

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 430
5376849

BETWEEN
GRAEME ALLAN
Applicant

A N D
MOBILE SHOP LIMITED
First Respondent

SUNY MANAGEMENT
LIMITED
Second Respondent

Member of Authority: Rachel Larmer

Representatives: Mark Donovan, Counsel for Applicant
Andrew Steele, Counsel for Respondents

Investigation Meeting: 12 September 2012 at Auckland

Submissions Received: 14 September 2012 from Applicant
28 September 2012 from Applicant
21 September 2012 from Respondent

Date of Determination: 30 November 2012

DETERMINATION OF THE AUTHORITY

- A. Mr Allan was initially employed by Mobile Shop Limited (Mobile Shop) and then subsequently concurrently employed by Suny Management Limited (Suny).
- B. Mobile Shop and Suny Management Limited jointly and severally dismissed Mr Allan on 03 November 2011.
- C. Mobile Shop's dismissal of Mr Allan was unjustified.
- D. Mobile Shop is ordered to pay Mr Allan:
- (i) Three months' lost remuneration;

(ii) \$1,150 lost benefits

(iii) \$6,000 distress compensation.

E. Mobile Shop is ordered to pay Mr Allan 5% interest on his lost wages from 01 February 2012 until that amount has been paid in full.

F. Suny breached the requirements of s.63A(2) of the Employment Relations Act (the Act) when bargaining for Mr Allan's individual employment agreement.

G. As a remedy for the unfair bargaining claim, the Authority is considering varying Mr Allan's agreement to remove the trial period provision. It therefore:

(i) under s.164(a)(i) of the Act identifies that unfair bargaining is a problem in relation to Mr Allan's employment agreement with Suny; and

(ii) under s.164(a)(ii) of the Act it directs Mr Allan and Suny to mediation to occur within 28 days of the date of this determination to attempt in good faith to resolve the unfair bargaining problem.

H. If the parties do not resolve the unfair bargaining problem then the Authority will have to determine a remedy for it. In which case Suny and Mr Allan have 14 days from the date of mediation to file submissions on whether or not the trial period provision should be struck out of the agreement under s.164 of the Act.

I. Suny's breach of s.63A(2) of the Act also:

(i) breached its good faith obligations under s.4(1A)(b) of the Act;

(ii) breached the implied term in Mr Allan's employment agreement that it would act fairly and reasonably towards him;



(iii) unjustifiably disadvantaged Mr Allan in his employment.

J. The Authority has not determined remedies for the above three claims pending the outcome of the s.164 process in the Act.

K. On the face of it, the trial period provision in Mr Allan's employment agreement with Suny prevents him from bringing a dismissal grievance. However, if the remedy for the unfair bargaining claim is removal of the trial period provision from Mr Allan's agreement, then he will be entitled to proceed with his dismissal grievance.

L. Mr Allan's claim that Suny unjustifiably dismissed him has not yet been finally determined pending the outcome of the s.164 process in the Act. However, if the trial period provision is struck out, then Suny will be found to have unjustifiably dismissed Mr Allan.

M. Mr Allan's claim against Suny for pay in lieu of contractual notice has not yet been determined pending the outcome of the s.164 process in the Act. Mr Allan's claim for payment of notice from Mobile Shop does not succeed.

N. Mobile Shop and Suny jointly and severally unjustifiably disadvantaged Mr Allan in his employment when they advertised for a replacement for his role before they informed him of his dismissal.

O. Mobile Shop and Suny are jointly and severally ordered to pay Mr Allan \$1,500 to compensate for the humiliation, loss of dignity and injury to feeling this unjustified disadvantage caused him.

P. Mobile Shop and Suny jointly and severally breached their good faith obligations under s.4(1A)(b) of the Act by advertising for a replacement for Mr Allan's role before he was notified of his dismissal.

Q. No penalty is imposed for this breach of good faith because the requirements of s.4A of the Act are not met.



R. Mobile Shop and Sunny jointly and severally breached an implied term of Mr Allan's employment to act fairly and reasonably towards him when they advertised his role before notifying him of his dismissal.

S. No penalty for this breach of Mr Allen's employment agreement is imposed on Mobile Shop or Sunny because this behaviour has been adequately addressed by compensating Mr Allen for his disadvantage grievance.

Employment relationship problem

[1] Mr Allan used to own and operate a business called EXCEL8 Recruitment Limited which specialised in recruitment for sales and commission based roles. In October 2009 Mr David Sun contracted EXCEL8 to provide recruitment services to his business which sells consumer goods door to door and which trades under the name "Mobile Shop" (the business).

[2] The Mobile Shop business is comprised of two separate legal entities - Mobile Shop Limited (Mobile Shop) and Sunny Management Limited (Sunny). Both entities are owned and operated by Mr Sun who is the sole director and shareholder of both companies.

[3] Mr Sun manages the business himself so he is the legal mind of both companies. The two companies are so closely connected that Mr Sun effectively acts for both companies simultaneously when he makes decisions which relate to the business.

[4] Mr Sun admits there may be some intermingling between the liabilities of each company, for example EXCEL8 invoiced Mobile Shop although its services involved recruitment of staff who Mr Sun claims were all intended to be employed by Sunny. Mr Sun was unclear about which areas of the business were Mobile Shop's sole responsibility and which were Sunny's.

[5] Mr Sun says he split the business into two companies for "tax and business efficiency reasons" but he did not explain what those reasons were. Mr Sun says Sunny employs all staff and management and Mobile Shop operates the sales business. Mr Sun says Sunny has no assets.



