

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2023] NZERA 272
3166201

BETWEEN THOMAS MASON
Applicant

AND SIGN-IT SIGNS LIMITED
Respondent

3180939

BETWEEN SIGN-IT SIGNS LIMITED
Applicant

AND THOMAS MASON
Respondent

Member of Authority: Philip Cheyne

Representatives: Lawrence Herzog, counsel for Thomas Mason
Naoimh McAllister and Kristin Macdonald, counsel for Sign-It
Signs Limited

Investigation Meeting: 8 & 9 November 2022 in Queenstown

Submissions Received: 21 November 2022, 12 & 22 December 2022 for Mr Mason
25 November & 22 December 2022 and 17 March 2023 for
Sign-It Signs Limited

Date of Determination: 26 May 2023

DETERMINATION OF THE AUTHORITY

Employment relationship problems – file number 3166201

[1] Sign-It Signs Limited (Sign-It) operates a sign-writing business, based at Frankton. Reece McChlery is the company director and Lockie Sutherland is its general manager. Through a different company, Mr McChlery is also involved in a sign-writing business in Queenstown called Queenstown Signs.

[2] Thomas Mason was employed by Sign-It and started work in late April 2021. However, Sign-It suspended Mr Mason in November 2021 and summarily dismissed him on 2 December 2021.

[3] Through his lawyer, Mr Mason raised a personal grievance claim for unjustified dismissal. Mr Mason's lawyer also advised Sign-It that Mr Mason had a personal grievance for unjustified suspension.

[4] Mr Mason commenced an action in the Authority in March 2022 (file number 3166201). Mr Mason says he was unjustifiably suspended on 16 November 2021 and unjustifiably dismissed on 2 December 2021. In his statement of problem, Mr Mason claims compensation for lost wages due to time off for stress prior to the dismissal, compensation for lost wages from 2 December 2021 to the date of the investigation meeting, compensation of \$60,000.00 for hurt and humiliation, loss of dignity and injury to feelings for the unjustified suspension and compensation of \$60,000.00 for hurt and humiliation, loss of dignity and injury to feelings for the unjustified dismissal.

[5] The claim for compensation for lost wages prior to the dismissal is based on Mr Mason saying that he was subjected to harassment and bullying during his employment, that Sign-It breached express and implied terms of his employment and that Mr Mason's doctor certified him unfit for work due to stress.

[6] In submissions lodged on 9 December 2022 after the investigation meeting, Mr Mason also asks for penalties against Sign-It for breaches of the employment agreement, or alternatively for breaches of good faith.

[7] Sign-It in its reply says that it carried out fair and reasonable suspension and disciplinary processes and complied with good faith obligations in accordance with s 4(1A) and s 103A of the Employment Relations Act 2000. Sign-It says it justifiably suspended Mr Mason and justifiably dismissed him for serious misconduct. Sign-It also says that Mr Mason did not raise a personal grievance within time about his suspension.

[8] In response to the pre-suspension lost wages compensation claim, Sign-It also says that it did not harass or bully Mr Mason and it did not breach the express and implied terms of his employment. The company says that Mr Mason had not raised a personal grievance claim regarding these matters within time and it does not consent to a grievance being raised out of time.

[9] Sign-It says that it is not liable for any penalties. It says that an action for the recovery of a penalty was not raised in time.

Employment relationship problems – file number 3180939

[10] Sign-It makes its own claims against Mr Mason (file number 3180939). It says Mr Mason breached terms of his employment agreement regarding confidential information. It seeks a declaration to that effect. The company also says that Mr Mason breached good faith, with the intention of undermining the employment relationship. Sign-It seeks a penalty for breach of the employment agreement, a compliance order requiring Mr Mason to delete and destroy its confidential information in his possession or control and a penalty for breach of good faith. Sign-It asks that at least part of any penalty be paid to it.

[11] Mr Mason disputes breaching his employment agreement and not acting in good faith. He says he has advised Sign-It that he does not possess or control any of its confidential information.

The Authority's investigation

[12] Despite mediation, these problems were not resolved.

[13] It is accepted that Mr Mason raised a personal grievance within time concerning the dismissal. The investigation covered the respective positions.

[14] The suspension was part of the dismissal process. Whether or not Mr Mason separately raised a personal grievance regarding the suspension was considered as part of investigating his unjustified dismissal claim, without prejudice to Sign-It's position that a separate grievance had not been raised within time.

[15] Mr Mason confirmed in evidence that he had not raised a personal grievance regarding any matters before the suspension in November 2021. Mr Mason did not apply for leave to raise a grievance regarding pre-suspension matters out of time.

[16] In this determination, I will state relevant factual findings, state and explain relevant legal findings, and express conclusions on issues necessary to conclude the matter and set out any orders.

[17] It will be helpful to set out the context in which these problems arose, before considering the issues to be determined. The following outline emerges from the exchange of correspondence and from undisputed facts.

Context for the problems

[18] There is a signed employment agreement dated 19 April 2021. Mr Mason was employed initially fulltime as group sales manager based in Queenstown, starting on 27 April 2021.

[19] Mr Mason's role and rate of pay changed from about the beginning of June 2021, without that being documented in writing. I will return to this issue. However, it is common ground that Mr Mason from then worked principally from the office of Queenstown Signs performing work for that business, not his original role. It is owned by a different company, of which Mr McChlery is also a director. However, Mr Mason continued in Sign-It's employment.

[20] Before the change in role, on 15 May 2021 Mr Mason sent an email to his ex-wife with an attachment containing Sign-It's client list. Following some exchanges between Mr Mason and Ms Mason, she converted the file to xls format and sent it to Mr Mason on 21 May 2021.

[21] Mr McChlery learnt of these emails in October 2021 and spoke to Mr Mason about them on 15 October 2021. Mr Mason confirmed when asked that he had emailed a copy of Sign-It's client list (names, addresses and phone numbers) to his ex-wife, that Ms Mason had reformatted it and returned the client list to Mr Mason.

