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## **Boone v Thornton Green Holdings Limited (Auckland) [2017] NZERA 355; [2017] NZERA Auckland 355 (13 November 2017)**

Last Updated: 1 December 2017

### **IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND**

[2017] NZERA Auckland 355  
3009671

BETWEEN DAVID BOONE Applicant

A N D THORNTON GREEN HOLDINGS LIMITED First Respondent

A N D CAR FINANCE 2U LIMITED Second Respondent

Member of Authority: Nicola Craig

Representatives: Marie Roberts, Counsel for Applicant

David Ure, Counsel for First and Second Respondents

Investigation Meeting: 1 August 2017 at Gisborne

Submissions Received: At investigation meeting and 8 August 2017 for

Applicant and 3 and 10 August 2017 for Respondent

Date of Determination: 13 November 2017

### **DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY**

**A. David Boone was employed by the Second Respondent, Car Finance  
2U Limited.**

**B. Mr Boone was unjustifiably dismissed by his employer.**

**C. Within 28 days of the date of this determination Car Finance 2U Ltd is to pay Mr Boone the following:**

**(i) Reimbursement of three months' wages, less 30 % for his contribution, with leave for the parties to return to the Authority if they are unable to reach agreement on that figure; (ii) \$7,000.00 as compensation for humiliation, loss of dignity and**

**injury to feelings; and**

**(iii) \$1983.10 as reimbursement of immigration expenses incurred as a result of his unjustifiable dismissal.**

**D. Car Finance 2U Ltd shall within 28 days of the date of this determination pay Mr Boone \$881.56 as reimbursement of expenses incurred prior to his dismissal.**

## **E. Costs are reserved.**

### **Employment relationship problem**

[1] Thornton Green Holdings Limited (Thornton Green) is a holding company owned by directors James Moore and Matthew Hodges (the directors). Car Finance

2U Limited (Car Finance 2U) is a subsidiary company of Thornton Green.

[2] David Boone entered into a written employment agreement with Car Finance 2U dated 1 May 2016, as a finance and insurance broker. He is an American who was in New Zealand with a working visa and is also in the process of obtaining residence here.

[3] Mr Boone's work went well, with him meeting sales targets and being seen as having some future in management with the business.

[4] On Saturday 1 October 2016, Car Finance 2U invited some of its employees and its business associates to the races in Napier. Mr Boone attended the function. During the course of the races, Mr Boone borrowed \$35 from Mr Hodges, although there is a question about whether the money was Mr Hodges' personal money or company money.

[5] Mr Hodges made requests for repayment. On 5 October 2016, after a confrontation between the two men at work, Mr Hodges called Mr Boone, who had

left work with approval on sick leave, demanding that he return to the office. Mr Boone refused to go in because he was on sick leave, although expressed a willingness to have a conversation about issues. A few hours later Mr Hodges sent Mr Boone a text message dismissing Mr Boone without specifying a reason.

[6] Mr Boone claims that he was unjustifiably dismissed, that he has an annual leave payment outstanding and that his employer owes him for reimbursement of immigration costs incurred while he was still employed.

[7] On 1 August 2017, the Authority held an investigation meeting in Gisborne and heard evidence from Mr Boone, Mr Hodges and Mr Moore. Evidence was also heard by telephone from Steve Owens, a business associate of the two respondent companies. By agreement a written statement was received from Mr Boone's former manager at Car Finance 2U.

[8] As permitted by [s 174E](#) of the [Employment Relations Act 2000](#) (the Act) this determination has not recorded all the evidence and submissions received from the parties but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

### **The issues**

[9] The issues for determination by the Authority are:

- (a) Was Thornton Green or Car Finance 2U Mr Boone's employer?
- (b) Was Mr Boone unjustifiably dismissed?
- (c) If so, what remedies (if any) should Mr Boone receive, including a consideration of contribution?
- (d) Is Mr Boone owed holiday pay?
- (e) Is Mr Boone owed reimbursement for immigration costs incurred prior to his dismissal?

