Buchanan (who did not give evidence at the Authority investigation), seems to have accepted the rebuke; Ms Williams did not.

[70] On the evidence that I heard, I am not persuaded that Ms Williams has made out her claim that this incident *marginalised or isolated* her from her colleagues. Mr Simpson may have expressed himself bluntly, but his management role entitled him to remonstrate with both Ms Williams and Mr Buchanan on the footing that they had failed to satisfactorily identify the client's needs and then deliver on those needs.

[71] I am particularly drawn to this conclusion by the fact that the evidence clearly supports Dunedin City Ford's view that both Mr Buchanan and Ms Williams were being criticised and they were being criticised because Dunedin City Ford formed the view that they had made a mess of a particular transaction which, but for the intervention of Mr Simpson, might have resulted in Dunedin City Ford losing a valued client. In those circumstances, it is difficult to see what else Dunedin City Ford could have done. Perhaps Mr Simpson was too blunt; I am certainly not going to base findings of fault against Dunedin City Ford on the manner of speaking of a member of the management team. Certainly in giving his evidence, Mr Simpson seemed to have a straightforward way of expressing himself and it may be that he was a little discourteous in making the observations he did in front of a client. However, as is clear from the case law, that is not enough to ground a finding of fault against the employer.

The Wanaka show

[72] Again, Ms Williams cites this dispute as evidence for her view that she was isolated and/or marginalised by her senior colleagues. Like a number of other major motor vehicle franchises, Dunedin City Ford had a longstanding policy of attending the rural A&P shows in the Otago province for the purpose of showing off their product range.

[73] There had been, according to the evidence I heard, a longstanding policy of allocating those shows to particular salespeople and Ms Williams had always attended the Lawrence show. This was because the timing of the Lawrence show in the week fitted in with her own personal needs; it was during the working week, not the weekend .

[74] However, in 2006, Ms Williams discovered that her husband would be attending the Wanaka show himself as part of his job requirements and she sought to vary the arrangements so that she could attend the Wanaka show as well on behalf of Dunedin City Ford. It seems from Mr Taylor's evidence (which I accept on the point) that the request was made at the last minute, that had it been made earlier granting the request may have been *an option*. The suggestion that Ms Williams attend the Wanaka show was not adopted by Dunedin City Ford and Ms Williams alleges that that failure by Dunedin City Ford to accept her proposal constitutes an example of isolation and/or marginalisation.

[75] I do not accept that contention. Dunedin City Ford is entitled to reach the conclusion that it did in relation to the allocation of salespeople to the various shows. It is under no obligation, in my view, to change the longstanding practice. I accept Mr Taylor's evidence that Ms Williams may not *pick and choose* which show she will attend.

[76] Certainly it would be wrong for Dunedin City Ford to reject Ms Williams' request out of hand but the evidence does not suggest it did that; the evidence is it considered her request but decided that the arrangements in place ought to be persevered with. It follows that I do not accept Ms Williams' contention that this is an example of isolation and/or marginalisation.

The disciplinary meeting

[77] This meeting took place in April 2006 and was called by Dunedin City Ford to discuss with Ms Williams the drop off in her sales performance. As I noted earlier in this determination, Ms Williams' poor sales performance was in effect a subset of a poor trading period for the whole firm, but Dunedin City Ford's evidence was that Ms Williams' performance in selling during the period in question was particularly problematic for it.

[78] Ms Williams complains about the process adopted by Dunedin City Ford in convening this meeting, and rightly so; it is unsatisfactory. To be fair to Dunedin City Ford, during the course of my investigation meeting, it readily acknowledged that the procedure it adopted was unfair and potentially unjust to Ms Williams.

[79] The subject matter of this meeting was wider than Dunedin City Ford had originally contemplated. Its purpose in calling the meeting was clearly to discuss Ms Williams' sales performance. The effect of that discussion, which Ms Williams readily acknowledged, was that her sales performance improved dramatically immediately after the meeting.

[80] However, Ms Williams also used the subject meeting to raise the first pornography issue but not the second. In the course of commenting on the first issue, Ms Williams advanced the view that Mr McKeitch ought to have been dismissed.

[81] Understandably, Dunedin City Ford emphasised the fact that Ms Williams did not raise the second pornography issue during this meeting. She said that it did not occur to her. In the circumstances, that is somewhat surprising. Clearly the matter was of concern to her at the time and, on her own evidence, she was dissatisfied with Dunedin City Ford's response.