[22] After the 15 October discussion, Mr Mason was on sick leave for a time. He was then due to return to work on Monday 8 November 2021. Mr Sutherland wrote to Mr Mason on 5 November 2021. The letter is headed "ALLEGATIONS OF SERIOUS MISCONDUCT AND PROPOSAL TO SUSPEND". The letter alleges that Mr Mason had breached clause 16 of the employment agreement and the company policy by sending the client list to his ex-wife. This was said also to be potentially a significant breach of privacy and a failure to act in Sign-It's best interests and/or to amount to Mr Mason conducting himself in a misleading and dishonest way in breach of implied duties. A disciplinary meeting was proposed for 11 November 2021. The letter also said that Sign-It proposed to suspend Mr Mason on pay pending the disciplinary meeting, given the seriousness of the allegations. Mr Mason was

asked to provide feedback about the proposed suspension by 5.00pm on Monday 8 November 2021 and invited to take “paid special leave” before then. Mr Mason was also asked to return his work phone to Mr Sutherland immediately.

[23] In the morning on Monday 8 November, Mr Mason reported to work at Queenstown Signs. Matt Dobbs is the general manager there. Following an exchange with Mr Dobbs, Mr Mason left the site.

[24] Mr Mason sent an email to Mr Sutherland at 5.04pm on 8 November. In his email, Mr Mason said it appeared to him he had already been suspended, given the interaction that morning.

[25] Mr Sutherland responded by email on 9 November, inviting Mr Mason to take paid special leave that day, while Sign-It considered his 8 November response. Later on 9 November, Mr Sutherland sent a letter of that date. Mr Sutherland responded to Mr Mason’s account of the events of the morning on 8 November and advised Mr Mason that he was then suspended on pay, pending the outcome of the current disciplinary process.

[26] The disciplinary meeting was deferred until 18 November. Mr Mason attended and was represented. Mr Mason’s ex-wife also attended. Mr Mason and Ms Mason provided statements which they read. For Sign-It, Mr Sutherland and Mr Dobb attended. Sign-It was also represented. There are notes of the meeting made by Sign-It’s representative. Mr Mason accepted in his evidence that the notes are accurate as to what was said during the meeting. Following the meeting, Mr Mason remained on suspension.

[27] On 24 November, Mr Sutherland wrote to Mr Mason setting out information relevant to Mr Mason’s explanation given on 18 November that he had sent Sign-It’s client list to this ex-wife in May 2021 with Mr Sutherland’s permission. The information indicated that Mr Sutherland had not been present in the Queenstown office on the date that Mr Mason said he had been given that permission. Mr Sutherland sought a response to the further information by midday on 26 November.

[28] On 25 November Mr Mason sent Mr Sutherland a screenshot of his Apple Notes for the week 10 May – 15 May and said, based on those notes, that it had been on 11 May not 14 May that Mr Sutherland gave permission.

[29] On 30 November 2021, Mr Sutherland wrote again to Mr Mason. The letter is headed “PRELIMINARY PROPOSAL TO TERMINATE EMPLOYMENT FOR SERIOUS

MISCONDUCT". Mr Sutherland repeated the allegations, summarised Mr Mason's responses and gave reasons why he did not accept those. Mr Sutherland asked for any response to the letter by midday on Thursday 2 December.

[30] On 1 December Mr Mason asked Mr Sutherland to agree to mediation about their employment relationship problem. Mr Sutherland responded on 2 December declining mediation and advising that Sign-It would proceed with its disciplinary process.

[31] Later on 2 December, Mr Sutherland sent Mr Mason a further letter headed "FINAL DECISION TO TERMINATE EMPLOYMENT FOR SERIOUS MISCONDUCT".

[32] There was correspondence about time and wage records, final pay and holiday pay. It is not necessary to set out the details as there is no claim in the Authority regarding these matters.

[33] On 16 December 2021 through its lawyer, Sign-It sought return of its property and confidential information, delivery of Mr Mason's devices so it could delete any of its information and Mr Mason's signed undertaking regarding its confidential information.

[34] Mr Mason responded through his lawyer on 21 December 2021. There was further correspondence from Mr Mason on 15 February 2022. Sign-It responded through its lawyer on 1 March 2022.

[35] Soon after, these claims were lodged.

Issues

[36] The following issues arise for determination:

- (a) Is Mr Mason entitled to compensation for lost wages prior to the suspension?
- (b) Did Mr Mason raise a personal grievance regarding the suspension within time?
- (c) If yes, does Mr Mason have a personal grievance arising from the suspension?
- (d) Did Sign-It unjustifiably dismiss Mr Mason?
- (e) If Mr Mason has any personal grievance, what remedies are established?
- (f) Can Mr Mason's claim for penalties succeed?

- (g) Did Mr Mason breach his employment agreement?
- (h) If yes, what if any penalty should be imposed?
- (i) Did Mr Mason breach good faith?
- (j) If yes, what if any penalty should be imposed?
- (k) Should Mr Mason be subject to a compliance order?

Is Mr Mason entitled to compensation for lost wages prior to the suspension?

[37] Mr Mason says he lost wages during the employment having to take time off for stress, caused by Sign-It's management. The claim is for compensation, not for an entitlement to paid sick leave that was not met. The amount of compensation was not quantified.

[38] Mr Mason gave evidence about events in June and July 2021 and on 15 October 2021. Mr Mason also said he was subjected to harassment and bullying on unspecified dates during the employment. His evidence is about Mr McChlery's conduct towards him.

[39] However, it is common ground that Mr Mason did not raise a personal grievance claim with respect to these matters. Mr Mason has not sought leave to raise a personal grievance out of time based on these events.

[40] Mr Mason did not formally withdraw the claim at paragraph 11(a) of his statement of problem for compensation for time lost due to stress. However, compensation cannot be awarded, since there is no grievance claim that might give a right to a remedy, if proven.

[41] I note that Mr McChlery denied that he bullied or harassed Mr Mason. I make no findings regarding Mr Mason's claim that he was bullied and harassed in June, July and August. I deal later with the events on 15 October.

[42] Mr Mason is not entitled to compensation for time lost prior to the suspension.

Did Mr Mason raise a personal grievance regarding the suspension within time?

[43] Mr Mason alleges a personal grievance based on events of the morning of 8 November. Mr Mason reported to work. He says he was told by Matt Dobb that he was on "SUSPEND LEAVE", so no work had been set for him. He then went to the public café that

is part of the premises. Mr Dobb came into the café, told him to leave the café and walked Mr Mason to the door, escorting him off the premises in front of staff and two customers.