[6] Mr Sun claims Mobile Shop should not be a party to these proceedings because it never employed Mr Allan. It is agreed there is no written employment agreement between Mr Allan and Mobile Shop. Mr Sun acknowledges Mr Allan was offered employment by Mobile Shop but says that was a mistake and the offer was not capable of acceptance.

[7] In August 2011 Mr Sun contacted Mr Allan to discuss major growth plans for his business and to ask for Mr Allan's help in recruiting staff, including a National Sales Manager. Mr Allen offered Mr Sun the option of contracting Mr Allan through EXCELR8 or employing him directly as a full time employee, on specified terms. On 01 September Mr Sun elected to contract Mr Allan through EXCELR8.

[8] Over the period 20 September to 14 October there were further communications about Mr Sun directly employing Mr Allan to work for Mobile Shop. This resulted in an email offer from Mr Sun to Mr Allan of employment as National Sales Manager for Mobile Shop Limited. Mr Sun says the offer should have been for employment by Suny, not Mobile Shop.

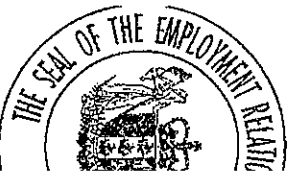
[9] Mr Sun agrees Mr Allan was employed by Suny in November as its National Sales Manager under a written employment agreement. Mr Sun says although he and Mr Allan actually signed the agreement on 02 November 2011 they agreed to date it the following day to reflect that Mr Allan's employment with Suny was not going to start until the next day.

[10] Mr Allan's employment agreement with Suny contained a 90 day trial period provision. Suny says s.67A of the Act prevents Mr Allan from bringing a dismissal grievance because he was dismissed within the 90 day trial period.

[11] Mr Allan says he accepted the offer of employment with Mobile Shop which was emailed to him on 14 October 2011. Mr Allan says he was jointly and concurrently employed by Mobile Shop and Suny. He says he started work with Suny on 02 November 2011, the same day he signed his employment agreement.

[12] Mr Allan says the trial period in his agreement does not prevent him from bringing his dismissal grievance against Suny because:

- He was dismissed outside the 90 day period;



- He was already an employee by the time he signed his employment agreement and trial period provisions only apply to new employees;

- The trial period provision in his employment agreement should be struck out because Sunny unfairly bargained with him over his employment agreement because it did not comply with the requirements in s.63A(2) of the Act.

[13] Mr Allan claims Mobile Shop and/or Sunny:

- Unjustifiably disadvantaged him in his employment;
- Unjustifiably dismissed him;
- Breached their statutory good faith obligations to him;
- Breached the implied term of his employment that as employers they would act fairly and reasonably towards him.

[14] Mr Allan claims Sunny:

- Breached his employment agreement;
- Unfairly bargained over his employment agreement;
- Dismissed him after his trial period had expired.

[15] Mr Allan seeks:

- Penalties be imposed on Mobile and Sunny for their breaches of good faith;
- Penalties be imposed on Sunny for its breach s.63A of the Act and of the implied term in his employment agreement;
- That some or all of any penalties imposed be paid to him personally, not the Crown;
- A payment in lieu of unpaid contractual notice, should the trial period not apply;

- Lost wages;
- Distress compensation for his unjustified disadvantage and unjustified dismissal claims;
- Compensation for lost benefits being loss of company vehicle and fuel costs;
- Interest on any lost wages and lost benefits.

Issues

[16] The following issues need to be determined:

- (a) Did Mobile Shop employ Mr Allan?
- (b) If so, did Mobile Shop dismiss Mr Allan?
- (c) If so, was dismissal justified?
- (d) If not, what remedies should be awarded?
- (e) Should interest be awarded on any lost wages and lost benefits Mr Allan is awarded?
- (f) Did Suny unfairly bargain with Mr Allan over the terms of his IEA?
- (g) If so, what is the appropriate remedy?
- (h) Does the trial period provision in Mr Allan's employment agreement with Suny prevent him from bringing an unjustified dismissal grievance against Suny?
- (i) If the trial period does not prevent Mr Allan from bringing a dismissal grievance, was Suny's dismissal of Mr Allan justified?
- (j) If not, what remedies should be awarded?
- (k) Did Mobile Shop and/or Suny unjustifiably disadvantage Mr Allan in his employment?
- (l) If so, what remedies should be awarded?

- (m) Did Mobile Shop and/or Suny breach their good faith obligations under the Act?
- (n) If so, should a penalty be imposed?
- (o) Did Mobile Shop and/or Suny breach an implied term of Mr Allan's employment?
- (p) If so, should a penalty be imposed?
- (q) Is Mr Allan entitled to pay in lieu of contractual notice from Mobile Shop and/or Suny?

Did Mobile Shop employ Mr Allan?

[17] Mr Sun says the offer Mobile Shop emailed Mr Allan on 14 October 2011 mistakenly referred to Mobile Shop as the prospective employer, when he intended the employer would be Suny. Mr Sun says this email was not a formal offer – it was a conditional offer which was not capable of being accepted until all of the conditions had been fulfilled. Mr Steele submits the conditions were not fulfilled so there was no offer and acceptance of employment.

[18] Mr Steele submits the “fifth condition” which stated “the job description and target details will be stated in your employment agreement” indicates the offer was “subject to a formal written contract”.

[19] No employment agreement was presented to Mr Allan until 02 November¹. Mr Steele submits Mobile Shop's conditional offer cannot have been accepted by Mr Allan until all of the conditions attached to the offer were fulfilled. He says this did not occur, so Mr Allan and Mobile Shop never entered into an employment relationship.

[20] Mr Sun says terms of employment were never settled with Mobile Shop but they were settled with Suny when Mr Allan signed an employment agreement with Suny. He says Mr Allan never did any work for Mobile Shop, nor did Mr Allan seek payment for the work he claims he did before he started employment with Suny.