[82] So, in addition to not taking the matter up with the dealer principal, which she had done in relation to the first incident, she also did not take a subsequent opportunity to raise the matter afresh in a *controlled* environment.

[83] The final subject matter that seems to have been traversed at this meeting was a suggestion that Ms Williams' hours of work changed. The question of who raised the hours matter is in dispute. Ms Williams' evidence is that Mr Taylor effectively

took advantage of something she said. Mr Taylor says that Ms Williams *was the one that raised hours*.

[84] Dunedin City Ford says that it was simply exploring that as an option; Ms Williams says that she felt pressured to change her hours in circumstances where the proposed change could not meet her family's needs.

[85] I am satisfied on the balance of probabilities that the meeting in question was procedurally unfair to Ms Williams and that in consequence it must be factored in to my wider consideration of Ms Williams' personal grievance by reason of an unjustified action or series of actions causing disadvantage.

[86] However, of equal significance, in my judgment, is a consideration of the various issues that were traversed at the meeting. The purpose of the meeting was to discuss declining sales and that seems to have been addressed appropriately and, by Ms Williams' own admission, resulted in her sales improving dramatically.

[87] Ms Williams took the opportunity to make some comments about the first pornography incident but, surprisingly, at no stage mentioned the second incident which she says she was unhappy with the handling of. It is difficult to explain why Ms Williams would not use this opportunity to advance her case.

[88] Finally, I am not persuaded that Dunedin City Ford did anything improper in relation to the hours of work issue.

[89] The evidence disclosed no improper pressure on Ms Williams to change her hours of work; I accept Dunedin City Ford's view that it simply sought to explore a possibility and nothing more.

The bullying allegation

[90] Ms Williams says that she dealt with a client who had previously been a client of her colleague, Mr McKeitch, that Mr McKeitch discovered this, became excited and angry and there were various intemperate exchanges between the parties. Ms Williams says that she left the workplace for the last time as a consequence of a perception that Dunedin City Ford was failing to support her and to deal with Mr McKeitch's bullying behaviour.

[91] I am not persuaded of this claim. The evidence is clear that the dealer principal, Mr Roger Taylor, rang Ms Williams shortly after her departure from the workplace on 21 June 2006 and a transcript of that telephone discussion, together with the tape from which it comes, has been made available to the Authority. That transcript, in my opinion, clearly discloses that Mr Taylor actively sought to engage with Ms Williams and to deal with her concerns. Furthermore, the transcript does not suggest that Ms Williams was so incapacitated by recent events as to not be able to engage with Mr Taylor.

[92] It follows that I think Ms Williams had a reasonable and genuine opportunity to engage with Dunedin City Ford and jointly identify how her concerns were to be addressed and she failed absolutely to do that. I do not think that Dunedin City Ford could be expected to take any further steps in the absence of any willingness by Ms Williams to engage with them.

Sexual harassment claim

[93] Ms Williams alleges that at a golf match on 11 December 2005 Mr Kippenberger grabbed her breast *sneakily*. The allegation was not raised at the time of the alleged incident and in fact was not put to the employer until a letter dated 31 July 2006 from Ms Williams' then legal representative.

[94] As soon as the issue was raised (which as I note was after Ms Williams' left the workplace on sick leave never to return), Dunedin City Ford proceeded to investigate the allegation, which Mr Kippenberger vehemently denied, and the allegation was found not to be made out.

[95] I am satisfied on the balance of probabilities that that inquiry was a proper one and that its findings were consistent with the known facts. Mr Kippenberger has a damaged hand and given the evidence before the investigation meeting as to which hand would allegedly have been used in the assault by Mr Kippenberger, I am satisfied that it is unlikely that Mr Kippenberger was indeed the assailant.

[96] I accept that there may have been an assault as Ms Williams describes, but I think it unlikely that Mr Kippenberger was the assailant.

[97] I am satisfied then that the result of the employer's investigation is credible. That view gains support by reference to the fact that Ms Williams did not raise the issue at the time and indeed did not raise it at all during the course of the employment.

The dismissal

[98] Ms Williams was dismissed from her employment by letter dated 7 November 2006 on the ground of incapacity.

[99] At the time that she was dismissed, she had been on sick leave for more than four months and there was no realistic prospect, in the foreseeable future, that she would be able to return to the workplace given the fact that the issues which were the subject of these proceedings at that point remained unresolved.

