

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

[2013] NZERA Christchurch 99
5388767

BETWEEN GARATH COLLINGS
 Applicant

AND HOME DIRECT LIMITED
 Respondent

Member of Authority: David Appleton

Representatives: Anna Oberndorfer, for Applicant
 Paul White, Counsel for Respondent

Investigation Meeting: 29 January 2013 and 15 May 2013 at Christchurch

Submissions received: 15 May 2013 from Applicant
 15 May 2013 from Respondent

Determination: 10 June 2013

DETERMINATION OF THE AUTHORITY

- A. The Applicant was not unjustifiably dismissed and his personal grievance is declined. The respondent made an unlawful deduction from Mr Collings' wages in the sum of \$176.08.**
- B. Costs are reserved**

Prohibition from publication

[1] Evidence was heard by the Authority regarding two customers of the respondent whose identities, addresses and other personal information were disclosed. These individual played no part in the investigation and it is not necessary for their identities to be published. Accordingly, I prohibit from publication any information identifying the two customers. The customers shall be referred to in this determination as LK and TK.

Employment relationship problem

[2] Mr Collings claims that he was unjustifiably dismissed on 2 December 2011, that he suffered an unjustified disadvantage in his employment when he was suspended without consultation and that an unlawful deduction was made from his wages upon dismissal.

[3] The respondent's position is that Mr Collings was justifiably dismissed for serious misconduct, that there was no disadvantage suffered through the suspension and that the deductions from Mr Collings' final wages were justified and authorised. If the deductions are found to be unlawful, they counterclaim for the same amount deducted.

Brief account of the events leading to the dismissal

[4] The respondent operates a shopping service for customers who sign up for accounts. The goods ordered (by telephone or directly from mobile sales personnel) are delivered to the customers' homes by the sales personnel. Mr Collings worked as the branch manager of the Christchurch operation, spending approximately 80% of his time on the road selling and delivering items to customers and approximately 20% of his time in supervisory and other duties. He was remunerated by way of a base salary together with commission on sales.

[5] Mr Collings was dismissed for the following reasons:

- i. Using a company vehicle for his personal use;
- ii. Charging the company fuel card for petrol used during the personal use of the company vehicle;
- iii. Storing stock in an undesignated and unsecured room in a building to which other tenants had access;
- iv. Failing to lock the designated stock room on at least two occasions and failing to lock the office in which other stock was being held; and
- v. Knowingly allowing a customer (referred to in this determination as TK) to purchase items using the account of that customer's former partner (LK), without authorisation.

[6] On the evening of Thursday 1 December 2011, Mr Collings returned to the Christchurch office with a colleague, Mr McManus, and found his sales manager, Mr Daviesonn, who was based in Auckland, in the yard along with another individual who turned out to be a security consultant from another company, Securitek. Mr Collings says that he was told that he was suspended and was given a letter telling him to come to a meeting the following day.

[7] Mr Daviesonn gave evidence that Mr Collings wanted to discuss the respondent's concerns there and then (which Mr Collings does not deny) but that Mr Daviesonn, having discussed the matter with Ms Comrie, the National Sales Manager at the time, to whom he reported, eventually decided, apparently on Mr Collings' insistence, that a meeting take place to investigate the matters the following morning at 10.30am. A letter, which was typed by Ms Comrie, and faxed to the Christchurch office, was given to Mr Collings that evening in the following terms:

Dear Gareth

We have some concerns about information we have received and a customer complaint and would like to discuss this with you formally. We have scheduled a meeting for Friday 2 December at 10.30am. This meeting will be held at the Home Direct office in Christchurch.

Specifically we would like to discuss the following:

- Possible unauthorised use of a company vehicle. Navman records show the Company credit control vehicle, registration [deliberately left blank], recorded at your listed home address in Darfield, Christchurch from August through to November 2011. In addition we have reason to believe the company vehicle has been used for personal reasons on other days from 23 August 2011 to 28 November 2011. We are concerned from the information available so far that this may indicate a breach of Company Policy.*
- Charges to the Company fuel card to the value of \$525.18 in August, September and November 2011 which do not relate to the Credit Field Agents use of the car. We are concerned this may indicate a breach of Company Policy and/or misappropriation of Company funds.*
- Unsecured Company stock. We have reason to believe that Company stock is unsecured in the designated stock room at Mainfreight, 1 McApline Street, Christchurch. In addition, we have received information that stock is also being stored in an undesignated and unsecured stock room in Mainfreight. We are concerned from the information available so far that this may indicate a breach of Company Policy and Procedure.*