### **Identity of the employer**

[10] There was some uncertainty regarding which of the two respondent companies was Mr Boone's employer. Mr Boone was aware of some connection with Thornton Green and Car Finance 2U. The respondents say that Car Finance 2U was Mr Boone's employer.

[11] Mr Boone's employment agreement was with "Car Finance 2U", although there was no reference to "Limited". He says that it was "always implied" that Car Finance 2U was his employer. However, he says that much of the correspondence, and the Human Resource Policy he was given, were in the name of Thornton Green. The HR Policy says that it is applicable to Thornton Green and its subsidiaries. Mr Boone regarded Thornton Green as his "primary employer" as it was the main holding company.

[12] Both of the directors had email addresses with Car Finance 2U and Thornton Green. There was a reference in a letter from Mr Boone's immigration lawyer one letter to the employer being Thornton Green trading as Car Finance 2U. Mr Boone's payslips referred to Car Finance 2U.

[13] An assessment of the evidence overall supports Mr Boone being employed by Car Finance 2U Ltd.

### **Immigration**

[14] Mr Boone is American. He arrived in New Zealand on a working holiday visa and worked in Wellington until January 2016. On expiry he moved to essential skills visa in May 2016.

[15] Mr Boone discussed with the directors having his immigration costs assisted by his employer, and well as his employer sponsoring him for immigration purposes.

[16] Car Finance 2U paid Mr Boone's residency cost of \$2470 in August 2016 when his residency application was submitted. Mr Boone incurred \$993 for his expression of interest costs (\$530) and for medical costs (\$463). He says that he had been approaching his employer for months trying to get reimbursement for these amounts but had not been paid. However, it appears that receipts were only provided by him in August and September 2016.

### **A day at the races**

[17] The races started at 12 noon on 1 October 2016. At about 1.20pm Mr Boone got a text message from a colleague who had some picks for horses to bet on. Mr Boone was sitting next to Mr Hodges, the men looked at the picks and agreed to go and put place bets on them.

[18] Both men went up to the TAB and chose cash betting stations, rather than EftPos, as the lines were shorter. Mr Boone realised that he was \$35 short of the amount he wanted to bet.

[19] Mr Boone describes a brief ten second exchange where he asked Mr Hodges to borrow \$35 to complete the bet. He is unable to recall any terms being associated with that, other than a simple requirement that he would repay Mr Hodges.

[20] Mr Boone denies having any idea of the money coming from Car Finance 2U. He thought it was from Mr Hodges personally. This seems like a reasonable assumption for cash lent for betting, even at a company sponsored event.

[21] Mr Hodges says that he told Mr Boone that the money was company money. He says that he told Mr Boone to repay "me", using that in what he described as the royal we or me way, meaning the business. A bank statement showed money being withdrawn from Car Finance 2U's account on the same day.

[22] I consider that the reference to repaying "me" may have contributed to Mr Boone's sense that it was Mr Hodges' money. Mr Hodges agreed that the discussion was a short one and that there was no discussion at that point about when the loan had to be repaid.

[23] A question arose about whether Mr Boone's recall could have been affected by alcohol. He denied that saying that he had had about three beers at the time the loan was made.

[24] Mr Hodges struggled to remember details of the day whereas Mr Boone's memory seemed clearer. Mr Hodges made a number of appropriate concessions but lacked recall of the events.

### **The drive back to the hotel**

[25] Mr Boone, Mr Hodges, Mr Moore, Mr Owens were in a car driven back from the races to the hotel where they were staying. Mr Hodges says that in the car he reminded Mr Boone to repay the loan. He thought that he had put a timeframe on it, possibly repayment that day.

[26] Mr Moore had not been drinking as he was unwell. He says that Mr Hodges made it clear that the loan had to be repaid by Mr Boone. In his view, Mr Boone

could have had no doubt that Mr Hodges was requiring immediate repayment of the loan. He thought that Mr Boone laughed it off and did not seem to be taking it seriously. Mr Moore thought that maybe Mr Boone thought that Mr Hodges' comments were banter. Mr Owens and Mr Moore described Mr Boone's behaviour in the car as boisterous or loud.

