

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2025] NZERA 577  
3255460  
3277399

BETWEEN

MICHAEL SOMERVILLE  
Applicant in 3255460  
Respondent in 3277399

AND

VORTEX DISTRIBUTORS  
LIMITED  
Applicant in 3277399  
Respondent in 3255460

Member of Authority: Sarah Blick

Representatives: Keziah Singleton, counsel for Mr Somerville  
Jamie McCulloch, for Vortex Distributors Limited

Investigation meeting: 22-24 January 2025 and 21 February 2025 in Auckland and by  
audio visual link

Submissions and further information received: 24 February, 6 March 2025 and 4 June 2025 for Mr Somerville  
27 February and 16 June 2025 for Vortex Distributors Limited

Determination: 17 September 2025

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Michael Somerville was employed by Vortex Distributors Limited (Vortex) as General Manager (GM) from March 2022 to August 2023. He says he has personal grievances for unjustified disadvantage and unjustified dismissal for which he seeks remedies. He further says Vortex owes him a bonus payment and did not pay him correctly at the end of his employment.

[2] Vortex denies Mr Somerville's claims and has filed a counterclaim. It alleges he breached the duty of good faith by misrepresenting his work history, and seeks to recover the costs of his recruitment. It also claims he failed to devote contracted hours to Vortex and

dishonestly sold company products for personal gain - both breaching the implied duty of fidelity in the parties' employment agreement (IEA). Additionally, Vortex alleges Mr Somerville breached the IEA by leaking confidential information. It seeks penalties for each alleged breach.

### **The Authority's process**

[3] The parties' claims against each other have necessarily been heard together.

[4] The Authority received witness statements from Mr Somerville, sons Conor and Troy Sommerville and former partner Sharmyn Turner. A friend of Mr Somerville, Shawn Winterburn also gave evidence. For Vortex, the Authority received statements for the following witnesses: Vortex director Jamie McCulloch, staff members Heidi McCulloch, Nicole McCulloch, Jake McCulloch, Vidhey Patel, Carl Kaschula, Richie Remnant, Ducheon Okesene, Nikki Bayer, and Chris Raven. It called other witnesses Luke Tempest, Neil Munroe Kevin Luckie. The Authority also heard from Tim Cox. All witnesses gave evidence under oath or affirmation at the Authority investigation meeting.

### **The issues**

[5] The issues for investigation and determination in Mr Somerville's application are:

- (a) Was Mr Somerville unjustifiably disadvantaged in his employment?
- (b) Was Mr Somerville unjustifiably dismissed from his employment?
- (c) If a personal grievance or grievances are established, are remedies payable?
- (d) Is Mr Somerville owed an unpaid bonus amount?
- (e) Is Mr Somerville's owed wages for 8-9 August 2023?
- (f) Is he owed holiday pay and KiwiSaver contributions?
- (g) If unpaid entitlements are owing, should interest be paid on those entitlements?

[6] It was agreed that the investigation as to the quantum of any bonus payment payable would be reserved pending the Authority's determination on whether there is in fact an entitlement to a bonus. If found to be payable, the Authority will allow the parties an opportunity to liaise and calculate it before making any determination on quantum.

[7] The issues for investigation and determination in Vortex's application are:

- (a) Did Mr Somerville misrepresent his work history, such that Vortex can recover recruitment fees as damages from him, and a penalty under s 4A of the Act?
- (b) Did Mr Somerville fail to devote his contracted hours to working for Vortex such that he breached the duty of implied fidelity and a penalty should be imposed under s 134 of the Act?
- (c) Did Mr Somerville dishonestly purchase and on-sell Vortex products for personal gain such that he breached the duty of implied fidelity, and can related losses be recovered as damages from him?
- (d) Did Mr Somerville breach the parties' employment agreement by "leaking confidential information" and if so should a penalty under s 134 be imposed on him?

## **Background**

[8] Vortex is an importer and wholesale distributor of water pumps and filtration equipment. It has an office and warehouse premises in Auckland.

[9] Vortex engaged a recruitment agency when recruiting to fill a newly-created GM role in 2022. Mr McCulloch had intended to step away from management. Mr Somerville applied for the role in February 2022. Vortex has provided a copy of an agency consent form signed by Mr Somerville, in which he declared that all information provided by him to the agency "is and will be true, accurate and complete and is not designed to mislead in any way".

[10] As part of this process, Mr Somerville provided the agency/Vortex with a CV. Vortex has provided a screenshot from November 2023 of Mr Somerville's LinkedIn profile which says he was employed as a chief operating officer at a company between June 2019 and April 2020 (the company). It is common ground Mr Somerville's CV omitted reference to that work.

[11] Vortex says Mr Somerville included a "falsified employment history" by omitting reference to his most recent employer. It says it would have conducted checks with the company and would not have employed Mr Somerville. He says he was already hesitant due to Mr Somerville's history of short-term roles, and disclosure of another brief tenure at the company would have made him unsuitable.

[12] Additionally, Vortex refers to Mr Somerville not having disclosed an Authority determination from 2021 involving another employer, which he says Mr Somerville downplayed as a “legal error” and denied any other employment issues.

[13] Mr Somerville denies falsifying his employment history – pointing out the job history on the CV said it was “relevant employment history”. He states he did not think it was relevant, because that company never really got off the ground due to Covid-19. He says it was no secret about his work for the company - it was right there on his LinkedIn profile for anyone to see. He says if he had included the company on his CV, an individual (who I refer to as Mr G in this determination) would have been the reference for it. He believes Mr G would have given him a positive reference and he cannot think of any reason why Vortex would not have wanted to employ him after conducting checks with the company.

[14] Vortex has provided a copy of tax invoices from the agency identifying its final fee for recruitment of the General Manager position. Mr Munro acted as the recruitment agent and says Vortex paid his company \$15,300 plus GST based on successfully appointing someone to the GM role. There were no other suitable candidates provided to Vortex that applied, so it says it would not have incurred this fee employing another candidate.

[15] Mr Somerville commenced employment on or about 24 March 2022.

#### *IEA provisions*

[16] The signed IEA between the parties states Mr Somerville’s role included performing work for another company, Company A, as required by Vortex. The position description stated the role and was responsible for 10 team members and it reported to the owner (Mr McCulloch).

[17] The IEA states Mr Somerville would receive a salary, which would be reviewed annually. As a result of negotiations, reference to an annual bonus scheme was included in the IEA, which stated the bonus scheme “will be discussed and mutually agreed within six months of the start date” (namely, by 24 September 2022). It contained no other conditions relating to the bonus.

[18] The IEA stated Mr Somerville was to be provided with a “mutually agreed” vehicle to use for work, which may be used for personal travel. The requirement for agreement was inserted at Mr Somerville’s request during negotiations.

[19] A confidentiality clause in the IEA stated Mr Somerville agreed to keep confidential information private. Except as part of proper performance of the job, the employee would not use, copy, share confidential information owned by Vortex unless given written permission to.

[20] The IEA provided for three months' notice of termination by either party, and that after notice is given, the employer and employee will discuss the kind of duties the employee will be expected to do during the notice period. It said this may include a change in duties.

[21] The first draft of the IEA provided to Mr Somerville shows it originally stated Mr Somerville's hours of work were 40 hours between Monday to Friday, with hours of work being 8.30am to 5pm. Following negotiation, the IEA was amended to also say Vortex would consider some flexibility in relation to start and finish times following consultation. Mr McCulloch's evidence is that Mr Somerville's usual work hours became 7.30am until 4:00pm by agreement.

[22] Mr Somerville signed an employee acknowledgment which included that the information he had given is true and correct and that he had not left anything out which could affect the decision to employ him.

### *Bonus*

[23] The bonus scheme was not agreed within that time frame. It is common ground that on 22 February 2023, by email Mr McCulloch proposed the following bonus scheme for the 2023 and 2024 financial years:

- (a) Payment of \$3,000 for each one percent increase in net profit before taxation over and above 25% when compared to the previous year.
- (b) Net profit before taxation from both Vortex and Company A to be added together for calculations.
- (c) Investment income to be excluded from calculations.
- (d) Performance payment to be paid after end of financial year accounts completed, provided Mr Somerville was employed by Vortex at the end of the financial year for which the payment was calculated.

