

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2019] NZERA 360
3038051
3042371

BETWEEN DEVAN HAGBERG
 Applicant in 3038051
 Respondent in 3042371

AND NEW ZEALAND WINE AND
 SPIRIT MERCHANTS
 LIMITED
 Respondent in 3038051
 Applicant in 3042371

Member of Authority: Nicola Craig

Representatives: Devan Hagberg in person
 Garry Critchley for New Zealand Wine and Spirit
 Merchants Ltd

Investigation Meeting: 14 and 15 March 2019

Submissions and further At the investigation meeting from both parties and 17
information received: June 2019 from both parties

Date of determination: 18 June 2019

DETERMINATION OF THE AUTHORITY

- A. Devan Hagberg was subject to unjustified action by New Zealand Wine and Spirits Merchants Limited to his disadvantage.**
- B. Mr Hagberg was unjustifiably dismissed by New Zealand Wine and Spirit Merchants Limited.**

- C. Within 28 days of the date of this determination New Zealand Wine and Spirit Merchants Limited is ordered to pay to Mr Hagberg the following sums:**
- (i) \$11,307.65 gross as lost remuneration; and**
 - (ii) \$12,000.00 as compensation for humiliation, loss of dignity and injury to feelings.**
- D. New Zealand Wine and Spirit Merchants Limited has not established its claims against Mr Hagberg.**
- E. A timetable is set for submissions on costs, in the event that the parties are not able to resolve the issue themselves.**

Employment relationship problem

[1] From October 2016 Devan Hagberg was involved in the establishment of a liquor distribution business, which became New Zealand Wine and Spirit Merchants Ltd (NZWSM or the company).

[2] From March 2017 Mr Hagberg was paid by Garry Critchley personally. Mr Critchley was the managing director of NZWSM. Although there was some discussion about Mr Hagberg and another employee gaining a shareholding in NZWSM, that did not eventuate. Mr Hagberg was subsequently employed as the NZWSM national sales manager.

[3] Mr Hagberg claims that he was bullied and singled out during his employment, including being notified of possible redundancy, and was later unjustifiably dismissed by the company for alleged serious misconduct. NZWSM largely denies those claims and also filed a counterclaim alleging various breaches of the employment agreement and duty of good faith by Mr Hagberg. I decided to hear the two claims together.

[4] An investigation meeting was held on 14 and 15 March 2019. I heard evidence in person from Mr Hagberg and his partner, as well as a support person he took to a disciplinary meeting. Mr Hagberg also filed statutory declarations from a customer who managed a liquor store and a man involved early on in the establishment of the NZWSM business. Neither man was available for questioning and I take that into account in the weight given to their evidence.

[5] For the company I heard in person from Mr Critchley, a current NZWSM employee and a former employee. Another former employee, who I shall refer to as Sales Rep, A gave evidence by telephone.

[6] This determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions, and specified orders, as permitted by s 174E of the Employment Relations Act 2000 (the Act).

Issues

[7] The issues for determination are:

- (a) Was Mr Hagberg subject to unjustified action by NZWSM to his disadvantage, regarding being bullied or singled out?
- (b) Was Mr Hagberg unjustifiably dismissed by the company?
- (c) If Mr Hagberg establishes a personal grievance, what remedies, if any, should he receive?
- (d) Did the company breach the duty of good faith which it owed to Mr Hagberg, and if so, should it be required to pay a penalty to him?
- (e) Was Mr Hagberg in breach of his employment agreement regarding clause 11 (conduct), clause 21 (confidentiality) and clause 13 (health and safety), and if so, should he be required to pay compensation or a penalty?
- (f) Was Mr Hagberg in breach of his duty of good faith owed to NZWSM and if so, should he be required to pay compensation or a penalty?

[8] NZWSM initially raised claims under the Health and Safety at Work Act 2015 and the Privacy Act 1993 but later withdrew them.

Establishment of the business

[9] My impression is that a significant source of Mr Hagberg's dissatisfaction with events during his employment came from his sense that he was an important part of establishing the business but was later cut out of having an influential role in its operation, with his earlier contribution minimised.

[10] Mr Critchley had been in discussion with other people about forming a new liquor distribution business or buying an established business. He asked Mr Hagberg to become involved. The possibility of potential key staff, like Mr Hagberg, having

the opportunity to purchase non-voting shares. Ultimately Mr Critchley pursued funding from other places.