[44] In his email on 8 November to Mr Sutherland, Mr Mason referred to the 5 November letter inviting him to comment on the proposed suspension. Mr Mason stated that he had been authorised to send the client list to his ex-wife so had not acted inappropriately. He also said he found the interaction with Mr Dobb on 8 November “uncomfortable and intimidating” and that it appeared his suspension has already been decided before he arrived at work that morning.

[45] The Employment Court summarised principles on point in *Chief Executive of Manakau Institute of Technology v Zivaljevic*¹ as follows (omitting references):

[36] The grievance process is designed to be informal and accessible. A personal grievance may be raised orally or in writing. There is no particular formula of words that must be used. Where there has been a series of communications, ... the totality of those communications might also constitute raising the grievance.

[37] It does not matter what an employee intended his or her complaint to be, or his or her preferred process for dealing with it in the first instance. It also does not matter whether the employer recognised the complaint as a personal grievance. The issues are whether the nature of the complaint was a personal grievance within the meaning of s 103 of the Act and, if so, whether the employee’s communications complied with s 114(2) of the Act by conveying the substance of the complaint to the employer.

[38] It is insufficient for an employee simply to advise an employer that the employee considers that he or she has a personal grievance, or even specifying the statutory type of grievance. The employer must know what it is responding to; it must be given sufficient information to address the grievance, that is to respond to it on its merits with a view to resolving it soon and informally, at least in the first instance.

[46] By his 8 November 2021 email, Mr Mason conveyed the substance of his complaint about the proposed suspension: that there were no grounds for it, that it was pre-determined and implemented in an “uncomfortable intimidating way” in front of staff and customers. Such a complaint is within the definition of personal grievance at s 103(1)(b) of the Employment Relations Act 2000. I find that Mr Mason raised his personal grievance concerning the suspension on 8 November 2021.

[47] There were exchanges on 18 November, 13 December and 21 December, but not about the suspension.

[48] On 15 February 2022, Mr Mason’s lawyer wrote to Sign-It’s lawyer. The letter refers to the earlier notice of Mr Mason’s intention to file a claim for unjustified summary dismissal

¹ [2019] NZEmpC 132.

and says “In addition, Mr Mason gives notice that he has a personal grievance for his unjustified suspension.”

[49] Sign-It replied through its lawyer on 1 March 2022. In part, the letter says that the suspension was lawful and justified, given the seriousness of the allegations. Issue was not taken about whether Mr Mason’s personal grievance regarding the suspension had been raised within time.

[50] These subsequent exchanges do not detract from Mr Mason having raised with his employer his personal grievance claim on 8 November.

[51] I turn to consider the substance of this personal grievance claim.

Does Mr Mason have a personal grievance arising from the suspension?

[52] The employment agreement permitted Sign-It to suspend Mr Mason on full pay to investigate “the matter” if it “considers” that Mr Mason has committed an act of serious misconduct which warrants further investigation. The procedure for disciplinary action permitted Sign-It “with cause and having first heard the employee” to suspend the employee on pay during a disciplinary process. Sign-It had a reasonable basis for the concern that Mr Mason may have committed an act of serious misconduct. The concern was “cause” for a suspension.

[53] I do not accept that Mr Mason was suspended by effect of his interactions with Mr Dobb on 8 November 2021. The decision was made and communicated on 9 November, after Mr Sutherland heard from Mr Mason.

[54] Mr Mason had been on sick leave but on 2 November arranged with Mr Dobb that he would return to work on Monday 8 November. However, Mr Mason received the 5 November suspension proposal letter after that arrangement. In that letter from Mr Sutherland, he was invited to take “paid special leave” on 8 November, pending his response and a decision on the proposed suspension by 5.00pm on 8 November 2021. Mr Mason did not alert Mr Sutherland that he intended to report for work rather than take “paid special leave” on 8 November.

[55] Shortly after the exchange between Mr Mason and Mr Dobb on 8 November, Mr Sutherland messaged Mr Mason to say that Sign-It had sent him away from work that morning on paid special leave to allow him to seek advice and respond to the 5 November

letter. Mr Sutherland stated that no decision had been made at that stage and repeated the request for a response to the 5 November letter.

[56] In his 9 November letter, Mr Sutherland said that they had requested Mr Mason to leave the café at the workplace because he was not required to be there and was on paid special leave, pending consideration of the suspension proposal.

[57] I find that the 8 & 9 November correspondence accurately describes what happened on 8 November. When Mr Mason arrived, Mr Dobb contacted Mr Sutherland. Mr Sutherland is likely to have got Mr Dobb to repeat the message set out in the 5 November letter.

[58] It is reasonably standard practice for an employee to be given paid leave for a brief period, without any impact on their employment, while they consider how to respond to a proposed suspension. I find that is what happened with Mr Mason. Mr Mason was not suspended until after he received the 9 November letter from Mr Sutherland.

[59] It is submitted that Sign-It breached natural justice by appointing Mr Sutherland to make the decision to suspend Mr Mason, when Mr Mason had already said to Mr McChlery that Mr Sutherland had authorised his May 2021 email to his ex-wife. There would likely be a breach of natural justice if the same person was the complainant, the witness and the decision-maker.²

[60] Mr Mason's evidence is that he told Mr McChlery on 15 October 2021 that he had Mr Sutherland's authority to send the client list to his ex-wife. For reasons set out elsewhere, I accept that Mr Mason said that.

[61] The alleged misconduct here that warranted suspension to allow for investigation was based on the discovery in October 2021 of the May email communications. It was not based on a complaint or a complainant's account as a witness. The employment agreement permitted suspension on pay to allow for an investigation, based on the emails.

[62] Given the size of this employer, only Mr Sutherland or Mr McChlery could have made the decision about suspension. In these circumstances, Sign-It did not breach natural justice by appointing Mr Sutherland to make the decision to suspend Mr Mason.

[63] Mr Sutherland acted with legal advice. The steps taken to alert Mr Mason to the possibility of a suspension, to give him paid time off to prepare a response and to consider the

² *Allen v C3 Ltd* [2012] NZEmpC 124

response before making the decision to suspend were the actions of a fair and reasonable employer. I find that Mr Mason was fairly treated with respect to the suspension. No personal grievance is established.

Did Sign-It unjustifiably dismiss Mr Mason?

[64] Sign-It summarily dismissed Mr Mason on 2 December 2021. I need to assess whether its actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time. There are several factors I must consider in applying this test. Before turning to those factors and any other relevant matters, I will say more about the circumstances at the time.