[24] Mr Somerville noted that not all expenses incurred by Vortex were business related, and that it would be unfair to him if Mr McCulloch's personal expenditure, and drawings by

him recorded as salary, affected the calculation of net profit. Mr McCulloch offered that all expenses, including salary, which related to himself and his wife would be excluded from the bonus calculations. There is no further documentary evidence showing Mr Somerville expressly accepted this bonus structure proposal.

#### *Salary review*

[25] It is common ground that Mr Somerville's salary was not reviewed in March 2023.

#### *Restructuring/redundancy process*

[26] On 29 May 2023 Mr McCulloch met with Mr Somerville. In the course of this meeting, Mr Somerville says Mr McCulloch advised he had decided to make Mr Somerville's role redundant. He handed Mr Somerville a document titled "Proposal for consultation with affected staff regarding proposed change" (the proposal). The document contained three paragraphs describing the proposed change:

2. Background Information  
The Director has reviewed the existing management structure of the business and identified an opportunity to reduce the number of management roles while maintaining existing levels of productivity, thereby reducing cost and increasing profitability.
3. Business Rationale  
Over the last several months it has become apparent that with increasing skill levels of staff, technological efficiencies and business fluency the organisational model potentially doesn't need or justify the role of a General Manager.  
The tasks which currently befall the General Manager role could potentially be absorbed into the roles of Director, Administrator and Operations Manager.  
Those roles are currently not operating at capacity and have the ability and capability to encompass those tasks also.
4. Proposed Changes  
Disestablish the role of General Manager. All staff previously reporting to the General Manager will instead report to the Director.

[27] The document provided Mr Somerville with two days to provide feedback on the proposal, with a final decision to be confirmed the following day.

[28] On 30 May 2023 Mr Somerville emailed Mr McCulloch requesting more information about the proposal, raising questions about whether the proposed change could achieve the stated objectives, and objecting to the proposed timeline. He also raised his concern that the outcome was predetermined. Mr McCulloch responded agreeing to an extension of time, and saying that Mr Somerville's "queries and statements are matters that can be discussed when we next meet".

[29] The next meeting between Mr McCulloch and Mr Somerville took place on 15 June 2023. Mr Somerville audio recorded the meeting. To the Authority's knowledge, this was the first of many recordings made of their discussions over the coming weeks.

[30] At the meeting, Mr Somerville says Mr McCulloch provided no meaningful responses to the issues Mr Somerville had raised. The recording shows Mr McCulloch spoke to the business rationale and reiterated that with the increased skill and knowledge of staff members and technological efficiencies – such as Vortex's use of business-to-business websites, Microsoft 365, Chat GPT and Shopify's subscription add-on, and the way staff interact lessened the management required. Mr Somerville mentioned the comment about reducing cost and increasing profitability, and asked for evidence of what other cost saving options had been considered and if any other roles had been considered for redundancy. He stated the cost saving was effectively a reduction in salaries and associated expenses. He said the GM role was the only role he found suitable for redundancy.

[31] Mr Somerville said he did not understand the commercial rationale and said the business had been growing, commenting on Mr McCulloch's bonus target offered was 125% and from MYOB he could see the business was probably at 130-135%. In response Mr McCulloch said the commercial rationale was to reduce the wage bill. He further stated he did not have a business plan when asked about Vortex's plans to expand, and "I believe strongly that the role of general manager is not required and that's why I'm proposing this". Mr Somerville responded that that "covers pretty much what I need" to go away and give some thought to the alternatives. Mr McCulloch advised the next step would be to schedule a feedback meeting, to which Mr Somerville proposed the next Friday.

[32] Mr Somerville raised the issue of his salary review, to which Mr McCulloch responded, "we need to finish this process first". Mr Somerville stated that the two issues were separate, and pointed out that other staff had received an increase. Later on the same day, Mr Somerville says Mr McCulloch informed him that he would not receive any pay increase for that year. Following the meeting, Mr Somerville emailed with his own outline of what was discussed. Mr McCulloch responded, disputing some of that outline.

[33] On 19 June 2023 Mr Somerville requested further information about the restructuring proposal – including an organisational chart, job descriptions for each role, and latest salary

figures for all staff, technical efficiencies and why the operations manager role had not been considered.

[34] Mr Somerville claims Vortex then took steps in attempt to procure his resignation.

[35] On 20 June 2023, Mr McCulloch sent Mr Somerville an email headed “Invitation to attend without prejudice meeting – employment relationship problem”. This email commented on Mr Somerville’s taking of three days’ sick leave, referred to Mr Somerville’s requests for information as “a barrage of emails” which “serves nothing but to defer from the process and damage the employment relationship”. It stated that “we haven’t even managed one formal meeting as yet” and that “I feel it’s time to explore the options for early resolution before further and more serious steps may become necessary”.

[36] Mr Somerville responded the same day. That evening, Mr McCulloch emailed responses to questions raised in Mr Somerville’s email of 19 June 2023, including that he had considered all roles within the business and only the GM role was suitable for redundancy. He further emailed saying that his use of the term “employment relationship problem” in his previous letter was an error, and that he did not believe there was an employment relationship problem.

[37] On 21 June 2023 Mr McCulloch again raised the question of a without prejudice discussion.

[38] On 23 June 2023, Mr McCulloch and Mr Somerville met again. Mr Somerville provided Mr McCulloch with some notes he had prepared. These included alternative proposals.

[39] A further meeting took place on 28 June 2023. Mr McCulloch provided Mr Somerville with written responses to his suggested alternatives. Mr Somerville says when questioned on his anticipated total savings from the termination of the General Manager role, Mr McCulloch said that in addition to salary, savings would also be made on the General Manager’s vehicle and bonuses. Mr Somerville says when he asked if the General Manager’s vehicle would be disposed of if the proposal went ahead, Mr McCulloch said “I haven’t actually considered that”.

[40] A further feedback meeting took place on 30 June 2023.

*Mr Somerville was given notice of redundancy*

[41] On 4 July 2023, Mr Somerville was given notice of termination of his employment for redundancy, and that his employment would end on 4 October 2023. The letter also stated there would be a change in Mr Somerville's duties, "which I will discuss with you once they have been decided". The letter confirmed Mr Somerville's performance payment would be made "according to my previous offer once EOFY accounts have been finalised".

*Mr McCulloch reviews Mr Somerville's work email account*

[42] Mr McCulloch says in about February or March 2023 he gained access to Mr Somerville's work email account so he could evaluate the email volume for the GM role. He says he did not routinely monitor Mr Somerville's email activity, but on 4 July 2023 he looked into the "Sent" items folder and found Mr Somerville had forwarded a spreadsheet to his personal email account, which greatly concerned him as it contained a list of all Vortex customers and a list of 1,200 plumbers who had been identified as potential customers. The Authority has been provided with a screenshot showing an email was sent the morning of 4 July 2023.

[43] Mr Somerville accepts he emailed information to himself but it related to his proposal he wished to discuss with Mr McCulloch about opening a local TWP outlet on Waiheke. He also disputed that the information regarding plumbers was necessarily confidential. Mr McCulloch's evidence is that he no longer trusted Mr Somerville to use Vortex's IT systems due to this and intended to remove his access to them.

*5 July 2023 meeting and discussions*

[44] On 5 July 2023 a further meeting between Mr McCulloch and Mr Somerville took place. The transcript of the conversation shows Mr McCulloch asked Mr Somerville about what was coming up work-wise that he needed to handle, to which Ms Somerville responded there were a few things he was working on. Mr Culloch said to "just give everything to me at this point in time" and he would distribute the work he did not want to handle himself. Mr McCulloch mentioned that Mr Somerville had wanted to have a meeting to which Mr Somerville said he had "some ideas". Mr McCulloch said he was open to hearing any ideas and thought a without prejudice conversation may be valuable for both of them, if he were open to it. Mr Somerville indicated he was open to having a discussion but wanted to talk about a

business proposal but was not quite ready to present it. He suggested after that a without prejudice meeting could be confirmed, which Mr McCulloch accepted.