[11] Mr Hagberg worked hard helping Mr Critchley establish the business. Initially he undertook various tasks including working on a logo, making email and website arrangements, looking for premises, and ordering business cards.

[12] Mr Hagberg stayed at Mr Critchley's home when in Auckland and the two would stay up late talking about the development of the business. Mr Hagberg initially submitted invoices for his work, which Mr Critchley paid himself. Mr Hagberg was keen to use the title of national sales manager (NSM). That had been his role in his previous job. Mr Critchley appears not to have been that keen but allowed Mr Hagberg to use it.

[13] The company was incorporated on 28 February 2017. In June 2017 Mr Critchley sent Mr Hagberg an employment agreement for the NSM role, which Mr Hagberg formally commenced on 3 July 2017. Mr Hagberg's job description included duties of developing and managing as well as providing guidance, support and training to, the sales team.

[14] The business was launched on 5 September 2017. Although there were some successes, Mr Hagberg found the business more difficult than he expected. In addition to selling in his own regions, he covered other regions when NZWSM were between sales reps.

Unjustified action claim

[15] Mr Hagberg saw his position as being undermined by Mr Critchley from mid/late 2017 onwards, with him being frozen out and ignored.

[16] Mr Critchley's view was that Mr Hagberg turned out not to be as good at the selling role as he earlier gave the impression of, and not doing well at the management aspects of the job either. He also saw them both as quite hot headed, leading to some confrontations. The company had developed and he had more staff to oversee and tasks to do, so less opportunities for discussion with Mr Hagberg.

[17] I now highlight Mr Hagberg's areas of concern.

Sales regions

[18] Mr Hagberg originally had the Bay of Plenty and the Waikato regions. In October 2017 a decision was made by Mr Critchley to transfer the Hamilton region to another employee, who lived between Auckland and Hamilton. Mr Hagberg says he complied with Mr Critchley's request but later discovered it significantly compromised his performance numbers. I am satisfied that this decision related to low sales in the Waikato with Mr Hagberg only been able to visit Hamilton once prior to the change, due to other work commitments. The area was undeveloped from NZWSM's perspective.

South Island situation

[19] Mr Hagberg relied on a couple of issues regarding a South Island sales rep. He and Mr Critchley had been discussing using a commissioned rep rather than a paid employee for that work. Then Mr Critchley employed a woman he had known previously, without any discussion with Mr Hagberg. The South Island rep initially reported to Mr Hagberg.

[20] In November 2017 Mr Critchley instructed the South Island sales rep to now report directly to him. His explanation was that the sales rep had said she would leave if she had to work with Mr Hagberg as she did not respect his skills. Mr Critchley was keen to keep her and so agreed that she could report directly to him. This was discussed at a 29 November 2017 meeting between Mr Critchley and Mr Hagberg referred to in more detail below.

[21] Unfortunately at a staff Christmas function in late 2017 the South Island rep told Mr Hagberg, in front of other staff, her views about him and the fact she was now reporting to Mr Critchley. Mr Hagberg felt that this undermined and disrespected his position as NSM and his standing in the business. Mr Critchley accepted that Mr Hagberg was rightfully very upset by what happened at the function.

November exchanges

[22] On 28 November 2017 Mr Critchley and Mr Hagberg argued over the phone when discussing the South Island rep and Mr Hagberg's management style. Mr Critchley suggested that Mr Hagberg step down as he did not think that Mr Hagberg

could do the job. Mr Hagberg said that Mr Critchley should get out in the market place and see how hard it was.

[23] Mr Hagberg emailed Mr Critchley that evening saying that he was not going to step down and asking for a quarterly review of his performance, including clear boundaries and goals for his role. Mr Critchley responded at 11.30pm referring to Mr Hagberg having made abusive comments during the phone call. He told Mr Hagberg to come to Auckland the next day, to discuss his attitude and performance to date, asking him to bring his employment contract with him. At 11.58pm he follows up telling Mr Hagberg to bring his company laptop, credit card, mobile and contact, along with his previous and current weekly call cycles. The reference to bringing all the equipment is clearly an indication that Mr Critchley is considering dismissing Mr Hagberg.

[24] The 29 November meeting was heated and included Mr Critchley saying that he could just make Mr Hagberg's role as NSM redundant and do it myself. They took a break and cooled down. Mr Hagberg agreed, albeit he says under pressure, to let the South Island rep report to Mr Critchley. He identified during the meeting that he was being undermined by the removal of the South Island rep from his team.

