

Attention is drawn to the order prohibiting publication of certain information in this determination

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2019] NZERA 329
3038375

BETWEEN SHAILEN KUMAR
Applicant

AND JB HI-FI GROUP (NZ)
LIMITED
Respondent

Member of Authority: Nicola Craig

Representatives: Rhys Walters, counsel for the Applicant
Elizabeth Coats, counsel for the Respondent

Investigation Meeting: 10, 11 and 12 December 2018

Submissions received: 17 December 2018 from both parties

Date of determination: 5 June 2019

DETERMINATION OF THE AUTHORITY

- A. Shailen Kumar was unjustifiably dismissed by JB Hi-Fi Group (NZ) Limited.**
- B. JB Hi-Fi Group (NZ) Limited is ordered to pay Mr Kumar the following sums within 28 days of the date of this determination:**
- (i) \$37,507.50 gross as reimbursement of remuneration;**
 - (ii) \$18,000 as compensation under s 123(1)(c)(i) of the Employment Relations Act 2000; and**

(iii) \$10,809.90 as lost benefits.

C. Costs are reserved and a timetable set in the event the parties are not able to agree on costs.

Employment relationship problem

[1] Shailen Kumar worked for JB Hi-Fi Group (NZ) Limited (JB or the company) from 2010 onwards as a salesperson. Initially he was at JB's Sylvia Park store and then moved to the Albany store.

[2] On 12 June 2018 JB wrote twice to Mr Kumar requiring his attendance at a meeting to answer allegations regarding sales issues, including selling goods below cost price to a reseller. On 14 June 2018 Mr Kumar met with Mikey Murray (JB Area Manager) and Kate Fitts (Human Resources Business Partner). After an adjournment Mr Kumar was summarily dismissed.

[3] Mr Kumar claims that his dismissal was unjustified. He seeks permanent reinstatement along with other remedies. JB says that Mr Kumar's dismissal was justified due to his serious misconduct.

[4] An investigation meeting was held on 10, 11 and 12 December 2018. Mr Kumar gave evidence and called the following witnesses:

- (a) a former JB store manager (who I refer to as Manager A);
- (b) a former JB salesperson (Salesperson A) who worked for JB for about five years at three different stores; and
- (c) his wife.

[5] Mr Kumar filed a signed witness statement from another former JB employee but that man did not attend the investigation meeting. It was agreed that, as his evidence was unsworn and not subject to cross examination, it should be given little weight.

[6] JB called the following witnesses who gave evidence in person:

- (a) Mr Murray;
- (b) Ms Fitts;
- (c) Rodney Korff (JB General Manager – Buying);

- (d) a JB employee who worked as Sales Manager at Albany at the time of Mr Kumar's dismissal (Manager B);
- (e) a Store Manager at Albany (Manager C);
- (f) a JB Merchandising Manager at Albany at the time of Mr Kumar's dismissal (Merchandising Manager);
- (g) A Sales Co-ordinator who worked at another JB store (Sales Co-ordinator).

[7] Another salesperson (Salesperson C) offered to provide evidence but did not wish to be called by either party. The Authority sought his evidence, which was given in person, as well as through a written statement.

[8] Towards the end of the meeting oral evidence given by the Sales Co-ordinator gave me serious concern regarding the evidence already given by other JB witnesses. An adjournment was taken. After that Salesperson B indicated through counsel that he misunderstood some of the questions and changed his evidence. JB witnesses were recalled and maintained their support for their previous evidence. Ultimately I decided that Salesperson B's evidence was of little value.

[9] I was assisted by thorough submissions on behalf of the parties received after the investigation meeting.

[10] This determination, reserved at the conclusion of three days of investigation meeting, has been issued outside the statutory period of three months after receiving the parties' submissions. When I advised the Chief of the Authority that this would likely occur he decided that, as permitted by s 174C(4) of the Employment Relations Act 2000 (the Act), exceptional circumstances existed for providing the written determination of the Authority's findings later than the specified date.

[11] This determination has not recorded all evidence received from the parties but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.¹

Confidentiality and non-publication orders

[12] JB applied for confidentiality and non-publication orders regarding various paragraphs in witness statements from Mr Kumar, Mr Murray, Mr Korff and Manager C as well as selected pages in its bundle of documents. The application was on the basis that that material contained commercially sensitive material regarding JB's

¹ S 174E of the Act

pricing, revenue and profit margins. Mr Walters for Mr Kumar, considered that the determination needed to make sense and that the application was too wide, although not objecting to some of the confidentiality claimed. Interim orders were made that the identified material could only be viewed by the Authority, parties and counsel, unless otherwise authorised by the Authority.

[13] I accept that the identified passages of witness statements and documents contain commercially sensitive information. I have written this determination with those concerns in mind. I also order non-publication of the identified passages and that the file shall only be viewed with the prior approval of the Authority.

[14] I also order non-publication of the evidence given by Mr Kumar under cross-examination regarding the commission structure at his current position.

The parties

[15] Prior to coming to New Zealand in October 2010, Mr Kumar lived in Fiji. He worked there for over a dozen years as store manager for an electronic retail business.

[16] JB was Mr Kumar's first employer in New Zealand. He was a very successful salesperson, at times being JB's highest selling sales representative nationwide. At the Albany store Mr Kumar was on a regular roster working Thursday through to Monday. Mr Kumar believed that he served on average around 80 to 90 customers a day.

[17] JB emphasises that it operates in a highly competitive, price-sensitive market. It is an authorised reseller of Apple products. This means that it has a special arrangement with Apple, whereby JB buys products directly from Apple and is authorised to then sell those products to its retail and commercial customers. JB also sells other electronic brands.

[18] JB competes with commercial resellers or onsellors of electronic products, who sell through small shops or through online businesses. These organisations do not have direct relationships with suppliers such as Apple or Samsung. On occasions they purchase goods via authorised resellers like JB and on-sell to their own customers at a higher price. JB puts limits on the quantity of at least certain products that can be sold to one customer. In addition to its retail stores, JB also has a commercial team who sell larger quantities of goods to commercial purchasers.

[19] On 20 March 2017 Mr Murray emailed JB managers regarding outright iPhone sales. The email informed managers that at least two groups of resellers and/or exporters had been visiting JB stores. Those customers are noted to send in groups of six or more people at a time using multiple credit cards to bypass JB's commercial sales rules. Further, large quantities of gift cards were purchased and then, in some cases, school children were paid to purchase stock for the resellers. A new restriction was notified, allowing only one iPhone to be purchased per customer except that a manager could approve a sale involving more than one iPhone.

Pricing and commissions

[20] JB sales staff carry PDAs (palmtop computers) which provide pricing information. This includes a rate below which management approval must be obtained. PDAs are used to create invoices which are then taken to counter-staff to conclude the sales. The sales people do not undertake the final stage of the sale at the counter.

[21] Sales staff have the opportunity to earn commissions on their sales. Commission rates vary, including depending on the product and price, with managerial discretion sometimes involved.