[45] Mr McCulloch told Mr Somerville he had informed all staff Mr Somerville had been made redundant and instructed them to report to him instead. Mr McCulloch said they needed to find something productive for Mr Somerville to do that “will be different from what you’ve been doing up to now”. He asked if Mr Somerville had any ideas about how he could be utilized over the next three months. Mr Somerville said it was up to Mr McCulloch as the contract allowed for changes of duties, but he was not expecting “a different job”, using the example of working in the warehouse. Mr McCulloch expressed he did not think working in the warehouse would be a different job. He said he wanted to go over with Mr Somerville what tasks he was working on.

[46] Mr McCulloch also asked Mr Somerville for his laptop password. Mr Somerville responded that he had “private stuff” on it to which Mr McCulloch asked if he could remove it. Mr Somerville said he could do so that night, and in response to his query about whether he wanted to take the computer and why he wanted it, Mr McCulloch is recorded as saying:

I just want all the computers to be accessible. But obviously not if it’s got personal or confidential information on it...

[47] Mr McCulloch said he would like all computers to have the same access code so that anyone could log on to any of the computers and then log into their own Windows 365 account. Mr McCulloch said if Mr Somerville had any passwords saved in the web browser, he would probably need to “clear the cache”, to which Mr Somerville said he would.

[48] Mr McCulloch and Mr Somerville met again later the same day. At that meeting, Mr McCulloch said he would take over Mr Somerville’s tasks and his new duties would involve working in the warehouse. Mr Somerville did not express concern about this from the transcript. Mr McCulloch also advised him to “get rid of any personal stuff” on his computer, but that he should not delete any work-related content. He told him to change the password to a stated one so it could be utilised like other computers in the business.

[49] Mr McCulloch again asked Mr Somerville if he was interested in a without prejudice talk. Mr Somerville responded he was in principle but he needed to sort something out first. Mr Somerville advised he has been working on a marketing campaign email, to which Mr McCulloch stated he had told another staff member not to send any further emails outside the business as someone had been in contact suggesting it looked like spam, or a scam. Mr

McCulloch advised he did not want Mr Somerville sending more external emails but if he wanted to, he should talk to him beforehand.

[50] In the evening, Mr Somerville forwarded Mr McCulloch a list of things he thought would be suitable tasks for him to do. It was mostly reports and working on process improvements.

*Mr Somerville hands over laptop*

[51] It is common ground that on 6 July 2023 Mr McCulloch requested Mr Somerville to produce his work laptop. Mr Somerville says Mr McCulloch “demanded” he hand it over, and that he was cut off from all access to company systems, including email, and was instructed to work in the warehouse building filtration systems.

[52] Mr McCulloch’s evidence is that on 6 July 2023 Mr Somerville advised he had spent three hours doing overtime – searching for a zip drive and removing his personal information from the laptop. He says a new password had to be generated for Mr Somerville as he had been accessing the laptop using the fingerprint function. Mr McCulloch says he gave Mr Somerville further time to access and check his email and OneDrive for personal files, then the laptop was handed over.

[53] Mr McCulloch accessed the laptop. He says Mr Somerville had deleted all emails in the work email account and from OneDrive contrary to his directions, although the Authority has been provided no proof of that allegation. He also says he found an internet browser of Mr Somerville’s personal email account which contained “numerous emails belonging to me”. He states he did not have a printer available at the time or know how to download the emails – so he forwarded them to his own personal email account, one at a time, being careful not to copy anything that appeared private or confidential. He acknowledges deleting the “sent” emails, saying he needed time to review them. He asserts that if he had asked Mr Somerville to forward the non-personal emails that he had stored in the account he would not have done so and would have taken even steps to conceal them. He says this is the reason he did not discuss the emails with Mr Somerville.

[54] Mr Somerville’s evidence is that he checked his personal email account that evening using his phone and saw two ‘delivery failure’ messages. The messages related to emails forwarded from his email account to a Gmail account with Mr McCulloch’s name in it.

Screenshots show the emails failed to send because they were too large. He says he went to his PC to check the account properly and found that the delivery failure emails were only showing on his phone, which was not set up to remove deleted items in sync with the online account. He says his deleted items folder was empty, and the forwarded emails were not showing in 'sent items'. He says he discovered there was a forwarding rule on his account to send all incoming emails to a Gmail address he did not recognise –a screenshot has been provided of a rule having been created at the time Mr McCulloch had possession of the laptop. Mr McCulloch has consistently denied setting up any forwarding rules, saying it is a “stitch up”.

[55] Mr Somerville says his personal email account had all kinds of private information on it and messages from his lawyer which contained legal advice. He says he was absolutely outraged about this and felt “utterly violated”. He states some this is the reason why some of his later interactions with Mr McCulloch were quite heated - it was very hard for him to keep dealing with him after he had done this.

#### *Events of 7 to 10 July*

[56] On 7 July 2023 Mr Somerville went into work. He says he was ready for a meeting with Mr McCulloch to discuss the possible business proposal, although he was furious and humiliated. Instant messages between them show Mr McCulloch said he could not make a meeting, and told Mr Somerville to continue making sentries (water filtration systems). Mr Somerville told Mr McCulloch the situation was very uncomfortable and asked to work from home instead, offering to take product parts home to assemble there. He was told he could not work from home, saying he needed to just turn up and do his eight hours a day.

[57] Mr Somerville requested his laptop back and required “full disclosure on all information that you have on me including all emails that you have distributed illegally outside the company to a third party in breach of my privacy and without my permission”. Mr McCulloch responded that he was having the laptop forensically examined as he had found evidence of concerning activity. Mr Somerville requested three hours pay for overtime worked on 5 July 2023, which Mr McCulloch queried and declined. It is fair to generally describe the exchange as very terse from both sides.

[58] Vortex’s operations manager, Mr Remnant, says on 7 July 2023 Mr Somerville called him into his office and made allegations about Mr McCulloch breaking privacy laws around

emails and expressed his intention to tell all staff members about privacy violations. On the same day, Mr Remnant interrupted a conversation Mr Somerville was having with a staff member and told Mr Somerville not to interact with his staff unless Mr Remnant was present. He says Mr Somerville left the office at about 1.30pm, saying he had “permission for overtime compensation”.

[59] On 9 July 2023 Mr McCulloch sent a message to Mr Somerville telling him to please bring the spare key for his work vehicle (the Skoda).

*Mr McCulloch requires the keys to the Skoda*

[60] On 10 July 2023, Mr McCulloch told Mr Somerville to hand over the keys to the Skoda. Mr Somerville strongly protested. He says the issue was not really about the keys, it was about Mr McCulloch accessing his emails and how he felt about that. Mr McCulloch says Mr Somerville became aggressive and verbally abusive, raising his voice in front of other staff inside Vortex’s premises. The pair continued their discussion outside, which Mr Somerville recorded, having called Mr Tempest over from a nearby business to listen. The recording shows Mr Somerville saying he had reported Mr McCulloch’s actions regarding the emails to the Police. Mr McCulloch told Mr Somerville to “stop trying to make shit up” and to “just give me my key”. Mr Somerville continued to refuse and Mr McCulloch stated he was not taking the car away from him, he was just wanting to use it, and he could take his stuff out of the car. Mr Somerville eventually relented and was given time to remove his personal property.

[61] During this time, Mr Somerville contacted Mr Winterburn and asked him to follow Mr McCulloch in the Skoda when he left the work premises. Mr McCulloch says after some time, Mr Somerville removed his belongings from the Skoda but still did not provide the keys to Mr McCulloch. When he asked again, Mr McCulloch stated he had left the keys inside the Skoda. When asked where in the car, Michael stated “You will find them if you look.” He says he found the key in the car and took it for a drive.

[62] Mr McCulloch then drove the Skoda to a reserve, followed from a distance by Mr Winterburn. It is accepted that once parked, Mr McCulloch got out of the car and conducted a search of its cabin and boot. He then returned to the workplace, providing the keys back to Mr Somerville. Mr Somerville asked if the Skoda now contained some kind of surveillance device, to which Mr McCulloch replied “assume that it does”. Mr McCulloch acknowledges saying the comment but denies he did install a device.