Negative emails

[25] Mr Hagberg was concerned that Mr Critchley copied one of the NZWSM owners in to a 31 January 2018 email regarding sales that week. The email included a positive comment regarding another employee and then read:

Pretty exciting to see that nearly everyone has already reached their weekly budget, a great effort. Come on Devan, you're holding the team up.

[26] Mr Critchley says that he always blind-copied the shareholders. Mr Hagberg says that he felt like resigning at that point but did not do so. He texted Mr Critchley saying, "stop kicking me when I'm down".

[27] An email to sales staff on 22 February says:

So, Devan, you're dragging the chain buddy, ...has a good excuse...rain and flooding, so what's yours.

[28] Similar emails in March refer to “Devan, mate, you have to try and pull out a magic rabbit from somewhere”, “Devan, what’s going on” and “Dev you have quite a bit to do yet”. These are in the context of the sales figures for all sales staff being presented. Although from the emails filed other staff were occasionally commented on in a negative way, the comments regarding Mr Hagberg appeared more frequent and intense.

Lack of involvement in decisions

[29] Mr Critchley made a significant pricing decision without consulting with Mr Hagberg. It appears he did not consult with anyone else either. Mr Hagberg’s evidence on whether this amounted to stepping into the NSM role was inconsistent.

April reviews

[30] Mr Hagberg is critical of Mr Critchley not allowing him to undertake the performance reviews of those in his team. Mr Critchley identified to staff that normally Mr Hagberg would be doing the reviews but as it was the company’s first one, he wanted to do them himself. Surprisingly Mr Critchley refused Mr Hagberg’s offer to provide input for the sales reps’ reviews.

[31] In addition, Mr Hagberg points to events in his own review. The review meeting was a lengthy one, with Mr Critchley estimating four hours. Mr Hagberg recorded his review meeting without letting Mr Critchley know. Mr Critchley considers that Mr Hagberg entrapped him, by deliberately provoking him into anger. Mr Hagberg says that he was having hearing loss, which he subsequently got hearing aids for. He wanted a recording to listen back to later. He was too embarrassed to tell Mr Critchley about the hearing loss.

[32] The conversation started fairly convivially about the office, other staff and various aspects of the business. Mr Hagberg questions where the sales numbers came from. Mr Critchley attempts to identify that but is unable to do so. He expresses concern about his sales manager (Mr Hagberg), who is more highly paid, selling less than his team. There is extensive discussion about how Mr Hagberg is feeling.

[33] Mr Critchley admits that he may have been undermining Mr Hagberg. I took this to be in the context of Mr Critchley assuming some of the NSM functions, which

he does not consider Mr Hagberg was meeting. There is some discussion about the prospect of Mr Hagberg stepping out of the NSM role although this did not occur.

[34] The meeting appears to have become somewhat heated but Mr Critchley moves on to talking about Mr Hagberg's KPIs¹, the work he has been doing and a detailed discussion of his region. Mr Critchley says that Mr Hagberg is obviously struggling a bit at the moment (with sales) and Mr Hagberg accepts he is struggling.

[35] Mr Hagberg expresses that he has felt unfairly treated. He gives the example of calls other staff have received from Mr Critchley but says that he has not been rung for three weeks. Mr Critchley's response is that when he rings Mr Hagberg, the latter spends time talking about why he has not achieved something, or why he had not made budget. He says it was hard to deal with Mr Hagberg being on the defensive all the time. Mr Critchley accepts that he took over Mr Hagberg's role of supporting the sales team, but says that this was because Mr Hagberg was on the road and did not respond to emails until evening.

[36] Although Mr Hagberg complains about Mr Critchley swearing in the meeting, there was swearing by both and often in the context of other discussions, not solely the part which became heated.

[37] Mr Hagberg seeks Mr Critchley's confirmation that he will back him and would make a positive comment about Mr Hagberg at the upcoming sales meeting. He says that he needed to get his mana back for running the team. Mr Critchley agrees to comment positively. Mr Hagberg stresses that he will find the answer. Unfortunately during the sales meeting Mr Critchley did not provide the type of support Mr Hagberg was anticipating.

Events in mid-2018

[38] Mr Hagberg considered that when he closed a deal with a group of stores, Mr Critchley raised his budget to minimise his accomplishment. Then the South Island sales person left and Mr Critchley replaced her with another person, who also ended up reporting to Mr Critchley.