¹ The employment agreement presented to Mr Allan on 02 November recorded Suny as the employer. There was no written employment agreement between Mr Allan and Mobile Shop.

[21] I find Mr Allan was employed by Mobile Shop. Whilst there is some uncertainty over the date Mr Allan started work with Mobile Shop I find he must have done so between 15 and 31 October 2011.

[22] Mr Sun and Mr Allan had agreed on the purchase of a company car for Mr Allan's use. The email offer said "[w]hen you choose to accept this offer, we will arrange a company car". Horseshoe Bush Investment Limited, of which Mr Sun is the sole director and shareholder, was invoiced on 31 October 2011 for the company vehicle Mr Allan was given to use.

[23] I consider it unlikely Mr Sun would have purchased a brand new \$45,000 vehicle, which had been selected by Mr Allan and prepared to his personal specifications, if Mr Allan had not already accepted Mobile Shop's offer of employment. Mr Sun's email said the car would be arranged once the offer had been accepted. I therefore consider Mr Allan must have accepted employment with Mobile Shop on or before 31 October 2011.

[24] The 14 October offer was not for employment with Suny. It expressly stated it was an "offer from Mobile Shop" the position offered was "National Sales Manager/NSM Mobile Shop Limited" and Mr Sun signed off the offer as "Director Mobile Shop Limited". At no point in communications between Mr Sun and Mr Allan had Suny ever been mentioned. I do not accept Mr Sun's evidence he made a mistake in his email of 14 October.

[25] The offer of 14 October was expressly stated to be a "formal offer" which was "valid for 15 days". I consider that, contrary to Mr Sun's evidence, these references indicate the offer was intended to be capable of acceptance.

[26] I find the terms of the offer were sufficiently settled to enable the parties to form an employment relationship. The following matters had all been agreed: the employing entity, position title, salary, company vehicle, possibility of a discretionary bonus, leave entitlements, and working hours. The timeframe imposed for acceptance expired 4 days before Mr Allan was given an employment agreement by Suny so I consider Mr Allan entered into two separate employment relationships which ran concurrently from 02 November 2011 until he was dismissed.

[27] I consider the core terms included in the offer of employment emailed to Mr Allan by Mobile Shop meant the offer was sufficiently certain to be capable of acceptance by him. I find as a fact that Mr Allan did accept the terms that had been offered, at which point he entered into an employment relationship with Mobile Shop.

[28] I reject Mr Steele's submission the offer was conditional on certain terms that were not fulfilled. Although the offer states it was "subject to the following terms and conditions" and then lists 5 matters, I find these were not conditions that had to be fulfilled before the offer could be accepted, rather they were instead matters to be addressed before Mr Allan actually commenced work.

[29] The first possible condition was "[Y]ou should email or submit your CV to me ASAP, so I can conduct the reference check in time". Mr Allan had already provided Mr Sun with his CV and permission to contact his referees. The second possible condition was "*You should end any business that could cause interest conflict [sic] with our company before you join us*". Mr Allan did wind up his EXCELRR8 business after receiving and accepting Mobile Shop's offer of employment.

[30] The remaining three possible conditions relate to matters Mr Allan had to do once he had started work (such as achieve certain levels of growth and maintain a good level of communication) or to documenting the employment relationship. There was no condition that the offer could not be accepted until a written employment agreement had been signed. I therefore accept Mr Allan's view that the signing of an employment agreement was a mere formality because by then he and Mobile Shop had already entered into an employment relationship.

[31] The wages payments into Mr Allan's bank account also suggest he was employed by Mobile Shop. Wages were variously recorded as "SUNNY PACIFIC IN MSL WAGES" and "DC MOBILE SHOP LTD SML". There is no express reference to Sunny Management. Sunny Pacific appears to refer to the separate entity of Sunny Pacific International Limited, of which Wei Sun is the sole director and shareholder.

Did Mobile Shop dismiss Mr Allan?

[32] Mr Sun ended Mr Allan's employment with Mobile Shop and Sunny on 31 January 2012. I find Mr Sun was acting as the agent and controlling mind of both Mobile Shop and Sunny jointly and severally when he dismissed Mr Allan. Sunny paid

Mr Allan one week's pay in lieu of notice but Mobile Shop dismissed him without notice.

Was Mobile Shop's dismissal of Mr Allan justified?

[33] Mr Sun says Mr Allan's dismissal was justified because his performance was not up to the required standard. Mr Sun's specific criticisms were Mr Allan had not built up a Business Development Team, the Auckland sales team was not performing well and a Hamilton branch had not been opened. Mr Sun says he raised these concerns with Mr Allan whose performance did not improve and who continued to fail to meet expectations, particularly in the area of staff recruitment.

[34] Justification is to be assessed in light of the s.103A justification test in the Act. This requires the Authority to determine whether "the employer's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal [...] occurred".

[35] An employer is expected to comply with all four tests in s.103A(3) of the Act. The full court of the Employment Court in *Angus and McKean v Ports of Auckland*² held failure of an employer to do so is likely to render a dismissal unjustified. The good faith obligations in s.4(1A)(c) of the Act require an employer to provide an employee whose ongoing employment may be in jeopardy with access to information relevant to the continuation of their employment and an opportunity to comment on it.

[36] I find Mobile Shop's dismissal of Mr Allan was unjustified. Mobile Shop breached its good faith obligations because it did not give Mr Allan access to information relevant to his ongoing employment or an opportunity to comment on it before he was dismissed. It also failed to meet any of the four tests in s.103A(3) of the Act which relate to well established natural justice and procedural fairness requirements.