*10 July 2023 meeting*

[63] On 10 July 2023 Mr McCulloch met again with Mr Somerville, with Mr Kaschula present as a witness. Mr Somerville recorded the conversation again. During the discussion he raised that Mr McCulloch had accessed his personal emails, to which Mr McCulloch responded that he should not keep that on a work computer, and that the emails were a separate matter. Mr McCulloch referred to their conversation on 5 July 2023, saying he told Mr Somerville not to delete work-related content, and accused Mr Somerville of doing so, which the latter denied.

[64] At one point Mr McCulloch told Mr Somerville his behaviour that day regarding the car keys was unacceptable, and was embarrassing for the company. Mr Somerville requested CCTV footage of the incident. Mr McCulloch then handed Mr Somerville a document entitled 'Direction to Mr Somerville from Jame McCulloch', telling him it would be good if he read it aloud, so he knew he had consumed it. Mr Somerville did so. It included the following:

- (a) Mr McCulloch had taken over all general manager responsibilities and all previous reports would now report to Mr McCulloch;
- (b) Mr Somerville was to do stocktaking work but those duties will change on Mr McCulloch's requirements;
- (c) he was to communicate with other staff only in relation to his duties;
- (d) he was not to communicate with any customers or suppliers, and if approached by customers or suppliers to state that he was not allowed to talk to them;
- (e) he was not to touch any computers or access any IT systems;
- (f) he was not to make any recordings or take any photographs;
- (g) he was to work the hours of 8.30am to 5pm;
- (h) Mr McCulloch would now use the office and desk Mr Somerville had previously used;
- (i) Mr Somerville was to remove any personal items from his office, and not to re-renter the office without invitation.

[65] Mr Somerville then said he could not be told not to record audio, and the two argued about that. Mr McCulloch then required Mr Somerville to hand over his keys to Vortex's premises, and his Vortex credit card, which I understand he did. At Mr Somerville's request Mr McCulloch agreed he could take three days annual leave.

*Mr Somerville raises a personal grievance*

[66] On 13 July 2023 Mr Somerville raised personal grievances for unjustified disadvantage based on a number of grounds. He said he believed it was a requirement for him to remain offsite until he received “clear directions” and that he was more than happy to make himself available for any work related activities. He suggested an offsite without prejudice meeting to resolve the issues.

*Events of 17 July 2023*

[67] On 17 July 2023, Mr Somerville returned to work in the warehouse space.

[68] At around 3pm Mr Somerville says Mr McCulloch called him into his office. The recording shows Mr McCulloch started out by saying the work mobile phone Mr Somerville had returned to him that morning was locked and requested unlock it. Mr Somerville denied having locked the phone.

[69] Mr McCulloch raised a concern that Mr Somerville’s son, Conor (who had carried out work as a contractor for Vortex) had submitted an inaccurate invoice for work performed. Mr Somerville telephoned Conor, who agreed to come to the office.

[70] While they were waiting for Conor, Mr McCulloch moved on to asking what recordings Mr Somerville had made, and required them to be sent to him. They continued to argue about the phone, audio recordings and CCTV recording until Mr McCulloch asked about new Company A premises in Hamilton Mr Somerville had set up for Company A, and asked if Mr Somerville had done the painting and what company was involved in the renovations of the premises. Mr Somerville evaded answering, and Mr McCulloch told him Mr Somerville had done the painting. Mr Somerville returned the conversation to his personal emails and says he set “bait emails” in case:

...hypothetically. Let’s say some real low life piece of shit fucktard knuckle dusting ankle got into my emails and started looking at them and emailed them to himself. There’s all sorts of shit in my emails that I plant that’s all rubbish. Just in case that idiot gets hold of it, and thinks it’s real. And it’s my personal email, I’m allowed to do it. And I’m not saying here that anybody has or hasn’t. I’m just saying that it’s quite fun to plant those emails, in case anyone ever does it.

[71] Mr McCulloch asked Mr Somerville what else he had arranged to be done at the Hamilton premises, and Mr Somerville went through what he had done but declined to say who

organised the work. He confirmed all the information would be found on his work laptop, and that he should feel free to speak to the landlord (Mr Luckie). Mr McCulloch confirmed that he had already done so, and he said Mr Somerville had organised it. After questioning Mr Somerville further about the name of the contractor who organised the work, Mr Somerville gave a person's first name. He did not mention Mr G, who he now acknowledges did the majority of the work. Mr Somerville says at one point that that this was "a fun conversation" between them and that he was "quite happy to continue", so Mr McCulloch asked further questions about the premises.

[72] Mr McCulloch then handed over a letter headed 'Notice of Formal Meeting – Potential Serious Misconduct'. The letter raised allegations and asked Mr Somerville to attend an investigation meeting on 21 July 2023. Having passed it over, Mr McCulloch stated he looked forward to hopefully getting some "straight answers on Friday".

[73] Conor then arrived. Discussions between Conor and Mr McCulloch became heated, and Mr McCulloch told Conor to leave numerous times. Conor refused to leave, saying Mr McCulloch needed to politely or nicely ask him to, to which Mr Somerville suggested he call the Police, and said "did your mother not bring you up to say please?". Mr McCulloch said he was trespassing Conor. Conor eventually left and Mr Somerville accompanied him downstairs.

[74] Near the building exit, Conor paused. Mr McCulloch came down the stairs and repeated for Conor to leave and waited for him to do so, which he did not. CCTV footage shows Conor speaking on his phone, ignoring Mr McCulloch, with Mr Somerville standing closely, taking no action. He looked apparently calm. The footage shows Mr McCulloch essentially grabbed Conor and pulled or dragged him out of the premises into the carpark.

[75] Mr Somerville's evidence is that he believed Mr McCulloch had 'sucker punched' Conor, and says he became upset and angry at Mr McCulloch. The footage shows otherwise – it shows Mr Somerville pointing his mobile phone at the pair, in an attempt to video record it, before following them out the exit. The CCTV footage then shows Conor being released in the car park, and Mr Somerville approached Mr McCulloch having words briefly, at which point Mr Kaschula and Conor came between them.

[76] Mr Somerville says he was locked out of the building, which Vortex does not deny. Mr Somerville was told he was not to use the Skoda. Footage shows Mr Somerville waited outside

until his backpack was brought to him, and a short time later Vortex allowed him access to remove items from the Skoda. He then left.

[77] At some time prior to 11am on 17 July 2023, Mr McCulloch had arranged to rent a Hyundai Santa Fe vehicle (the Santa Fe) until 24 July 2023, as shown in a rental confirmation. This indicated the car had been organised before the afternoon meeting on 17 July 2023. On 18 July 2023 Mr McCulloch emailed Mr Somerville saying:

Due to your aggressive, threatening and damaging behaviour on Monday 17<sup>th</sup> of July 2023, I decided to remove the Skoda from your control to ensure it was not damaged or misused. I have rented an alternative vehicle for you to use.

[78] Mr Somerville wrote back raised a personal grievance about the email. Mr Somerville requested the recording of the events be provided immediately to back up the allegations, asserting Mr McCulloch had assaulted Conor. He advised he had no issue with being provided another vehicle, and thanked Mr McCulloch, who later arranged an Uber ride for Mr McCulloch to come pick it up. On 18 July 2023, Mr Somerville returned to the workplace to collect the Santa Fe, without any interaction between Mr Somerville and Mr McCulloch.

#### *The disciplinary letter allegations*

[79] The 17 July 2023 letter outlined three disciplinary allegations against Mr Somerville, namely he:

- (a) failed to follow a lawful and reasonable instruction on 10 July 2023, when directed to hand over the Skoda keys more than 10 times, having refused on all occasions;
- (b) dishonestly interfered with Vortex's accounting system and dishonestly used a staff discount to on-sell Vortex products to Mr Cox, and personally profiting by \$1,047.39; and
- (c) deliberately withheld quotes from Mr Luckie in relation to refurbishment of the Hamilton Company A premises for personal gain. It was said he presented quotes from a company associated with Mr G, which were accepted by Mr Luckie. By so doing, Mr Somerville apparently shared in the profit made.