¹ Key Performance Indicators

Conclusion

[39] Some of the sense that Mr Hagberg had of being distanced from Mr Critchley and decision-making was due to the fact he was based in Tauranga. The business was expanding, so Auckland-based Mr Critchley had less time to focus on Mr Hagberg. The initial phase of them working closely together to set the business up was over. All this was disappointing for Mr Hagberg. Also, the reality was that it was tougher selling for NZWSM than Mr Hagberg had anticipated.

[40] Another difficulty was an on-going disagreement between Mr Critchley and Mr Hagberg regarding whether sales should be reported or measured by the case (of bottles) or by the dollar.

[41] Of more significance in terms of a personal grievance claims were:

- (i) the appointment of the South Island sales rep without the involvement of, or even prior notification to Mr Hagberg as the NSM;
- (ii) allowing that sales rep to report directly to Mr Critchley;
- (iii) her replacement also reporting to Mr Critchley; and
- (iv) the undermining of Mr Hagberg which was admitted by Mr Critchley, including dealing with matters which should have gone to Mr Hagberg.

[42] Mr Critchley developed concerns about Mr Hagberg's work both as a manager and a sales rep. At his performance review Mr Hagberg accepted that he was struggling. Possibly because they were mates and had been involved in the establishing of the business, Mr Critchley chose not to set up a performance improvement plan or take any formal disciplinary action against Mr Hagberg. Instead he took steps which had the effect of undermining and by-passing Mr Hagberg. He focused on Mr Hagberg's title and salary not changing, however, Mr Hagberg was partially demoted from his job by the removal of functions identified in his position descriptions. These were not the responses of a fair and reasonable employer. I find that Mr Hagberg's employment was affected to his disadvantage by the unjustified actions of NZWSM.

[43] I will consider remedies as part of my discussion below about the other grievance claims. There was not an easy distinction between the effects on Mr Hagberg of the actions during his employment and of his dismissal.

Restructuring proposal

[44] On 31 July 2018 Mr Critchley arranged to meet with Mr Hagberg and another manager to go over poor results from the profit and loss reports. A substantial loss was identified. Mr Hagberg's view was that the financials would be getting better.

[45] Later Mr Critchley arranged meetings with other sales staff and another meeting with Mr Hagberg on 29 August 2018. At his meeting Mr Hagberg was introduced to a human resources advisor NZWSM had appointed to assist with the process. She informed him that his role was potentially going to be made redundant due to the company's poor financial performance. He was given documentation, including a process sheet, structure diagrams and a three page business case proposal for consultation. Mr Hagberg was invited to return to Auckland subsequently to ask questions and provide comment.

[46] Mr Hagberg's role was the only one proposed to be made redundant. Mr Critchley's explanation was that he could undertake the role of national sales manager himself and that others, including the human resource advisor had identified that a NSM was excessive for an organisation of this size.

[47] Mr Hagberg wrote seeking further information to provide a response and instructed a representative. The parties attended mediation on 7 September 2018.

[48] NZWSM filed accounts compiled by their accountant indicating the financial position to the 13 months ended 31 March 2019. I am satisfied that there was a financial basis on which to consider restructuring. Whether the procedure would ultimately have been adequate cannot be definitively answered as it was never finalised. I am not satisfied that Mr Hagberg has a personal grievance claim based solely on the initiation of the procedure.

Disciplinary process

[49] Shortly after the mediation NZWSM discovered that Mr Hagberg had transferred the phone number he was using for company work, which had previously been his, to another phone company under his name.

[50] On Monday 10 September 2019 Mr Hagberg received a letter from NZWSM inviting him to attend a disciplinary meeting. The allegations were set out as the transfer of the phone number and causing disruption and dissention between the company and other staff. Some particulars of the disruption and dissention allegation were included.

[51] An email was sent to Mr Hagberg's then representative the night before the disciplinary meeting adding an allegation about talking to a customer, based on what Sales Rep A had reported. This was that Mr Hagberg had allegedly told the customer about the NZWSM managing director buying himself a brand new, expensive car and making Mr Hagberg redundant because he could not afford to pay the bills.

[52] On his representative's advice, Mr Hagberg called Sales Rep A about what the customer had said. Sales Rep A was uncomfortable, not wanting to get involved. As a result Mr Hagberg called the customer directly. The customer said that Sales Rep A had told him there was a big meeting at head office tomorrow with Mr Hagberg. The customer asked if Mr Hagberg had done something wrong, to which Sales Rep A replied no, it was redundancy.