- *The security of customer purchases (bag and tags) which are waiting to be OFD. We have received information that the bag and tags are being stored in the Home Direct office at [address deliberately left blank], Christchurch which is left unlocked and unattended by Home Direct staff during the course of the day. We are concerned from the information available so far that this may indicate a breach of Company Policy and Procedure.*
- *Customer LK, (customer number [deliberately left blank]), called on 24 November 2011 and complained that there are purchases on her Home Direct Lifestyle account which you have written, however she has not made. Details of these purchases are:*
 - *Invoice 5047643, dated 10 December 2010, written by you for 12 items and a value of \$459.00. The customer claims she did not make this purchase.*
 - *Invoice 5072751, dated 17 February 2011, written by you for 5 items in and a value of \$246.98. The customer claims she did not make this purchase.*

We are concerned form [sic] the information we have so far that this might indicate the misappropriation of stock and/or falsification of your sales records.

Gareth, we view the allegations as very serious and wish to hear your account of the matters detailed above. If your explanations for the above are unsatisfactory, disciplinary action including termination of your Employment Agreement is a possible outcome of this meeting.

Given the seriousness of the concerns, we recommend you bring a support person with you to this meeting. Bryan Wottom, Securitek Advisor, may be present at this meeting also. If for any reason you cannot attend this meeting please contact me on [deliberately left blank] to reschedule.

*Yours sincerely
Gavin Daviesonn
Regional Sales Manager*

[8] Mr Collings contends that this letter had been prepared prior to him returning to the office that evening, and that the company had deliberately invited him to the investigation meeting with very short notice. He relies on the fax imprint on the letter that records that the letter was received by the Christchurch office at 6.01pm. Mr Daviesonn and Ms Comrie insist that the fax machine must have been wrongly programmed so that the wrong time appears on it because, they say, the letter was not faxed till around 8.30 pm, after the conversation between Mr Collings and Mr Daviesonn.

[9] Mr Collings' evidence was that there was no discussion with him about his suspension. Mr Daviesonn says that he asked Mr Collings about suspending him and Mr Collings did not object.

[10] Ms Comrie sent an email to Mr Collings at 11.05am the following day (Friday 2 December 2011) in the following terms:

Dear Gareth,

The Company has received information regarding you which is of concern. We wish to carry out an investigation into the information provided to determine the best course of action. Whilst the Company is carrying out the investigation you are suspended from all duties in line with section 6.7 of your Employment Agreement, until further notice.

Once we have completed the investigation we will advise you in writing of the course of action.

Whilst you are suspended you are not to enter the premises at McAlpine Street, Sockburn, Christchurch. Your swipe tag, mobile shop keys and mobile telephone are to be handed to Gavin Daviesonn, Regional Manager.

If you have any questions, please direct them to your Regional Manager.

*Yours sincerely
Jodi Comrie*

[11] The disciplinary investigation meeting took place as scheduled and a note was taken of the meeting by the security consultant which recorded the questions asked of Mr Collings and his answers. Mr Collings indicated to the Authority in his evidence that the extracts from these notes, which are recorded below, were accurate as far as he remembered.

[12] With respect to the company vehicle, Mr Collings said that he had had a conversation with the South Island Regional Sales Manager, Mr Jon Paul Jacquier, in which he had been told that he was to drive the credit agent's car once a week to charge up the battery. He also stated that he had asked Mr Jacquier if he could use the credit agent's car when his own car had broken down. Mr Collings' evidence was that he had not got a firm agreement from Mr Jacquier for him to use the company car and the note of the disciplinary investigation meeting records the following exchange between Mr Daviesonn and Mr Collings: (The notes, for an unknown reason, recorded the initials of all of the participants incorrectly. In the extracts replicated below, they have been corrected to avoid confusion).

GD Look Gareth you have obviously been using the car for personal use, do you think that is acceptable?

*GC No I admit I have done wrong. I just had a s*** period with cars, my wife needed a car and that caused me problems.*

GD Did JP say you could use the car?

GC I ran it past JP, to be honest I don't think JP was fully with me, it was after work. I should have done it by email and that but I didn't. I told JP I was going to use it and he said he had to go because he was going to miss something on the internet.

[13] The notes of the disciplinary meeting also indicate that Mr Collings admitted that he had used the fuel card when he had been driving the credit agent's car for personal use. He acknowledged that he knew the fuel card was for filling up the car for business purposes.