[65] Susanne Spencer is Sign-It's financial controller. Mr Mason had recently started as group sales manager. Mr Mason asked her for a copy of Sign-It's client database. Ms Spencer sent it to him in CSV format on 29 April 2021. Mr Mason sent the CSV file to his ex-wife on 15 May 2021. Ms Mason replied 20 minutes later with "This should work". Later, on 21 May 2021, Ms Mason sent an Excel version to Mr Mason. These emails to and from Mr Mason used a Sign-It email account. There is no evidence that Mr Mason forwarded the CSV or Excel files elsewhere.

[66] Mr Mason gave evidence when questioned that he "showed" Mr Sutherland the problem with the database, before he sent it to his ex-wife. I do not accept that evidence. If that had been the case, Mr Mason would have expressly said this during the disciplinary process. He did not.

[67] Sign-It's IT support firm attended the premises on Monday 10 May 2021 to provide some IT support work on Mr Mason's computer.

[68] At some point in 2021, Mr McChlery was told by a sales rep for another business that a client had told the rep that Mr Mason had been talking to the client about providing finance for Mr Mason to set up a business to compete with Sign-It, because Sign-It had so much work on its books. I take from Mr McChlery's evidence, supported by the rep's statement, that this was in about May 2021.

[69] Mr McChlery's evidence is that the rep was "not comfortable" to give him the client's name, so he was not able to discuss it with Mr Mason at the time.

[70] It is common ground that Mr McChlery did not raise the rep's claim with Mr Mason. Mr McChlery's evidence is that he did not tell Mr Sutherland about the matter and Mr Sutherland's evidence is that he did not learn of it, until after the dismissal. Based on this evidence, the rep's claim would not have been information relevant to the suspension or the dismissal. I return to the point below.

[71] Mr Mason moved from his original position (Group Sales Manager) to a different role working from a different location (Queenstown Signs) as an installer, from about the beginning of June 2021. The change was not recorded by any amendment to the employment agreement. Mr Sutherland was involved in the discussions about this change.

[72] In October 2021, Mr Dobb from Queenstown Signs contacted Mr McChlery. Mr McChlery's evidence is that Mr Dobb had been checking Mr Mason's emails as a matter of routine and found the deleted May 2021 emails between Mr Mason and his ex-wife. Sign- It did not explain why routine checking had not identified the deleted emails earlier. Mr McChlery sought legal advice "straight-away". Mr McChlery was entitled to seek advice, rather than raising it immediately with Mr Mason.

[73] There was an exchange between Mr McChlery and Mr Mason on 15 October at Queenstown Signs. Mr Mason says it was "high pressure", that Mr McChlery was intimidating and bullying and stood over him "for hours". Mr Mason says the exchange was in the office with Mr Dobb present. When questioned, Mr McChlery denied behaving like that.

[74] Mr Mason told me that there was then a discussion in the yard where Mr McChlery said that he could "fire" Mr Mason and mentioned the deleted May emails. Mr Mason's evidence is that he told Mr McChlery that Mr Sutherland had approved it. Mr McChlery's evidence is that Mr Mason acknowledged the May 2021 emails, but did not claim that he had authority from Mr Sutherland to do this. On balance, I accept Mr Mason's evidence about this exchange in the yard. It helps explain why Mr McChlery delegated decision making regarding the disciplinary process.

[75] Mr Mason's Apple notes dated 15 October are in evidence. The notes lack detail, but provide some support for Mr Mason's evidence about the nature of the exchange. However, I treat the Apple notes with some caution, since they can be edited without an audit trail. Mr Mason's medical notes are also in evidence. One such note dated 18 October records Mr Mason saying that the director harassed him for 3 hours "yesterday". The apparent

inconsistency about the date is a reason for caution, but I accept Mr Mason felt pressured by the exchange on 15 October.

[76] To summarise, Mr Mason's role changed from about the end of May 2021. Before then, Mr McChlrey had heard a rumour about Mr Mason possibly setting up as a competitor. There was an exchange between them on 15 October, during which Mr McChlrey told Mr Mason he could fire him but Mr Mason claimed he had approval for those emails.

[77] What follows is mostly based on the documentary material, including the undisputed notes of the disciplinary meeting.

Sufficiency of investigation

[78] Sign-It is a small private-sector business. Mr Sutherland as general manager was appointed as the decision-maker. He had legal advice to assist with the investigation process.

[79] An issue is made of Mr Sutherland not speaking during the investigation meeting on 18 November. Sign-It was represented and was entitled to rely on the representative for the conduct of the meeting.

[80] Mr Sutherland sufficiently investigated the allegations against Mr Mason.

Raising Sign-It's concerns before the dismissal

[81] Through correspondence and the disciplinary meeting, Sign-It raised its concerns with Mr Mason before Mr Sutherland dismissed him. However, Sign-It did not tell Mr Mason about the rep's claims.

[82] Sign-It set out its concerns initially in the 5 November letter, as follows. Mr Mason sent Sign-It's client database to his ex-wife, without authorisation. The email exchange and the formatted file were located in the deleted items folder. Mr Mason had disclosed or used Sign-It's confidential information in breach of clause 16 and other provisions of the employment agreement. Mr Mason had failed to act in Sign-It's best interests and/or conducted himself in a misleading and dishonest way in breach of implied duties. Sign-It was concerned that Mr Mason's conduct could be a significant breach of privacy and/or that he may have retained its information for his own gain. Relevant material was included.

[83] Mr Mason in a signed statement dated 17 November 2021 said that he had been given permission for his actions by Mr Sutherland on 14 May 2021 at 3.31pm. In her statement,

Ms Mason said that Mr Mason had told her that Sign-It knew that he was sending the information to her. The statements were presented for the 18 November 2021 disciplinary meeting.

[84] Mr Mason's statement that he had been given permission on 14 May 2021 at 3.31pm by Mr Sutherland raised a further concern. Mr Sutherland had no recollection of giving authorisation. He checked his own emails and correspondence for that day. They showed he was not at work on 14 May and was out of Queenstown. Mr Sutherland raised this in his 24 November letter and provided relevant documents. It raised the concern that Mr Mason might have attempted to mislead Mr Sutherland during the disciplinary process, affecting trust and confidence. Mr Mason was given an opportunity to respond to the additional information by Friday 26 November.