[53] Mr Hagberg and his support person met with Mr Critchley and the human resources advisor on 12 September 2018. Mr Hagberg provided responses on the issues raised, disputing that he had done anything wrong. These included that the telephone number was always his and he saw it as remaining so after the business started paying for it.

[54] Mr Critchley was critical of Mr Hagberg for ringing Sales Rep A. The latter phoned Mr Critchley saying he was stressed by it and feeling a bit sick. He was also critical of Mr Critchley for ringing the customer. Mr Hagberg said that he needed to investigate to defend himself as the company was not investigating. Mr Hagberg reported what the customer had told him.

[55] An adjournment was called. No further investigation was done during that time. The meeting resumed and Mr Critchley informed Mr Hagberg that he was summarily dismissed. Mr Hagberg was told to leave all company property including the car. He asked to keep the car for a few more days but this was denied. Eventually NZWSM arranged a flight for Mr Hagberg to Tauranga.

Substantive issues

[56] There is no letter of dismissal filed. Mr Hagberg's support person, when asked which items were upheld or found to be substantiated, said that her impression is that they were all grouped together into a good faith and mistrust topic.

[57] I will look at each of the particulars, as I took Mr Critchley's submissions for NZWSM to indicate that if the dismissal was found to be unjustified, Mr Hagberg had contributed to the situation leading to his dismissal.

Phone number

[58] This allegation was phrased in the meeting invitation letter as Mr Hagberg misrepresenting himself as an authorised person to undertake this type of transaction ("fraud") and committing "theft" of NZWSM property, namely the number.

[59] The parties agree that the number belonged to Mr Hagberg before he started with the company. Mr Hagberg says he never agreed that the number would be transferred to NZWSM. Mr Critchley and other witnesses said that staff were spoken to about their number transferring to NZWSM when the company started paying the phone bills. However, Mr Hagberg started earlier than most of those staff and I am not satisfied that he was told that the number would belong to the company. His employment agreement did not contain anything relevant and there was no relevant policy filed.

[60] Some witnesses assumed that if the company paid it got the number, but I do not consider that of itself to be a sufficient basis on which to regard Mr Hagberg's actions as serious misconduct

[61] My sense, from hearing his evidence and that of Sales Rep A, was that Mr Hagberg was annoyed at the way Mr Critchley was treating him and decided to make a stand.

[62] The impersonation or misrepresentation issue is important. Mr Hagberg says that he was able to transfer the number without pretending to be Mr Critchley or the owner of the business. Given that he had held the number before and it was going back to him, this seemed feasible. Mr Critchley denies this. However, his evidence regarding his investigation was not entirely consistent. This appears to have been a matter of recall, reinforced by the absence of notes taken during the discussions and possibly his anger at Mr Hagberg's transfer of the number. At one point Mr Critchley said the company from where the number was transferred told him that whoever changed it would have needed NZWSM's pin number. At another he said that he thought instead that the phone company who received the number had said that to him. There was also a reference to the person needing "details" more broadly rather than a pin. Mr Critchley accepted that there was no mention of the pin at the disciplinary meeting.

[63] I cannot be satisfied on the basis of the evidence before me that had NZWSM investigated adequately, it could say it genuinely believed that Mr Hagberg had impersonated or misrepresented himself. I cannot rule out there being an error in what was done by the phone shop. Mr Critchley had been told by the transferring phone company that an inexperienced staff number was involved.

[64] Neither Mr Hagberg nor Mr Critchley, at least at the time of the disciplinary meeting, seemed well versed in issues regarding the ownership of call phone numbers and their transfer. Information filed by Mr Hagberg suggested that numbers are not owned to the person or organisation they are allocated to.² I am not satisfied that NZWSM investigated adequately to decide that this was a theft situation. There was no evidence that Mr Critchley asked the phone companies about that.

[65] Although unknown to NZWSM at the time of the dismissal, the sales rep who took over Mr Hagberg's company car after the dismissal discovered some paperwork in the glovebox. This included a copy of Mr Critchley's driver's licence and a phone company application form which stated the pin number. Having seen Mr Hagberg and Mr Critchley at the investigation meeting I find it most unlikely that the driver's licence was used as a form of identification by Mr Hagberg at the shop, as the two men do not look similar.

² Number Administration Deed (NAD), an industry-based mechanism for the centralised and independent administration of New Zealand's telecommunications numbering system.

