

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2021] NZERA 324  
3107172

BETWEEN                      SIMON BATES  
Applicant

AND                              MAJOR MOTORS LIMITED  
Respondent

Member of Authority:        Helen Doyle

Representatives:             Paul Mathews, advocate for the Applicant  
Anastasia Eliseeva, advocate for the Respondent

Investigation Meeting:       19 March 2021 at Christchurch

Submissions [and further    27 April 2021 from the Applicant  
Information] Received:       23 April 2021 from the Respondent

Date of Determination:       27 July 2021

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**DETERMINATION OF THE AUTHORITY**

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- A     Simon Bates was not unjustifiably dismissed constructively or actually from his employment with Major Motors Limited.**
- B     Mr Bates was unjustifiably disadvantaged when he was misled over Level 3 and lost the chance to work.**
- C     Major Motors Limited has been ordered to pay the following amounts:**
- (a)    The sum of \$2,500 without deduction being compensation.**
  - (b)    The sum of \$935.40 gross being a shortfall in payments over lockdown.**
  - (c)    The sum of \$265.50 gross being payment for 24 and 25 March 2020.**

**D Leave is reserved for either party to return to the Authority if there are issues over the amounts paid for commissions, holiday pay and notice.**

**E Costs are reserved.**

### **Employment Relationship Problem**

[1] Simon Bates commenced employment with Major Motors Limited (Major Motors) on 30 April 2018 as a Sales Manager. He was party to a written individual employment agreement.

[2] Mr Bates wants the Authority to resolve several employment relationship problems set out in his statement of problem.

[3] He says that he was unjustifiably disadvantaged when his pay was unilaterally reduced during the COVID-19 lockdown period and he was only paid the wage subsidy, and further when he was prevented from returning to work during Level 3 and was misled by his employer who said the business would not open until Level 2.

[4] Mr Bates says that he resigned and that was in the nature of an unjustifiable constructive dismissal because he was unable to get proper answers as to why he was not being paid the commission he was owed as at the date of lockdown, that he was misled about the Level 3 operation of the business and was not paid properly. In final submissions Mr Mathews submits that the ending of the employment could be viewed alternatively as an actual dismissal because Mr Bates was asked to leave during his notice period.

[5] Mr Bates seeks compensation of \$25,000 in respect of the unjustified dismissal and \$5,000 for each disadvantage claim. He also seeks reimbursement of lost wages at his pay rate from 8 May 2020, reimbursement of lost wages from the unilateral reduction in pay during the lockdown period and payment for two days on 24 and 25 March 2020 when he says that he was instructed to go home. He also seeks a penalty.

[6] Before the Authority investigation meeting the Authority asked whether commission and holiday pay had been paid. The Authority was advised that these payment were made. Out of an abundance of caution I will reserve leave for either party to return if there are issues with those payments.

[7] Major Motors was represented at the Authority investigation meeting by Anastasia Eliseeva who is a shareholder of the company and whose husband is the director of Major Motors. Mr Bates reported to Ms Eliseeva. Major Motors do not accept that Mr Bates was unjustifiably constructively dismissed from his employment or unjustifiably disadvantaged.

[8] Major Motors says that it paid the wage subsidy in full to Mr Bates and other employees. It says the delay in paying the commission owing to Mr Bates at the start of lockdown was due to the fact that the vehicles were not delivered and paid for in full. It says on 8 May 2020 Mr Matthews advised of Mr Bates' resignation. On 13 May 2020 Ms Eliseeva says that Mr Bates came to work at 10:00 am and advised that he was going to work out his notice period. Major Motors say that he disconnected the office camera and started to take pictures from the office computer. Mr Bates was asked to leave the premises and notice was paid in lieu of working.

### **The issues**

[9] The Authority needs to determine the following issues in this case:

- (a) Was Mr Bates paid correctly during the COVID-19 lockdown period?
- (b) If Mr Bates was not paid correctly over the lockdown period then what is he owed?
- (c) Was Mr Bates unjustifiably constructively dismissed or was he actually dismissed?
- (d) Has Mr Bates suffered an unjustified disadvantage when his pay was unilaterally varied?
- (e) Has Mr Bates suffered an unjustified disadvantage when he was prevented from returning to work during level 3?
- (f) Should a penalty be awarded?
- (g) Should there be payment for the two days before lockdown when Mr Bates says he was told to leave.