[14] Clause 18 of the latest employment agreement signed by Mr Collings states as follows:

18.Fuel card

Where you are one of a number of users of a Company Vehicle you may use the fuel card assigned to the Company Vehicle for the purchase of fuel and lubricant only. Such fuel and lubricant may only be used for the running of the Company Vehicle. For the purposes of clarity you acknowledge and agree that you will not be issued with a Company fuel card.

Misuse of a Company fuel card may constitute misconduct or serious misconduct and may result in disciplinary action including dismissal.

[15] With respect to the insecure storage of stock, the following exchange took place:

GD Let's talk about the stock in the building when Jodi and I came down, what happened?

GC Well the stock was insecure.

GD We dealt with this so what did you expect from that?

GC That I wouldn't do it and would secure the stock. It was probably me that didn't push the button on the door. The only reason for the other storeroom was that I put it there for safe keeping.

GD When we appointed you as branch manager, did we not talk about stock loss, security?

- GC *Yes so I'm gone burger.*
- GD *Okay so you say you didn't push the button, where is the key kept for that?*
- GC *In that drawer.*
- GD *So when we came yesterday the far storeroom was unlocked and the office was unlocked. Whose responsibility is it to secure the office?*
- GC *Yes I know it is totally my responsibility.*
- GD *I was told by Justin at Mainfreight that he is the only one who has a key to that room.*
- GC *No I had a key. I looked through the draws [sic] out there and found a key to it.*

[16] With respect to the issue of the customers' accounts, it would appear that Mr Collings initially confused the two customers but realised sometime during late 2010 or early 2011 that that was not the case. At one point, when Mr Collings was asked whether he *didn't know or didn't want to know* whether TK was LK, Mr Collings responded *didn't want to know probably*. He explained to the Authority that he had meant that he did not want to know about the details of the break up of the relationship between LK and TK.

[17] Mr Collings was also asked who was responsible for protecting the business and who had authority to use the customers' account, to which Mr Collins replied *I realise it is important, it's my responsibility, ever since the last incident about three months ago. I am very careful about it*. Mr Collings agreed that he knew how to use an authorised account and to set up an authorised account. Later on in the discussion the following exchange took place:

- GD *Okay this [LK] and [TK] thing, now is the time to tell the truth. Look when did you realise that [TK] was using [LK's] account?*
- GC *On the 17/2/11 when I did the sale dockets 5072751. I asked her if she was the one who did the 25 referrals and she said yes. I asked her why she was using LK's account and she said it was her wife and she paid the bills for it.*
- GD *So did you check to see if she had authority to use that account, by she I mean TK?*

- GC To be honest I don't know if I did. She said Ryan [another employee of the respondent] knew she had authority, she had done it with Ryan and s*** in most businesses you believe the client and the reason I didn't bring this up is because I thought I would look like a dick.*
- GD So you realised on that day 17/2/11 that TK was using LK's account?*
- GC No it was on the 10/12/10.*
- GD Okay so on the 17/02/2011 you knew it was TK not LK you were dealing with?*
- GC Yes I did, she was making out to me that she was authorised to use the account. If you are authorised to use the account you can do tele sales right. I know she had done tele sales on the account.*
- GD She had her own account didn't she?*
- GC Yes, she would use LK's account if she didn't have the purchase limit on her account.*

[18] Mr Daviesonn gave evidence to the Authority that he adjourned the disciplinary meeting twice. First, in order to check some of Mr Collings' answers and, secondly, in order to discuss the possible outcome of the meeting with Ms Comrie and the Managing Director. Mr Daviesonn's evidence was that he had formed a view that Mr Collings should be dismissed because he felt that the use of the company car and fuel card for personal use and allowing TK to use LK's account when he knew she was not allowed to both constituted serious misconduct. He said that these actions of Mr Collings had persuaded him that he could not trust Mr Collings to work on the road with valuable stock. This view was conveyed to Mr Collings at the end of the meeting and summarised in the letter sent to him a few days later.

[19] The dismissal letter was dated 5 December 2011 and included the following passages:

Gareth, after reviewing all of the facts and your explanations for the concerns raised, we are led to believe that you have chosen to not follow Company Procedure and Policy. Specifically you have failed to follow the Company Vehicle Policy by using the Company credit control vehicle without permission. You have failed to follow the Company Security Policy by not securing Company stock and customer purchases at all times. In addition, we believe you have falsified Company documentation by knowingly allowing a customer to charge purchases to another customers account. We also believe

you have misappropriated Company funds by using the fuel card for the credit control vehicle whilst using it for your personal gain.