[80] Attached to the letter was a partial audio transcript and three employee witness statements relating to the key incident on 10 July 2023. There were also relevant emails

between Mr Somerville and Mr Cox and relevant tax invoices relating to Mr Cox's purchase. Further, attached were emails relating to renovation work at the Hamilton premises as well as spreadsheets.

[81] On or about 19 July 2023 counsel for Mr Somerville requested the meeting of 24 July 2023 be postponed. On 21 July 2023 counsel for Mr Somerville further emailed attaching a medical certificate for Mr Somerville saying he was unfit for work from 20 July 2023, but should be fit to return on 3 August 2023. The email also raised concern that Mr McCulloch was not an unbiased decision-maker, and requested that an independent third party undertake the investigation. Mr McCulloch responded, stating that he was entitled to address the allegations.

*Mr Somerville responds to allegations by letter*

[82] Mr Somerville elected not to attend a meeting, and to provide his responses to the allegations in writing through counsel on 4 August 2023. Counsel's letter stated Mr Somerville believed the emails produced had been improperly obtained, and were unreliable and may have been edited, and the laptop should be submitted for expert examination. Further, because Mr McCulloch had considerable animosity towards Mr Somerville he could not act as an unbiased decision maker in the circumstances, and the outcome was predetermined. The letter went on to comment on the three allegations.

[83] In relation to allegation one, he said the instruction to hand over the keys was not lawful or reasonable, and he believed the issue had been resolved on the day, with Mr Somerville apologising and Mr McCulloch asking him not to do it again.

[84] In relation to allegation two, Mr Somerville stated he offered to assist Mr Cox with a discount and told Mr Raven he planned to do so, and that he was not aware there would be an issue with him passing a discount to a friend. He said the items purchased were still in his possession. The letter did not say whether he had personally profited from the purchase.

[85] In relation to allegation three, he stated the establishment of the Company A branch in Hamilton was a KPI for him and he liaised with the landlord Mr Luckie about quotes. Mr Somerville says he obtained a number of quotes but obtained a global but competitive quote from Mr G's company which Mr Luckie elected to use. Mr Somerville said the company was entitled to make a profit on work done by subcontractors.

[86] On 9 August 2023, Mr Somerville was sent a letter advising of his summary dismissal, effectively immediately. In this letter, Mr McCulloch stated the email information had not been accessed unlawfully, and it was “entirely within my prerogative as the company’s Director” to access the information. He denied the emails had been edited and Vortex would consider having the laptop examined “separately moving forward”. He said he had conducted an unbiased process “from my perspective”, and there was nobody else in the business who had the authority to make decisions other than himself. The letter also referred to comments made by staff in relation to the staff discount and Mr Luckie, which had not been put to Mr Somerville for comment.

[87] By 17 August 2023 Mr McCulloch was saying that the performance payment for the previous financial year was “solely discretionary” and he had elected not to pay it, on the basis Mr Somerville had not worked out his notice period, and he withdrew his “offer” to pay it.

### **Personal grievances – relevant law**

#### *The test for justification*

[88] In assessing whether an employer’s actions are justified, the test is set out in s 103A of the Act involves determining whether the employer’s actions and how the employer acted were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred.

[89] In addition, a fair and reasonable employer is expected to comply with its statutory obligations which include the good faith obligations which include at s 4(1A)(b). These require the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative. Failure by an employer to comply with these obligations may fundamentally undermine its ability to justify a dismissal or other action “because a fair and reasonable employer will comply with the law”.<sup>1</sup>

[90] An unjustified disadvantage personal grievance is set out in s 103(1)(b) of the Act - an employee may have a personal grievance where the employee’s employment or any condition

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<sup>1</sup> *Simpsons Farms Ltd v Aberhart* [2006] ERNZ 825 (EmpC) at 842 [65].

of employment is or was affected to the employee's disadvantage by some unjustified action by their employer. Based on s 103(1)(b), the questions to be addressed are:

- (a) What does Mr Somerville complain of in terms of Vortex's actions and did it act as alleged?
- (b) If so, did Vortex's actions cause any disadvantage to Mr Somerville's employment or a condition of his employment?
- (c) If so, were Vortex's actions unjustified?

### **Was Mr Somerville unjustifiably disadvantaged in his employment?**

[91] Mr Somerville says the redundancy process and Vortex's actions during it and subsequent to the decision caused him disadvantage and were unjustified.

#### *Restructuring/redundancy process*

[92] Principles developed in case law confirm a dismissal on the grounds of redundancy are relevant here. These include that these may justifiably be made for the purpose of making the operations of a business more efficient or more effective. An employer is not required to prove such measures were commercially necessary for survival of its business.<sup>2</sup> In addition to having genuine and sound reasoning a redundancy must be carried out in a procedurally fair manner.

[93] Where questions are raised about the commercial rationale for the employer's decision, or ulterior motives are alleged for the selection of a position and a worker for redundancy, the Authority's evaluation may consider whether the employer's decisions were made for genuine business reasons and "not used as a pretext for dismissing a disliked employee".<sup>3</sup>

[94] When an employer terminates an employee's employment because a position had become superfluous the employer is required to show their actions meet the objective standard in s 103A of the Act when making decisions about redundancy and comply with good faith obligations. The duty of good faith under s 4(1A) of the Act requires employers proposing to make a decision about redundancy to provide the affected employees with access to information. That includes information that is relevant to the continuation of the employee's

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<sup>2</sup> *Grace Team Accounting v Brake* [2014] ERNZ 129 (CA) at [47].

<sup>3</sup> Above n 2 at [85].

employment, about the decision, and an opportunity to comment on the information to their employer before the decision is made.<sup>4</sup>

### *Genuineness of redundancy*

[95] It is for Vortex to make decisions about its operations, and the Authority does not substitute its own view for the business judgement of the employer. As such I base my determination on whether or not Vortex's decision in this case was based on a genuine business rationale, how that decision was reached, and what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[96] The restructuring proposal did not express that the business was in any financial difficulties - that was not the rationale for the restructuring and nor was it required to be. Mr McCulloch stated at the investigation meeting he had formed the view that the GM role was adding little value to the company. The rationale was said to be based on reducing cost and increasing profitability by reducing management roles while maintaining existing levels of productivity.

[97] The Authority has been careful not to allow the subsequent relationship problems between Mr Somerville and Mr McCulloch to cloud its assessment of the genuineness of the redundancy at the time. I find overall there were genuine reasons for the restructure.

### *Whether process procedurally fair*

[98] The evidence has not established Mr Somerville's claim that Mr McCulloch told him his role was redundant at their first meeting. There is no independent evidence of any such statement, and the proposal letter made it clear it was only a proposal.

[99] Very limited written information was provided to Mr Somerville at the outset of the restructuring. However, during the consultation process, as a result of Mr Somerville's questions, he was provided with answers to those questions in a timely manner (albeit rather informally by email). He was also provided with answers in the context of several meetings. In his role as GM, Mr Somerville had, or very ready access to, much of the information he requested in relation to the restructuring proposal. This was pointed out to him and the evidence shows he chose to access some of that information.

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<sup>4</sup> *Grace Team Accounting Ltd v Brake* [2014] NZCA 541, [2015] 2 NZLR 494 at [81]-[82] and [85].

[100] Mr Somerville was given opportunities to comment on the proposal, including what value he added to the business, with invitations and opportunities to provide feedback on the restructuring proposal both in writing and in person.

[101] Through the feedback process Mr Somerville proposed two alternative options which involved the redundancy of two other roles in the business and other staff members taking on responsibilities of those roles, as well as Mr Somerville taking on more sales functions. Mr McCulloch commented on those proposed options and identified a number of reasonable issues with them, including that they involved less savings in wages/salary than the original proposal.

[102] Mr McCulloch says he considered redeployment, but at the time the only available role was less skilled and would have involved a very significant drop in salary for Mr Somerville. This option for redeployment does not appear to have been put to Mr Somerville for comment.