[27] Mr Boone says that he has not recall Mr Hodges raising the money in the car. His recall of events at this time did not appear as strong as his recall of events earlier in the day. I accept Mr Moore and Mr Owen's evidence that the issue of repayment was raised.

### **Discussion between Mr Boone and Mr Owens**

[28] The directors met with Mr Owens for breakfast the following morning, 2

October 2016. At that point Mr Owens told them that the previous night Mr Boone had said a few things about leaving Car

Finance 2U which made Mr Owens uncomfortable. Mr Owens did mention that Mr Boone might have had a few beers.

[29] Mr Boone later denied much of what Mr Owens said. However, the issue were not raised with him whilst he was employed. I will deal with this issue in more detail as part of consideration of contribution.

### **Repayment discussions**

[30] Two days later on Monday 3 October 2016, the first work day after the races, Mr Hodges asked Mr Boone for the \$35 back. Mr Boone says this was at the end of business that day, when he was walking out the office to his car. Mr Hodges asked him in passing about the money and he replied that he did not have any cash with him but he would get some later. Mr Boone says that he did not refuse to repay the loan and there was no mention of it being company money. Mr Hodges did not have a clear recall of this discussion, but accepted that it occurred. I accept Mr Boone's version of events.

[31] Mr Moore says that he was aware of Mr Hodges asking for the money to be repaid on 3, 4 and 5 October 2016. Mr Moore was still somewhat unwell on 3

October but was in at work training new staff.

[32] There was some uncertainty regarding which events occurred on 4 October and which on 5 October 2016.

[33] One of those days, it seems more likely 4 October 2016, Mr Boone began talking to Mr Hodges about a flight voucher which Mr Boone had been given as a performance incentive. He had previously emailed Mr Hodges to say that the voucher diminished considerably in value when he tried to use it for flight arrangements for an upcoming American trip. Mr Boone says that he suggested that the \$35 he had borrowed be deducted from the flight voucher and that Mr Hodges would then owe him \$215 instead. He acknowledges saying that the voucher "wasn't worth shit" in reference to the high fees that the travel agency charged that in his view nullified a considerable amount of the voucher's value.

[34] Mr Boone regards these remarks as being made in a joking manner, in keeping with the relationship which the two men usually had. Both men agree that the use of such language was common in this office environment. Mr Hodges did not see the voucher comment as banter and was unimpressed by what he saw as Mr Boone mouthing off in front of other staff about a performance incentive which had come from a customer. I accept that Mr Boone was actually unhappy about the voucher not living up to the performance bonus which he thought that he was receiving.

[35] Mr Boone's impression was that discussions with Mr Hodges earlier in the week were quite nonchalant and Mr Hodges did not seem to press the issue for prompt payment. He thought that the men had had a reasonably good relationship before. Mr Hodges did not disagree.

### **Confrontation after team meeting**

[36] On Wednesday, 5 October 2016 Mr Hodges raised the issue of the loan repayment with Mr Boone straight after a team meeting, was in front of the other staff. He said that Mr Boone was going to go for a little walk and get his \$35 right now. Mr Boone attempted to raise other issues which he thought were related, particularly his immigration cost reimbursement and annual leave calculation. He asked to talk privately. Mr Hodges yelled that Mr Boone was get the money right now and there was the door. Mr Boone took this as a suggestion that if he did not get the money, he would be out the door, as in fired.

[37] Mr Boone says that he was shocked and very upset. He attempted to deal with Mr Moore by going over to his desk and saying that he would like to talk to him and Mr Hodges in private. He says that Mr Moore said "you owe Matt money, go get his money". This failure to step in, and reference to Mr Hodge's money, supports Mr Boone's impression that the money lent was personal rather than company money.

[38] Mr Boone went to an ATM to get cash. He was so upset when he went back to the office, that he decided he needed to leave office and work from home. He was feeling sick due to the stressful situation. Mr Boone says that he did not give the money to Mr Hodges as Mr Hodges was tied up with another colleague. He says that he still wanted to talk about the other issues (immigration costs and annual leave). Further, it did not cross his mind to leave the money for Mr Hodges.

[39] Mr Boone's manager says that she thought that he had gone to withdraw the money to repay the loan. However, when he came back he was still agitated and told her that he was feeling sick and would be leaving to work from home.