JB's identification of concerns

[22] JB identified concerns about Mr Kumar well before it informed Mr Kumar on 12 June 2018 that it wanted to meet with him. On around 5 May 2018 Manager C called Mr Murray saying that Mr Kumar had advised her that he had sold 27 clearance phones to one customer in a single transaction at very modest prices. Manager C said that Mr Kumar had not sought prior management approval for this sale. The price level meant that the sale was electronically flagged to JB's buying team. Mr Murray asked Manager C to keep her concerns and the discussion confidential while he investigated further.

[23] Mr Murray was then contacted by a member of the buying team who said that JB had suffered an unusually low profit margin on 4 May 2018. The buyer assessed that this could be traced back to the sale of 27 phones, as well as a sale of seven phones on the same day. He said that he suspected the buyer was a reseller.

[24] On Mr Murray's return to the office on Monday 7 April 2019 he spoke to the buyer's team member as well as to Mr Korff and the support office manager. The team member had been to the Albany store over the weekend and understood the sale had been to a reseller. Further he said he thought the buyer could have been a named man and his son who were trading as a business I will refer to the Reseller. The team member used to work for the Reseller years previously.

[25] Mr Korff's buying team undertook analysis of sales to the credit card involved in the clearance phones transaction. Mr Murray and the support office manager contacted JB's Risk Team in Australia to ask them to "run the numbers" and investigate Mr Kumar's transactions, the credit card used in the May transaction and any other credit cards used in similar transactions in the Albany store.

Risk Team's investigation

[26] The Risk Team took some weeks to come back to Mr Murray. The next steps in the investigation included compiling spreadsheets of Mr Kumar's transactions, and identifying transactions of concern. This process included obtaining transaction histories for a couple of credit cards where there was concern about the genuineness of the transactions.

[27] Mr Murray said that around four credit cards were identified as being associated with the Reseller. However, the spreadsheets provided by the Risk Team showed at least six or seven credit cards.

[28] Mr Murray was uncertain how the Risk Team had linked the other cards to the two originally identified from specific sales by Mr Kumar. No one from the Risk Team gave evidence. There were features about various spreadsheets which Mr Murray was unable to explain and suggested the Risk Team could.

Mr Murray's contact with the Reseller

[29] Mr Murray spoke to Manager C about the Risk Team member's concerns about the Reseller. She said she had been told by Salesperson C, who was also under investigation, that the customer Mr Kumar was dealing with was the owner of the Reseller. The Sales Co-ordinator provided Manager C with the contact number for the son of the Reseller's owner. That was provided to Mr Murray.

[30] Mr Murray phoned the owner's son, saying that he was aware that the Reseller was doing a lot of business with JB. Mr Murray appears to have raised Mr Kumar's name as the son confirmed he knew Mr Kumar and regularly dealt with him. Mr Murray tried to arrange a meeting to discuss "business" but did not receive confirmation of availability.

[31] Mr Murray then went to the Reseller's store. He saw phones, speakers and gaming consoles which he thought had JB barcodes on them. Mr Murray believed the Reseller was avoiding his calls so he spoke to Mr Korff and the two agreed to go to the Reseller's store together.

[32] At the store Mr Murray and Mr Korff spoke to the owner. The son was not present. The men went across the road to a coffee shop. The JB managers said they knew the Reseller was doing business with Mr Kumar, which the owner confirmed and said he knew Mr Kumar personally. The owner said he did not want to do business through JB's commercial team. He said that Mr Kumar would contact him when they had a good offer. Mr Murray took knowing Mr Kumar personally to refer to a working situation. Mr Murray did not ask how long he had known Mr Kumar.

[33] The Reseller's owner confirmed that two or more credit cards JB had identified did belong to his business and that he had multiple cards. Mr Korff identified the amount of sales JB believed had been made to the Reseller. The owner thought the number was higher.

[34] I found it surprising that the Reseller's owner was this co-operative with Mr Murray and Mr Korff. Under questioning from the Authority Mr Murray said that when he was on the phone with the owner's son he said that JB were looking at building a more formal relationship between its commercial division and the Reseller. However, this was not the primary purpose of the discussion, which was to investigate Mr Kumar and shut down improper sales to the Reseller. My impression is that the possibility of a formal relationship was introduced as a means of extracting information from the Reseller which might not otherwise have been forthcoming.

[35] Mr Korff pressed whether the relationship with Mr Kumar was outside the walls of JB with Mr Kumar earning commission from the Reseller. The owner denied that that was occurring.

[36] No notes were taken either at the time or afterwards of the discussion with the Reseller's representatives.

Other transactions and further investigation

[37] Mr Murray became aware of further transactions of concern. On 8 and 10 May 2018 Mr Kumar undertook sales of a total of four iPads at a low price which Mr Murray thought needed management approval. These sales were identified as they were linked to the Reseller, by use of the same credit cards. The buying team identified that there was an error in the PDA information and with the PDA listing a price lower than intended.

[38] As part of his investigation Mr Murray spoke to the three store managers at Albany (Managers B and C and the Merchandising Manager) regarding the various transactions which were part of his inquiry.

[39] Mr Murray's evidence was that all three denied having authorised relevant sales, however, this is not entirely accurate, as is set out below. Manager C in particular was spoken to a number of times, although my impression was that she had something of a dual role, being the person in charge of the store and a witness regarding events being investigated.

Letters regarding disciplinary meeting

[40] Mr Murray said that he held off notifying Mr Kumar that he was being investigated as he wanted to compile all the data and ensure everything was in order before he had any kind of conversation with Mr Kumar.

[41] On 12 June 2018 Mr Murray wrote to Mr Kumar requiring him to attend a meeting on 14 June 2018. The letter was sent to Manager B to be passed on to Mr Kumar. Mr Kumar was messaged and replied with his gmail address, to which the letter was then sent. The meeting was to be with Mr Murray and Manager C. The letter identified that Mr Kumar had the right to bring a representative. The purpose of the meeting related to allegations that Mr Kumar:

- contravened company policy and procedure as well as the directive of management to sell iPad(s) at a loss to the business despite being advised not to do so by management and the buying team (which I refer to as Allegation 1);

- sold multiple telco products well below cost price at a loss to the business without seeking management approval (Allegation 2); and
- over the last year sold multiple products below cost to a commercial on seller which has resulted in a loss of over -\$16,643 in profit to the business between 2014-2018 from this commercial on seller alone (Allegation 3).

[42] No more details are provided in the letter. Mr Kumar was stated to have the opportunity to explain his actions fully at the meeting. However:

If you are unable to substantiate your actions, you will be disciplined appropriately, in line with company policies and procedures.

[43] Mr Kumar received the first letter around 1.30pm. Then at 4.10pm Manager B messaged Mr Kumar saying he had an updated version of the letter but did not know what was updated. Mr Kumar was off doing activities with his children and only looked briefly at the new letter. The second letter had very similar content to the first. There were three differences. Firstly, the time of noon was now specified for the meeting. Second, Ms Fitts was to attend instead of Manager C. Mr Murray says that it was a mistake to originally identify Manager C. Thirdly, the final sentence of the letter was now:

If you are unable to substantiate your actions, you will be disciplined appropriately, in line with company policies and procedures, up to and including termination.