[66] Mr Hagberg's explanation for the paper work being in his car related to a previous sales rep who had flown to Tauranga for her orientation with Mr Hagberg. He provided her with a computer, iPad and phone. Mr Critchley had picked those items up and he and Mr Hagberg had transferred the rep's previous phone number to the NZWSM account. The licence copy and application form were in the bag with her phone. Mr Hagberg gave her the phone and put the papers in his glove box and forgot about. This was in keeping with evidence regarding the car being messy. I found this explanation credible.

Causing disruption and dissention between NZWSM and other employees

[67] There were two aspects to this issue, one concerning a female staff member and the other relating to Sales Rep A. The allegation is that Mr Hagberg discussed his own grievance with these employees. No specific prohibition on discussing grievances, for example in a policy, was referred to.

[68] It was common ground that the female staff member's hours had been cut back by NZWSM and she was not happy. She told Mr Hagberg that she had phoned Employment NZ about that. He suggested she get advice from someone else before taking any action and gave her the name of an advisor. The female staff member later indicated that she was not going to take it any further. Mr Hagberg denied telling her she should fight the change. She was not called to give evidence.

[69] I am not satisfied that Mr Hagberg mentioning his own grievance can be seen as being misconduct. Likewise giving another staff member a contact to get advice. Employees are entitled to seek advice about their employment situations.

[70] Mr Hagberg and Sales Rep A were running a wine tasting together. Mr Hagberg said he might be going to be made redundant. At the disciplinary meeting Mr Hagberg admitted he probably should not have told Sales Rep A. He says it was a heads up for Sales Rep A rather than being undertaken with any malicious intent. Sales Rep A remained working at NZWSM and Mr Hagberg's discussion does not appear to have caused any disruption or tension between himself and the company. This is not a matter which I see as serious misconduct.

Talking to customer

[71] The letter inviting Mr Hagberg to the disciplinary meeting states that Sales Rep A told Mr Critchley that the customer had said Mr Hagberg was going to a meeting about redundancy at head office. However, when Mr Hagberg phoned the customer, the customer said it was Sales Rep A who had discussed the head office meeting with him, not Mr Hagberg. Mr Hagberg told NZWSM this at the disciplinary meeting.

[72] NZWSM failed to follow up when this information was passed on. It did not speak to the customer or go back to Sales Rep A. The company cannot say that it genuinely believed following a proper investigation that the conduct alleged by Mr Hagberg had occurred as it had not undertaken an adequate inquiry.

Speaker

[73] A new allegation was introduced at the disciplinary meeting, namely that Mr Hagberg had taken a speaker from the head office. Mr Hagberg's support person says that that came as a bit of a surprise and felt like an ambush. Mr Hagberg admitted that he had taken the speaker but said it was his. He was on the way past the head office, when coming up from Tauranga for mediation, and he picked it up because it was his and he believed he was going to be dismissed. He did not tell Mr Critchley he was going in to pick it up as it was a split second decision made at 6am in the morning.

[74] Although this looked like a theft allegation from Mr Critchley's evidence the concern was that Mr Hagberg had gone into the office without telling him. Mr Critchley described it as an unwritten rule that staff did not go into the office without telling him. This related at least in part to the storage of alcohol on the premises. Some of the other employees said at the investigation meeting that they would have told Mr Critchley if they were going in after hours. However, one said that he would write it down in a book. I am not satisfied that what Mr Critchley saw as a rule was passed on to Mr Hagberg, particularly as he was not based at the Auckland office.

Procedural issues

[75] I now look at whether the procedure adopted by NZWSM was sufficient. Did NZWSM sufficiently investigate, put its concerns to Mr Hagberg, give him a reasonable opportunity to respond and genuinely consider his responses?³

[76] Even taking into account the relatively small size of NZWSM, as noted above, the investigation into the phone issue was inadequate. Mr Critchley did not have a clear sense of what had happened during the phone transfer. He believed the number belonged to the company and thus theft was involved but did not check this with the phone companies.

[77] As regards the disruption issue, Mr Hagberg's version of events appears to have been different to that reported by the female staff member, including regarding who had initiated the contact between them. NZWSM did not go back to her regarding Mr Hagberg's version of events. Mr Critchley acknowledged at the investigation meeting that he now believed Mr Hagberg had not initiated the contact.

[78] In addition, Sales Rep A's word was accepted even when Mr Hagberg reported that the customer said it was Sales Rep A who had talked to him about NZWSM events, rather than Mr Hagberg. NZWSM did not go back to Sales Rep A to check with him. The customer was not contacted.

[79] Adding an initial allegation shortly before 7am, the night before a disciplinary meeting, as well as another allegation at the meeting itself, was not ideal.

