



[3] Moyes says that Mr Ali resigned because he was unhappy with the job, and that his decision was entirely voluntary. It says that Mr Ali has been paid all commission he was owed.

[4] Moyes accepts that it owes Mr Ali \$2,544.60 (\$2356.11 wages and \$188.49 holiday pay on this amount) because it had not paid him the equivalent of the minimum wage for the hours he worked. It says this was an oversight which arose because Mr Ali was a commission only salesman, and that it was unusual he had not earned the equivalent of the minimum wage through commissions, which is why the error was not picked up until now.

### **Procedure**

[5] David Feist represented Mr Ali until shortly before the investigation meeting. He filed the Statement of Problem and a written statement on Mr Ali's behalf and he had advised Mr Ali of the date of the investigation meeting.

[6] Mr Ali did not attend the investigation meeting and the Authority was unable to contact him.

[7] This matter was set down for an investigation meeting on 9 November 2010. Mr Feist did not withdraw until the afternoon of 4 November 2010 and his communications with the Authority make it clear he had contact with Mr Ali that day. Mr Feist advised that "*Mr Ali will almost certainly not turn up to the hearing, which he is aware of.*" Mr Ali was clearly aware of the meeting date because he complied with the timetable set by the Authority for filing his evidence.

[8] The Authority has the power pursuant to s173 to investigate a matter which is before it in the absence of one or more of the parties. Where it proceeds with an investigation in the absence of a party, s173(2B) of the Employment Relations Act 2000 requires it to provide the absent party with any relevant material it receives (s173(2B)(a)) and an opportunity to comment on the material before the Authority takes it into account (s173(2B)(b)).

[9] I am satisfied that all of the written material which was before me was provided to Mr Feist, when he was still acting, in advance of the investigation meeting. Accordingly, I consider that Mr Ali had an opportunity to comment on it had he wished to do so.

[10] The Authority summonsed Simone Maraki who used to work for Moyes but who is now employed by one of Moyes' competitors to give evidence at the investigation meeting. Because he was summonsed Mr Maraki did not provide a written statement in advance of the meeting.

[11] Mr Ali, in his absence, was unable to respond to that evidence. I made sure that the allegations in the Statement of Problem and Mr Ali's written statement were specifically put to Mr Maraki to respond to. I am satisfied that I tested Mr Maraki's evidence thoroughly.

[12] Mr Ali's claim relates to matters that occurred over a year ago. The parties have unsuccessfully mediated and I am aware that without prejudice communications between the representatives have also occurred. I considered it appropriate for this matter to be investigated today so that both parties can get closure on these issues.

### **Constructive dismissal**

[13] Mr Ali's case was that on 19 October 2009 Mr Maraki told him that he [Ali] was costing the business money and that if he resigned that day he would get paid his entitlements. Mr Ali alleges that Mr Maraki passed him a pen and paper and told him to sign a resignation. Mr Ali's written statement says that he was told that if he did not sign, Mr Maraki would call security to remove him off the premises.

[14] Mr Ali says that he only resigned because he was pressured to, so this amounted to a constructive dismissal.

[15] Mr Marakui strongly refuted Mr Ali's claims. He says that Mr Ali was unhappy with the job and had raised that a number of times. Selling used cars is a highly competitive industry and Mr Ali's confidence had dropped because he had not been doing very well.

[16] Mr Maraki says he had two conversations with Mr Ali on 19 October 2009 and that both of these were initiated by Mr Ali. The first occurred downstairs in an office with the door open and they kept getting interrupted by other staff who needed Mr Maraki's attention. Mr Ali spoke about how he was struggling, was unhappy and felt out of place. Mr Maraki says he gave him advice that he needed to start talking to his colleagues more and listening to the advice that other more experienced sales people were giving him.

[17] After a break to enable Mr Maraki to attend to other business, he and Mr Ali met again later that day, this time in the boardroom upstairs. Mr Ali said he was very down and wanted Mr Maraki's advice about what to do because he did not feel he belonged. He also discussed his personal problems at length and expressed the view that maybe he should just leave.

[18] Mr Maraki told him that he knew he [Ali] was struggling, and that he needed to have more confidence in himself and should make an effort to get to know his colleagues. Mr Maraki said it was up to Mr Ali to decide what he wanted to do, but that he needed to focus on building relationships with his colleagues and on following the Road to Success process properly which would make him more successful.

[19] Mr Ali said he had a lot to think about, so Mr Maraki left him in the boardroom by himself to do that. Later in the day Mr Ali handed Mr Maraki a handwritten resignation letter and his employment ended that day. Mr Maraki said the usual practice was to let staff who wanted to leave go as soon as they wished, because there was no point having them out on the yard if they did not want to be there.

[20] John Moyes (the sole owner of Moyes) and Mr Nash both explained the time, training and investment that went in to engaging new staff. They both said that they wanted to retain Mr Ali because he would have been hard to replace. Mr Moyes said that Mr Ali was having a slow start to sales but not to the extent that it raised performance concerns or was something that needed dealing with.

[21] Mr Maraki says that Mr Ali called him a number of times after his employment ended to discuss what Mr Ali believed was unpaid commission but that he never raised any issue about a constructive dismissal.

[22] I find that Moyes did not want Mr Ali to leave and did nothing to instigate his decision to resign.

[23] Mr Ali also alleged that he did not receive appropriate training which compromised his ability to do well. I reject that suggestion. Like many dealers Moyes follows the very specific and prescriptive Road to Success process, which if properly applied will result in sales. There was considerable training and support around this process and the steps were also visually recorded in a big poster in the yard.

[24] Moyes produced a training register which showed that Mr Ali had signed for 8 group training sessions during his five weeks of employment. Mr Maraki and Tyrone Nash also gave evidence about the specific one to one training and support given to Mr Ali. They attributed Mr Ali's selling difficulties to him not following the process.

[25] I am not satisfied that Mr Ali has discharged the onus of establishing that a dismissal occurred. I find that his resignation was at his own initiative and was motivated by his lack of confidence and various personal issues at that time.

[26] Mr Ali's personal grievance claim for unjustified dismissal is not upheld.

### **Wage arrears**

[27] In the course of preparing for the investigation meeting Mr Moyes discovered that Mr Ali had not been paid the minimum wage of \$12.50 per hour for all of the hours he worked. He agrees that Mr Ali is due \$2,544.60 being \$2356.11 wage arrears plus \$188.49 (being 8% holiday pay on the wage arrears).

[28] Moyes is ordered to pay Mr Ali wage arrears of \$2,544.60 gross.

[29] Mr Ali claimed he was not paid commission on one car that he sold before he resigned, but which had not been delivered to the buyer at the time Mr Ali's employment ended.

[30] The commission provisions in Mr Ali's employment agreement dated 4 September 2009 state that;

*On termination of employment the Salesperson will not be paid any commission or bonus (at the time of termination or in the future) for vehicles that are not fully paid for and delivered on or before the day their employment is terminated.*

[31] *Delivered* means that the sold car has been picked up and driven off the yard by the purchaser because a number of sales will fall over during the period between the sale being made at the yard and the buyer taking possession of the vehicle.

[32] I find that Mr Ali sold five cars which were delivered prior to his employment ending. He has been paid his full commission for these. He is not entitled to commission on the one car he sold before he resigned, but which had not been delivered to the purchaser before his employment ended.

### **Costs**

[33] The respondent did not seek costs, so costs are to lie where they fall.

**Rachel Larmer**  
**Member of the Employment Relations Authority**