[44] Mr Murray realised that the first letter did not notify Mr Kumar of the possible disciplinary consequences which could result from the meeting. Mr Kumar did not notice the new phrase referring to termination.

[45] Neither letter came with any other documents.

[46] Mr Murray continued his investigation after arranging for the letters to be sent. On 13 June 2018 Mr Murray phoned Manager A, the previous Albany store manager. That manager said that he “probably would have” approved two transactions for iPhones in March 2018, which Mr Murray was investigating. Mr Murray understood that, by putting the transactions through separately in two transactions, Manager A and Mr Kumar were aware they were contravening company policy.

[47] Mr Murray also spoke to Salesperson A who had priced clearance phones for a store display. He said that he thought about three quarters of the phones in the 27 phone sale were at prices he set.

Disciplinary Meeting

[48] On 14 June 2018 Mr Murray met in person with Mr Kumar, with Ms Fitts attending by phone. In his witness statement Mr Murray identified himself as the decision-maker. Mr Murray had jotted some points to make beforehand and then took a few notes during or shortly after the meeting. Ms Fitts took more full notes during the meeting although not at a level approaching a transcript.

[49] Mr Kumar did not bring a representative or support person. At the start of the meeting Mr Murray confirmed that Mr Kumar was entitled to have a representative with him and asked if he wanted to arrange for one to attend. Mr Kumar said he would proceed without one.

[50] Mr Murray showed Mr Kumar about 16 pages of documents. These were:

- (a) Eight pages of receipts of sales from 2 March, 4, 6, 8 and 10 May 2018;
- (b) A spreadsheet page headed "Shailen Commission Sales" covering some sales from October 2017 to June 2018, with 16 columns, not indicating what items were sold, only the number of units;
- (c) Two pages from a spreadsheet which had 13 columns. Although headed "Shailen 2018 sales" the documents shows sales from October 2017 to June 2018. There is no indication of what the sales are for. A total loss of \$14,904.62 is set out at the bottom;
- (d) The email of 20 March 2017 regarding outright iPhone sales;
- (e) His position description; and
- (f) JB's Code of Conduct.

[51] Mr Murray says he explained all of the transactions on the receipts to Mr Kumar. Both Mr Murray and Mr Fitts say that Mr Kumar appeared familiar with the transactions.

[52] Mr Kumar's response to the allegations was that the sales had all been approved by his managers. When Mr Kumar saw a receipt from March 2018 he said the sale might have been approved by Manager A. Mr Murray replied that the matter did not involve Manager A so there was no need to talk to him. Mr Murray said this despite having already talked to Manager A, who confirmed that he probably would have authorised the sale.

[53] Mr Kumar also said at the meeting that that sale would have needed the cage holding high value stock opened by the manager and that Manager A had a policy that staff opens the cage without his approval. Mr Murray did not follow this up during the subsequent adjournment.

[54] Mr Murray said that he had spoken with the management team and that they had not approved the sales. As noted below this is not entirely accurate as regards Manager B.

[55] Mr Murray told Mr Kumar that JB believed the transactions were linked to the same reseller. Mr Kumar denied knowing that Reseller.

[56] Ms Fitts says that she did not believe that Mr Kumar appreciated the seriousness of the concerns raised. He simply repeated that he had approval from management and that the store management was being untruthful to Mr Murray.

[57] Mr Kumar asked for further time to consider the documents. He says he asked for 48 hours, which JB refused. Mr Murray appeared to accept that that was what was asked for. Ms Fitts accepted that it could have been 48 hours. JB refused Mr Kumar's request, instead setting a half hour adjournment. Mr Kumar was said to have the opportunity to review the documents during the adjournment although he was asked to leave the store during that period.

[58] During the adjournment Mr Murray phoned Managers B and C and the Merchandising Manager and asked if they had given Mr Kumar approval for any of the transactions. He said it was their last opportunity to say something and they should be transparent. He says that none of them changed their positions, reiterating that the sales had not been approved. Manager A was not contacted during the adjournment.

[59] Mr Murray and Ms Fitts discussed the appropriateness of dismissal during the break. They took into account lack of manager approval, Mr Kumar's admission to understanding the bulk sales and onsellers rules, Mr Kumar's flippant and arrogant responses, JB's financial loss, and Mr Kumar's denial that he had a relationship with the Reseller "which was a blatant lie".

[60] After the adjournment Mr Murray advised Mr Kumar that he had spoken to the managers who had advised again that they had not approved any of the transactions in question. Mr Kumar again said that they had all been approved by management. Mr Murray told Mr Kumar that he was dismissed.

[61] There is no dismissal letter. A JB terminations form was completed by Mr Murray. It referred to Mr Kumar's dismissal being terminated summarily for serious misconduct. No further details were given.

Reasons for dismissal letter

[62] Mr Kumar's representative sought reasons for his dismissal. On 29 June 2018 Mr Murray wrote stating that Mr Kumar was dismissed after fair procedure for serious misconduct namely:

- Contravening the Outright iPhone Sales Process – specifically selling more than 1 iPhone per transaction and selling to a re-seller
- Engaging in prohibited conduct – selling commercial quantities of product to a re-seller and unauthorised discounting of products to a re-seller
- Failure to follow management instruction

[63] No further detail was provided on those three items. The letter concludes that as a result of its investigation and after consideration of Mr Kumar's response to the allegation JB summarily dismissed Mr Kumar.

[64] A significantly more detailed letter was provided by JB on 16 August 2018 in response to Mr Kumar's representative raising a personal grievance on 13 July 2018. This includes almost the same list of the allegations which were found to be substantiated, although the second items now have iPads and iPhones specified as the product. More detail is then provided in three areas; the Outright iPhone sales process, the iPad transactions and mobile phone transactions.

Policies

[65] Before going into the reasons for dismissal, I discuss the policies relied on by JB. Mr Kumar's employment agreement stated that he was bound by, and agreed to abide by, all policies and procedures issued by JB. These policy and procedures included those set out in a detailed Terms and Conditions document.

[66] However, rules or directions about various sales practices were not necessarily in that document, or in a policy-type format.

[67] Messages regarding sales issues were emailed to managers, who were expected to distil the key messages to staff, particularly at the morning meetings. Mr Kumar did not attend such meetings as he was not rostered to work that early in the morning.

[68] Of importance to this case is direction contained in the 20 March 2017 email from Mr Murray. Although policies were available via JB's intranet, it was not evident that this email was on the intranet as a policy document. It is not in the form of a policy. Mr Kumar's recall was that the requirement to sell no more than one iPhone without a manager's approval related to a particular model of iPhone which was exclusive to JB. In any event I do not consider that issue to be critical to the case as Mr Kumar's defence on the iPhones issue was that the sales were authorised.

[69] Mr Murray's witness statement originally stated that only two iPhones could be sold without a manager's approval but this was amended to one at the investigation meeting. It appears that the directive prior to the 2017 email was that two iPhones could be sold without managerial approval, but that changed with the 2017 email.

[70] Witnesses agreed that there was a policy covering most goods, or at least high value goods other than iPhones, which specified that no more than three of a particular model or SKU number could be sold without approval. Most agreed that this did not apply to low value items, such as batteries. There was some evidence the rule did not apply to quit-stock (clearance goods, referred to as q-stock), or at least that managers had to approve such sales. In any event Mr Kumar regarded multiple sales of q-stock as a question for the manager to approve.