Conclusion on dismissal

[80] Did NZWSM act as a fair and reasonable employer could have done in the circumstances? I am not satisfied that it did. I have outlined why serious misconduct has not been established. The process was rushed with insufficient investigation undertaken.

[81] NZWSM did not act as a fair and reasonable employer could have in the circumstances. Mr Hagberg was unjustifiably dismissed by the company.

³ S 103A of the Act

Remedies

[82] I now look at what remedies, if any, Mr Hagberg should receive for his personal grievances.

Lost remuneration

[83] Mr Hagberg was dismissed on 11 September 2018. He was unemployed until 18 November 2018, which is ten and a half weeks after dismissal. He was paid \$1,346.15 gross per week by NZWSM. His total loss is therefore \$14,134.56. I consider below any contribution to the situation made by Mr Hagberg.

Compensation

[84] I take into account at this point the unjustified disadvantage grievance and Mr Hagberg's dismissal and make an award covering both.

[85] Mr Hagberg's evidence focused on the effects on him during his employment and the effects on his self-esteem. He was shocked about the way he was treated. Mr Hagberg did not talk to his friends after his dismissal about what had happened feeling embarrassed.

[86] Mr Hagberg's partner spoke of him struggling emotionally and professionally to understand the meanings of Mr Critchley's decisions and behaviour. NZWSM's actions have greatly affected his confidence both in his career and his personal life. He is not the man she met.

[87] Although I accept that Mr Hagberg was affected by his time at and dismissal by NZWSM, I take into account the fact that a significant part of his disappointment related to his sense that he was one of the founders of NZWSM and thus should have ended up with shares in the company but did not. His personal grievance claims are not founded on that.

[88] I consider that compensation of \$15,000 would be appropriate before an assessment of contribution.

Contribution

[89] I am required under s 124 of the Act to consider the extent to which the actions of Mr Hagberg have contributed to the situation that gave rise to the personal

grievance. If the actions of Mr Hagberg are to be taken into account they must be both causative of the outcome and blameworthy⁴.

[90] I do consider that Mr Hagberg contributed to some extent to the situation giving rise to his dismissal. Of most importance was his failure to speak to Mr Critchley about the phone number to clarify the company's position. One sales rep got to keep his number by agreement with Mr Critchley when he was made redundant. Mr Hagberg failed to pursue that possibility, which I consider to be causative and blameworthy.

[91] A deduction of 20% is warranted. I order NZWSM to pay Mr Hagberg within 28 days the following sums:

- (i) \$11,307.65 gross as lost remuneration; and
- (ii) \$12,000.00 as compensation for humiliation, loss of dignity and injury to feelings.

Good faith claim by Mr Hagberg

[92] Mr Hagberg did not identify which aspects of NZWSM's actions he considered to be breaches of the duty of good faith. I consider that his concerns in relation to the events outlined above are sufficiently captures within the grievance claims, and it would be double dipping to penalise NZWSM for aspects of its behaviour under this heading.

Claims by NZWSM

[93] I now move on to consider the claims by NZWSM that Mr Hagberg breached his duty of good faith under s 4 of the Act and provisions in his employment agreement. Many of the facts relevant to these claims have been outlined above.

Good faith

[94] I am not satisfied that Mr Hagberg breached his duty of good faith to NZWSM, for the reasons outlined below.

⁴ *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]

Recording of performance review

[95] I accept Mr Hagberg's explanation for recording the meeting without telling Mr Critchley about it. It would have been preferable to have notified Mr Critchley of his hearing issue and asked to record. Mr Hagberg would then not have been open to accusations that he had entrapped Mr Critchley.

Failing to raise concerns more promptly

[96] While there is some validity to this concern, Mr Hagberg did raise some concerns during the November meeting. He also expressed at the April review that he thought Mr Critchley was undermining him. He identified what he would like to happen at the Waiheke sales meeting to re-establish his mana but this did not occur.

Transferring phone number and impersonating Mr Critchley

[97] Mr Hagberg has already suffered the punishment of being dismissed for these matters and I do not consider it right to punish him further because of them.

[98] NZWSM also raised an allegation that Mr Hagberg had refused to return the phone number leading to lack of orders for product being made to the company. This relates to after Mr Hagberg was dismissed. Good faith duties do not outlast the employment agreement.⁵ In any event Mr Hagberg's evidence was that he had referred all the calls he got, texted (but this was not reciprocated for his calls).