After full consideration of your explanations and considering the interests of the Company in this matter and in particular the fundamental requirement on the Company's part to feel certain that when an employee records information on invoices that this information can be trusted. We view your deliberate action of falsifying invoices as serious misconduct.

We have considered your explanation for using fuel card and after due consideration of the information you provided us to explain the charges, we believe that you have misappropriated Company funds which we view as serious misconduct.

We have also considered your explanations for not following Company Policy for stock security and vehicle usage and after due consideration of the information you provided us to explain the reasons, we believe that you have misappropriated Company funds which we view as serious misconduct.

The outcome of our consideration is that we are driven to the view that you deliberately falsified Company invoices and documentation and have misappropriated funds. This constitutes serious misconduct. We advise you that unfortunately the only appropriate course of action in this matter is to terminate your employment for serious misconduct. This letter confirms that we are terminating your employment, effective immediately.

We will be seeking reparation for the charges to the fuel card and other deductions in accordance with clauses 16, 38, 39 and 40 of your signed Employment Agreement.

[20] The letter concluded by setting out the details of the calculations including what was owed to Mr Collings, what was going to be deducted and the balance owing. Of relevance to this investigation, the following deductions were made:

- a. Vehicle charges, 1,586.3 kilometres (at 0.74 cents per kilometre plus GST) \$1,349.94.
- b. Vehicle repair costs \$201.25.

[21] The matter of the vehicle repair costs was eventually resolved when the respondent became satisfied that damage caused to the vehicle in question had not been caused by Mr Collings. Accordingly, this sum has recently been refunded to Mr Collings.

The issues

1. Was Mr Collings' dismissal procedurally and substantially justified?
2. Did Mr Collings suffer an unjustified disadvantage in relation to his suspension?
3. Has the respondent unlawfully withheld wages from Mr Collings? If so, does the respondent have a valid counterclaim against Mr Collings?

Was Mr Collings' dismissal procedurally and substantially justified?

[22] Section 103A of the Employment Relations Act sets out the statutory test for determining whether a dismissal or other action by an employer is justified or not. The section provides as follows:

(1) For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).

(2) The test is 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 dismissal or action occurred.

(3) In applying the test in subsection (2), the Authority or the court must consider—

(a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and

(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and

(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and

(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

(4) In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.

(5) The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were—

(a) minor; and

(b) did not result in the employee being treated unfairly.

Procedural unfairness?

[23] Mr Collings argues that his dismissal was unfair procedurally because he was given insufficient warning of the meeting and did not have time to arrange a support person.

[24] Mr Collings' recollection of the events of the evening of 1 December 2011 seemed to be more hazy than that of Ms Comrie, who had prepared the letter. As her evidence was more detailed, I believe that, notwithstanding the time recorded by the fax imprint, the 1 December letter probably was sent through to the Christchurch office around 8.30 pm, after Mr Collings and Mr Daviesonn had conversed and Mr Collings had said he wanted to discuss the matters then and there.

[25] This leads me to conclude that, on balance, Mr Collings did ask for the disciplinary investigation meeting to take place early the following day, at 10.30am. Therefore, Mr Collings' complaint that he did not have time to arrange a support person does not hold much water. This does not mean to say that an employer can shirk all responsibility for ensuring an employee is treated fairly in a disciplinary setting even if the employee is asking to do things in a way that could prejudice him or her. The test in s.103A makes clear that the requirements of sufficient investigation and so forth cannot be waived by the employee in a disciplinary setting.

[26] However, when I consider the notes of the disciplinary meeting, which are quite detailed, and which Mr Collings does not dispute, I do not believe that Mr Collings was prejudiced by his unopposed decision to go ahead with the disciplinary enquiry with haste. Mr Collings clearly understood what the issues were (and they had been set out succinctly in the letter of 1 December). He gave answers to Mr Daviesonn which shows his understanding of the issues.

[27] Mr Collings was not given copies of supporting documentation prior to the disciplinary meeting. This had the potential of rendering the dismissal unjustified. However, supporting documentation was shown to Mr Collings during the meeting and he did not ask for more time to consider it, and seemed to recognise and understand the documentation he was shown. Accordingly, I do not believe that this potential procedural flaw renders the dismissal unjustified.