[103] In light of the process outlined, I find that Mr Somerville was overall treated fairly by Vortex. While there may have been some defects in the consultation process, these were ultimately minor and did not result in Mr Somerville being treated unfairly. I would have found the termination for redundancy was substantively and procedurally unjustified.

#### *Actions after redundancy notice given*

[104] Vortex's actions following notice of termination on redundancy grounds are a different story, however. I find many were not actions open to a fair and reasonable employer.

#### *Accessing of Mr Somerville's personal email account*

[105] Mr McCulloch's accessing of Mr Somerville's personal email account in the manner that he did was highly problematic. For obvious reasons, a person's personal email account attracts a high expectation of privacy. While Vortex had a valid concern that Mr Somerville had sent an email from his work email address to his personal email account containing what it considered confidential information, for Vortex's actions to be considered lawful and reasonable, the Authority would have expected a personal use policy to be in place making clear that personal emails on a work computer could be subject to monitoring and collection. This was not the case here. That Mr McCulloch had advised Mr Somerville to remove personal information from the laptop does not excuse his actions. That he then saw emails relevant to Vortex also did not automatically render the relevant emails Vortex's property. Vortex's

accessing of Mr Somerville's personal email in the circumstances were not the actions of a fair and reasonable employer.

*Change in duties and key incident*

[106] The parties' IEA enabled Vortex to discuss with Mr Somerville the kind of duties he would be expected to perform during the notice period for redundancy, which could include a change in duties. One day into his three-month notice period, Mr McCulloch told Mr Somerville to give him "everything" and to think of ideas about how he could be utilized for the next three months.

[107] By 10 July 2023, after the key incident, Mr Somerville was directed to read out loud and in front of another employee "rules" that applied during his notice period; instructing him to surrender his work tools, vacate his office, and sit in the warehouse doing manual labour; instructing him not to speak to any customer or supplier, and if approached to state that he was not permitted to talk to anyone; and not to send external emails. No reasons were given at the time. Mr McCulloch's actions were clearly motivated by what he had discovered in the personal emails on or about 6 July 2023, which had failed to raise and address with Mr Somerville at that point.

[108] Mr McCulloch's actions in requiring Mr Somerville to hand over the keys to the Skoda on 10 July 2023, a vehicle to which he the contractual right to the use of for work and personal travel, without reason, could not be said to be a fair and reasonable instruction in the circumstances.

[109] Vortex's actions over this period were not those of a fair and reasonable employer and they resulted in Mr Somerville being disadvantaged. Vortex clearly had other reasonable options available to it throughout this period to extricate itself from the employment relationship if it wished to do so - such as deciding to pay Mr Somerville instead of working out his notice period – which it was entitled to do under the IEA.

**Was Mr Somerville unjustifiably dismissed from his employment?**

[110] In assessing whether Mr Somerville's dismissal was justified, the Authority must consider:

- (a) whether, having regard to the resources available to it, Vortex sufficiently investigated the allegations against Mr Somerville before dismissing him;
- (b) whether Vortex raised its concerns with Mr Somerville before dismissing him;
- (c) whether Vortex gave Mr Somerville a reasonable opportunity to respond to its concerns before dismissing him; and
- (d) whether Vortex genuinely considered Mr Somerville's explanation(s) before dismissing him.

[111] The Authority has concluded none of the above requirements were met and Mr Somerville's dismissal was unjustified due to procedural defects in the process which were not minor and resulted in him being treated unfairly. My reasons follow.

*Whether allegations sufficiently investigated*

[112] Vortex is a relatively small employer and I accept that its investigation of the matter would have been influenced by having limited inhouse resources to investigate, apart from Mr McCulloch. However, Vortex acknowledged accessing legal advice around certain times in relation to Mr Somerville's employment, such that it was not without the means to utilise that resource during the investigation and disciplinary process.

[113] During an impromptu meeting on 17 July 2023 at Mr McCulloch's request, Mr Somerville was asked at considerable length about matters relating to allegation three, prior to being handed the letter raising allegations in relation to it. Mr McCulloch's actions in doing so were not those of an impartial and fair investigator.

[114] Despite advising Mr Somerville on 7 July 2023 by a text message that the laptop would be forensically examined, Mr McCulloch did not arrange for that to be done. Mr McCulloch has said that he believed Mr Somerville's concerns about the integrity of evidence to be 'a joke', and Mr Somerville's statement that emails had been deleted from his personal account to be 'BS'.

*Whether Vortex raised its concerns with Mr Somerville before dismissing him*

[115] Mr Somerville submits that other considerations appeared to play a role in Mr Somerville's dismissal, which were not part of the original investigation. In his oral evidence Mr McCulloch stated that:

- (a) by 20 June 2023, he believed that Mr Somerville's email of 15 2023 June was a deliberate attempt to misrepresent a conversation between them, and that Mr Somerville had not engaged with the restructuring proposal in good faith;
- (b) by 5 July 2023, he was certain that Mr Somerville had sent sensitive information from Vortex to his personal email account, in the form of a list of plumbers and clients he had emailed to his personal email address;
- (c) by 17 July 2023, he believed that Mr Somerville had assisted his son Conor to create and submit invoices for work not performed; and
- (d) Numerous non-work related personal emails of Mr Somerville, which it now relies on as evidence that he was failing to devote his contracted hours to working for Vortex.

[116] None of these allegations were put to Mr Somerville during the disciplinary investigation process.

*Whether Vortex gave Mr Somerville a reasonable opportunity to respond to its concerns before dismissing him*

[117] Mr Somerville was not given a reasonable opportunity to respond to concerns which were not put to him as relevant. Although not an exhaustive list, this included:

- (a) A significant number of other documents Vortex had obtained from Mr Somerville's personal email account, which were not provided despite Mr Somerville having made a request for them on 7 July 2023. This included the fact Vortex held different versions of a spreadsheet, of which only one version was supplied to him, and in printed form only;
- (b) That Mr McCulloch had visited Mr Cox's building site regarding the goods purchased by him through Mr Somerville's account;
- (c) Witness comments referred to in the letter of dismissal and in evidence before the Authority.

*Whether Vortex genuinely considered Mr Somerville's explanation(s) before dismissing him*

[118] Concerns about whether Vortex would give genuine consideration to Mr Somerville's responses were raised on 4 August 2023. These concerns included that Mr McCulloch could not act as an unbiased decision maker in the circumstances, and that Mr McCulloch's actions

to date demonstrated that the outcome of the investigation was predetermined. Mr McCulloch told the Authority that he gave no serious consideration to these concerns, and believed they were “put in there just to be difficult”.

[119] Given Mr McCulloch’s interactions with Mr Somerville by the time of the investigation, his undisclosed concern that Mr Somerville had sent confidential information to himself on 5 July 2023, and the trove of emails he had taken possession of from Mr Somerville’s personal email account, it is abundantly clear his ability to conduct an impartial investigation was significantly impeded by the time he did so. In the circumstances, as fraught as they were by time the investigation was conducted, the Authority cannot be satisfied Vortex genuinely considered Mr Somerville’s explanations.

#### *Finding on procedure*

[120] There were significant defects in Vortex’s investigation process, which I am satisfied resulted in him being treated unfairly. His dismissal was unjustified on procedural grounds.

#### *Substantive justification*

##### *Allegation one*

[121] Given my earlier finding in relation to allegation one regarding the key incident, the Authority does not find dismissal on that ground was substantively justified. In any event, that matter appeared to have been considered as resolved by Vortex on the day of the incident. There was no substantive justification for dismissal on this ground.

#### *Remaining allegations*

[122] Mr Somerville submits that no weight can be placed on any of the personal email documents produced by Vortex which purport to show wrongdoing by him. The Authority agrees Vortex ought to have ensured the relevant personal emails and documents attached to them were forensically examined, or at least dealt with in a way that preserved their integrity in a more robust way. However, having had the opportunity to question the witnesses at length regarding both allegations two and three, and questioned Mr Somerville about the relevant documents, the Authority is satisfied there was substantive justification for findings made by Vortex in relation to both allegations two and three.