Undermining NZWSM's relationship with two employees

[99] The staff member who Mr Hagberg provided an advisor's name to did not give evidence. I am satisfied that she was distressed by the reduction in her hours and do not consider that Mr Hagberg's comments to her had the effect of undermining her relationship with her employer any further. Employees are entitled to seek advice.

[100] Sales Rep A was made uncomfortable by Mr Hagberg phoning him to ask what he had said about the customer. However, he reported this to Mr Critchley and the two appear to have maintained a good relationship since then. There was nothing to indicate that Sales Rep A's relationship with NZWSM was undermined or otherwise adversely affected by Mr Hagberg's actions.

⁵ *Idea Services Ltd (in Stat Man) v Barker* [2102] NZEmpC 112

Breach of clause 11 – conduct

[101] NZWSM claims that Mr Hagberg breached clause 11 of his employment agreement with the company. Clause 11 requires the employee to undertake duties and responsibilities in a professional manner with a commitment to good relationship with clients and the like with whom the employer has business relationships or potential relationships.

Showing restructure proposal to two other employees

[102] The evidence does not establish that Mr Hagberg showed the restructure proposal to anyone other than his representative. He did mention possible redundancy. However, NZWSM employees had been notified by Mr Critchley that things were not going as well as they could have been and that he was making some changes to reduce costs and increase the return on investment. Further, team members involved had been spoken to and some changes to the team might be needed. I am not satisfied that identifying himself as one of those people was sufficient to breach clause 11.

Discussing redundancy situation with customer from liquor store

[103] I am not satisfied that Mr Hagberg talked to the customer about redundancy.

Discussing misconduct process/issues with Sales Rep A and customer

[104] Mr Hagberg was relying on his representative's advice in making these calls. Although it would have been preferable to seek to have the customer contacted by NZWSM, I do not consider this a matter which justified a penalty.

Breach of clause 12 – confidentiality

[105] NZWSM claims that Mr Hagberg breached clause 12⁶ of his employment agreement regarding confidentiality. There are two aspects to this claim, although they overlap with the conduct claim above.

Discussing restructuring proposal with employees and customer

[106] Mr Hagberg was intending to give Sales Rep A a heads up at a wine tasting that he may have to take over a future event if Mr Hagberg was made redundant. While that might have been contrary to the instructions given by NZWSM, I do not consider that it is a matter which Mr Hagberg should be penalised for. Restructuring

⁶ Referred to as 21 in the heading to this clause, but it is in the position of clause 12.

proposals are stressful for employees and it is not uncommon for employees to mention them to workmates.

Discussing misconduct process with Sales Rep A and customer

[107] As noted above, it would have been preferable to have asked NZWSM to call the customer and also to put Mr Hagberg's denial to Sales Rep A. However, Mr Hagberg was facing a dismissal and was acting on the advice of his representative. This is not a matter on which he should be penalised.

Breach of clause 13 - health and safety

[108] NZWSM claims that Mr Hagberg breached clause 13 of his employment agreement by not keeping his company car clean and safe. Clause 13.1 requires the employee to take all practicable steps to ensure his or her own safety while at work and no action or inaction which causes harm to any other person.

[109] I am not satisfied that the lack of cleanliness of the company car can be seen as jeopardising Mr Hagberg's own or any other employee's safety. It appears to have been the level of rubbish which is not uncommon in those who do not clear their cars out regularly, especially those who drive for work, as Mr Hagberg did.

[110] NZWSM says that Mr Hagberg's car required new tyres immediately on being taken over by another employee and that the old ones were a safety risk. Only two of the tyres were changed straight away with the others being left for a change at a later date. The company did not provide any evidence regarding when it last paid for tyres for the car. No one from the garage where the tyres were changed was called to give evidence. Mr Hagberg gave unchallenged evidence that the car had a current warrant of fitness and that was not challenged. He was not aware of the tyres being dangerous.

[111] NZWSM has the onus of establishing a breach of clause 13 and I am not satisfied that it has met that onus in this case.

Costs

[112] Costs are reserved and the parties invited to resolve the matter. If they are unable to do so Mr Hagberg shall have 28 days from the date of this determination to file a memorandum on costs. NZWSM shall have a further 14 days in which to file a

memorandum in reply. Submissions claiming costs must include a breakdown the costs and be accompanied by supporting evidence. Although Mr Hagberg was not represented at the investigation meeting, he did have representation when his claim was filed and may be able to establish some costs which would justify an award.

Nicola Craig

Member of the Employment Relations Authority