[37] I find Mr Sun did not fairly or properly raise the alleged performance concerns with Mr Allan. The discussions Mr Sun seeks to rely on were general discussions about the progress of the business so could not reasonably have put Mr Allan on notice his employment was in jeopardy. Mr Sun did not set out clear performance expectations for Mr Allan. Nor did Mr Sun identify how Mr Allan's achievement of

his performance expectations would be objectively assessed or even when that would occur.

[38] Mr Allan was not given a reasonable opportunity to settle into his new role or to improve his performance. He was not given any documentation in support of the alleged performance concerns. He was not given prior notice of the disciplinary meeting at which he was dismissed.

[39] I find the first Mr Allan knew about any perceived deficiencies in his performance was after 5pm on Friday, 27 January 2012, which was the Auckland Anniversary weekend public holiday. This was less than one working day before his dismissal.

[40] Mr Allan was not informed the meeting at which he was dismissed would be a disciplinary meeting or that it may result in his dismissal or that he was entitled to be accompanied to the meeting by a representative. Mr Allan was not informed in advance of the meeting what Mr Sun's specific concerns were and he was not given sufficient time to prepare his response to those matters. Mr Allan also was not given any support to address the matters of alleged concern to Mr Sun.

[41] I find that Mr Allan's dismissal was procedurally unfair. The process defects were not minor and did result in substantial unfairness to Mr Allan, so s.103A(5) of the Act does not prevent me from finding his dismissal was unjustified.

[42] I also find that Mr Allan's dismissal was substantively unjustified. Mobile Shop did not have a good reason for summarily dismissing Mr Allan. Performance concerns are not capable of amounting to serious misconduct which would justify summary dismissal. An employer is required to undertake a graduated warning process before dismissing for poor performance. Mr Allan did not receive any warnings before he was dismissed.

What remedies should be awarded?

Did Mr Allan properly mitigate his loss?

[43] Mr Allan says he felt "thoroughly depressed" at the thought of going back into full time employment with the possibility of the same thing happening to him again. He says the stress of the situation he had been through caused him to think

about doing something new. Mr Allan says he believed the employment market was tight so he felt that trying a new business of his own was the answer.

[44] He says he spent most of February looking for a business and found a small shop selling clothes and bric a brac. He signed a lease on the store on 01 March 2012 with a view to turning it into an antiques store. He borrowed money from family to get started and says the business has not yet turned a profit. Mr Allan says that since his dismissal he has had no income so has been surviving on savings and a loan from family.

[45] Mr Allan says starting his own new business did not amount to a failure to mitigate his loss because it was reasonable in the circumstances. He says he did not turn down any offers of employment after his dismissal.

[46] An employee has an obligation to properly mitigate their loss. Failure to do so is likely to break the chain of causation between dismissal and a lost wages claim. Mr Allan has a highly marketable skill set which includes extensive experience in retail, sales, management and recruitment. Mr Allan had only wound up his recruitment business three months before he was dismissed. He could have restarted that business in order to mitigate his loss. Instead he elected to start a new business which did not generate any income for him.

[47] I consider Mr Allan's failure to apply for any jobs or to take other steps to earn income such as contracting out his services and/or or restarting his recruitment business breaks the chain of causation between the 7.2 months lost wages he is claiming and his dismissal.

What lost remuneration should Mr Allan be awarded?

[48] Mr Allan seeks lost wages of \$69,692.31 gross³ plus unpaid holiday pay on that amount. Mr Steele submits Mr Allan should only be awarded one or two weeks lost wages, at most. In determining how much lost wages to award I must assess how many weeks' lost wages is attributable to his dismissal.

[49] I accept Mr Allan's evidence the employment market was tight but I would expect someone with his skills, knowledge, background and experience to have been

³ Lost wages from date of dismissal to date of IM - 7.2 months x \$10,000 per month less the \$2,307.69 pay in lieu he received.



that caused his lost wages and not his dismissal. I therefore decline to award him more than three months' lost wages.

[50] Mobile Shop is ordered to pay Mr Allan three months' lost wages under s.128(2) of the Act. No deduction has been made for notice pay because Mobile Shop dismissed him without notice.

Should Mr Allan be awarded lost benefits?

[51] Mr Steele did not provide submissions on Mr Allan's claim for lost benefits.

[52] It was a contractual term of his employment that Mr Allan had full private use of a new company car worth \$45,000 and that all his fuel costs were paid by his employer. I consider these are lost benefits Mr Allan may be compensated for under s.123(1)(c)(ii) of the Act.

[53] Mr Allan claims \$5,368.03⁴ for the loss of the benefit of a company car plus \$2,560⁵ for the loss of the benefit of having his fuel costs paid. I consider this claim does not account for the fact the motor vehicle and fuel were provided predominantly for work purposes so only a small proportion of the vehicle and fuel costs would have related to Mr Allan's private use.

[54] I therefore order Mobile Shop to pay Mr Allan under s.123(1)(c)(ii) of the Act \$1,000 to compensate him for the loss of his work vehicle which he used for personal use and \$150 for the loss of having his fuel costs paid by his employer.

What distress compensation should Mr Allan be awarded?

[55] Mr Steele submits distress compensation should be limited to \$2-3,000 because Mr Allan was a robust personality who found new ways to engage himself within a week or two of dismissal.

[56] Mr Allan seeks \$20,000 distress compensation. The evidence does not support such a high award. Mr Allan did not need medical assistance. He had only been

⁴ Based on AA published average annual vehicle ownership cost of \$8,946.71 divided by 12 and multiplied by 7.2 months being the time between dismissal and the Authority's investigation.

⁵ \$80 fuel per week for 32 weeks, being the time between dismissal and the Authority's investigation.