[85] Mr Mason responded by email on 24 November. He apologised for the "typo", stated that it should have read "11 May at 3.31" and included screenshots of his Apple notes for the week. Mr Mason could have provided a screenshot for or shortly after the 18 November meeting, but did not.

[86] Mr Sutherland wrote to Mr Mason on 30 November 2021. In the letter, Mr Sutherland summarised the misconduct allegations and Mr Mason's explanation. He set out reasons and his "preliminary view" that the allegations were proven and Mr Mason would be dismissed without notice as a result.

[87] Mr Mason had returned a printed copy of the database at the 18 November meeting. Clause 19 of the employment agreement prohibited removing Sign-It materials from its premises without consent. The letter also outlined Mr Sutherland's concern that Mr Mason had taken the printed client database off site without consent.

[88] Mr Mason did not provide a substantive response, but sought Sign-It's agreement to attend mediation. Mr Sutherland declined mediation.

[89] Mr Sutherland confirmed his decision to dismiss Mr Mason by letter on 2 December 2021. The letter only referred to the concerns already raised.

[90] Given the foregoing sequence, I find that Sign-It raised the concerns it had with Mr Mason before dismissing him, except regarding the rep's claims.

A reasonable opportunity to respond to the concerns

[91] It is apparent from the correspondence and the disciplinary meeting that Sign-It gave Mr Mason a reasonable opportunity to respond to its concerns before dismissing him, except regarding the rep's claims.

Genuine consideration of Mr Mason's explanation

[92] Mr Mason's explanation was that he needed to print the database to carry out his duties effectively and efficiently. Mr Mason said he was not able to format the CSV file and spoke to Mr Sutherland who authorised his suggestion that he send the file to his ex-wife to reformat it as she had expertise with formatting Excel files. Mr Mason gave a specific time and date for the exchange with Mr Sutherland and said he sent the file the "following day". Mr Mason later corrected the date he claimed he had been given permission by Mr Sutherland. He produced screen shots of his electronic notes in support.

[93] Mr Mason denied breaching clause 16 of his employment agreement, as he acted with authorisation. He denied disclosing/using confidential information to a third party significantly breaching privacy, he denied a failure to act in Sign-It's best interest and denied conducting himself in a misleading and dishonest way in breach of his implied duties. Mr Mason denied retaining and sharing confidential information for his personal gain.

[94] Mr Sutherland concluded that Mr Mason's explanation was not credible. In his view, Mr Mason did not require a hard copy to perform his role. Mr Mason's role was predominantly office based, where he had electronic access to the database.

[95] Mr Sutherland considered that Sign-It had other people (including himself) proficient with CSV and Excel formatting and its computers had the necessary software. Sign-It had professional IT assistance available if necessary. Mr Mason had accessed that support previously. Mr Mason had not sought assistance internally or from the IT service provider, despite acknowledging the confidential nature of the customer database.

[96] Mr Sutherland stated in his 30 November letter that he did not authorise Mr Mason's action. He did not accept Mr Mason's explanation that he had given authority. Mr Sutherland was not at work on the first date given. He did not accept the explanation that the date first given was a "typo" and approval had been given on 11 May. If approval had been given on 11 May, the dates did not line up. The email to Ms Mason was not "the next day", as claimed by Mr Mason. Mr Mason had not copied Mr Sutherland in on the email exchange with his ex-wife.

[97] Mr Mason referred to the confidential nature of the material to explain why he did not share it with others at Sign-It and why he did not seek internal assistance. Mr Sutherland did not accept this, given that those others had electronic access to the information.

[98] Mr Mason said he deleted the electronic file because the job was completed. However, Mr Sutherland did not accept that explanation. Mr Mason had said he wanted the document in a form that he could make changes to the information. It did not make sense to retain the hard copy, but delete the electronic copy.

[99] As demonstrated by the correspondence, I find that Mr Sutherland genuinely considered Mr Mason's explanations in response to the concerns raised, before he made the decision to dismiss Mr Mason.

Actions of a fair and reasonable employer in the circumstances

[100] The employment agreement required Mr Mason not to disclose to any person any confidential information, except as required for the proper performance of his duties. Confidential information included customer lists.

[101] The agreement permitted Sign-It to terminate Mr Mason's employment summarily if it considered he was guilty of serious misconduct. It gave examples of behaviour that would justify dismissal, including unauthorised disclosure or use of confidential information.

[102] Mr Mason's actions were in breach of clause 16 of his employment agreement, unless authorised. Mr Sutherland did not accept Mr Mason's explanation that he had authorised those actions.

[103] It is submitted for Mr Mason that Mr Sutherland should not have been the decision-maker because as a "key witness", he could not be unbiased and impartial. Principles of bias developed in relation to courts and tribunals do not neatly apply in the employment context.³ As explained above, only Mr McChlrey or Mr Sutherland could have been the decision-maker. Mr McChlrey appropriately decided not to be the decision-maker. Mr Sutherland was not a complainant, and his conduct was not at issue. The conduct of the disciplinary process does not indicate bias or partiality on Mr Sutherland's part. It was not rushed and it was well documented. Good reasons were given to reject Mr Mason's assertion. Sign-It acted fairly and reasonably in appointing Mr Sutherland as the decision-maker.

³ *Yan v Commissioner of Inland Revenue* [2015] NZCA 401 at [12].

[104] Sign-It's rejection of the "authorised" explanation was an action that a fair and reasonable employer could have taken in the circumstances.

[105] I am mindful that Mr Mason was no longer in the position of group sales manager, but was working as an installer at the time of his dismissal. The evidence is that Mr Sutherland was involved in that change, as he later referred to his performance discussions with Mr Mason "after just one month" of the change.⁴ However, correspondence during the disciplinary process only referred to Mr Mason being in the initial position, in relation to trust and confidence in his handling and use of confidential information for the purpose of his role. In reaching a decision to summarily dismiss an employee based on loss of trust and confidence, a fair and reasonable employer would have had regard to the employee's position at the time of the misconduct, as well as to the effect on trust and confidence in the employee's current position at the time of the decision. I find that Mr Sutherland did not consider the latter aspect.