[71] It was widely agreed that one sale could legitimately, without management approval, include for example, three items of one model or SKU number, three of another SKU number and three of a different SKU number.

[72] JB produced an email from October 2015 which had an undated memo attached regarding Commercial Sales. That memo stated that there “seems to be different levels of interpretation of the rules” around commercial/multiple sales. Over three was said to be a commercial quantity. Further:

Let’s not be creative around putting multiple single line transactions in order to hide non-approved commercial sales.

[73] My impression from hearing several salespeople and managers was that there was a mixed understanding of the details for the messages JB sent. Also, that practices were variable, including depending on whether a store was struggling to make budget, in which case manager approval might be given for sales which might be rejected in other circumstances.

Substantive issues

[74] There was no letter of dismissal. I had some difficulty linking the items in the 12 June 2018 letters calling Mr Kumar to the disciplinary meeting to the reasons given for dismissal in JB’s 29 June 2018 letter and then to JB’s justification in the 16 August 2018 response to the raising of Mr Kumar’s personal grievance.

[75] This is partly because it seems the reasons for were put in a different order, but also because different wording was used to describe what appeared to be the same actions. Also, the broader concern, the relationship and sales history with the Reseller appears to have been one of the items in the 12 June letters although the Reseller is not named, but also seems to have overlapped with one or more of the three specific concerns. The three specific groups of concerning transactions were sales of iPads, sales of iPhones and sales of multiple clearance phones.

Allegation 1 - iPads

[76] On 8 and 10 May 2018 Mr Kumar sold four iPads in two separate transactions. Mr Murray says that the sales were to the Reseller. Three were sold on 8 May and the remaining one on 10 May. The iPads were old stock which was no longer going

to be sold by JB. The sales were made using two different credit cards; one a Visa and the other a Master Card.

[77] Mr Kumar says a customer introduced himself on 6 May and asked about buying old stock iPads. He says he did not recognise the customer. At the investigation meeting he said the customer introduced himself with the same first name as that of the Reseller's owner. Mr Kumar told the customer that he needed to check with Manager C who was not in. The two exchanged numbers. Nothing happened the following day as Manager C was still not at work.

[78] The following day the customer called Mr Kumar who was not working that day. Mr Kumar told him to speak to Salesperson B who was working that day. Mr Kumar then phoned Salesperson B to check if Manager C was working. She was not but the Merchandising Manager was in charge. Mr Kumar asked Salesperson B to check with the Merchandising Manager how many of the quit stock (q-stock) or end of line iPads he could sell. She said up to a maximum of five in two transactions. This, along with evidence from Manager A, supports there still being a practice in 2018 of selling in split transactions, presumably to avoid appearing to be selling commercial quantities.

[79] Salesperson B reported this back to Mr Kumar, who said his customer would come in. As it turned out Salesperson B left before the customer came in. Another salesperson ended up selling three iPads, using Mr Kumar's staff code, to the customer when he came in. The price was a small amount over what was approved on the PDA for sale without manager approval.

[80] On 10 May 2018 the Merchandising Manager got a call from one of the JB buyers about the 8 May sale by Mr Kumar. She said that she had approved the quantities of iPads that could be sold and that if necessary, they could be split. The buyer said the price was below the price on the PDAs and the staff price.

[81] The Merchandising Manager went to check with Mr Kumar. He showed her the price on his PDA, which was slightly under the price he had sold the three iPads for. She went to call the buyer who said there was an error. He told her to tell Mr Kumar not to sell any more at that price, which she did. She said that the PDA price was below cost.

[82] Later that day Mr Kumar sold one iPad to a different person at the PDA price. He said he was confused and thought the Merchandising Manager had got it wrong, as the price was PDA authorised. He had checked with other staff and they had not heard anything about not selling the iPads at the PDA price. In his experience with PDA errors the buyers' team would send an email to all JB stores, which would be posted straight away.

[83] However, some months later he apologised to the Merchandising Manager and said at the investigation meeting that he should have followed her instruction.

[84] Mr Murray describes the sales of the four iPads as being at an unauthorised price. However, the evidence was clear that the price was slightly above that specified on the PDA as the lowest price not requiring management approval. This included photographic evidence of the PDA screen. Mr Murray's witness statement refers to the price being incorrectly loaded.

[85] I am satisfied that although the price appears to have been an error, it was an authorised price in the sense of appearing on the PDA.

[86] Mr Murray says that these sales were without authorisation. The investigation failed to turn up the Merchandising Manager's evidence regarding her approval of a sale of five iPads, split into two sales, albeit authorisation given through Salesperson B rather than directly to Mr Kumar.

[87] JB's letter of 16 August 2018, signed by Mr Murray, replying to Mr Kumar's grievance states that Mr Kumar sold three iPads on 8 May 2018 "after being instructed" not to sell the iPad at the (PDA) price. That is clearly wrong. Mr Kumar sold only one iPad after being instructed not to. That was on 10 May. Mr Murray accepted that at the investigation meeting.

[88] In conclusion the Merchandising Manager approved the sale of the three iPads, albeit without specifying a price. They were however sold at a price authorised on the PDA. The final sale of a single iPad was undertaken by Mr Kumar after he had been told by the Merchandising Manager not to sell iPads at that price. Mr Kumar acknowledged at the investigation meeting that he should not have done that.

Allegation 2 - iPhones

[89] There was no mention of iPhones specifically in the letters calling Mr Kumar to the disciplinary meeting. The sale of iPhones was discussed at the disciplinary meeting. It appears that the iPhone issue may have been allegation two which related to “selling multiple telco products” at a loss to the business without management approval, although a clearance phones issues could also come within that description.

[90] Looking at the iPhones issue, on 2 March 2018 there were four iPhones of the same model sold by way of two sales of two iPhones each, undertaken at the counter, one minute apart. Two different credit cards were used; a Visa and a MasterCard. These had the same numbers as credit cards used in other transactions being investigated.

[91] At the disciplinary meeting Mr Kumar had difficulty recalling the transactions which had taken place almost three and a half months previously. He accepted that they could have been to the same people but was not sure. He said that, as they were March sales, Manager A could have authorised them. He explained Manager A’s policy of holding the key to the cage out the back of the store where high value products were held. He asked Mr Murray to check with Manager A. Mr Murray replied that it did not involve Manager A and there was no need to ask him.

[92] Mr Murray had in fact already spoken to Manager A who said he probably would have approved the iPhones sales in March 2018. Mr Murray considered that this contravened JB’s policy.

[93] Mr Murray says that he did not believe that Manager A had approved the sales and rather was just trying to cover Mr Kumar. Mr Murray said that in March 2018 Manager A was in the final few weeks of employment and “had a history” of contravening policy and procedure in regards to commercial quantities and selling to onsellors. Mr Murray says that he had spoken to Manager A on several occasions about these issues

[94] I found Mr Murray’s evidence regarding Manager A contradictory. Despite his evidence above, Mr Murray accepted that Manager A was a trusted long serving employee and that the two had a good relationship. Manager A had been asked to act in Mr Murray’s role when the latter was away.