[56] Mr Allan seeks \$20,000 distress compensation. The evidence does not support such a high award. Mr Allan did not need medical assistance. He had only been employed for three months and decided to embark on a new business venture within a month of dismissal.

[57] I accept Mr Allan was very distraught, humiliated and angry about the way Mr Sun had treated him. I also recognise Mr Allan suffered stress and viewed his dismissal as “traumatic”. Mobile Shop is ordered to pay Mr Allan \$6,000 under s.123(1)(c)(i) of the Act to compensate him for his “humiliation, loss of dignity and injury to feelings.”

Did Mr Allan contribute towards the situation which gave rise to his dismissal grievance?

[58] Mr Steele did not address the issue of contribution in his submissions.

[59] Having found that Mr Allan has a dismissal grievance, s.124 of the Act requires me to determine whether he contributed to the situation which gave rise to his grievance, and if so, to reduce remedies accordingly.

[60] Contribution denotes some blameworthy conduct by Mr Allan which has been established on the balance of probabilities. Mr Allan was able to provide credible explanations in relation to all of Mr Sun’s performance concerns as to why they were not examples of poor performance.

[61] This meant Mr Sun was unable to establish any of his performance concerns to the onus of proof which is required⁶ before I could conclude Mr Allan has engaged in blameworthy conduct. The evidence strongly suggests that the issues Mr Sun was concerned about had been caused, or at the very least significantly contributed to, by decisions Mr Sun himself had made⁷.

[62] I find Mr Allan did not contribute to the situation which gave rise to his dismissal grievance, so remedies are not reduced.



⁶ The standard required is the balance of probabilities.

⁷ Such as to dismiss staff and not to sign a lease on new premises in Hamilton.

Should interest be awarded?

[63] Clause 11 in Schedule 2 of the Act gives the Authority the discretion to order interest. The purpose of awarding interest is to reflect the fact Mobile Shop has had the use of the money since Mr Allan's dismissal and that he has been deprived of its use. There is no reason not to compensate Mr Allan for the loss of the use of his lost wages since his dismissal.

[64] Mobile Shop is ordered to pay Mr Allan interest from 01 February 2012 on his award of three months' lost wages at the current rate of interest of 5% as prescribed by the Judicature (Prescribed Rate of Interest) Order 2011⁸. I decline to award Mr Allan interest on the lost benefits awarded because they did not represent money he would have had the use of.

Did Suny unfairly bargain with Mr Allan over the terms of his IEA?

[65] Mr Sun says the employment agreement Mr Allan signed was fairly bargained. He says Mr Allan knew his rights so could have asked for time to seek independent advice had he wanted to. Mr Sun says he did not tell Mr Allan to sign the agreement immediately. He says if Mr Allan had asked for more time to consider the agreement or seek advice he would have agreed to that.

[66] Section 63A(2) of the Act requires an employer to provide the employee with a copy of the intended agreement, advise them of their right to seek independent advice, give them a reasonable opportunity to seek advice, and consider and respond to any issues raised by the employee.

[67] I find Suny did not comply with s.63A(2)(b) of the Act because Mr Sun did not advise Mr Allan of his right to take advice. I do not accept Mr Steele's submission that Mr Allan's knowledge of his rights⁹ absolves Suny of its statutory responsibility to advise Mr Allan of his right to take independent advice. It is clear Mr Allan did not know his rights because he mistakenly thought the trial period provision in his agreement was not enforceable.

[68] Suny also breached s.63A(2)(c) of the Act because it failed to give Mr Allan a reasonable opportunity to seek advice. Mr Allan signed the agreement within 20



⁸ S.83 of the Judicature Act 1908.

⁹ Gained via his experience in management and recruitment.

minutes of receiving it from Mr Sun, which was the first time he had seen the agreement. I find a 20 minute delay between receiving and signing an agreement does not allow “a reasonable opportunity to seek advice”.

[69] I do not accept Mr Steele’s submission that it was up to Mr Allan to ask for time to seek advice if he wanted to do so. The onus in s.63A(2) of the Act is on the employer to meet the obligations in that section. The Employment Court in *Blackmore v Honick Properties Limited*¹⁰ held there is an obligation on an employer to provide a reasonable opportunity for an employee to take independent advice, even if the employee freely wants to sign the agreement immediately and without taking advice.

[70] Suny was obliged to provide Mr Allan with a written agreement sufficiently in advance of him starting work so that he had an opportunity to take advice and discuss or negotiate any terms. That did not occur because Mr Allan started work the day after he received the employment agreement. The Court in *Blackstone*¹¹ stated “the opportunity for consideration, advice and negotiation must be a real opportunity as opposed to a nominal or minimal opportunity”. I find Suny did not provide Mr Allan with a real opportunity to take independent advice.

[71] I find Suny breached s.63A(2) of the Act because it failed to give Mr Allan the opportunity to consider, take advice about, and then discuss or negotiate the proposed terms of employment, including the trial period provision. I find these breaches mean that under s.68(2)(d) of the Act Suny bargained unfairly for Mr Allan’s employment agreement.

What is the appropriate remedy?

[72] Section 69 of the Act sets out the potential consequences of unfair bargaining. Subject to a number of statutory preconditions, one remedy may be the cancellation or variation of Mr Allan’s agreement. Because he has taken issue with his trial period provision that clause could potentially be struck out of his agreement.

[73] If that occurs Suny will have to justify its dismissal of Mr Allan.



¹⁰ [2011] NZEmpC 152.

¹¹ *Supra*.

[74] I find Suny's breaches of s.63A(2) were not minor or inconsequential. Under s.63(3) a maximum penalty of \$20,000 may be imposed on Suny for its breach of s63A. Under s.164(d) of the Act the trial period provision could only be struck out of Mr Allan's agreement if the Authority is satisfied any remedy other than an order cancelling or varying the agreement would be "inappropriate or inadequate".