[106] There is a more significant point. I conclude that Mr Sutherland's decision was influenced by Mr McChrey's suspicions based on the rep's claims from May 2021. The 5 November allegation that Mr Mason had retained or shared Sign-It's client information for his "own personal gain" could only be sourced from that suspicion. Given Mr Sutherland's involvement in the change in position, it is improbable that Mr McChrey would not have mentioned the rep's information to Mr Sutherland at that time.

[107] Mr Sutherland did not communicate a conclusion that Mr Mason acted for his personal gain, but nor did Mr Sutherland expressly resile from it.

[108] Despite the rep's unwillingness at the time to identify his source, a fair and reasonable employer would have raised the information in the context of the disciplinary process for Mr Mason's response. I find that by not doing so, Sign-It failed to act as a fair and reasonable employer could have in the circumstances.

[109] Mr Mason was unjustifiably dismissed and has a personal grievance.

[110] I will return to assess remedies for the personal grievance later.

Can the Authority order penalties against Sign-It?

⁴ See the email dated 14 December 2021.

[111] By his statement of problem (file number 3166201), Mr Mason did not commence an action against Sign-It for the recovery of penalties. Mr Mason did not refer to penalties in his later statement in reply (file number 3180939). Mr Mason first sought penalties under s 134 or s 4A of the Employment Relations Act 2000 in submissions lodged in the Authority on 9 December 2022.

[112] Sign-It says that Mr Mason needed to amend his pleadings, otherwise the Authority is limited to the remedies in the unamended pleadings. I am also referred to the requirement that an action for the recovery of a penalty be commenced within 12 months of the cause of action being known to the claimant.⁵

[113] In response, counsel for Mr Mason refers me to *Ashby v NIWA Vessel Management Ltd*.⁶

[114] Assuming for current purposes that there was a breach of the employment agreement or good faith by Sign-It, Mr Mason must have known about that no later than his summary dismissal on 2 December 2021. Even if asking for a penalty in submissions lodged after the investigation meeting could be treated as commencing an action for recovery of a penalty in accordance with requirements,⁷ the earliest that Mr Mason commenced his action was 9 December 2022. On that basis, Mr Mason's claim would fall outside the time limit for penalty claims.⁸

[115] In any event, the finding of the Court in *Ashby* does not assist Mr Mason. In that case, the Court held that the Authority had power to award more compensation for a personal grievance than the amount claimed in a statement of problem. It is not authority for the Authority to supplement a personal grievance claim by adding an action for the recovery of a penalty.

[116] I find that Mr Mason has not commenced an action in the Authority for a penalty for alleged breaches of the employment agreement and of the duty of good faith. A penalty is not available as a remedy.

Sign-It's claim – did Mr Mason breach his employment agreement?

[117] Sign-It relies on two provisions.

⁵ Employment Relations Act 2000 s 135(5).

⁶ *Ashby v NIWA Vessel Management Ltd* [2022] NZEmpC 174.

⁷ Employment Relations Act 2000 s 135 and s 158.

⁸ Employment Relations Act 2000 s 135(5).

Clause 16.1

[118] Clause 16.1 of the employment agreement proscribed Mr Mason from copying, revealing or disclosing confidential information to any person, without authority or as required for the proper performance of his job. It also prevented Mr Mason from using confidential information for his own benefit.

[119] I find that Mr Mason breached clause 16.1 by sending the customer database file to his ex-wife on 15 May 2021.

[120] Mr Mason says that he did this with Mr Sutherland's authority, but for reasons explained elsewhere I do not accept that evidence.

[121] Mr Mason argues that his actions were required for the proper performance of his duties, so were within the exception in the clause. I accept that, in May 2021, Mr Mason had access to the confidential information for the performance of his duties. A preference for a printed copy of the information would not be a breach of clause 16.1. However, he was not required to "copy, reveal or disclose" the information to his ex-wife. The evidence establishes that Sign-It had several employees proficient with converting a CSV file to Excel and editing it to facilitate printing. Sign-It also had external IT consultants with that capability. The strongest that it can be put from Mr Mason's perspective is that it might have been convenient to get his ex-wife's assistance, but it was well short of being required.

[122] In October 2022, Sign-It's IT consultants analysed the computer used by Mr Mason. The consultant recovered a deleted file called "Tom-doc.xlsl". The file properties show that it was created at 1.25pm on 9 August 2021. Mr Mason had no business reason to view that information then. He was not able to explain why the file was created then. The consultant gave evidence that this would not have resulted from the transfer of files from an old computer to a new computer, something that had been done for Mr Mason. The actions on 9 August 2021 are not adequately explained, but there is no evidence to establish it was associated with transferring the file or information externally either electronically or by printing a copy at that time. The information always remained within Sign-It's computer system. I find there was no further breach of clause 16.1 as a result.

Clause 19.1

[123] Clause 19.1 of the employment agreement proscribed Mr Mason from removing from the premises without the employer's prior consent "materials, tools or equipment of any description". I find that Mr Mason did not breach clause 19.1.

[124] Mr Mason in his evidence has probably exaggerated his use of the folder containing the printed customer list in meetings with Mr Sutherland. However, I find that he did not hide its existence and sometimes had it with him. Mr Mason routinely took the folder to and from work, rather than leaving it at the premises. Given his position as group sales manager, it was within the scope of his authority to take the folder away from the premises, without the express consent from Mr Sutherland or Mr McChlrey.

[125] Mr Mason's role changed from about June 2021. This involved Mr Mason working as an installer, based at different premises. However, Sign-It did not document the change. For present purposes, I will assume that the original terms continued to apply. Mr Mason was not asked to deliver-up materials only relevant to his former position, when his position changed. While I accept that Mr Mason no longer had a business reason to retain the folder, not delivering it up until November 2021 did not amount to a breach of clause 19.1.

[126] Sign-It seeks a declaration that Mr Mason breached the terms of his employment agreement. The finding that he breached clause 16.1 resolves that part of the problem.

[127] I deal below with the claim for a penalty.

Sign-It's claim – did Mr Mason breach good faith?

[128] The duty of good faith applies with respect to any matter arising under or in relation to an individual agreement while it is in force.⁹ It applied to Mr Mason and Sign-It more generally and specifically during the disciplinary process.