**Was Mr Bates paid correctly during the COVID-19 lockdown period?**

[10] Mr Bates' income at Major Motors was made up of a retainer and commission on the cars he sold.

[11] The wages and hours of work were set out in clause 6 and 7 of the employment agreement.

[12] The hours of work clause in the employment agreement provided as follows:

6 Hours of Work

6.1 Full Time Hours of Work

The Employee's hours of work shall be 7.5 hours per day on Monday to Sunday, between the hours of 09.00 AM to 5:00 PM. Total 37.5 Hours per Week with 2 days off to be arranged between Employer and Employee.

[13] Clause 6.2 set out the entitlement to lunch breaks as 30 minutes.

[14] Wages were provided in clause 7.1 as follows:

7 Wages

7.1 Hourly rate

The Employee shall be paid accordingly to an hourly rate which shall be \$16.50 per hour.

[15] The hourly rate in the employment agreement increased with minimum hourly wage increases. At the material time Mr Bates was paid \$17.70 per hour under clause 7.1. The commission arrangement between Mr Bates and Major Motors sat outside the written employment agreement. In his oral evidence Mr Bates said that the retainer was paid every week and the commission was paid about a week later. He described when there was payment of commission in his evidence as "ad hoc" and usually paid on Thursday or a Friday.

*Payment to Mr Bates during lockdown*

[16] The Ministry of Social Development (MSD) provided information about the wage subsidy paid to Mr Bates. Over a twelve week period Mr Bates was paid the full time subsidy rate of \$7,029.60 or \$585.80 gross per week. This payment commenced from the start of lockdown.

*Mr Bates raises a concern about payments*

[17] Ms Eliseeva flew to Russia before the lockdown in New Zealand because the Russian borders were about to be closed and she wanted to be with her children. She landed in Moscow on 22 March 2020 and was required to stay in Russia until the border opened with the United Arab Emirates in September 2020. Therefore the communication that took place between Mr Bates, Mr Mathews and Ms Eliseeva during the material period was predominantly by email.

[18] Mr Bates sent emails to Ms Eliseeva shortly after lock down setting out his position about payment over lockdown. It was that he should be paid 80% of his averaged total annual income including commissions over lockdown.

[19] Ms Eliseeva in response said that she was obliged to pay up to 80% wages or the wage subsidy and that commission was additional income and not counted as normal income. There was a suggestion that Mr Bates accept the wage subsidy or he could face redundancy.

[20] There was no evidence that Mr Bates agreed to be paid only the wage subsidy. His reference to any agreement to 80% included his commissions.

*Mr Mathews raises a personal grievance*

[21] Mr Mathews was instructed by Mr Bates. He raised a personal grievance in a letter dated 16 April 2020 about the payment to Mr Bates of the wage subsidy only. He referred to it being a breach on the part of Major Motors to not make endeavours to pay Mr Bate at least 80% of his “typical pay.” There was no elaboration on what was meant by “typical pay.” I have taken it to be payment on the same basis as that advanced by Mr Bates earlier to Ms Eliseeva including commission.

*What was Major Motor’s obligations for payment to Mr Bates over lockdown?*

[22] The Authority in a determination in *Raggett and others v Eastern Bays Hospice Trust t/a Dove Hospice* was required to resolve an issue over whether, in accepting the government

COVID-19 wage subsidy, the employer was released from its obligation to pay wages and salary under the parties' employment agreements and/or the Wages Protection Act 1983 (WP Act).<sup>1</sup>

[23] It found in *Raggett* that the employer had breached obligations owed to the workers to pay contractual wages under the employment agreements and provisions of the Wages Protection Act 1983. There was no agreement in that case between the employer and employee to vary the normal wages or salary due under the employment agreement for a notice period.<sup>2</sup>

[24] Commission on car sales was the most significant aspect of Mr Bates income. From the evidence he was a very successful sales person. Mr Bates described the system for payment of commission in his evidence. The system was not reduced to writing but there did not appear to be any disagreement about how it was paid. Commission was paid separately to the wages and was taxed as scheduler payments. Taxation in this manner was a concern for Mr Bates. The payment of commission to Mr Bates flowed from the sale of a car and not otherwise.