[95] However, Mr Murray assumed Manager A was lying to cover up for Mr Kumar, whereas Mr Murray's evidence of Manager A being involved in selling and approving sales to onsellors would seem to be entirely in keeping with him having approved these iPhones sales.

[96] Mr Murray says that company policy viewed the iPhone sales as one transaction. However, I received evidence supporting split transactions being approved by more than one manager in this period. In the 20 March 2017 email JB told managers to "qualify" customers wanting to buy two (or more) iPhones. This involved an inquiry of why they wanted them. However, Mr Murray did not speak to Manager A about qualification when he talked to him on the phone.

[97] Mr Murray acknowledged that although the till transactions were one minute apart, it was possible that the two invoices from Mr Kumar's PDA could have been further apart in time. There was no evidence provided regarding the PDA invoices. Mr Murray did not attempt to check CCTV footage or find out how long it was available for.

[98] Mr Kumar's statement at the disciplinary meeting was that he could not access the iPhones without a manager's approval as they were held in a cage which required a manager's key to unlock. Mr Murray referred to keys being passed around when things got busy or managers were assisting elsewhere in the store or more than one key was "floating around". However, I found Manager A's evidence that he held the key closely to be credible. Salesperson A's experience was that Manager A held the key and had to be located for staff to access the cage.

[99] Mr Murray did not explore with Manager A why he thought he had authorised the sales. Mr Murray did not seem aware of Manager A's key practice. Unlike other still employed managers, Manager A was not phoned again during the adjournment of the disciplinary meeting.

[100] JB has not established a substantive basis for disciplinary action regarding the iPhones.

Allegation 3 – Selling multiple products

[101] The 12 June 2018 letters refer to this allegation as relating to Mr Kumar over the last year (presumably mid-2017 to mid-2018) selling multiple products below cost to a commercial onseller. This was said to have resulted in a loss of greater than \$16,643 between 2014 to 2018 from this commercial onseller.

[102] I had some difficulty untangling this allegation. Firstly, there are references to two different time periods; mid-2017 to mid-2018, as well as 2014 to 2018. Secondly, it appears from the 12 June letters as well as the reasons for dismissal letter of 29 June 2018 that this allegation relates to sales over a long period to one onseller. However, at the meeting on 14 June 2018 and in JB's letter of 16 August 2018, JB produced receipts only at particular sales made of multiple phones on 4 and 6 May 2018 (as well as the iPad and iPhone receipts discussed above). The wider issue of a relationship with the Reseller was also mentioned though. I will consider both.

Clearance phones issue

[103] Three of Mr Kumar's sales of clearance phones were identified as being of concern; two on 4 May and one on 6 May 2018.

The pricing

[104] A directive came out for the JB stores to mark down a group of clearance phones so they could "clear out all the old stuff and make way for the new". These were a mixture of older models, ex-return (brought back by customers) and ex-display phones, often referred to as q-stock. A sheet was provided indicating net cost price and some products' average sale price, which were mostly below the cost price. The evidence was that, although the reference was to net cost, this was not what would usually be seen as the actual cost price.

[105] Manager C asked Salesperson A to action the directive, price the phones and put them in a display case. Salesperson A asked another person to assist him. The two salespeople wrote out reduced to clear price tags, setting the prices themselves. They based the price on what they thought the market would pay considering factors such as condition and age. The clearance prices could be considerably less than "net cost" price on the sheet. So, for example, an iPhone might have been given a clearance price of less than a third of its cost price. Manager A confirmed that selling

old stock below cost price was not unusual. Manager C appears to have intended the prices to be set higher for a period and then further reduced if the phones were not sold. She was not aware of the actual prices set until after most of the phones were sold.

The sales

[106] On 4 May 2018 at lunchtime Mr Kumar arranged a sale of seven clearance phones in one transaction to a credit card later identified by JB as belonging to the Reseller.

[107] Later that afternoon he sold 27 clearance phones in one transaction, to a buyer using a different credit card, also later identified by JB as belonging to the Reseller. This was the transaction that triggered the investigation.

[108] On 6 May 2018 Mr Kumar arranged a sale of a further nine phones in one transaction. Mr Kumar says this was not to the same person as the buyer of the 27 phones. However, the same credit card was used. Some of these are clearance phones but some were at the normal price. There were no more than two phones of the same type included.

[109] Mr Kumar says all the phones were sold at the marked, mainly clearance, prices, except for phones approved by Manager B. He says Manager B approved the price on three phones (at \$550) and one at \$450 (last one was display model).

[110] Mr Murray says that on the basis of the credit cards, the data from the Risk Team and the discussion with the Reseller, he assumed it was the same person buying all these clearance phones. However, under questioning he accepted that the Reseller might have sent one of his employees to buy. The Reseller told Mr Murray that he used a team of four plus people to purchase.

Policy

[111] There was no clear policy about the maximum number of products in a total sale which was unacceptable, as distinct from products with the same SKU number. Although there were indications that JB wanted to stop resellers purchasing, there was a lack of explicit rules about multiple items sales when there were different products being purchased.

[112] However, Mr Kumar confirmed that at least for the 27 phone sale and for some further reduced pricing in the 6 May sale, he sought and obtained approval.

Evidence regarding approval for 4 May sales

[113] Mr Kumar says that Manager C had approved the 4 May sales. He sought her approval for the first sale and then while the customer of the first sale was paying Mr Kumar told Manager C that the customer's friend wanted to come back and buy maybe all the phones. Manager C said it is all good. He says that after the 27 phone sale he took the receipt to Manager C in the office and she asked if the friend had come in to buy all the phones. He said yes and she replied "well done, we got rid of all of them".

[114] Mr Murray says that he spoke face to face to Managers B and C and the Merchandising Manager about whether they approved the transactions. They all denied it. They were contacted again during the break from the disciplinary meeting and denied it again. Mr Murray says that he trusted his managers. However, there was much evidence at the investigation meeting which Mr Murray had not obtained during his investigation.

[115] On 4 May 2018 Salesperson B, who did not wish to give evidence in support of either party, asked Mr Kumar whether he had permission to sell the clearance phones. Mr Kumar said yes, Manager C approved him to sell them all. Shortly thereafter Salesperson B saw Mr Kumar ask counter staff to give him a print-out of the sale and Mr Kumar then headed to the office where Manager C was. He saw Mr Kumar give Manager C the receipt. He heard Mr Kumar say his "mate came in for the phones" and Manager C replying: "did he end up buying all of them?" Mr Kumar replied "yes he came in and bought them all". Manager C replied "all good, not to worry I will sort it out". Salesperson B took this as a clear indication that Manager C had approved Mr Kumar selling all of those phones. Salesperson B believed, having seen the receipt that this related to the sale of 27 phones on 4 May 2018.