[75] In accordance with s.164(a)(i) of the Act I identify the problem in relation to Mr Allan's agreement is that it was unfairly bargained over. This meant he did not understand the effect of the trial period provision on his ability to pursue a dismissal grievance if he was dismissed within the first 90 days of his employment.

[76] In accordance with s.164(a)(ii) I direct Mr Allan and Suny "to attempt in good faith to resolve that problem" by mediation to occur within 28 days of the date of this determination. If despite the use of mediation the problem caused by the unfair bargaining has not been resolved then the parties have 14 days from the date of mediation to file submissions. These must address whether the remedy for the unfair bargaining claim should be the striking out of the trial period provision in Mr Allan's agreement.

Does the trial period provision in Mr Allan's employment agreement prevent him from bringing an unjustified dismissal grievance against Suny?

Did the trial period provision meet the requirements of s.67A(2) in the Act?

[77] Mr Allan and Suny entered into an employment agreement which contained a valid trial period provision. The trial period provision in Mr Allan's employment agreement met the requirements of s.67A(2) of the Act because it specified a 90 day trial period, it advised that Suny could dismiss Mr Allan within that period, and that if dismissed within 90 days he was prevented from bringing a dismissal grievance.

[78] Mr Allan was a new employee of Suny when he signed the agreement, because he had not previously been employed by that entity. He had also not started work before he was presented with, and signed, the agreement. Previous or concurrent employment with Mobile Shop is not relevant because it is an entirely separate legal entity from Suny.



What date did Mr Allan start work?

[79] Mr Allan says he started work the same day he signed the agreement. He says that after signing the agreement he and Mr Sun went together to the car dealer to collect Mr Allan's work vehicle. They then went to lunch together. Mr Allan says after lunch he and Mr Sun went back to the office in their separate cars "to work for the afternoon". Mr Allan says he set up his office for a meeting with staff the next day and talked with Mr Sun about a game plan. Mr Allan says he left work around 6pm that day.

[80] I find that Mr Allan did not actually start work until 03 November. Although he may have attended the office, I find on the balance of probabilities it was unlikely that he did any work and it was more likely he just viewed his new office. Mr Allan and Mr Sun had been together and talking most of the day. There was no need for Mr Allan to have gone to the office to speak to Mr Sun about a game plan. Mr Allan's preparation for the staff meeting the next day involved moving some chairs around his office. I do not consider that was work because moving chairs was not part of his core duties or responsibilities.

[81] The date on the agreement had been amended to reflect Mr Allan would start work the day after he signed it. Mr Allan was introduced to staff on 03 November and his computer and office was set up that day by administration staff. The Employer's Monthly Schedule records Mr Allan's start date as 03 November. He was put on the payroll from that date. Mr Allan did not claim any pay for allegedly working on the day he signed the agreement. These factors lead me to conclude he started work on 03 November.

Was Mr Allan dismissed before the end of the trial period?

[82] Mr Allan says he was dismissed the day after his trial period expired.

[83] Section 67A(2)(a) of the Act provides that the trial period cannot exceed 90 days "starting at the beginning of the employee's employment". The Employment Court in *Blackmore*¹² held that phrase "means when an employee begins work, not when the parties agree (offer and acceptance of work) that the employee will work for the employer as from a future date".



[84] The trial period provision in Mr Allan's agreement also stated that "the trial period will commence on the day the employee starts work." This means the trial period takes effect from the date when the job starts. Mr Allan started work on 03 November so his trial period expired on 31 January 2012, not 30 January as he claims. Mr Allan was therefore dismissed within the 90 day trial period.

Can Mr Allan pursue his dismissal grievance?

[85] On the face of it the trial period provision in Mr Allan's agreement prevents him from pursuing his dismissal grievance. However, that is not necessarily the end of his dismissal grievance against Suny because under s.69(1)(b) of the Act the Authority may cancel or vary an employment agreement if a party to it is found to have bargained unfairly under s.68 of the Act.

[86] Provided the prerequisites of s.164 have been met then the Authority may strike out the trial period provision from Mr Allan's agreement as a remedy for his unfair bargaining claim. If that occurs then Mr Allan would not be prevented from pursuing his dismissal grievance.

If the trial period does not prevent Mr Allan bringing a dismissal grievance, was Suny's dismissal of Mr Allan justified?

[87] Mr Allan's unjustified dismissal claim against Suny cannot be finally determined until the Authority has imposed the remedy to be awarded for his successful unfair bargaining claim.

[88] If the remedy is to strike out the trial period provision in Mr Allan's agreement then he will be able to pursue his dismissal grievance against Suny. However, if the Authority determines that some other remedy (aside from varying the terms of his agreement) is appropriate or adequate in terms of s.164 of the Act then the trial period provision will prevent Mr Allan from pursuing his dismissal grievance against Suny.

[89] The Authority has no power to strike out the trial period provision unless the preconditions in s.164 have been fulfilled. It is therefore not in a position to be able to determine the remedy for the unfair bargaining claim until the s.164 process has been completed by Suny and Mr Allan.

[90] However, in order to assist the parties with their good faith attempts to resolve the problem in relation to the unfair bargaining, I consider Mr Sun was acting on



behalf of Suny and Mobile Shop jointly and severally when he dismissed Mr Allan. This means that if the trial period provision is struck out and Mr Allan is entitled to pursue his dismissal grievance, then I will find that Suny's dismissal was unjustified for the same reasons that apply to the finding of unjustified dismissal by Mobile Shop.

If Suny's dismissal is unjustified, what remedies should be awarded?