[25] Over the lockdown period Mr Bates did not sell any cars and the basis for payment of commission was not triggered. The evidence supported that a car could potentially have been sold other than through contact with a salesperson in the car yard but there was no evidence that Mr Bates sold a car over the lockdown period. Ms Eliseeva explained in her evidence that Trade Me was connected to the Major Motors 0800 number and that she managed to sell one vehicle by email whilst in Russia. Mr Bates had the work cell phone with him at home for much of lockdown.

[26] I do not find that there was a contractual basis for the payment of commission in the manner Mr Bates proposed of averaging out over lockdown. There was no breach by Major Motors of its obligations in that regard.

[27] There was no agreement to vary the wages payable in the employment agreement. Clause 15.1 of the employment agreement provided that no variation shall be effective or binding unless in writing and signed by both parties. The deductions clause in 15.5 of the employment agreement did not authorise Major Motors to make deductions in the

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<sup>1</sup> *Raggett and Others v Eastern Bays Hospice Trust t/a Dove Hospice* [2020] NZERA 266.

<sup>2</sup> Above n [1].

circumstances presented in March 2020. Deductions under that clause were limited to matters such as social club, superannuation and union fee type payments.

[28] There was a breach of the obligations by Major Motors to pay Mr Bates the wages in the employment agreement in full.

[29] Mr Bates is entitled to reimbursement of short paid amounts over the twelve week period.

### **Calculating short paid amounts over lockdown**

[30] Mr Mathews seeks reimbursement of the shortfall on the basis that Mr Bates worked at least 43 hours per week. Mr Bates in his evidence said that he worked six days a week and Ms Eliseeva did not disagree with that.

[31] The Authority is considering payment for a lockdown period where there was no work undertaken by Mr Bates aside from some phone and online communication. It is appropriate in those circumstances to assess lost wages on the basis of clauses 6 and 7 of the employment agreement. That is 37.5 hours multiplied by \$17.70 which Mr Bates was receiving at the time of the lockdown. From 1 April 2020 the minimum wage rate that applied was \$18.90 for an adult worker paid by the hour. The full Court in *Gate Gourmet New Zealand Ltd v Sandu* held that the Minimum Wage Act 1983 does not apply to employees not performing work.<sup>3</sup> I make no adjustment therefore on the basis of the increase to the minimum wage rate on 1 April 2020.

[32] I have assessed shortfall over the period of twelve weeks consistent with MSD advice about payments to Mr Bates rather than the ten weeks referred to by Mr Mathews. It appears some of the subsidy was used for a notice period payment. Mr Bates was paid \$585.80 gross government wage subsidy for each of the twelve weeks. Under the employment agreement he was entitled to receive payment on the basis of 37.5 hours at \$17.70 for the first of the twelve weeks which is \$663.75 gross. The difference between \$663.75 and \$585.80 is \$77.95 gross.

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<sup>3</sup> *Gate Gourmet New Zealand Ltd v Sandu* [2020] NZEmpC 237.

[33] The sum of \$77.95 multiplied by 12 is \$935.40 gross. There is a shortfall of \$935.40 gross for the twelve weeks.

### **Unjustified constructive dismissal**

[34] Mr Bates' resignation was contained in an emailed letter from Mr Mathews dated 8 May 2020 that provided as follows:

Dear Ana

We have been waiting for a response from you as to why Simon is not able to return to work now.

You told our client that you were closed during Level 3. This was clearly false. We now have evidence that you have been open throughout Level 3. Indeed, you have implied that yourself or at least not denied it.

When we queried this and asked why Simon was unable to work you have not given any satisfactory answer. You simply said that Simon will start at Level 2. This is unacceptable. Simon needs to make a living. You have prevented him from working throughout the past two weeks. This is akin to an unlawful suspension. This has prevented Simon from earning any commissions and mean he is merely surviving on the governments wage subsidy. Please consider this the raising of a **personal grievance for unjustified disadvantage**.

Further, your continuous breaches of good faith have destroyed the trust and confidence that is requisite in an employment situation. Further, Simon need to seek employment elsewhere so that he can earn a proper living. Therefore, Simon has no choice but to resign. You can take this as his notice. You can consider this to be a **personal grievance being raised for unjustified dismissal**.