[116] The Merchandising Manager gave evidence that she was told about the large sale by another staff member shortly after the 27 phones were sold. She was shocked by the large quantity and got the receipt reprinted. She took it to Manager C, who took the receipt and scanned through the items, making comments like "that was an end of line item", and "that looks a bit cheap". Manager C said "it's okay because I

had asked sales staff to get rid of the stock and I approved it". A few days later Manager C spoke to the Merchandising Manager saying that she might get a call from head office because of the large sale but Manager C had approved it so she would take the hit.

[117] By contrast to these witnesses, Manager C says that she was not aware of the 27 phone sale until after it occurred. Her recollection is of seeing the receipt after the sales when she was on the shop floor and saying "Cool cool" or "that's a bit low" while "freaking out" on the inside. She says that she tried to remain neutral. She denied having a discussion with Mr Kumar out the back. She cannot recall Mr Kumar mentioning a mate buying phones, as Salesperson B overheard. She accepted that she may have mentioned the phone clearance sale to staff and said "sell the heck out of the phones" or the like.

[118] Mr Kumar's evidence that Manager C had approved the sale was consistent with Salesperson B and the Merchandising Manager's evidence. I found both Salesperson B and the Merchandising Manager to be credible witnesses and accept their evidence.

Evidence regarding approval of 6 May sale

[119] Mr Kumar had asked Manager B to give him a price for a model of phone which was also q-stock. The Manager was not aware that other phones were being sold in the same transaction.

[120] Manager B accepts that he was asked to approve the price. The evidence regarding the number of phones of that model involved was not entirely clear as four phones of this type were sold, three at the price Manager B approved. The fourth was noted as a display model whereas the three were referred to as manager's clearance. Manager B recalled that he personally identified that two of the phones were in the cage in the office and needed to be sold. However, he accepted three may have been in the office.

Investigation

[121] This is a situation where the inadequacies of the investigation are such that it impacts upon the substantive justification for the dismissal.

[122] In June 2018 Salesperson A was interviewed about these events by Mr Murray and Manager C and asked to identify which phones he had priced from the receipt of Mr Kumar's sale. It appears that only the 27 phone sale was shown to and marked by Salesperson A. Given Manager C was a witness to some events being investigated it was unwise to have her present.

[123] Salesperson A said that as the events were a month earlier he could not remember the prices he had set and was reluctant to guess. He says he mentioned several times that he was reluctant to guess. However, he was pushed to comment. He then said the prices looked right for about three quarters of the sales and he was not sure about the last quarter. He drew on the receipt which transactions he thought had prices he had set.

[124] At the disciplinary meeting Mr Kumar was not shown or told about Salesperson A indicating on a receipt which prices he had set. Salesperson A was not mentioned at all, even though Mr Murray had spoken to him and appeared to regard his evidence as relevant to the investigation.

[125] Also, Mr Murray did not speak to the other employee involved in pricing the clearance phones to check her recollection of prices set by her and Salesperson A. He says he was not aware of her involvement. Both Salesperson A and Manager C were aware of her involvement but appear not to have been asked. This suggests a failure to adequately explore topics with witnesses and consider other potential witnesses.

[126] Salesperson B was not identified as a possible witness and not interviewed.

[127] The Merchandising Manager was interviewed at least twice by Mr Murray, once in person and once on the phone during the disciplinary meeting adjournment. She says that she told him that Manager C told her she had dealt with Mr Kumar about the issue. This did not appear to make Mr Murray ask further questions of the Merchandising Manager, which could well have led to her telling him that Manager C admitted to her that she had approved the 27 phone sale.

[128] Manager B was interviewed, together with Manager C, by Mr Murray, and shown copies of receipts. Manager B told Mr Murray during at least two interviews that he had approved the price for one type of clearance phone sold. However, this was not mentioned at the disciplinary meeting. Rather it was said that the manager had not approved the sales.

Cost to JB

[129] The evidence regarding the cost of these transactions was inconsistent.

[130] The letter calling Mr Kumar to the disciplinary meeting stated that the loss was “over -\$16,643 in profit to the business between 2014-2018 from this commercial on-seller alone”. That suggests that the loss was over that four plus year period. JB’s letter of 16 August 2018 responding to Mr Kumar’s personal grievance claim says that the three mobile phone transactions cost the business over \$13,500. Mr Murray’s witness statement refers to him having calculated the total financial loss to JB from these transactions was “around \$22,780”. The calculation method was not clear, with Mr Murray relying on methodology done by others, which seemed to compare the original price for the phone with what it was actually sold at some time later when it was display stock, had been repaired etc.

Commission

[131] Mr Murray says that Mr Kumar manually amended the commission report and sought “to pay himself \$163.96”. The PDA system did not automatically calculate commissions for some sales, including clearance items. Salespeople were not entitled to commission on sales below a certain nominated price. However, commission was sometimes authorised in such circumstances and a manual transaction was needed for this type of sale. Several witnesses confirmed that managers would often approve commission payments on q-stock, as an incentive to sell older stock.

[132] Mr Murray suggests that Mr Kumar was attempting to gain commission that was more advantageous than he would otherwise have received. Mr Murray says that he intervened before Manager C had approved the commission. Commission was thus not paid.

[133] I did not find JB’s evidence on the commission issue compelling. Mr Kumar was not automatically entitled to commission for these sales, but was entitled to seek it. There was no evidence of him misleading anyone about the seeking of commission.

Wider issue of relationship with the Reseller

[134] There was some tension between JB's investigation of particular transactions and the wider issue of its concerns about what the relationship between Mr Kumar and the Reseller was.

[135] Ms Fitts described the broad issue with the Reseller as "mainly the purpose of the discussion" at the investigation meeting. Under re-examination she repeated that the purpose of the meeting was to disclose that JB had contacted the reseller and the reseller knew Mr Kumar. The letters inviting Mr Kumar to the disciplinary meeting did not make that obvious. My impression was that JB had purposefully not chosen to mention the Reseller's name to Mr Kumar until the disciplinary meeting.

[136] The evidence was inconsistent as to whether the Reseller's business name and/or the names of the owner and his son were mentioned to Mr Kumar at the disciplinary meeting. None of those names were mentioned in the letters calling Mr Kumar to the disciplinary meeting. Although some of the spreadsheet material compiled was headed with the Reseller's business name, the pages given to Mr Kumar at the disciplinary meeting did not mention the business or people's names.

[137] Mr Murray considered that he had mentioned the business name but could not recall whether he had mentioned the owner and his son's names, although he believed that he would have. His notes refer to the business name and the first names of the owner and son. However, looking to the writing of the notes and hearing Mr Murray's evidence I consider that the names were in Mr Murray's list of points to discuss at the meeting rather than the few notes taken during or shortly after the meeting itself.

[138] Ms Fitts was confident that the reseller's business name was mentioned at the meeting. Her notes refer to the Reseller's business name. Ms Fitts initially said that the names of the Reseller's owner and his son were mentioned at the meeting. However, she then said that she could not be certain. Her notes do not refer to the individuals by name.

[139] Considering all the evidence I conclude that the Reseller's business name was referred to at the disciplinary meeting but not the names of the owner and his son.