[91] In terms of remedies against Suny for an unjustified dismissal I would impose joint and several liability on it for the remedies already awarded against Mobile Shop. I would not award additional remedies.

Did Mobile Shop and/or Suny unjustifiably disadvantage Mr Allan's in his employment?

[92] Mr Allan says his employment was affected to his disadvantage by the unjustifiable actions of his employer, namely:

- Mr Sun was aggressive towards, and dismissive of him in discussions immediately before his dismissal
- His role was advertised before he had been notified of his dismissal.

[93] The evidence did not satisfy me that Mr Sun acted in an unjustifiably aggressive or dismissive manner towards Mr Allan in discussions with him immediately before he was dismissed.

[94] Mr Sun admits lodging an advertisement for a 'National Sales Manager/BDM'¹³ Team Manager" on www.seek.co.nz on 28 January 2012. He says this advertisement was to fill the BDM role Mr Allan had previously drawn up a job description for and which was a separate role intended to work alongside Mr Allan.

[95] I consider on the balance of probabilities that the role Mr Sun advertised was intended to replace Mr Allan's role. Mr Allan's job title of National Sales Manager, was also part of the job title of the advertised role. The advertised role involved "recruiting, training, motivating and managing the sales team" which was part of Mr Allan's duties in his NSM role.



[96] I find that Mr Sun and Mr Allan had only previously discussed hiring a BDM. They had not discussed Mr Sun's intention to hire a NSM/BDM Team Manger. It was part of Mr Allan's role to advertise for jobs within the business yet he was not aware the advertisement was to be placed.

[97] I consider that Mr Allan's lack of knowledge about the new role and the fact he did not advertise for it himself undermines Mr Sun's evidence that the new role was not intended to replace Mr Allan's role. If Mr Sun had really intended the new role to work alongside Mr Allan, instead of replacing his role, I would have expected him to have discussed that with Mr Allan. It is also odd that Mr Sun advertised the new role when it was Mr Allan's job to advertise for staff.

[98] The timing of the advertisement also suggests it was more likely to have been intended to replace Mr Allan's role rather than to work alongside him. When Mr Sun met Mr Allan on 27 January he said he was considering terminating Mr Allan's employment under the trial period provision.

[99] The same day Mr Sun placed the advertisement on the seek website he also emailed Mr Allan reiterating he was considering terminating his employment. Mr Sun's email noted he had wanted to have a "last meeting" with Mr Allan that day or on Monday 30 January to discuss his employment but that Mr Allan had not been prepared to meet on either day.¹⁴

[100] Further, Mr Allan was in the closing stages of hiring Mr Shaun Hand for the BDM role that had been previously discussed. Mr Sun interviewed Mr Hand on 27 January 2012 and Mr Hand was ultimately employed in the BDM role. It does not make sense for Mr Sun to have advertised for a role he knew was about to be filled.

[101] I accept Mr Allan's evidence that when he confronted Mr Sun about advertising for a replacement for Mr Allan's role on seek Mr Sun denied placing the advertisement. I consider this indicates Mr Sun attempted to conceal his actions which suggests Mr Allan's view that the advertised role was intended to replace his role has merit. If the role was to assist Mr Allan there was no need to for Mr Sun to have denied his actions. The key accountabilities in the job descriptions of each role were also almost identical.



¹⁴

Monday 30 January 2012 was the Auckland Anniversary public holiday.

[102] I find on the balance of probabilities the advertisement Mr Sun placed was a replacement for Mr Allan's role. Mr Allan found out about the advertisement when he arrived at work on Tuesday 31 January 2012 to find he had received 32 applications to his email address for the NSM/BDM Team manager role.

[103] Because Mr Allan had responsibility for advertising for staff for the business he was listed on the seek website as the contact person for the business. This meant the email responses to the advertisement Mr Sun listed were automatically sent by the seek website to Mr Allan.

[104] I find that Mobile Shop and Suny jointly and severally unjustifiably disadvantaged Mr Allan in his employment by advertising a role which was intended to replace his role before he had been notified of his dismissal.

[105] I consider Mr Allan was disadvantaged because the advertisement undermined the trust and confidence he was entitled to have in his employers, it signalled his dismissal had been predetermined, and it disallowed him an opportunity to fully or fairly respond to Mr Sun's concerns and to persuade Mr Sun not to dismiss him.

What remedies should be awarded for the disadvantage grievance?

[106] Mr Allan claims lost wages, \$10,000 distress compensation and lost benefits as a result of his disadvantage grievance. Mr Allan submits he is entitled to lost wages and lost benefits because he says if his dismissal had not been predetermined, as evidenced by the advertisement of his role, he may have had the opportunity to respond to the poor performance allegations and persuade Mr Sun he should not be dismissed.

[107] I do not accept that submission. The predetermination of his dismissal has already been appropriately compensated because Mobile Shop has been ordered to pay remedies for unjustifiably dismissing him. I consider it would be double dipping to award additional lost wages and lost benefits for his disadvantage grievance.

[108] I am satisfied Mr Allan was humiliated and suffered a loss of dignity and injury to his feelings when he saw his role had been advertised while he was still employed. Mobile Shop and Suny are jointly and severally ordered to pay Mr Allan \$1,500 under s.123(1)(c)(i) of the Act to compensate him for unjustifiably disadvantaging him in his employment.

Did Mobile Shop and/or Suny breach their good faith obligations under the Act?

[109] Section 4(1) of the Act requires parties in employment relationships to deal with each other in good faith. Section 4(1A)(b) of the Act also requires parties when dealing with each other in good faith “to be active and constructive in establishing and maintaining a productive employment relationship on which the parties are among other things, responsive and communicative”.