We note that we filed this matter with MBIE over a week ago. You have not replied to their request for a date for mediation. Therefore, if a date for mediation is not agreed by Tuesday at 5pm we will be filing this matter directly with the Employment Relations Authority.

Regards

Paul Mathews

[35] On Saturday 9 May 2020 Ms Eliseeva sent Mr Mathews an email explaining that under Level 3 a business can open its premises but not physically interact with customers. She advised in her email that Mr Bates had to start work on 11 May 2020 as per his usual schedule.

[36] On 12 May Ms Eliseeva emailed Mr Mathews and asked why Mr Bates did not come to work on the Monday 11 May.

[37] By email of the same date Mr Mathews stated that the Saturday email was sent after Mr Bates was advised he could not return to work under Level 3. Further that Mr Bates has resigned and that he may not believe it is feasible for him to return to work given “there seems little prospect he will be paid properly.” Mr Mathews asked what he would be paid on his return and when the outstanding commission would be paid.

[38] By further email on 12 May Ms Eliseeva asked that Mr Mathews specify the date of the resignation and email the letter of resignation to her with Mr Bates’ signature. She advised that she would complete his commission on all completed deals and finalise his holiday pay.

[39] In response and also on 12 May Mr Mathews advised that the resignation letter was sent Friday and that he was sure she was aware of that when she invited him to return to work on 11 May. Mr Mathews also advised that Mr Bates would be back at work the following morning to work out his notice period.

[40] On Wednesday 13 May 2020 there are a series of emails that are material.

[41] The first was when Ms Eliseeva emailed Mr Mathews at 10.09 am and advised that she had not received the resignation letter and asked of it to be sent again.

[42] Mr Mathew’s advised by email at 10.26 am that she did have it in the email thread.

[43] Ms Eliseeva then responded at 11.48 am and asked if Mr Bates had resigned on Friday then why was he at work “now.”

[44] Mr Mathews responded at 11.51 am and said Mr Bates was working out his notice period.

[45] Ms Eliseeva in an email at 12.13 pm advised that Mr Bates had turned off the cameras in the office and asked the purpose of that. She wrote that he was making pictures from the screen on his phone. She asked that Mr Bates return his keys to another employee and not to come to work for his 2 week notice period.

[46] At 12.16 am Mr Mathews asked if Ms Eliseeva was dismissing Mr Bates.

[47] At 12.19 pm Ms Eliseeva responded and said that Mr Bates resigned on Friday and she would pay him 2 weeks' notice. She asked again the purpose of disconnecting the camera in the office.

[48] At 12.25 pm Mr Mathews advised he would take instructions. He also asked the purpose of the camera in the office.

[49] At 12.45 pm Ms Eliseeva asked again why Mr Bates disconnected the camera and took photos. At 12.49 pm she advised that she could not see any notice [notification] period in the Friday email [resignation letter].

[50] At 1.04 pm Mr Mathews advised that Mr Bates' notice period is one month (not two weeks) as per clause 13.2 in the employment agreement. He wrote that Mr Bates turned off the camera because he found it an invasion of privacy and said that he considered in the absence of a policy it seemed a reasonable thing to do. He then wrote that Mr Bates has taken photos of commission that remain unpaid and that he was entitled to do that given the refusal to pay commission and the fact that the business operated at Level 3 and Mr Bates was advised it was not operating.

[51] At 1.04 pm Ms Eliseeva emailed Mr Mathews and wrote that they were dealing with cash in the office and the cameras are in the office and everywhere in the yard for security purposes. She said that no-one including staff can disconnect the cameras which are a security alarm system connected to the security company monitoring the yard.

*Legal framework for considering claim of constructive dismissal.*

[52] The Court of Appeal in *Auckland Shop Employees v Woolworths (NZ) Ltd* held set out three non-exhaustive categories of constructive dismissal.<sup>4</sup>

- (a) An employer gives the employee a choice between resigning or being dismissed.
- (b) An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.

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<sup>4</sup> *Auckland Shop Employees v Woolworths (NZ) Ltd* [1985] 2 NZLR 372, [1985] ACJ 963 (CA).

(c) A breach of duty by the employer leads an employee to resign.