[129] Good faith is wider than the implied obligations of trust and confidence. It includes not doing anything (directly or indirectly) to mislead each other or that is likely to mislead or deceive each other. The duty also requires the employer and the employee to be active and

⁹ Employment Relations Act 2000, s 4(4)(bb).

constructive in establishing and maintaining a productive employment relationship in which they are responsive and communicative.¹⁰

[130] Mr Mason would be liable to a penalty for failure to comply with the duty of good faith if the failure was deliberate, serious and sustained; or if the failure was intended to undermine bargaining for an agreement, or an employment relationship, or a pay equity claim or statutory passing on provisions.¹¹

[131] Bargaining, pay equity and passing on do not arise here. There is no evidence to prove that Mr Mason acted with an intention to undermine his employment agreement or his employment relationship. Mr Mason is not liable for a penalty under either s 4A(b) or s 4A(c) of the Employment Relations Act 2000 Act. I turn to consider whether Mr Mason breached s 4A(a) of the Employment Relations Act 2000 Act.

[132] Mr Mason's action in May 2021 sending the client database to his ex-wife, although a breach of good faith, was not a sustained breach of the duty. Ms Mason's evidence is that she received the file, converted it and edited it. Following this, Ms Mason deleted the file from her computer. There is no reason to doubt Ms Mason's evidence. These events took place over a short timeframe - between 15 and 21 May 2021.

[133] There is no evidence to establish that Mr Mason used the printed customer database for any purpose other than for his work for Sign-It. If not returning the folder promptly after he transferred from the group sales manager role, amounted to a breach of his implied obligations, it was neither serious nor deliberate. There is no evidence that Mr Mason misused the information during the period he retained the folder. Mr Mason returned the folder when asked to do so during the disciplinary process. It is likely that Mr Mason overlooked returning it, given the lack of formality and documentation around the change in roles.

[134] During the disciplinary process, Mr Mason claimed that his actions in May had been authorised by Mr Sutherland. He then gave a specific time and date. Sign-It established that Mr Sutherland was not present on that date. He next provided a screen shot of his Apple notes in support of his contention that he had authorisation but had given a mistaken date. I am satisfied that Mr Mason's authority claim was untrue. These actions were likely to

¹⁰ Employment Relations Act 2000, s 4(1A).

¹¹ Employment Relations Act 2000, s 4A.

mislead or deceive Sign-It. Mr Mason also breach his implied obligations of trust and confidence. I find that Mr Mason breached the duty of good faith.

[135] The difficulty with a penalty claim for breach of good faith based on Mr Mason's false claim is that it was not sustained. Sign-It doubted the contention soon after it was first made and rejected it not long thereafter. Mr Mason's employment then ended, along with the good faith obligation owed to Sign-It.

[136] For these reasons, the penalty claim for breach of good faith must be dismissed. Mr Mason is not liable for a penalty under s 4A(a) of the Employment Relations Act 2000.

[137] Sign-It seeks a declaration that Mr Mason breached good faith. However, I have found that Mr Mason breached good faith by sending the database to his ex-wife and but falsely claiming he had authority to do that. Nothing further is required to resolve that part of the problem.

Sign-It's claim – should compliance be ordered?

[138] To paraphrase as presently relevant, the Authority has power by order to require Mr Mason to do any specified thing or to cease any specified activity, to prevent further non-compliance with a provision of an employment agreement. The power arises if Mr Mason has not complied with a provision of the employment agreement.¹²

[139] Mr Mason breached clause 16.1 of the employment agreement by sending the database to his ex-wife. However, it is not necessary to order Mr Mason to do or to cease doing any specified thing, in order to prevent further non-compliance. I accept Ms Mason deleted the file. There is no evidence that Mr Mason copied the database to a personal device. Mr Mason returned the folder with the printed copy of the database and there is no evidence that any other copy exists.

[140] The claim for a compliance order is dismissed.

Penalty for breach of employment agreement by Mr Mason

[141] Mr Mason breached clause 16.1 of his employment agreement in May 2021. This came to Sign-It's attention in October 2021. There is no basis to conclude that it should reasonably have come to Sign-It's attention any earlier. Sign-It commenced this action for a

¹² Employment Relations Act 2000, s 137.

penalty by lodging its statement of problem in July 2022, so the action commenced within 12 months as provided by s 135(5)(a) of the Employment Relations Act 2000.

[142] Mr Mason is liable to a penalty of up to \$10,000.00 for the breach.

[143] The severity of the breach was low.

[144] While Mr Mason understood the sensitivity of the information given his industry background, there is no evidence to show that his actions were for an ulterior or dishonest purpose. Mr Mason did not act with the contractual prohibition in mind, or being wilfully blind to it. I consider the breach was negligent, not intentional.

[145] The breach was limited to Mr Mason sending the information to his ex-wife. Ms Mason might have seen some of the information, but only as a by-product of her global formatting and editing of the file. There is no reason to think that Ms Mason had any interest in or recollection of the information once she sent it back to Mr Mason. I accept Mr Mason and Ms Mason share ownership and control of a company, but it does not operate in an industry associated with Sign-It's operations.

[146] There is no evidence of loss or damage suffered by Sign-It or of gains made and losses avoided by Mr Mason. Sign-It submits that it may be years before any loss is identified or losses (and gains) might not eventuate until Mr Mason sets up as or becomes involved in a competitor. Those possibilities are speculative at best, so play no part in the present task.

[147] A penalty is not required as deterrence for Mr Mason. The finding is sufficient denunciation for his conduct, despite his lack of remorse. The case does not demand the imposition of a penalty as general deterrence. Mr Mason's breach was the main cause of his dismissal. That amounts to deterrence.

[148] There is no evidence about Mr Mason's financial position to consider as part of this assessment.

[149] I am referred to *Johnson v Fourth Estate Holdings (2021) Ltd*.¹³ The submission is that the employee in that case was penalised \$9,000.00 for sending the employer's confidential information to her personal email, in breach of the agreement. The cases are not comparable. That case involved multiple breaches (even after globalisation) in the context of

¹³ *Johnson v Fourth Estate Holdings (2021) Ltd* [2018] NZERA Auckland 341

seeking and then obtaining alternative employment. The breach here was in connection with Mr Mason starting the role with Sign-It, probably to facilitate that work.

[150] The second case is *Tag Oil (NZ) Limited v Watchorn*.¹⁴ It is submitted that it involved similar facts, but I disagree. The employee in that case had copied an enormous amount of data to his own external drive at times associated with being interviewed for other employment with a competitor and again when he gave notice. There were criminal charges as well as the action in the Authority. At the time of the arrest, Police discovered the external drive connected to the employee's new work computer. The Authority's orders included a penalty of \$12,000.00 for eight breaches on four separate days. The circumstances in the present case are substantially different.