[140] JB accepted the evidence of the Reseller's owner that he knew Mr Kumar and assumed that meant that Mr Kumar must be lying when he said he did not know the Reseller. For example, Ms Fitts said it "was pretty difficult for [Mr Kumar] to deny he knew them when [the Reseller] had told [Mr Murray] that they knew [Mr Kumar] personally". There was no exploration of other possible alternatives. Having not mentioned the names of the individuals, it was not explored whether he might know them but not the name of the Reseller.

[141] Despite the 20 March 2017 email showing JB was aware of multiple individuals being used as purchasers in some instances and Mr Korff and Mr Murray being told that the Reseller used at least four people to purchase for it, the possibility of Mr Kumar not recognising these people seems not to have been contemplated. There were factors which made it more likely that purchasers would know his name without him knowing theirs. Mr Kumar wore a name badge and so was identifiable to customers. He also has a first name that is relatively unusual in the New Zealand context.

[142] Mr Murray expected Mr Kumar to recognise customers buying on behalf of the Reseller, even though there were apparently over four people involved and the sales did not make up a large part of Mr Kumar's sales. The Reseller's sales amounted to about 0.6% of Mr Kumar's sales. Even with only four people buying, that would make each individual purchasing 0.015% of Mr Kumar's sales.

[143] Added to that, Mr Kumar was not involved in handling the actual payment transaction and so would not have seen the credit cards used or the names on the cards. I did not find Mr Murray's evidence that the Reseller would stand out to be credible.

[144] Mr Murray emphasised the recentness of the identified transactions as allowing Mr Kumar to remember the transactions. However, he did not ask Mr Kumar to describe the customers involved. Mr Murray did not describe the owner to Mr Kumar. At the disciplinary meeting Mr Kumar said he had a lot of repeat customers but not anyone he recognised as professional commercial resellers.

[145] Mr Murray did not find convincing or credible Mr Kumar's denial of personally knowing the Reseller's owner and doing business with them. He based

that view on the “significant volume of transactions” that Mr Kumar had undertaken with the Reseller.

[146] JB’s Risk Team had developed evidence regarding sales back to 2014. However, the investigation regarding Mr Kumar was focused on the period from March to June 2018. This was seen as a reasonable period for memory to be good enough and it was during Mr Murray’s time with JB. However, that time period did not fit with the spreadsheets provided to Mr Kumar at the disciplinary meeting which covered events from October 2017 to June 2018; a wider period although not back to the 2014 date mentioned in the 12 June letters.

[147] When asked why Mr Kumar was provided with information beyond the March to June 2018 period, Mr Murray responded that the more information the better, to know how long this had been impacting on our business. “From a business perspective” he said it made sense to have a lot of information. Mr Murray accepted that in hindsight he should have provided more to Mr Kumar, although he did not think that it would have impacted on the outcome.

[148] Both Mr Korff and Mr Murray said to me that they thought there was an arrangement whereby the Reseller paid Mr Kumar, as well as possibly other JB staff. However, that serious allegation was not put to Mr Kumar and was purely based on a sense of what Mr Kumar’s possible motivation was. There was no evidence to support such an allegation.

[149] Mr Murray says that other employees had also given him information to suggest that Mr Kumar had relationships with on-sellers and that these relationships were well known. When asked at the investigation meeting he named Salesperson B who had given information to Manager C. Mr Murray did not speak to Salesperson B about these issues. Salesperson B’s comments were not put to Mr Kumar.

[150] I am not satisfied that JB has established on the balance of probabilities that Mr Kumar had an inappropriate relationship with the Reseller.

Procedural fairness

[151] Some of the procedural issues, particularly as regards the investigation, have already been referred to above as they impinged on the substantive justification for the dismissal.

[152] There are different ways in which a process can be run and still be fair. However, JB chose to delay disclosing the investigation to Mr Kumar, did not properly investigate the allegations regarding particular sales, gave him very restricted information before the meeting, gave him limited information at the meeting, failed to grant his request for a reasonable period to look at the documents and consider the issues and failed to follow up properly on his responses to the allegations.

[153] There was a failure to keep any notes of any of the interviews with JB witnesses or discussions with the Reseller's owner and his son. It was not a simple matter being looked at. There were three sets of transactions being investigated as well as the broader issue of the Reseller. The information provided verbally to Mr Kumar did not adequately outline the information received.

[154] Mr Murray wanted to wait until all the data was compiled and everything was in order before he spoke to Mr Kumar. That may be understandable. However, having done that he did not provide everything he had to Mr Kumar to comment on. What had been compiled included over 70 pages of data. All sales believed to be to the Reseller were included, which were also broken down by individual staff member. A table was compiled identifying the sales from 2014 to 2018 by each staff member by sale price, ticket price, cost and total loss to JB. Mr Kumar's total sales price was the highest but another former staff member had almost three times Mr Kumar's sum what was calculated as JB's total losses.

[155] There was a failure by JB's representatives to seek out further witnesses or to work through what information was held by managers. Salesperson B who had worked for a number of years at the Albany store was not questioned and yet he had critical evidence. JB cannot establish that it formed its view regarding Mr Kumar's culpability after a proper investigation.

[156] Mr Kumar says JB did not adequately inform him that dismissal could have been an outcome of its disciplinary process. It would have been preferable if JB had identified this significant change to the first 12 June letter. Sending the letter through someone who does not know what the changes are and failing to identify changes clearly were inadequate. Communication of the letter was undertaken solely by email, allowing less opportunity for Mr Kumar to compare the letters side by side. That being said, the letters were not long and Mr Kumar was off work on 13 June and there was no evidence that he was unable to look at them on that day.

[157] The 12 June 2018 letters do not clearly identify the particular instances which JB was investigating. References to iPads and iPhones did not sufficiently assist as Mr Kumar sold large numbers of these devices. For example, in terms of iPad sales, the letter referred to no numbers or dates. Mr Kumar provided unchallenged evidence estimating that he sold 500 or more iPads a year. Significantly also, there is no reference to the Reseller's name.

[158] No documents were provided to Mr Kumar before the meeting, which Ms Fitts says does not fit with JB's usual practice of sending them before a disciplinary meeting. Mr Kumar was familiar with the receipt format but it was not evident that he was familiar with spreadsheets. The JB representatives at the meeting were not able to entirely explain them. JB then refused Mr Kumar's request for 48 hours to consider the documents.

Conclusion on dismissal

[159] A lot of JB's time and effort was put into compiling the spreadsheets identifying all sales to the Reseller, and the sales of each employee where the same credit cards were used. Rather less was put into a careful gathering of information regarding both specific transactions and whether Mr Kumar was sufficiently established to have an inappropriate connection with the Reseller.

[160] I find that JB's representatives went into the 14 June 2018 meeting with Mr Kumar strongly influenced by weight of the work done by the Risk Team regarding sales by all staff to the Reseller. Much of this information was not made available to Mr Kumar.

[161] They did not have an open mind to the prospect that Mr Kumar, for whom these sales are only a very small part of his transactions, might not have known about the Reseller as an organisation and not been able to identify individuals involved and link them to the organisation. There was no willingness to explore other explanations. For example, Ms Fitts who was involved in discussion about whether to dismiss, says it was "pretty difficult for [Mr Kumar] to deny that he knew" the Reseller. Further she says that Mr Kumar had blatantly lied about having no relationship with the Reseller. Such comments indicate the lack of preparedness to investigate and consider Mr Kumar's responses properly.