[53] Mr Mathews submits that the matter falls in the third of these, the breach of duty category.

[54] The Court of Appeal in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* held that the correct approach is to firstly conclude whether the resignation has been caused by a breach of duty on the part of the employer. In determining that matter all of the circumstances of the resignation have to be examined, not simply the communication of the resignation. The Authority needs to then assess whether the breach of duty by the employer was of sufficient seriousness to make resignation reasonably foreseeable.<sup>5</sup>

[55] The resignation letter refers to the advice about Level 3 and that Mr Bates had to resign to earn a living elsewhere. It also refers to “numerous good faith breaches.” In his oral evidence Mr Bates said that the reasons for his resignation were that he was not getting paid and that he was getting “lied to.”

*Unilateral variation of pay over lockdown*

[56] There was a concern that Ms Eliseeva did not respond to Mr Bates’ queries about his payments over lockdown. She was consistent though to both to Mr Bates and Mr Mathews about her view. As set out earlier a disadvantage grievance was raised in a letter dated 16 April 2020 from Mr Mathews that Major Motors was not paying Mr Bates his “typical pay.” The possibility of resignation was set out in the letter. Ms Eliseeva responded on 17 April 2020 and stated:

Simon is employed on minimum hourly rate per hour as per his contract and gets paid according to NZ law during lockdown. Commission is not a part of his hourly rate.

Simon hasn’t sold any vehicles during lock down. Last commission claimed by Simon is not completed and cannot be paid until it is completed.

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<sup>5</sup> *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW* [1994] 1 ERNZ 168.

[57] There was a unilateral variation to the amount Mr Bates should have been paid under his employment agreement. What he should have been paid fell well short of what Mr Bates considered he was entitled to be paid on the basis of an averaging of the commissions received over the previous year on a weekly basis. As Mr Bates said in his evidence at the end of lockdown he had lost a considerable amount of his income primarily because he did not sell cars and receive commission payments.

[58] Ms Eliseeva said in her evidence that she considered from advice received at the time that she was paying Mr Bates correctly. Mr Bates had forwarded to Ms Eliseeva some internet links to demonstrate that his view about what and how he should be paid was correct. Both parties had genuine views about what was to be paid at that time. Whilst unilaterally reducing pay is a breach it has to be seen in the context of a worldwide pandemic and a “hard lockdown.” There were different views and some conflicting advice about payments over this time. I do not find in all the circumstances it was a breach of such seriousness that a resignation would have been foreseeable.

*Payment of commission owing as at 25 March 2020*

[59] There was a delay in paying Mr Bates his commissions for the week ending 25 March 2020 before lockdown. Payment was made on 5 June 2020. There were numerous emails from Mr Bates and Mr Mathews sent to Ms Eliseeva seeking payment.

[60] Ms Eliseeva’s response was that the commissions were not completed until all vehicles were delivered and trade-ins are sold otherwise she set out in an email to Mr Mathews they were short for the money on the account.

[61] Mr Bates and Ms Eliseeva had very different views about whether the commission was completed. Mr Bates said that the rules were changed. In answer to a question from Mr Mathews at the Authority investigation meeting Ms Eliseeva said that she did not change the rules and that there was \$9000 owing on one trade in. In oral evidence Ms Eliseeva said that the business was short of money and had other obligations. She also said that it was difficult during lockdown to check and see that payments have been made for sales.

[62] The statement provided by Ms Eliseeva shows commissions were paid to Mr Bates on 5 June 2020 in the sum of \$602.88.

[63] It was unfortunate that this payment was not able to be made sooner to Mr Bates because it would have assisted him financially over the lock down period. He was owed the money. There was some evidence to support that commission payments for some of the vehicles sold would in all likelihood have been made sooner in circumstances where the parties were not in lockdown.

[64] Ms Eliseeva did not deny that money was owing or state that it would not be paid. It was paid eventually. I do not find in the circumstances that the failure to pay commission for the week ending 25 March 2020 was of such seriousness that a resignation would have been foreseeable.

#### *Opening over Level 3*

[65] On 27 April 2020 Mr Bates and other employees received an email that provided Major Motors would remain closed under Alert Level 3 and was planning for opening at Alert Level 2.