##### *Allegation two*

[123] In relation to allegation two, there can be no realistic dispute that the email chain between Mr Somerville and Mr Cox accurately reflects their exchange. Mr Somerville caused an invoice to be prepared, which was billed to him on 21 June 2023, for the amount of \$2,619.75. An invoice was also prepared for the amount of \$1,572.61, which was then paid by Mr Somerville. From his personal email account, Mr Somerville emailed Mr Cox telling him of the higher amount he was required to pay for the relevant products. Mr Cox received and paid the amount in the invoice of \$2,619.75, into Mr Somerville's account, which was the same bank account number (although a different suffix) his salary was paid into. As a result, Mr Somerville profited by \$1,047.39. Vortex did not receive that profit, which it would have if the products had been bought directly from Vortex.

[124] I do not accept Mr Somerville's suggestions that he believed he was acting in accordance with the staff discount policy. If there was nothing to hide in relation to the exchange, it is not clear why he did not conduct the exchange via his Vortex email address. Relevant emails from Mr Somerville also indicate he was aware the transaction was not in accordance with policy, where he advised Mr Cox that he could not "sell to you at this price – it has to be [me] buying", "I will need to buy it for "myself" at these prices", and indicating that he would not be able to give the products to Mr Cox at the workplace.

[125] I have also noted Mr Cox's evidence at the investigation meeting. He showed me his message exchange with Mr Somerville regarding them meeting offsite on or about 22 June 2023, which was when Mr Cox took possession of the products. While Mr Cox said he met again with Mr Somerville once more to swap a filter, that occurred on 3 July 2023. Mr Somerville's claim that he still had possession of the products as at 4 August 2023 was clearly incorrect, and further undermines his stated belief that his actions were not in accordance with the staff policy.

### *Allegation three*

[126] At the investigation meeting, Mr Somerville was questioned in relation to the contents of relevant spreadsheets, which Vortex says it recovered from his personal email account. Mr Somerville says he recognises some parts of it, but did not recall all of the tabs. Mr Somerville

gave evidence Mr G told him he had decided to leave New Zealand, and they had some discussions about whether he might take over his business.

[127] He claims he used the Hamilton renovation job to see what the profits of the business would look like, since he already knew those numbers. When questioned about spreadsheet tabs identifying a profit on the job under his name in spreadsheet cell, Mr Somerville said these were projected profits if he took over Mr G's business. He denied profiting from the Hamilton renovations.

[128] The Authority does not accept Mr Somerville's explanation that the profits in the spreadsheet were only projections, as unlikely and implausible. The Authority considers it is more than likely that Mr Somerville personally profited in relation to the work carried out pursuant to the work carried out through Mr G's business. There is also no reasonable explanation for Mr Somerville utilising his personal email account in relation to the renovations to the Hamilton property, instead of his Vortex email address.

[129] The Authority is satisfied there was substantive justification for dismissal in relation to allegations two and three.

### **Personal grievance remedies**

[130] Mr Somerville has established personal grievances. He is entitled to a consideration of remedies under the Act. Mr Somerville sought reimbursement of lost wages and compensation for humiliation, loss of dignity, and injury to his feelings.

#### *Disadvantage grievances*

[131] It is unsurprising that Mr Somerville felt degraded and demeaned by his treatment by Vortex after the redundancy process concluded in relation to the matters forming the basis of his disadvantage grievance. I consider modest compensation under s 123(1)(c)(i) is payable in relation to the disadvantage grievances of \$5,000.

#### *Dismissal grievance*

[132] Mr Somerville says he is entitled to reimbursement of lost earnings for a minimum of three months after the date of his dismissal. This is based him being unemployed aside from some small one-off jobs, having made "extensive efforts" to mitigate his losses which were

undermined by the conduct of Vortex, which included contacting former employers who may have been acting as referees for Mr Somerville.

[133] Given my findings in relation to the redundancy process and decision itself, I consider Mr Somerville would only have lost earnings in respect of the unpaid notice period following notice of redundancy, to 4 October 2023. Mr Somerville has lost wages as the result of his personal grievance for unjustified dismissal, and I make this finding accordingly.

[134] Mr Somerville has provided evidence about the health effects his dismissal had on him in support of a claim for compensation. The Authority also heard evidence from Mr Somerville's family about his loss of confidence and other health consequences. While I accept Mr Somerville has experienced negative emotions and consequences as a result of the dismissal process and following his dismissal, the Authority is not satisfied there is a sufficient causal connection between some of the harm or loss suffered and Vortex's procedural shortcomings during the disciplinary process.

[135] Conduct of the employer after dismissal may be relevant to an award of compensation under this heading, provided that the loss is sufficiently connected to the grievance. Mr Somerville also asks that the Authority also take into account Vortex's conduct after the employment relationship ended. In this case, Mr Somerville says Mr McCulloch actively sought to damage his reputation with third parties as a result of his bringing a claim for unjustified dismissal. Vortex declined to state what it has said about Mr Somerville when it contacted at least three of his former employers after his dismissal. I have taken that into account. I am satisfied an award of \$15,000 prior to consideration contribution would have been appropriate.

[136] Ms Somerville significantly contributed to the grounds giving rise to his grievance, both procedurally in relation to his very intemperate behaviour and decision not to fully engage in the disciplinary process leading to dismissal, and substantively in relation to two of the grounds for dismissal. In these important respects, he has been the architect of his own misfortune. A significant reduction to his remedies should reflect his contribution. Remedies in relation to his unjustified dismissal grievance are reduced by 75%.

### **Is Mr Somerville owed an unpaid bonus amount?**

#### *Bonus entitlement*

[137] The Authority advised the parties that the quantum of any bonus payments would be reserved pending its determination of any liability in relation to it.

[138] It is clear the bonus clause in Mr Somerville's agreement was negotiated by him before accepting Vortex's offer of employment, and he accepted the offer on the basis that a performance-related bonus was included in his remuneration package.

[139] While the evidence did not establish Mr Somerville expressly accepted Vortex's bonus proposal as outlined earlier in this determination, Mr McCulloch's letter of 4 July 2023 confirms his previous email, and the method of calculation is referred to in terms suggesting it had been agreed.

[140] There is no suggestion in either the IEA, the 22 February 2023 email, or the 3 July 2023 letter that payment would be discretionary, or that it could be forfeited for any reason other than failure to meet the agreed conditions. By advising Mr Somerville the bonus amount would be paid on 3 July 2023, it was clear Vortex considered itself bound by its earlier proposal. The bonus was therefore not discretionary, nor was it expressed as not being payable in the event of termination for serious misconduct.

[141] Mr Somerville is entitled to be paid a bonus in accordance with the terms outlined at [23] above in this determination for the 2023 financial year, being from 1 April 2022 to 31 March 2023.

#### **Is Mr Somerville's owed wages for 8-9 August 2023?**

[142] Mr Somerville claims an entitlement to be paid for 8 and 9 August 2023, on the basis he was ready and willing to work at the point. The evidence had not shown Mr Somerville advised Vortex that he was no longer under a medical certificate and that he was in fact ready and willing to work. In those circumstances I am not satisfied pay for these two days is due. His claim for pay for the two days, and holiday pay and KiwiSaver contributions relating to, are dismissed.

#### **If unpaid entitlements are owing, should interest be paid on them?**

[143] Mr Somerville is entitled to interest, calculated in accordance with the Civil Debt Interest Calculator, in relation to the bonus payment, calculated from 9 August 2023.

## **Vortex's counterclaims**

### **Did Mr Somerville misrepresent his work history, such that Vortex can recover recruitment fees as damages from him, and a penalty under s 4A of the Act?**

#### *Misrepresentation of work history*

[144] Vortex claims Mr Somerville misrepresented his work history by omitting a role with another company, thereby falsifying his employment record. Vortex claims that if it had known about Mr Somerville's prior role, it would have contacted it for references and, based on those checks with Mr Somerville's associate, would not have hired him.