### **Telephone call on 5 October 2016**

[40] At around 11am Mr Hodges called Mr Boone. Mr Hodges instructed him loudly and strongly to get back to work right now. Mr Boone said he was taking the rest of the day off sick and he would come back in if the two could have a civilised conversation. Mr Hodges replied that if Mr Boone should not tell him how to run his business. Mr Boone says that Mr Hodges made a threatening comment about his visa although Mr Hodges denies this. However, as Mr Hodges had little or no recall of the telephone call and was clearly irate, I accept Mr Boone's evidence on this point.

### **Dismissal by text**

[41] Within an hour of the phone call, Mr Boone's access to his work email address and Car Finance 2U's customer relationship management system stopped working. He called in to his manager to see what was going on.

[42] Mr Boone then received a text at 1.48pm from Mr Hodges saying that this "is your 1 month written notice of termination, please arrange to return work items..."

[43] The text message did not give any reason for termination. Mr Hodges suggested at the investigation meeting that had the two men been able to have a conversation things could have gone on a different path although he was not clear as to why this did not happen before he decided to dismiss Mr Boone.

[44] Mr Boone emailed Mr Hodges and Mr Moore a few hours later asking for clarification of the grounds on which he was being terminated. This resulted in a text message from Mr Hodges saying that if Mr Boone wanted clarification on the exit process he was available at 10am at a café. Other than that there was an absence of responses to Mr Boone's various attempts to communicate with the directors.

[45] There was some further correspondence regarding the possibility of a meeting. Mr Boone was seeking to be put back in his position. However, in a text message on 7 October 2016, Mr Hodges said that Mr Boone had misunderstood the intention of the proposed catch up as the company's position had not changed, and his intention was to talk to Mr Boone about the exit process and how they could work through that process. Both parties engaged lawyers and the exit process meeting did not occur.

[46] In June 2017 an open offer was made on behalf of Car Finance 2U to resolve Mr Boone's claims, offering three months' lost salary and \$4,500 compensation for hurt, humiliation and loss of dignity. There was no offer to pay for any immigration costs or annual leave, despite these claims having been raised previously by and on behalf of Mr Boone.

### **Unjustified dismissal**

[47] Mr Moore now accepts that the employer did not follow procedure when dismissing Mr Boone. There was no discussion with Mr Boone regarding the company's concerns, Mr Boone was not given a reasonable opportunity to respond to those concerns and thus any explanations which he may have had were not considered by Car Finance 2U.

[48] All these matters are contrary to what is required under [s 103A\(3\)](#) of the Act. Mr Boone's employer did not act as a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. There was also no identification to him of the cause for the dismissal.

[49] The company did provide Mr Boone with payment in lieu of notice for his dismissal. This was for the one month period specified by the employment agreement.

[50] The directors acknowledge that since these events they have carried out a comprehensive review of their HR policies.

[51] Despite accepting that the correct procedure was not followed, the directors assert, that because they were already aware of Mr Boone's refusal to repay the loan, as they were the lenders and Mr Owens had contacted them about his concerns without solicitation and they had no reason to doubt he was genuine, they do not know what Mr Boone could have said to counter their belief (which they think is reasonable) that their trust and confidence in Mr Boone was irreparably damaged.

[52] I accept that this was a situation where there might be less in the way of possible investigation than might sometimes be the case. However, I do not consider that that the defects here can be seen as being minor and not resulting in the employee being treated unfairly<sup>1</sup>.

[53] I am not satisfied that the dismissal was substantively justified. There was a loan of money in the context of a race meeting. There was no documentation about the loan and a lack of clarity about the terms of the loan, including whose money it was and when it was to be repaid. I accept that Mr Hodges repeated his requests for payment but until 5 October 2016 there was no stipulation as to when payment was to occur or indication that the issue was becoming serious.

[54] There was an attempt by Car Finance 2U to describe this as theft. However, even in the context of a finance and insurance company it is hard to see how a failure to repay within a few days could be seen as theft. The loan occurred at a social event, albeit one funded by the business. The men had been friendly and socialised together occasionally. Mr Hodges described it as not a social transaction, it was work. However, I do not consider that a reasonable third party observer would agree.