[110] Mr Allan claims Mobile Shop and Suny breached their good faith obligations when:

- Mr Sun was aggressive and dismissive towards Mr Allan when discussing his performance immediately before his dismissal;
- Mr Sun advertised for a replacement for Mr Allan’s role before he dismissed him;
- Suny breached its obligations under s.63A(2) of the Act when bargaining over his employment agreement.

[111] The evidence did not establish Mr Sun has been aggressive or dismissive so that alleged breach of good faith does not succeed. It was a breach of good faith for Suny and Mobile Shop to advertise for Mr Allan’s replacement before he had been dismissed.

[112] It was also a breach of good faith for Suny to fail to meet the statutory requirements in s.63A when bargaining for Mr Allan’s employment agreement.

Should a penalty be imposed for the breach of good faith?

[113] The Authority may impose a penalty for certain breaches of good faith under s.4A of the Act, provided the requirements of that section are met. Mr Allan submits the breaches of good faith were intended to undermine his employment agreement and/or employment relationship.

[114] I find the requirements of s4A(b)(ii) and (iii) of the Act are not met because the evidence fell short of establishing Mr Sun intended to undermine Mr Allan’s employment agreement or employment. The Authority therefore does not have jurisdiction to impose a penalty.



Did Mobile Shop and/or Suny breach an implied term of Mr Allan's employment?

[115] Mr Allan claims Mobile Shop and Suny breached the implied term of his employment that as employers they would treat him fairly and reasonably because

Mr Sun:

- Was aggressive and dismissive towards him when discussing his performance immediately before he was dismissed;
- Advertised for a replacement for Mr Allan's role before notifying him of his dismissal.

[116] I am not satisfied on the balance of probabilities that Mr Sun was aggressive or dismissive towards Mr Allan so that claim does not succeed.

[117] I have already found on the balance of probabilities the advertised role was intended to replace Mr Allan's role. That was a breach of the implied term that his employers would treat him fairly and reasonably because it fundamentally undermined the trust and confidence Mr Allan was entitled to have in his employers.

Should a penalty be awarded?

[118] I decline to award a penalty under s.134 of the Act because I consider this behaviour has been adequately addressed by compensating Mr Allan for the unjustified disadvantage this breach caused him.

Is Mr Allan entitled to pay in lieu of contractual notice from Mobile Shop and/or Suny?

[119] Although Mobile Shop dismissed Mr Allan without notice, the award of lost wages has already compensated Mr Allan for any unpaid notice period. His application for additional pay in lieu of notice is therefore declined.

Summary

[120] I have reached the following conclusions:

- Mobile Shop and Suny both employed Mr Allan.
- Mobile Shop and Suny jointly and severally dismissed Mr Allan.

- Mobile Shop's dismissal of Mr Allan was unjustified.
- Mobile Shop is ordered to pay Mr Allan three months' lost wages, \$1,150 lost benefits and \$6,000 distress compensation.
- Mobile Shop is ordered to pay Mr Allan 5% interest on his lost wages from 01 February 2012 until it has been paid in full.
- Suny unfairly bargained with Mr Allan for his individual employment agreement.
- The remedy for the unfair bargaining claim has not yet been determined because one remedy would be to vary the agreement by striking out the trial period provision. However that remedy cannot be imposed unless the preconditions in s.164 of the Act are met.
- In accordance with s.164(a)(i) of the Act, the Authority identifies there is a problem in relation to Mr Allan's agreement with Suny because it was unfairly bargained for. In accordance with s.164(a)(ii) of the Act Mr Allan and Suny are directed to mediation to occur within 28 days of the date of this determination to attempt to resolve the unfair bargaining problem in good faith.
- If Mr Allan and Suny do not resolve the unfair bargaining problem at mediation then they may each file submissions within 14 days of the date of mediation on whether any remedy other than varying the agreement would be "inappropriate or inadequate."¹⁵
- Suny's failure to comply with the requirements of s.63A(2) of the Act when bargaining for Mr Allan's employment agreement was also a breach of good faith, a breach of the implied term it would act fairly and reasonably towards him and such actions by Suny unjustifiably disadvantaged Mr Allan.
- The remedies for the breach of good faith, breach of implied term and unjustified disadvantage grievance claims have not yet been determined pending the outcome of the s.164 process in the Act.



- The trial period provision in Mr Allan's agreement met the requirements of s.67A of the Act. Mr Allan was dismissed within the 90 day trial period so if the trial period provision is not struck out of his agreement under s.164 of the Act then he is prevented from bringing a dismissal grievance against Sunny. If it is struck out then the trial period provision will not prevent Mr Allan from proceeding with his dismissal grievance against Sunny.
- If the trial period provision is struck out of the agreement then Sunny will be found to have unjustifiably dismissed Mr Allan. No additional remedies will be awarded because Sunny will be ordered to have joint and several liability with Mobile Shop in respect of the remedies already awarded against Mobile Shop.
- Mobile Shop and Sunny jointly and severally unjustifiably disadvantaged Mr Allan when they advertised for a replacement for his role before notifying him of his dismissal. Mobile Shop and Sunny are jointly and severally ordered to pay Mr Allan \$1,500 distress compensation in respect of this disadvantage grievance.
- Mobile Shop and Sunny jointly and severally breached their good faith obligation to Mr Allan by advertising for a replacement for his role before he had been dismissed. Mr Allan's application for a penalty for this breach of good faith is declined.
- Mobile Shop and Sunny jointly and severally breached the implied term of his employment to act fairly and reasonably towards him by advertising his role before notifying him of his dismissal. I decline to award a penalty for this breach of his employment agreement.

Costs

[121] Costs are reserved pending the outcome of the s.164 process.



Rachel Larmer
Member of the Employment Relations Authority