[145] Vortex incurred a successful recruitment fee as a result of employing Mr Somerville, set out in an invoice from the recruitment agency. Vortex submits it would not have employed Mr Somerville or incurred these costs if it had known of his dishonesty. The evidence was that there were no other suitable candidates provided to Vortex, so it would not have incurred fees employing another candidate. Vortex seeks these recruitment costs as damages which it would not have incurred, but for Mr Somerville's alleged misrepresentation.

[146] Counsel for Mr Somerville has referred relevant authority in *Watts and Hughes Construction Ltd v De Buyzer*.<sup>5</sup> Mr Somerville denies any misrepresentation, stating that his CV indicated it was not show his full employment history, he was never asked to provide a full record, and the omitted information was accessible via his LinkedIn profile. In *De Buyzer*, the evidence was not strong enough to find deliberate deception. I find that is also the case here.

[147] In *De Buyzer*, the Court found the counterclaim would have failed in any event. In that decision the Employment Court noted in order to be successful in its claim for damages, the employer would need to show not only that the employee had misrepresented his qualifications and experience, but also that the misrepresentation caused its loss. It is not clear how Vortex can say with certainty that had it contacted the employer for references it would not have hired him. Vortex elected to engage a recruitment agent to assist it to fill the role it had available, and incurred a fee for that. The employee was not responsible for that choice. The fee did not flow from any alleged misrepresentation.

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<sup>5</sup> *Watts and Hughes Construction Ltd v De Buyzer* [2019] NZEmpC 116, at [27].

[148] Additionally, it was available to Vortex to raise the matter with Mr Somerville in a disciplinary context. Rather than do so, it has belatedly lodged the issue as a counterclaim.

[149] The claim for damages does not succeed for the reasons set out above and is dismissed. Vortex's claim for a penalty would also appear to have been brought outside the statutory limitation period.<sup>6</sup> The claim for a penalty also fails.

**Did Mr Somerville fail to devote his hours to working for Vortex such that he breached the duty of implied fidelity and a penalty should be imposed under s 134 of the Act?**

[150] Vortex alleges that Mr Somerville failed to dedicate his full efforts to the role. It says he spent significant time on non-work-related tasks, and worked on other business endeavours during work hours, completing very little work during work hours. As a result it says he was paid for hours he did not work. Vortex says this constituted a breach of the implied duty of fidelity in the IEA it seeks a penalty for that breach.

[151] Mr Somerville submits that Vortex has not established a breach of the implied duty of fidelity of the nature or extent that would warrant imposition of a penalty. Importantly, no issues around the alleged conduct was raised with Mr Somerville during his employment. It was only raised belatedly as an issue in response to Mr Somerville's proceedings in the Authority.

[152] The evidence showed that Mr Somerville had specifically negotiated for flexibility in his hours of work and break times. He says he believed he was making use of that flexibility. In all the circumstances the Authority is not satisfied this alleged breach has been established on the balance of probabilities.

[153] No penalty is to be imposed under this head of claim.

**Did Mr Somerville dishonestly purchase and on-sell Vortex products for personal gain such that he breached the duty of implied fidelity, and can related losses be recovered as damages from him?**

[154] Vortex says Mr Somerville purchased products from it at significantly less than trade value, and sold these products to a potential customer at full trade value, incurring losses to Vortex, and dishonestly receiving a pecuniary benefit. The respondent's conduct was dishonest

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<sup>6</sup> Employment Relations Act 2000, section 135.

and constitutes a breach of the implied duty of fidelity to the employer. As a result of this contractual breach, Vortex has incurred losses of \$1,047.39 which it seeks to recover from the respondent as contractual damages.

[155] Mr Somerville says he did not act with deliberate dishonesty in relation to the pump transaction, and no penalty should be imposed. Mr Somerville says he did not believe he was acting unlawfully, or against any policy of Vortex, when he did this. However, Mr Somerville also accepts that the difference between the price he paid and the price he received, being \$1,049.39, can be considered a loss to Vortex. He suggests that the amount of that loss could appropriately be offset against any remedies awarded to him by the Authority. I agree with that submission. The amount of \$1,049.39 is payable to Vortex as damages.

[156] No penalty is to be imposed in relation to this conduct, it having been addressed as part of the reduction in personal grievance remedies.

**Did Mr Somerville breach the parties' employment agreement by "leaking confidential information" and if so should a penalty under s 134 be imposed on him?**

[157] Vortex claims a penalty against Mr Somerville for emailing himself a list of Vortex's plumbers and clients on 4 July 2023. In its statement of problem this was framed as "leaking information". In its statement of problem, Vortex stated Mr Somerville's actions constituted a clear breach of confidentiality and could lead to further losses if Vortex suffers from a loss of business.

[158] Mr Somerville has given evidence that he emailed that list to himself for the purpose of preparing a joint venture proposal he intended to submit to Vortex. Mr Somerville says that the joint venture proposal formed part of his feedback on Vortex's proposed restructuring, and submits that it was both lawful and appropriate to gather relevant information.

[159] In the resolution section of Vortex's statement of problem, it stated it sought a penalty for 'leaking confidential information'. Mr Somerville says there is no evidence to show that the information was in fact leaked. However, the facts pleaded were that Vortex became aware that on 4 July 2023, Mr Somerville forwarded customer list from his Vortex work email address to his personal email address. I accept the lists were confidential information. Had Mr Somerville legitimately wished to have access to that information for the purposes of proposing

a joint venture, he should have sought permission to do so. I am satisfied this act constituted a breach of the parties' IEA.

[160] There is no evidence that the information concerned has been disclosed to any other party or used by Mr Somerville in any way. There is also no evidence Vortex has incurred any losses as a result of Mr Somerville's action in this instance. Reflecting that, I am satisfied a modest penalty of \$500 should be imposed on Mr Somerville.

### **Choice of proceedings**

[161] During the investigation meeting, a question was raised about Mr Somerville's decision to submit a claim to the Privacy Commissioner about Mr McCulloch accessing and forwarding his personal emails.

[162] Vortex expressed the view that having made that choice of procedure, Mr Somerville could not then refer to this issue in evidence. Mr Somerville has submitted that he has elected to pursue a claim under the Privacy Act 2020 about Mr McCulloch's collection of his personal information. He stated the intention to file proceedings in the Human Rights Review Tribunal, which I am told has occurred.

[163] Mr Somerville notes that no claim is brought in the Authority, and no remedies are sought, in respect of the access to Mr Somerville's personal email account and collection of personal information from it. However, claims are brought in the Authority, and remedies sought, in respect of subsequent actions by Vortex. The fact that Mr McCulloch accessed Mr Somerville's personal emails and attempted to conceal having done so is necessary background context to the Authority claims.

[164] In lodging his application in the Authority, Mr Somerville made a commitment to the employment dispute resolution track in relation to his personal grievances. This was prior to lodging proceedings in the Human Rights Review Tribunal. Following the Authority's investigation meeting, at my request the parties confirmed Mr Somerville has lodged proceedings in the Tribunal. The Authority has not been provided with a copy of the statement of claim, but I understand it relates to a claim under section 98 of the Privacy Act 2020.

[165] Should the Tribunal need to consider remedies for Mr Somerville, it may need to take into account any remedies received from the Authority and the degree to which they overlap with the privacy claim.

### **Outcome**

[166] Within 21 days of the date of this determination, Vortex Distributors Limited is to pay Michael Somerville:

- (a) \$5,000 in compensation (disadvantage grievance); and
- (b) \$3,750 in compensation (dismissal grievance);
- (c) Lost wages for period between date of dismissal to 4 October 2023 (less 75% for contribution).

[167] Within that time, Vortex should liaise with counsel regarding quantification of the bonus amount and any applicable interest on it.

[168] Within 21 days of the date of this determination, Michael Somerville is to pay:

- (a) \$1,049.39 as damages to Vortex Distributors Limited, being the profit he made in on-selling Vortex products; and
- (b) \$500 as a penalty into the Crown account.

### **Costs**

[169] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[170] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Mr Somerville may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum Vortex will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[171] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.<sup>7</sup>

Sarah Blick  
Member of the Employment Relations Authority

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<sup>7</sup> For further information about the factors considered in assessing costs see:  
[www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1)