[28] I also do not believe that the respondent failed to consider Mr Collings' answers fairly. I accept Mr Daviesonn's evidence in this regard.

[29] All in all, I believe that the respondent carried out a thorough investigation, conveyed to Mr Collings its concerns, asked for his responses to their concerns and genuinely considered his responses.

Substantive unfairness?

[30] Mr Collings contends that his dismissal was effectively a set up and predetermined because one of the Christchurch Territory Managers, Mr McManus, who has brought a separate personal grievance claim in the Authority against the respondent under case number 5391900, was also dismissed within five days of Mr Collings' dismissal. Mr McManus was dismissed after agreeing a discounted cash sale with a man who had visited all three mobile trucks in Christchurch within two days. (This man turned out to be a mystery shopper engaged on behalf of the respondent). Mr Collings asserts that the respondent was trying to catch out the three Christchurch salesmen in order to dismiss them.

[31] Mr Collings also relies upon adverts that he says had been placed with TradeMe for his position, as well as Mr McManus', before Mr McManus had been dismissed.

[32] It is my strong view that the dismissal of Mr Collings was not predetermined. The respondent's evidence is that the issues involving Mr Collings came to light after LK had raised a complaint about items being charged to her which she had not purchased. This prompted head office to investigate what could have been a matter involving fraudulent use of a customer's account by, amongst other things, viewing the GPS records of the three mobile stores and the credit agent's car, to see whether any had visited LK. This threw up details of the excessive use of the credit control car which appeared to often end up at Mr Collings' home address.

[33] When Mr Daviesonn and the security consultant arrived in Christchurch to interview LK and TK, they found the office unattended and unlocked but containing customer purchases, and also heard from an occupant of the building that stock was being stored in unsecured rooms. I believe that the respondent's evidence is credible and that it was a coincidence that the mystery shopper was visiting the Christchurch area at around the same time.

[34] I also accept the evidence of the respondent that the mystery shopper was operating under instructions pursuant to a genuine mystery shopper exercise. Having heard evidence from the mystery shopper, I accept that he was not acting as an *agent provocateur* and trying to catch out any of the Christchurch based salesmen.

[35] As for the TradeMe advertisements, it emerged before the Authority during its investigation of Mr McManus' personal grievance the day after the Authority investigated Mr Collings' personal grievance, that the advertisements had not been placed prior to Mr McManus' dismissal, but after it.

[36] For these reasons I reject the contention that Mr Collings' dismissal was part of a set up.

[37] Turning to whether the decision to dismiss was a decision that a fair and reasonable employer could have made in all the circumstances, it is my view that it was. Mr Collings' did accept during the disciplinary investigation meeting that he had *done wrong* with respect to the use of the credit agent's car. He acknowledged that he was *gone burger* in respect of the failure to secure the stockroom, and he also acknowledged that there had come a point when he had wondered about whether TK had been allowed to use LK's account but had not enquired into the matter. I believe that these acknowledgments, taken together, did justify Mr Collings' dismissal. Mr Collings' personal grievance in respect of his dismissal therefore fails.

Was there an unjustified disadvantage in Mr Collings' employment by the way he was suspended?

[38] The last employment agreement signed by Mr Collings was dated 23 June 2010, when he was a Territory Manager. Although a Branch Manager's agreement was produced to the Authority, this was never signed by Mr Collings, and so I believe that the Territory Manager's agreement is the relevant one to refer to.

[39] Suspension is dealt with in clause 6.7 of the agreement, and states as follows:

Power to suspend: *In the event that we decide to instigate an investigation into whether or not disciplinary action should be taken against you, we may, after consulting with you, suspend you from your duties until we make a decision as to what further action, if any, is appropriate in the particular circumstances. We will give you written notice of any suspension and, in that note, may include such conditions on you as we think fit.*

[40] On balance, I believe that Mr Collings was not consulted with before he was suspended. I believe that Mr Daviesonn simply told Mr Collings he was suspended.

[41] However, although this failure constitutes a breach of clause 6.7 of the employment agreement, I do not believe that this breach caused any loss to Mr Collings, nor caused him a disadvantage. The clause does not say that the employer can only suspend if the employee agrees. Under the circumstances that prevailed on 1 December 2011, when the respondent had concerns about the way Mr Collings had operated one of the company's customer accounts, I believe that it was justified in suspending Mr Collings to safeguard evidence, and to prevent any further possible wrongdoing, even if Mr Collings had not agreed to be suspended after consultation. In any event, Mr Collings' suspension lasted only a matter of hours.