[55] The other aspect to consider is the attitude which Car Finance 2U took to repaying Mr Boone the around \$900 for immigration costs. It appeared to take a relatively relaxed approach to when it was going to arrange payment and had

prioritised dealing with other issues over that one, although I accept that it was

intending to reimburse. This attitude changed after Mr Boone's dismissal.

1 S 103(5) of the Act

[56] A disciplinary process could have been begun for persistent non-payment but that was not what had occurred.

[57] In conclusion Mr Boone's dismissal was not something which a fair and reasonable employer could have done at the time and in that manner. His dismissal was therefore unjustified.

### **Remedies for unjustified dismissal**

[58] Mr Boone seeks reimbursement of lost wages, compensation for distress and reimbursement of costs incurred as a result of his dismissal.

### **Lost wages**

[59] Mr Boone had been hoping to get his job at Car Finance 2U back again as a result of bringing his grievance but this did not occur. He therefore began looking for other work. He limited his job search was limited to jobs that would comply with his current work visa.

[60] A letter from the lawyer assisting Mr Boone with immigration matters was filed setting out the requirements for essential skills work visas. This confirmed that this was the only category under which Mr Boone was currently eligible to apply for a work visa in New Zealand. The letter confirmed that, based on Mr Boone's resume, the only jobs which he could demonstrate sufficient amounts of relevant experience in order to satisfy the necessary skill level was finance or insurance broker or similar. Similarly, the only category of residence for which Mr Boone was able to satisfy was the skilled migrant category based on the finance broker.

[61] Car Finance 2U questioned, after speaking to the Immigration Service, whether Mr Boone could have made a new visa application could be made in a different industry he that the applicant had the requisite skills.

[62] Having seen the detailed letter from Mr Boone's immigration lawyer, that he is unlikely to have satisfied the requirements for a visa in a job other than finance or insurance broker. However, there is a slight prospect that he could have satisfied the Immigration Service of some other ground of eligibility and I take that into account in my assessment of what period of lost wages to award Mr Boone. He did make

extensive efforts to obtain employment in the fields in which he was entitled to work in.

[63] Mr Boone obtained work of a similar nature to that which he had with

Car Finance 2U. This work was based in the South Island and he commenced on

15 May 2017.

[64] No figures were provided for Mr Boone's lost wages claim. He was paid a month's notice period which would have run until early November 2016. He was away in America on holiday for some weeks between December 2016 and January

2017 and so cannot claim wages for that period. He was unemployed for a few months on his return. I am satisfied that Mr Boone should be awarded reimbursement for three months' lost wages less any contribution considered below. I do not consider this a suitable case to exercise my discretion under s 128(2) of the Act to award further lost remuneration.

### **Compensation for non-pecuniary loss**

[65] Mr Boone claims \$12,500 for his humiliation, loss of dignity and injury to feelings caused by the dismissal.

[66] The public dispute with Mr Hodges in the workplace was embarrassing for Mr Boone. Mr Boone was confused by the dismissal text and felt that the whole situation was surreal. He was not quite sure what was happening and had to try to find out why he had been dismissed.

[67] Mr Boone had worked hard to get the Gisborne position and was hoping that this was his chance to get residency and live permanently to New Zealand. That process was at least temporarily thwarted by his dismissal. He had a holiday back to America booked before his dismissal, after having not been back for a couple of years. He took the holiday but found it difficult to talk to his family about what had happened. He says that for several months he was on the brink of being deported.

[68] Finding other employment was difficult and required relocation. Mr Boone attended a counselling session to assist with the stress and confusion about his dismissal and the manner in which it occurred.

[69] The manner of Mr Boone's dismissal was most sudden and unexplained and had a serious impact on his life. I consider that compensation of \$10,000 would be appropriate but need to consider his contribution to the situation which I will do below.

### **Costs incurred as a result of dismissal**

[70] Mr Boone claims relocation costs as well as the additional immigration costs resulting from having to apply for a visitor's visa (\$165), covering his remaining in the country while he was not in work and having to apply for an additional work visa for his new position (\$298). He also claims \$2,370 as legal costs for immigration advice.