[151] Given the foregoing points, the finding that Mr Mason breached clause 16.1 in May 2021 is sufficient to resolve this part of the problem. I am also mindful that effects on Sign-It as a result of the breach are met by the application of s 124 of the Employment Relations Act 2000, rather than by the recovery of a penalty that would be payable to the Crown.

[152] I will assess remedies for Mr Mason's personal grievance.

Remedies for the personal grievance

[153] As explained earlier, Mr Mason cannot recover compensation to cover time he was off work before the dismissal.

[154] There is a substantial claim for lost wages following the dismissal. Mr Mason's evidence is that he was not able to secure other work from then up to the date of the Authority's investigation. Compensation to cover that loss is claimed.

[155] Mr Mason was obliged to take reasonable steps to mitigate his loss. His evidence to establish that is set out in his statement of evidence. However, the first two listed steps were prior to the dismissal. Mr Mason did not specify the dates, so I cannot say that they were in anticipation of a likely dismissal. Mr Mason left Queenstown shortly after the dismissal. His evidence is that it would have been two months afterwards that he approached the third listed business. It is clear that Mr Mason took no steps to find other employment for the first two months (perhaps longer) after the dismissal. The other three steps followed from then. When questioned, Mr Mason confirmed that he had "inquired" about four jobs after his dismissal.

¹⁴ *Tag Oil (NZ) Limited v Watchorn* [2014] NZERA Wellington 58.

However, there is no evidence that Mr Mason applied for any vacant positions. Mr Mason has not established that he took reasonable steps to mitigate his lost remuneration.

[156] Mr Mason explained that his limited effort to find other employment was because of his poor health. He was certified as medically unfit to work throughout the period. The evidence establishes that Mr Mason's lost remuneration was the result of this medical incapacity, but it does not establish this medical incapacity was the result of his dismissal. Based on this, Mr Mason has not suffered any lost remuneration as a result of his personal grievance so the claim for compensation must be dismissed.

[157] There is a claim for compensation for hurt and humiliation, loss of dignity and injury to feelings.

[158] Much of Mr Mason's evidence to support this claim concerned his interactions with Mr McChlrey prior to the suspension in November and the dismissal in December 2021. Mr Mason referred to their meetings on 3 June, 16 July, 19 July and 15 October 2021. Mr Mason also referred to the changed role, reduced income, reduced benefits and the increased rental for his accommodation. However, Mr Mason cannot recover compensation under s 123(1)(c)(i) of the Employment Relations Act 2000, based on that evidence. Any emotional loss as a result of those interactions between Mr Mason and Mr McChlrey, did not result from his unjustified dismissal.

[159] The evidence of emotional loss properly attributable to the dismissal is limited. There is reference in the medical notes after the dismissal to sleeplessness, stress and anxiety, which I accept was attributable at least in part to the dismissal.

[160] I do not accept the submissions that the evidence establishes that Mr Mason was "deeply affected" by his dismissal. The submission addresses the interactions with Mr McChlrey in October 2021 and earlier. As explained, the only matter which the Authority can order compensation in settlement of a personal grievance is the unjustified dismissal.

[161] The proven harm is significantly less than was established to support the awards in the two cases counsel referred me to. I assess \$10,000.00 compensation as the amount required to restore Mr Mason for the harm caused by the unjustified dismissal.

[162] I am required to assess the extent to which Mr Mason contributed to the circumstance in a blameworthy manner and reduce compensation accordingly.¹⁵ Mr Mason's contribution was significant. He breached clause 16.1 of the employment agreement. A disciplinary process resulted, but its outcome was influenced by the undisclosed report. Mr Mason then wrongly claimed he had Mr Sutherland's authority. Sign-It's conclusion that this was not true was not advanced as the reason for the dismissal, but it was no doubt a factor in the decision. By breaching his agreement and giving an untrue explanation when asked about that, Mr Mason contributed in a blame worthy manner to the circumstances.

[163] Mr Mason's level of contribution matched that of the employee in *Maddigan v Director-General of Conservation*.¹⁶ The Court in that case considered the employee's conduct more significant than that of the employee in *Xtreme Dining Ltd v Dewar*.¹⁷ The same applies to the present case.

[164] I fix 20% as the reduction required to reflect Mr Mason's contribution.

[165] As a result, there will be an order for Sign-It to pay \$8,000.00 to Mr Mason.

Summary and orders

[166] Mr Mason was unjustifiably dismissed by Sign-It and he has a personal grievance. Sign-It Signs Limited is to pay Thomas Mason compensation of \$8,000.00 pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000 by Friday 23 June 2023.

[167] Other claims (except as below) by Mr Mason are dismissed.

[168] Thomas Mason breached clause 16.1 of the employment agreement between him and Sign-It Signs Limited. The claim by Sign-It Signs Limited to recover a penalty for breach of the employment agreement is dismissed.

[169] Other claims (except as below) by Sign-It Signs Limited are dismissed.

[170] Costs are reserved. I encourage Mr Mason and Sign-It to reach agreement, if possible. In the absence of agreement, Mr Mason may lodge and serve a supporting memorandum within 14 days of today's date. Sign-It may lodge and serve a memorandum in reply within a

¹⁵ Employment Relations Act 2000, s 124.

¹⁶ *Maddigan v Director-General of Conservation* [2019] NZEmpC 1910.

¹⁷ *Xtreme Dining Ltd v Dewar* [2016] NZEmpC 136.

further 14 days. Mr Mason may lodge a final memorandum in reply within a further 7 days. I will then determine costs with regard to these submissions and the Authority's practice.

[171] I should not be taken as indicating a view about who (if anyone) is entitled to costs in the sequence set out above. Mr Mason was the initial applicant and Sign-It the initial respondent. Each might be seen as having achieved a measure of success in the respective claims and defences. If Mr Mason considers there are grounds for costs in his favour overall, he can advance that case. Similarly, Sign-It can respond. Mr Mason has a strict right of reply to respond to matters raised by Sign-It that have been adequately dealt with in his initial memorandum.

Philip Cheyne
Member of the Employment Relations Authority