[100] Ms Williams does not complain that she was unjustifiably dismissed except to the extent that the fact of her dismissal was a consequence, she says, of the longstanding failure of Dunedin City Ford to properly deal with the issues that arose in the employment relationship between her and Dunedin City Ford.

[101] It follows that there is no argument about the process of the dismissal, nor indeed the substance of it (clearly she was unwell and unable to return to the workplace), but the fact of the dismissal is, in Ms Williams' submission, a consequence of the successive and collective failures of Dunedin City Ford.

[102] That being the position, it is not necessary for the Authority to make any particular findings in relation to the dismissal; the summation of the issues which go to Ms Williams' disadvantage claim will decide the issue.

Determination

[103] I am satisfied on the balance of probabilities that Ms Williams has made out her personal grievance at least to the extent that the employer has breached its obligation to provide her with a safe workplace free of offensive pornographic images.

[104] In relation to the first pornographic issue, there can be no question of Ms Williams not having behaved entirely properly; she raised the matter with her immediate superior, was unhappy with the progress that he was making, and then

raised the matter with the dealer principal who, seized of it, dealt with it, by Ms Williams' own admission, in a reasonably satisfactory way.

[105] However, the underlying issue which Ms Williams draws attention to in her statement of problem is the contention that there was a culture in the workplace which was supportive of pornographic material and antithetical to her enthusiasm for stamping it out. I think the facts support Ms Williams' contention.

[106] However, the question of contribution must arise in relation to the second pornographic issue. In this case, Ms Williams simply referred it to her immediate superior, Mr Kippenberger, and then took no further steps. Indeed there is dispute about exactly what steps she took in bringing the matter to Mr Kippenberger's attention. Certainly it is true to say that she took no further steps and did not for instance refer the matter to the dealer principal, nor did she take the opportunity to raise the matter at the disciplinary meeting which followed some months after the second pornographic incident.

[107] Further, I need to consider whether Ms Williams' behaviour in collecting pornographic images and not making them available to her employer but retaining them for the purpose of these proceedings is, in itself, a contributory factor.

[108] Certainly Dunedin City Ford takes the view that Ms Williams behaved improperly in accessing its computer network for the purposes of downloading pornographic images which by Dunedin City Ford's own admission ought not to have been on its computer system.

[109] In the end, given that the material in question was on Dunedin City Ford's own computer system and in breach of Dunedin City Ford's own policy, it is difficult to make a finding of contribution against Ms Williams as in effect both parties are in the wrong. Ms Williams could only be said to have contributed to her own misfortunes to the extent that material which plainly was in breach of Dunedin City Ford's own policy and procedures was stored on its equipment. Accordingly, I make no finding of contribution in relation to Ms Williams' collection of those images, although undoubtedly as I have already said, she behaved improperly in collecting them.

[110] There is, however, a finding that Ms Williams contributed to the second pornographic issue by not upgrading her complaint to the dealer principal when she

was dissatisfied with Mr Kippenberger's performance. I do not think this is a major contribution to matters. The major failing was the employer's in failing to deal properly with grossly offensive pornographic material in the workplace. I allow for this modest contribution in the awards I now make.

[111] The rest of Ms Williams' claim, as I have analysed it in this determination, does not persuade me that anything further can be added to Dunedin City Ford's culpability except in regard to the acknowledged failure of Dunedin City Ford in running an unfair disciplinary meeting which impacted negatively on Ms Williams. However, while I have taken that fact into account in the awards I have made, I do note that Ms Williams used that very forum to advance her own issues, and properly so. That being the position, the damage which might otherwise have been done by the default of Dunedin City Ford was to a real extent mitigated.

[112] Ms Williams has not satisfied me that the behaviour of her colleagues was sufficient to isolate and marginalise her, nor do I accept that the employer behaved improperly in investigating the alleged sexual assault on Ms Williams nor do I consider that any further damages flow from Dunedin City Ford's decision to terminate Ms Williams' employment for incapacity.

[113] I award Ms Williams the sum of \$7,500 as compensation under s.123(1)(c)(i) of the Employment Relations Act 2000, taking into account the factors I refer to above.

[114] Ms Williams is entitled to a contribution to her wages loss as a consequence of the end of her employment at Dunedin City Ford which I attribute wholly to the trauma originally created by the two pornographic issues and I think a contribution by Dunedin City Ford in the sum of \$10,000 gross would be just in all the circumstances, representing a conservative calculation of three months' lost salary.

Costs

[115] Costs are reserved.