[71] In terms of relocation expenses, Mr Boone claims the ferry and mileage costs of driving to his new place of employment.

[72] Mr Boone emphasises that Car Finance 2U was aware of his immigration situation at the time that it dismissed him, as it was involved in both his visa and residence processes and knew that his immigration status was tied to his job with it.

[73] Mr Boone relies on *Hall v Crane*, where the Authority awarded the applicant reimbursement for variation of work visa costs under s 123(1)(b) of the Act as money lost by him as a result of his grievance.<sup>2</sup> I note that in that case the Authority did not regard costs for travel for finding new employment as something which could be compensated for under s 123(1)(b) of s 123(1)(c)(i) of the Act. I do not award Mr Boone compensation for the travel costs.

[74] I am satisfied that Mr Boone should be reimbursed for the immigration costs which were foreseeable. These total \$2833.00 but are also subject to my consideration of contribution.

### **Contribution**

[75] Under s 124 of the Act I am required to consider the extent to which

Mr Boone's actions contributed to the situation that gave rise to his personal

grievance. For his actions to be taken into account in reducing remedies, they must be both causative of the outcome and blameworthy<sup>3</sup>.

[76] Car Finance 2U bases its claim that failure to repay the loan and his dealings with Mr Owens.

### **Discussion with Mr Owens**

[77] Car Finance 2U's claim was that one of the reasons why it lost trust and confidence in Mr Boone is a report of a discussion which he allegedly had with Steve Owens, the Chief Executive of an insurance firm which provides insurance to Car Finance 2U.

[78] Mr Owens attended Car Finance 2U's Napier raced day event. He says that during the races at around 2 or 2.30pm he spoke to Mr Boone. Mr Boone told him that he was thinking about leaving Car Finance 2U. Further, Mr Boone asked Mr Owens if he were to leave and do his own thing, could Mr Owens provide him with an insurance facility similar to that provided to Car Finance 2U.

[79] Mr Owens did not consider that was appropriate as Mr Boone was an employee of Car Finance 2U. As well as concerns about Mr Boone's obligations whilst still employed, Mr Owens was concerned about the discussion occurring at a function being hosted by that company. He closed down the conversation.

[80] Mr Boone's account was that he had a relatively short conversation with Mr Owens at the races which he described as chit chat, and not including anything along the lines of what Mr Owens alleged. During the conversation Mr Owens said that if Mr Boone was ever up in Auckland he should give him a call.

[81] Mr Boone also recalls a discussion later in the evening regarding a query he had about insurance implications of a dial-a-driver type business. Mr Boone denied that he had asked anything inappropriate. He says that he knew that his visa was tied to Car Finance 2U and would not have jeopardised that at this point.

[82] The following day Mr Owens reported the incident to the directors. Mr Owens would appear not to have been particularly disturbed by the comments as he was involved in a short but pleasant email exchange with Mr Boone the next day on

regarding a photo from the races. Mr Boone's ambitions would not have been entirely a surprise to Car Finance 2U as he had talked during a performance review type meeting on 23 September 2016 about his desire to save to start a business. The company acknowledges that it did not raise this issue with Mr Boone while he was still in employment.

### **Conclusion on contribution**

[83] I look firstly at the loan situation. The amount of money involved in the loan here was relatively small. However,

working in the finance industry one might expect money to be regarded seriously. I do not accept that Mr Boone was clearly informed that this was company money rather than Mr Hodge's personal money.

[84] Mr Boone's initial non-payment due to not carrying cash is credible. However, I find that Mr Boone then chose to mix his dissatisfaction with the voucher, and delayed payment of immigration and clarification on annual leave entitlement, with the loan repayment issue. My impression from his evidence at the investigation meeting was that he decided not to pay the \$35 until the other matters were sorted out. His strong views about what he saw as these injustices, when combined what was described as Mr Hodges' dog with a bone attitude to money, led to a clash. I consider that Mr Boone's actions were blameworthy and did contribute to the situation that led to the dismissal.