[66] On 6 May 2020 Mr Bates received a text message from another salesperson at Major Motors with advice that Major Motors had been open every day that week. Mr Bates checked the website and it said they were open. Customers were advised to follow the safety instructions for Level 3 at the entrance. Further that Major Motors were also operating online and by phone and customers could apply for a test drive and the sales team would contact them.

[67] Mr Bates said that he felt lied to and this was on top of not being paid correctly and not having regular communication.

[68] Ms Eliseeva explained in her oral evidence that she had an arrangement with her son-in-law who just worked a few hours each day over Level 3 to attend to car sales. She explained they also had a groomer come to work and clean some vehicles for a few hours. She said theoretically the yard was closed and customers were not allowed to go in the yard. She said that part of the difficulty was that Mr Bates would not answer the work phone and he would not return it so there needed to be someone in the office to answer the phone.

[69] There are emails from Ms Eliseeva requesting that Mr Bates return the work cell phone as she believed he was not answering it. Mr Bates did not accept that was the case. This remained an issue for Ms Eliseeva. There are emails from Ms Eliseeva requesting the return of the phone on 30 April and 6 May 2021. In the email to Mr Mathews of 6 May 2021 she asked why Mr Bates was still retaining the phone, not answering it and refusing to return it. Mr Mathews responded that Mr Bates had returned it and has been answering it. There was some limited evidence of a missed call as supported by an email. Mr Bates said this was about finance.

[70] What was happening at Level 3 should have been raised openly and honestly with Mr Bates. Major Motors could ultimately reach decisions about who could be present in the workplace with the limitations with customer contact and social distancing. Most of the employees were not at work.

[71] This may not have resulted in Mr Bates returning to the work place until level 2 however he would have felt that he was part of the process and that he had an opportunity to persuade Ms Eliseeva that he should return to work. There could have been some further discussion about the work phone and his answering of calls.

[72] When asked by Mr Mathews Ms Eliseeva did not explain what was happening with the business at Level 3. It appeared that she wanted to discuss that with Mr Bates directly.

[73] Mr Bates saw the failure to act in good faith about the Level 3 operation as effectively the last straw on top of the failure to pay him properly and communicate properly. The Authority has reached a different view to Mr Bates about what he was entitled to be paid under his employment agreement during lockdown. His income for much of the period would still have been very limited. I have also considered the large number of emails between the parties. The communication from Ms Eliseeva was not always immediate however she made her views on material matters reasonably clear. This was a period where decisions were made quickly in unprecedented circumstances with some sense that businesses may not survive.

[74] I do not find that the failure to act in accordance with good faith obligations about what was occurring in Level 3 was a breach of sufficient seriousness in all the circumstances to make resignation foreseeable even when viewed with the other matters.

[75] I do not find that the breaches separately or cumulatively support a finding that Mr Bates was constructively dismissed. Mr Bates has not been able to establish that his resignation was in fact a dismissal.

### **Actual dismissal?**

[76] On 13 May 2020 Mr Bates attended work and disabled the work camera. Ms Eliseeva advised that Mr Bates was to leave work and she was paying out two weeks' notice. In fact her evidence was that four weeks' notice was actually paid but seemingly at the subsidy rate. Ms Eliseeva relies on clause 13.2 of the employment agreement – “the Employer may, at its discretion, pay remuneration in lieu of some or all of this notice period.”

[77] Mr Mathews submits this was an actual dismissal and a sending away.

[78] Ms Eliseeva understood that Mr Bates had resigned. He then came to work and disconnected a camera and took some photos of work information on his phone. There was no notice given at the time of resignation but Mr Mathews advised that was why Mr Bates was present at work on 13 May 2020. Ms Eliseeva applied clause 13.2 in the employment agreement after the camera was disabled and paid Mr Bates in lieu of notice. She said that she would pay two weeks initially however I understand that four weeks' notice was paid. The wage subsidy was used to pay for some of the weeks.

[79] I do not find that Ms Eliseeva actually dismissed Mr Bates. He resigned from his employment and Ms Eliseeva did not require him to work out notice under clause 13.2 of the employment agreement. Notice was paid. I reserve leave for either party to return to the Authority if there are issues about the amount paid for notice.