[162] There was a breach of the duty of good faith which JB owed to Mr Kumar. Of particular note is the disciplinary meeting comment that Manager A was not involved and did not need to be asked, when in fact Manager A had already been spoken to and provide an exculpatory response for Mr Kumar. Likewise Manager B's approval of the prices of several phones in the last clearance phone transaction was ignored and not mentioned at the meeting. Particularly when there was no documentation of the interviews, these matters were significant.

[163] I find that JB's decision to dismiss was not one that a fair and reasonable employer could have made in the circumstances. Mr Kumar was unjustifiably dismissed by JB.

[164] For the sake of completeness I note Mr Kumar's concern that his dismissal was motivated by JB's concern about his earlier raising of issues about commission arrangements. I did not find any evidence to support that proposition. Similarly a suggestion that Mr Kumar was racially discriminated against was not supported by any evidence.

Remedies

[165] Mr Kumar seeks permanent reinstatement to his former role. Interim reinstatement was not sought. Mr Kumar also seeks reimbursement of lost remuneration (including commissions), compensation under s 123(1)(c)(i) of the Act and compensation for lost benefits such as sales incentives, as well as interest on those sums. I decline to order interest on such sums as Mr Kumar's entitlements do not crystallise until this determination.

Reinstatement

[166] Mr Kumar wishes to be reinstated as he considers that this would help him regain his previous sense of himself. He emphasises his good relationship with staff and customers. Some of those involved with this case no longer work in the Albany store or in New Zealand so he considers he would be able work in the store without difficulty.

[167] JB strongly opposes reinstatement on the grounds that it has lost trust and confidence in Mr Kumar. This was on the basis of Mr Kumar having an ongoing relationship with a commercial onseller and regularly undertaking large sales to that

customer. Ms Fitts also referred to Mr Kumar's lack of remorse for his actions, as there was no apology, acknowledgment of wrongdoing or conflict of interest. I note Mr Kumar has belatedly said that he was sorry for selling one iPad at a low price against the Merchandising Manager's instructions.

[168] Mr Korff says that he would have no confidence that Mr Kumar would conduct himself in a way which was consistent with the best interests of JB. As a result his transactions would have to be closely and regularly monitored, which is above the level of resources the buying team has. Manager C says that it would feel like she had to watch over all of Mr Kumar's transactions if he returned. She says that it is difficult to micromanage one salesperson and that Albany is a busy store with lots of different staff. She thought it would be difficult for Mr Kumar to earn her trust back.

[169] There was concern that reinstating Mr Kumar could send a bad message to resellers that selling in bulk quantities and consistently selling items at significantly reduced prices were practices which the company's sales people could get away with.

[170] JB witnesses expressed concern that it could be difficult to manage relationships within the store.

[171] Considering all of the relevant circumstances, I am not satisfied that reinstatement would be reasonable and practicable in this case.

Reimbursement of remuneration

[172] Mr Kumar's earnings at JB were variable. Using his previous year's total pay, he would have earned \$49,365.00 gross from JB up to the date of the investigation meeting, had he not been dismissed (excluding incentives from suppliers discussed below). That figure includes base income, commissions and average bonuses. I am satisfied that there is sufficient certainty of him earning that amount or more had he not been dismissed.

[173] Mr Kumar applied for a number of roles with businesses which sold electronic products as well as other sales roles. I am satisfied that he attempted to mitigate his loss.

[174] Mr Kumar gained other employment but at a lesser rate of pay. His earnings at his new job were \$7,690 as at the start of the investigation meeting. The difference up to the time of the meeting, and thus his loss, is \$41,675.00.

[175] Mr Kumar was a long serving employee who was doing well out of employment with JB. I am satisfied that I should exercise my discretion under 128 of the Act and award Mr Kumar reimbursement of lost wages for more than the three-month period. Subject to a consideration of contribution, I consider \$41,675.00 to be appropriate reimbursement.

Compensation for non-economic loss

[176] Mr Kumar was escorted out of the store after having been dismissed and found this humiliating in front of his colleagues and the public. Mr Kumar's daily life was strongly affected by his dismissal. He was unable to sleep properly. He woke in the night and kept on going over what had happened and how he could have been terminated. His trip back to Fiji, which had been booked prior to his dismissal, was spoiled. He no longer had his previous energy and positivity. He was emotionally volatile which affected his family life. His self-esteem was affected to the point where he withdrew from people. He was ashamed to go to family functions as relatives would ask him what had happened. He had worked hard and successfully for many years

[177] Financially, times were difficult with the family's savings being almost used up. He became focused on how he was going to pay his mortgage. He was unable to afford to pay for activities for his children and was pained to see their sadness.

[178] Mr Kumar's wife gave evidence that while she had known her husband as a carefree, happy and energetic person, since the dismissal he is more reserved and has lost his smile. She reports him not sleeping well, being very depressed and often having headaches. The couple have been under strain, with Mr Kumar becoming upset and angry about every little thing, which ends in arguments. I am only able to compensate Mr Kumar but can take into account the effects on him of seeing his wife's strain.

[179] I accept that Mr Kumar was significantly affected by his dismissal and consider \$20,000 an appropriate amount of compensation before considering any contribution.

Lost benefits

[180] Mr Kumar claims for various incentives from suppliers which he was eligible for and likely to receive. These were all schemes which had been approved by JB's head office. Although Mr Kumar provided what he describes as a conservative estimate of the total value of these incentives, there were insufficient details of the value of what was likely to be achieved.

[181] There are two areas where there is sufficient detail to make some award and I am satisfied that Mr Kumar had a high likelihood of achieving the incentive. A trip from an electronics supplier included flights, for which there is evidence a cost of at least \$4019. Mr Kumar was likely to receive two televisions from a supplier, with evidence of JB selling them for \$3996 each (\$7992 in total).

[182] These lost benefits total \$12,011.

Contribution and award

[183] I have considered carefully the issue of whether Mr Kumar contributed to the situation leading to his dismissal. If his actions are to be taken into account they must be both causative of the outcome and blameworthy².

[184] I am satisfied that Mr Kumar's sale of an iPad after the Merchandising Manager had told him not to sell at the PDA price, was blameworthy and causative of his dismissal. However, this was only one of the matters taken into account by JB. I consider that a 10% deduction should be made for his contribution.

[185] I therefore order that JB pay Mr Kumar within 28 days of the date of this determination the following sums:

- (i) \$37,507.50 gross as reimbursement of remuneration;
- (ii) \$18,000 as compensation under s 123(1)(c)(i) of the Act; and
- (iii) \$10,809.90 as lost benefits.

² *Harris v The Warehouse Ltd* [2014] NZEmpC 188 at [178], *Xtreme Dining Ltd (t/a Think Steel) v Dewar* [2016] NZEmpC 136 Full Court [175]

Costs

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

[187] The parties could expect the Authority to determine costs on its usual 'daily tariff' basis unless particular circumstances or factors require an adjustment upwards or downwards.

Nicola Craig

Member of the Employment Relations Authority