[85] I consider that a reduction on all grievance remedies of 30% is appropriate for this contribution. I turn now to consider the interactions with Mr Owens.

[86] In terms of the interactions with Mr Owens, Mr Boone denied saying anything inappropriate. However, Mr Owens was a credible witness and it seems unlikely that he would have any reason to create a story about Mr Boone.

[87] The directors were aware of Mr Owen's concerns for several days before the dismissal. They acknowledge that they did not raise these concerns at all with Mr Boone before his dismissal and thus did not have the chance to hear his side of the story. It seems unlikely that if they regarded it as serious threat to their business that they would not have taken action sooner. Mr Hodges says that Mr Boone had a non-competition clause. Mr Moore says that he was dealing with Mr Boone's visa application and so knew that Mr Boone could not leave immediately as.

[88] Mr Hodges described the discussion with Mr Owens as irreparably damaging his trust and confidence in Mr Boone. However, the failure to take any action to raise the issues suggests that the directors did not see the threat as serious or imminent. The alternative is that the discussion with Mr Owens was a significant factor in the decision to dismiss but had not been raised at all with Mr Boone before dismissal.

[89] I am not satisfied that the employer should be able to rely on a matter which it knew about but had chosen not to raise promptly or had delayed acting on, in order to deal with another issue which it had prioritised for reasons which are not entirely clear. This is not the same situation as *Salt v Fell*<sup>4</sup> where there was very serious misconduct which the employer did not know about, but which would likely have ended the employment once it was discovered.

[90] Having concluded that a 30% reduction for contribution is appropriate, I find that Mr Boone must be paid \$7,000.00 as compensation for non-pecuniary loss and

\$1983.10 as reimbursement of immigration expenses incurred as a result of his unjustifiable dismissal. A 30% reduction is also to be made from the lost wages figure.

### **Holiday pay**

[91] Mr Boone claims that his annual leave was partially unpaid in that the calculations of entitlements did not include recognition of the commission he was paid. This was a substantial part of his salary.

[92] Car Finance 2U originally said that it had paid all holiday pay based on advice from its payroll operator which is an external company and thus did not accept that there was any holiday pay outstanding. However, at the investigation meeting they offered to contact the payroll service again to check.

[93] This resulted in the payroll operator recalculating and discovering that an error had occurred. Car Finance 2U subsequently paid the outstanding amount in full.

There is therefore now no holiday pay owing.

4 *Salt v Fell* [2008] NZCA 128

### **Immigration costs before termination**

[94] Mr Boone claims reimbursement for immigration costs of \$881.56 which he incurred prior to his dismissal.

[95] The parties agreed that the employer would reimburse Mr Boone for his costs in obtaining a work visa to work for Car Finance 2U. This was actual costs up to a total of \$5,500.

[96] The agreement, as set out in emails from May 2016, was that if Mr Boone did not hit his performance targets for 12 months he would have to repay half or \$2750. Also, if he breached the HR policies his employment may be terminated and he would have to repay half of those costs.

[97] Car Finance 2U says that as Mr Boone breached the terms of his employment agreement it is only liable to pay half of the total immigration costs. It accepts that

\$280 may be outstanding to him and it would reimburse that amount if receipts were provided.

[98] The employer's email setting out the agreement clearly refers to Mr Boone breaching the HR policies rather than his employment agreement. I am not satisfied that the 2016 HR Policy document was breached by Mr Boone during his discussion with Mr Owens.

[99] I award Mr Boone the amount of reimbursement claimed, being \$881.56.

### **Costs**

[100] Costs are reserved and the parties are invited to attempt to resolve that issue between themselves.

[101] If the parties are unable to resolve this matter, Mr Boone shall have 28 days from the date of this determination in which to file and serve a memorandum on the costs issue. Car Finance 2U will have a further 14 days within which to file and serve a memorandum in reply.

[102] Any claim for costs are to include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[103] The parties could expect the Authority to determine costs, if asked to do so, on its usual "daily tariff" basis unless particular circumstances or factors require an adjustment upwards or downwards.

Nicola Craig

Member of the Employment Relations Authority

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