### **Disadvantage grievance for unilaterally reducing payments**

[80] In final submissions Mr Mathews said that it was irrelevant for this grievance what the nature of the reduction was, what should have been paid and whether commission was considered with normal pay. He referred to the unilateral reduction of wages and breach of the Wages Protection Act 1983 being the disadvantage.

[81] Mr Bates was disadvantaged over lockdown by the fact that his ability to sell cars and be paid commission was limited and his weekly income as a result dropped significantly over lockdown. I heard evidence from Mr Bates and his wife Rochelle about the significant impact in their ability to meet daily outgoings and the stress that caused as a result.

[82] It was not however an unjustified action on the part of Major Motors that Mr Bates' commissions were not paid out on an averaged basis over the lock down. That was the true nature of the grievance as originally advanced for unjustified disadvantage. The loss of commission payments was the most significant contributor to the financial difficulties.

[83] Given those findings it is appropriate to approach the unilateral reduction of wages in the employment agreement as an arrears claim as the Authority has above rather than a personal grievance for an unjustified action.

### **Disadvantage grievance for actions in Level 3**

[84] Mr Mathews submits that in Level 3 Mr Bates was prevented from working and misled by Major Motors.

[85] I find the actions of Major Motors were not in accordance with good faith obligations and therefore not justified. Mr Bates lost a chance that, if he had been consulted, he could have returned to work and sold vehicles for a period between 28 April and 13 May 2020 in Level 3. Mr Bates felt misled by the advice that Major Motors would remain closed during Level 3 when that was not true and that had an impact on a relationship that was already fragile.

[86] As said earlier I do not conclude that it was inevitable that Mr Bates would have returned to work over that period even if consulted.

[87] An appropriate award of compensation subject to any issue of contribution that recognises that there was no certainty in any return to work is the sum of \$2500.

[88] I am not satisfied that Mr Bates contributed to the circumstances that gave rise to the grievance. I could not be satisfied from the evidence that Mr Bates deliberately refused to answer calls.

**Penalty**

[89] A penalty is sought for a breach of good faith because Mr Bates was misled about the yard opening under Level 3. This effectively mirrors the basis of the grievance found made out above. I am not satisfied under s 4 of the Act that the advice about Level 3 was a deliberate, serious and sustained failure in the unusual circumstances that faced New Zealand at the time or that it was intended to undermine the employment agreement.

[90] The threshold required for a penalty is not reached and I do not award a penalty.

**Two days arrears – 24 and 25 March 2020**

[91] Mr Bates was not paid for 24 and 25 March 2020 and seeks payment for those days. This was the period immediately before lockdown. He said that he was instructed by another employee that the business would close at the end of the day on Monday 23 March 2020. Ms Eliseeva said that it was Mr Bates who advised her through an email that he was closing the yard. I have read that email. I do not find that the email clearly provides that Mr Bates was closing the yard.

[92] I have also read the written statement from the other employee who said that he did not order anyone including Mr Bates to close the yard. I did not hear evidence from that employee.

[93] There appeared to be an absence of clear instructions to Mr Bates about continuing to work on the Tuesday and Wednesday. Some of the cars were moved inside from the yard from close of business on the Monday. In those circumstances I cannot conclude there was not an element of confusion on the part of Mr Bates as to whether he was to work or not for those two days.

[94] An order for reimbursement should be made. I have calculated reimbursement for each day on the basis of \$17.70 multiplied by 7.5 hours. That is the sum of \$132.75 multiplied by 2 which is \$265.50 gross.

**Costs**

[95] I reserve the issue of costs.

[96] Mr Bates has had some success however not to the extent that he had claimed. The meeting concluded at 2.30pm. The parties may be able to reach an agreement as to costs using the daily tariff as a guide. Failing agreement Mr Mathews has until 12 August 2021 to lodge and serve submissions as to costs and Ms Eliseeva has until 26 August 2021 to lodge and serve submissions in reply.

**Orders made:**

[97] I order Major Motors Limited to pay to Simon Bates the following sums:

- (a) The sum of \$2,500 without deduction being compensation in the sum of \$2,500.
- (b) A shortfall in payments over lockdown in the sum of \$935.40 gross.
- (c) Payment for 24 and 25 March 2020 in the sum of \$265.50 gross.

**Helen Doyle**  
**Member of the Employment Relations Authority**