[42] All in all, therefore, I decline to find that Mr Collings' suffered an unjustified disadvantage in his employment by being suspended without consultation having occurred first.

Did the respondent make an unlawful deduction from Mr Collings' salary?

[43] The respondent deducted the sum of \$1,349.94 from Mr Collings' final salary, calculated on the basis that he drove 1,586.30 kilometres in the car for personal use at a rate of \$0.74 per kilometre plus GST.

[44] Section 4 of the Wages Protection Act 1983 states that, subject to s.5(1) and s.6(2), an employer shall, when any wages become payable to a worker, pay the entire amount of those wages to a worker without deduction.

[45] Section 5(1) of the Wages Protection Act allows an employer to withhold wages or make deductions from wages when it has a written consent of a worker or the worker has made a written request to that effect. Section 6(2) entitles an employer to withhold wages when it has made an overpayment to a worker.

[46] Clause 16 of the employment agreement states as follows;

Deductions Clause *You agree to a deduction from your pay or other benefits either during your employment or from your final pay including holding pay for overpayments made to you or for any other monies you owe us.*

[47] This clause does constitute an agreement for deductions to be made from Mr Collings' final pay in certain circumstances. It is understood that the respondent

argues that the money deducted in respect of the unauthorised use of the credit agent's car was money that Mr Collings *owed* to it.

[48] Clauses 44 to 50 of the last signed employment agreement also deal with deductions from final salary. None of them deal with sums that may become owing as a result of unauthorised use of a company car or fuel card.

[49] I accept the evidence of Mr Jacquier for the respondent that he never authorised Mr Collings to use the credit agent's car for his own use. His evidence was credible on this point, as he explained that was new to the post at that time and would not have given permission without checking with his manager first. I am also satisfied that he did not give permission for Mr Collings to charge petrol to the fuel card when he had been using the car for his personal use.

[50] Mr Collings' unauthorised use of the company car and the fuel card for his personal use constituted a breach of his employment agreement, specifically the implied term of fidelity, good faith and honesty. I am satisfied that Mr Collings' actions in respect of the use of the car and the fuel card were done knowing that he did not have the express consent of his employer. They were therefore dishonest.

[51] The breach by Mr Collings of the implied duty to deal honestly with one's employer did cause loss to the respondent, which the respondent is entitled to recover. In my view, that entitlement gives rise to the position where Mr Collings owes the amount of the loss to the respondent. Although, arguably, the money did not become owing until the Authority has made that finding, which has occurred after the deduction took place, I am satisfied that the breach itself, from which the loss flows, was sufficiently clear to enable the Authority to find that the amount of the loss became owing upon the occurrence of the loss. Therefore, I am satisfied that, giving the provision a fair, large and liberal interpretation so as to best meet its presumed purpose, the general deduction clause 16 does give the respondent the right to deduct a sum equivalent to the amount of its loss.

[52] If I am wrong about that, then I would find that the respondent's counterclaim succeeds by reference to the same principle of breach of an implied term of Mr Collings' employment agreement.

[53] The final question is to consider whether the amount of the loss equates to the amount deducted by the respondent. Mr Daviesonn explained that it was calculated at

the same rate as the company compensates staff for the private use of their car. It took into account not only the fuel used on the fuel card, but also wear and tear. Mr Daviesonn referred to evidence from the GPS records that showed that Mr Collings had driven the car at speeds well in excess of the legal speed limit (and possibly close to the top speed that the car can travel at) and pointed out that such driving would have contributed to the wear and tear of the vehicle.

[54] I accept that argument, and believe that the method of calculation adopted by the respondent was fair. However, I do question whether it was correct to include GST. Even though the company paid GST on the fuel and on any service or repairs of the car, it will be GST registered and so will be able to set it off against GST received in the course of its business. Therefore, I do not agree that GST should have been deducted as that does not represent a loss to the company. The company therefore owes Mr Collings the sum of \$176.08.

Order

[55] I order that the respondent pays to Mr Collings the sum of \$176.08.

Costs

[56] Costs are reserved. The parties are to try to agree how costs are to be disposed of between them. However, if by the end of 28 days from the date of this determination they are unable to agree, the respondent may serve and lodge a memorandum setting out their position, and Mr Collings' advocate may serve and lodge a response within a further 14 days.

David Appleton

Member of the Employment Relations Authority